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September 30, 2021

Via email at pubcom@finra.org

Jennifer Piorko Mitchell
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 21-19: Short Interest Position Reporting Enhancements and Other Changes Related to Short Sale Reporting

Dear Ms. Mitchell:

Fidelity Investments[1] appreciates the opportunity to provide comments on potential enhancements to FINRA's short sale reporting program. To help improve the usefulness of short sale related information to FINRA, other regulators, investors, and market participants, FINRA is considering: (1) modifications to its short interest reporting requirements under FINRA Rule 4560; (2) a new rule to require that participants of a registered clearing agency report to FINRA information on allocations to correspondent firms of fail-to-deliver positions; and (3) other potential enhancements related to short sale activity, including a potential reporting framework related to stock lending activity (collectively, the "Proposed Enhancements").[2]

FINRA currently requires member firms to maintain a record of their gross "short" positions in all customer and firm accounts in each OTC and listed equity security.[3] Firms are

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[1] Fidelity and its affiliates are leading providers of mutual fund management and distribution, securities brokerage, and retirement recordkeeping services, among other businesses. Fidelity submits this letter on behalf of National Financial Services LLC ("NFS"), a Fidelity Investments company and SEC and FINRA registered broker-dealer clearing firm subject to FINRA Rule 4560's short interest position reporting requirements and Fidelity Prime Financing ("FPF") an SEC and FINRA registered broker-dealer that engages in arranged financing for Fidelity Prime Services customers. Fidelity generally agrees with the views expressed by the Securities Industry and Financial Markets Association ("SIFMA") and Financial Industry Forum ("FIF") in their comment letters. We submit this letter to supplement the SIFMA and FIF letters on specific issues.

[2] Short Sales, FINRA Regulatory Notice 21-19 (June 4, 2021) ("Regulatory Notice"), *available at* https://www.finra.org/rules-guidance/notices/21-19. Capitalized terms have the meanings ascribed to them in the Regulatory Notice.

[3] Among other items, FINRA Rule 4560(b) requires FINRA member firms to "record and report all gross short positions existing in each individual firm or customer account, including the account of a broker-dealer, that resulted from (1) a "short sale," as that term is defined in Rule 200(a) of SEC Regulation SHO, or (2) where the transaction(s) that caused the short position was marked "long," consistent with SEC Regulation SHO, due to the

generally required to report this information, on two days each month, by the second business day after the designated reporting settlement date ("Short-Interest Reporting"). FINRA subsequently compiles short interest data across all reporting firms and provides it for publication on the 7th business day after the reporting settlement date. FINRA publishes aggregated short interest data for OTC equity securities, on a security-by-security basis, on its website. Total short interest data for listed securities is published by the national securities exchange on which the stock is listed. Other entities such as swaps dealers, custody banks and offshore entities, that may also hold customer short positions but are not FINRA members, are not subject to FINRA Short-Interest Reporting requirements. FINRA's publication of short-interest reports supplements additional short sale data that FINRA publishes, such as monthly short sale transaction files and daily aggregate short sale volume files.

Fidelity supports enhancements to Short-Interest Reporting requirements that are coordinated across financial regulators and do not impose unnecessary operational risks, burdens, or competitive disadvantages to FINRA member firms. Our comments focus on the following areas:

- FINRA should allow the SEC to determine whether it will proceed with any rulemaking related to short sale disclosure, stock lending disclosure, and beneficial ownership or interests in swaps, prior to proceeding with the Proposed Enhancements;

- FINRA should further research the feasibility of obtaining short interest data from the CAT;

- FINRA should publish short interest data for both OTC equity and listed securities on the FINRA website and make this data available free of charge;

- FINRA should consider whether the Proposed Enhancements will serve intended regulatory goals and/or will competitively disadvantage member firms if market participant short sale activity is driven from FINRA broker-dealers to entities which are less transparent and outside the scope of FINRA's Short-Interest Reporting program;

- FINRA should consider the sourcing / accuracy of Total Shares Outstanding and public float metrics and how this information could influence, or even negatively impact, market participants' trading strategy if inaccurate, or if incorrectly interpreted;

- Current broker-dealer short interest data is reviewed for accuracy prior to submission to FINRA, and significant time is expended with the submission of the data and responding to follow-up questions from FINRA. If FINRA requires more frequent reporting of short interest data (i.e., in a shorter reporting time period than the current twice per month timeframe), broker-dealers should be able to provide this information in a raw data

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firm's or the customer's net long position at the time of the transaction. Members shall report only those short positions resulting from short sales that have settled or reached settlement date by the close of the reporting settlement date designated by FINRA."

format based on information from their stock record to minimize operational risk and reduce unnecessary burden / costs. Firms should have an opportunity to cure any inaccuracies and should not be penalized for inaccurate Short-Interest Reporting if reasonable policies and procedures are in place to govern this process; and

- FINRA's proposed clearing firm report on daily allocations to correspondent firms of fail-to-deliver positions would impose excessive costs that outweigh its potential incremental benefits. If FINRA determines to proceed with the proposed report, FINRA should eliminate the proposed data field noting the applicable close out obligation time period as the introducing, not clearing, firm is responsible for this information.

Each of these points are discussed further below.

<u>FINRA should allow the SEC to determine if it will proceed with anticipated rulemaking related to short sale disclosure, stock lending disclosure, and beneficial ownership or interests in swaps, prior to proceeding with the Proposed Enhancements</u>.

In the Regulatory Notice, FINRA does not provide a specific reason why it is considering the Proposed Enhancements at this point in time; however concentrated volatility earlier this year in heavily shorted meme stocks, such as GME, has focused attention on short selling and securities lending. As experienced market participants, we believe that the securities lending market functioned appropriately during this time and that the existing regulatory framework is sound. Supply was liquid and trading activity among our clients was fair and orderly. Clients with concentrated short positions rebalanced their books as a result of sound risk management practices.

As the SEC has long recognized, short sales are a legally permissible trading strategy and a fundamental part of equity market structure. Short selling contributes to market liquidity, reduces bid/ask spreads, and supports price discovery. Abusive short sale practices are illegal and are addressed by both FINRA and the SEC, primarily through enforcement of Regulation SHO, Rule 10b-21, and Rule 105 of Regulation M. We understand that SEC staff are currently preparing a report on the drivers of recent, narrowly targeted stock volatility. We look forward to the publication of the SEC's report and its thoughtful analysis. Any proposed regulatory changes to short sales should be data driven and avoid harm to the existing highly efficient U.S. equity markets.

It is understood that the SEC is determining whether to propose rules concerning short sale disclosures in the near future. The SEC's most recent unified regulatory agenda noted that the SEC's Division of Trading and Markets is considering recommending that the Commission propose rules concerning aggregate, monthly public disclosure of short sales with a "notice of proposed rulemaking" by November 2021.[4] Similarly, the SEC's most recent unified regulatory agenda noted that the SEC's Division of Trading and Markets is considering recommending that

[4] *Press Release* SEC Announces Annual Regulatory Agenda (June 11, 2021) *available at* https://www.sec.gov/news/press-release/2021-99.

the Commission propose rules concerning the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities, with a "notice of proposed rule-making" by April 2022.[5] The SEC's most recent unified regulatory agenda further noted that the SEC's Division of Trading and Markets and the SEC's Division of Corporation Finance are considering recommending that the Commission propose amendments to enhance market transparency, including disclosure related to beneficial ownership or interests in security-based swaps with a "notice of proposed rule-making" by April 2022.[6]

Given the SEC's articulated potential rulemaking path, FINRA should allow the SEC to consider whether to initiate rulemaking efforts concerning these topics prior to proceeding with the Proposed Enhancements. This course of action would follow standard administrative precedence for the SEC, as the federal policy maker, to set broad policy guidance and for FINRA rules and interpretations to align with SEC policy. For example, FINRA has promulgated a broker-dealer best execution rule and related guidance, but FINRA's rule and guidance align with previously established SEC rules on a broker-dealer's duty of best execution. Similarly, FINRA and the SEC should take a consistent approach with rules governing short sales and securities lending with the SEC first establishing federal policy on these topics, and FINRA following with specific rules and guidance, as applicable, for member firms.

Allowing the SEC to consider whether to initiate rulemaking efforts on this topic may also result in a more comprehensive short sale data set to regulators and market participants. FINRA's current Short-Interest Reporting program is limited because it only includes short interest data from FINRA registered broker-dealers. Short positions held outside of a broker-dealer, such as short positions held at a custody bank, are not included in FINRA's current Short-Interest Reporting program. Rather than add additional requirements to an already limited data set, federal financial regulators might consider developing a more comprehensive, market wide, aggregate short sale report (*i.e.,* a report that aggregates short sale information by security across all market participants) that would provide regulatory parity and a consolidated view of this activity to regulators and to the marketplace. The SEC is in a better position to lead these coordinated efforts as a federal financial regulator and policy maker.

<u>FINRA should further research the feasibility of obtaining short sale related data, including short interest data, from the CAT.</u>

In the Regulatory Notice, FINRA notes that data collected from firms through Short-Interest Reporting is distinct from, and cannot be derived from, the information available through

[5] Id

[6] Id

the CAT.[7] While short sales are a transaction that broker-dealers must report to the CAT[8], information regarding broker-dealers' aggregated, gross short positions is not currently separately reported to the CAT, nor apparently available through broker-dealers' existing CAT data submissions.

We recognize the challenges associated with obtaining short interest data from the CAT under its current construct; however, given the time and expense that member firms, FINRA, the SEC and the national securities exchanges have dedicated to the CAT, we believe that this potential alternative merits further regulatory and industry exploration. To this end, we encourage FINRA to work with the industry and their fellow regulators to determine the interest and feasibility of deriving Short-Interest Reporting from the CAT before determining that this potential path is not an acceptable alternative to the Proposed Enhancements.

Our recommendations for FINRA to allow the SEC to lead the consideration of rulemaking efforts and for FINRA to further research the feasibility of obtaining short interest data from the CAT will further regulatory goals without imposing operational risks, unnecessary burdens, or competitive disadvantages to member firms. Nevertheless, if FINRA determines to proceed with the Proposed Enhancements, we offer the following additional comments.

<u>FINRA should publish short interest data for both OTC equity and listed securities on the FINRA website and make this data available free of charge.</u>

FINRA is considering consolidating the publication of short interest data that is reported to FINRA for both listed and unlisted securities. If FINRA were to make this change, short interest files for all equity securities (both OTC and listed) would be made available free of charge on the FINRA website and would not require changes to firms' Short-Interest Reporting obligations.

Fidelity supports FINRA publication of short interest data for both OTC equity and listed securities, on the FINRA website, and making this data available free of charge. Fidelity currently obtains short interest data for listed securities from a third-party vendor and pays the national securities exchanges for this data under a standard pricing schedule. We believe that consolidating both OTC and listed security short interest data in one location on the FINRA website will make it easier for market participants to find and view this data. We believe that offering this data on a no-fee basis would make it accessible to all market participants as long as the data is presented in a usable format, downloadable and re-distributable such that firms would not need to continue to purchase this data from the exchanges.[9] We see no reason why the Proposed Enhancements should apply differently to OTC versus listed securities.

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[7] Regulatory Notice at footnote 21.

[8] Broker-dealer information reported to the CAT includes "material terms" of an order, including the identity of the selling participant, and order marking information (i.e., whether the sale is "long", "short", or "short exempt").

[9] Similarly, in the Regulatory Notice, FINRA notes that it is considering including in FINRA disseminated short interest data a new field that would indicate if the security is a threshold security as of the short interest position

FINRA should consider whether the Proposed Enhancements will serve intended regulatory goals and/or will competitively disadvantage member firms if market participant short sale activity is driven from FINRA broker-dealers to entities which are less transparent and outside the scope of FINRA's Short-Interest Reporting program.

FINRA has proposed additional data points to member firm Short-Interest Reporting. We are concerned that these additional data points will not serve intended regulatory goals and will competitively disadvantage member firms, as outlined below.

Proprietary and Customer Accounts Categorization; Account Level Position Information

FINRA is considering requiring firms to segregate the total reportable short interest into two categories – short interest held in proprietary accounts and short interest held in customer accounts (both retail and institutional customers). Alternatively, FINRA is considering requiring firms to report (for regulatory purposes only) short interest position information at the account level for all equity securities.

FINRA should not require member firms to report the portion of the total short position that is held across customer accounts and, separately, across proprietary accounts (aggregated per symbol across all firms) for distribution in publicly disseminated short interest data. Proprietary accounts can include a variety of different accounts, including firm proprietary accounts, proprietary accounts of brokers (PAB accounts), and firm principal accounts. A unified "proprietary account" category in publicly disseminated Short-Interest Reporting would generalize these accounts and present an inaccurate metric which would not serve investor or regulatory interests.

We also do not support programmatic reporting to FINRA of short interest position information at the account level to provide FINRA insight into the identity of individuals or entities that are not FINRA members and who have accumulated concentrations of large short interest positions. Under current practices, on an as needed basis, FINRA will contact a member firm and request information on large short interest positions at the account level. We believe that FINRA's current practice balances a regulatory need with the highly confidential and sensitive nature of the data. Given that short selling is a legally permissible practice, we do not understand the policy rationale or cost benefit reasoning why, in the normal course of business, it is necessary to programmatically report to regulators the trading strategy of a customer's account.[10]

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reporting settlement date. Today, member firms must obtain OTC threshold security data from FINRA and listed security threshold security data from the exchanges (for a fee). If FINRA were to offer both OTC and listed security threshold security data on a no-fee basis, to the public, in a consolidated feed, that was presented in a usable format, downloadable and re-distributable, FINRA would create a more efficient and accessible means for market participants to obtain threshold security data.

[10] This potential enhancement is also not consistent with other FINRA reporting requirements that require reporting of customer information at the aggregate level. For example, FINRA Rule 4521(d)(2) requires member firms carrying margin accounts for customers to provide to FINRA customer margin debit information at the aggregate, not account, level.

We are concerned that account level reporting for regulatory purposes, at any percentage level, will drive broker-dealer customers away from broker-dealers to entities not subject to FINRA requirements, which would provide less transparency to regulators and market participants. There are negative competitive effects associated with account level reporting between member firms and non-member firms, notably non-FINRA registered swaps dealers, custody banks that offer "enhanced custody" platforms that would not be required to report their hedge fund client stock borrow positions held at the bank[11] and offshore entities that may not be subject to similar reporting requirements, in the aggregate or at the account level. We assert that account level short interest reporting at any level is problematic: if FINRA proposes to set a threshold over which account level reporting is required, we anticipate that market participants will work to remain within the FINRA reporting threshold and move the remainder of their position to an entity not subject to FINRA requirements, further clouding the goals of the Proposed Enhancements.

Synthetic Short Positions

FINRA is also considering requiring firms to reflect synthetic short positions in short interest reports. We recommend that FINRA not proceed with this proposed reporting requirement for the following reasons.

First, although FINRA has identified the sale of a call option and the purchase of a put option as an example of a "synthetic short", there are multiple trading strategies that could fall under the definition of a "synthetic short". It will be difficult for member firms to report synthetic short positions unless FINRA identifies, with granularity, specific types of synthetic short positions that can be easily reported by member firms and that provide an accurate metric for regulatory use. Absent a clear definition of a synthetic short that is easy for member firms to implement from a programmatic coding perspective, reporting will vary from firm to firm, resulting in inconsistent data to FINRA in contravention of its regulatory goal.

Second, as FINRA notes in the Regulatory Notice, "the benefits of this information may be limited by an absence of information on whether and to what extent the synthetic short positions are hedged". We agree. Hedged positions are held across the street and synthetic short positions require sophisticated options pairing logic versus convertible securities, convertible preferred, warrants, rights, etc. Thus, a single member firm could not capture a synthetic short

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[11] FINRA broker-dealers are already subject to several FINRA rules that do not apply to banks that engage in similar activities. This disparate regulatory treatment provides regulators an incomplete view of these activities and is competitive disadvantage to broker-dealers who bear regulatory costs not borne by banks engaged in similar activities. For example, SEC-registered broker-dealers that are FINRA members have reported their Treasury transactions to TRACE since July 2017. In January 2021, the Federal Reserve Board proposed to collect data on daily transactions in Treasury securities from certain banking institutions through TRACE, but this proposal has not yet been approved and it is not clear at what future date banks will begin to report their Treasury transactions to TRACE. TRACE data is used by regulators to understand market dynamics and perform market oversight, yet the U.S. official sector continues to base their decisions on an incomplete view of Treasury securities trading in the secondary market. Short-Interest Reporting should not follow a similar path – if new reporting requirements are added to existing broker-dealer obligations, banks who engage in the same activities should simultaneously be subject to the same reporting requirements.

position established through different accounts held at two or more firms resulting in an incomplete view of this data if reporting is required. Moreover, corresponding dealers/market makers have a corresponding short position versus long call which will essentially double-count short positions and thereby inflate reported shorts outstanding. A reporting requirement for synthetic short positions will thus provide both a limited and over-inclusive view of these positions, serving neither regulatory nor market participant interests.

Also, even if trading strategies that resulted in a synthetic short position could be identified as of the date of a final rule in a manner that was a more complete view of this activity, trading strategies advance and proliferate at a rapid speed: new trading strategies that may result in a synthetic short position of shorter / quicker duration will continue to be developed, with associated reporting lagging behind these new developments, and further contributing to an inaccurate view of this activity.

Loan Obligations from Arranged Financing

FINRA is considering requiring members to report outstanding stock borrows by customers in their arranged financing programs to better reflect actual short sentiment in the stock. Fidelity currently offers arranged financing services that provide certain Fidelity Prime Services customers of NFS the ability to obtain increased leverage for certain securities transactions (generally, short sale transactions). Shares are loaned to the Prime Services customer by FPF, a domestic, affiliated, Fidelity broker-dealer.

We believe that the proposed disclosure requirement for the resulting loan obligations will shift borrowing activity away from FINRA broker-dealer arranged financing programs to swaps dealers, custody banks or off-shore entities that are not subject to similar reporting requirements. There are significant anti-competitive effects associated with requiring this type of reporting for FINRA member firms, but not firms such as custody banks, who are not FINRA regulated entities and yet carry stock borrows for customers similar to arranged financing. If loans from broker-dealer arranged financing transactions are reported to regulators, but loans from bank transactions are not subject to similar requirements, broker-dealer customers are likely to move their positions to banks. A non-FINRA member would thus have a significant competitive advantage over a FINRA-regulated broker-dealer if this Proposed Enhancement were adopted.[12]

<u>FINRA should consider the sourcing / accuracy of Total Shares Outstanding and public float metrics and how this information could influence, or even negatively impact, market participants' trading strategy if inaccurate, or if incorrectly interpreted.</u>

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[12] This competitive disadvantage cannot be overstated. When FINRA's amendments to FINRA Rule 4210 requiring broker-dealers to receive a minimum amount of margin from their counterparties (including buy-side entities) with respect to "Covered Agency Transactions", including "to-be-announced" (TBA) transactions, were finalized, banks advertised that they were not subject to FINRA rules and thus did not have the same margin collection requirements for their customers, the net impact being that customers shifted their TBA business away from broker-dealers to banks. *See* also footnote 11 *infra*.

FINRA is considering including, at no cost to member firms, in FINRA-disseminated short interest data, where available, the public float and Total Shares Outstanding ("TSO") for securities. FINRA would obtain this information from a third-party data provider. While we welcome additional transparency of these metrics at no additional cost, we have concerns about the sourcing / accuracy of this information and how it could influence or even negatively impact market participants' trading strategy if incorrectly interpreted.

Short interest metrics can provide valuable pricing transparency into a security; however, comparing short interest in a security relative to its public float may be less relevant. This is because large institutional investors (such as passive ETFs and index funds) may own securities that, while certainly included within the public float of a stock, remain infrequently transacted, especially in funds / vehicles tracking stable indices and targeting retail customers. Public float metrics can *overstate* the float available for borrowing (which is limited to shares being actively or frequently transacted), and potentially *understate* the short interest in that stock, hampering price discovery. Revised metrics that account for passive float could lead to more accurate Short-Interest Reporting for regulators and market participants.

Separately, short interest calculations typically do not reflect the impact of securities lending upon a stock, which effectively raises the public float available for borrowing if there is reasonable confidence that all stock borrowed for short sales will be delivered. An "adjusted" short interest metric that correctly accounts for securities lending would neither *understate* the public float nor *overstate* the short interest in that stock and could provide a more accurate metric of short interest for regulators and market participants. For example, a security with 100 million shares public float versus 20 million shares short would ordinarily report 20/100 or 20% short interest. However, if this metric accounted for securities lending, the "adjusted" float would be 120 million shares available to borrow, with the "adjusted" short interest of 20/120 or 16.67% short interest, not 20%.

Because it is not clear to us how the proposed TSO and public float data elements would be calculated, we suggest that FINRA provide more details on these proposed data elements to help evaluate their use and usefulness to regulators and market participants.

<u>If FINRA requires more frequent reporting of short interest data within a shorter time period, broker-dealers should be able to provide this information in a raw data format to help minimize operational risk and reduce unnecessary burden / costs. Firms should have an opportunity to cure and should not be penalized for inaccurate Short-Interest Reporting if reasonable policies and procedures are in place to govern this process.</u>

In place of member firm current bi-monthly short interest reporting to FINRA, FINRA proposes to increase the frequency of member firm short interest reporting to weekly or daily. FINRA also proposes to reduce the time after the settlement date by which firms must report short interest to FINRA and to reduce FINRA's delay prior to public dissemination.

Any proposed increase to short interest reporting frequency should recognize the current process used by member firms to generate FINRA short interest reports and consider the quality of information that is published. To this end, we believe that it would be helpful to outline the current process for a member firm to generate a short interest report.

Given the volume of positions on firms' books and records, most firms, including our own, have developed a programmatic system that looks across its stock record, across all account types, to generate a bi-monthly short interest report. Although the process is technology based and highly automated, most firms still spend considerable human resource time validating data prior to submitting a report to FINRA. This validation process does not review every short position on a stock record but analyzes pulled data on a sampling, exception and variance basis based on prior reports. These reports may identify, for example, situations where one reporting period had high number of short positions in an issuer, and the subsequent period has no shorts in this same issuer. In this situation, firms typically review the stock record for further analysis.

Approximately twenty-four (24) hours after a broker-dealer files a short interest report with FINRA, FINRA typically follows up with specific questions on positions reported. Firms have forty-eight (48) hours to respond to FINRA's questions. In our experience, FINRA's questions often concern the timing of a corporate actions event. For example, FINRA might indicate that a specific cusip reported no longer exists, an issue that is typically due to the timing between when FINRA reviews the report and when the report is created. Thus, under the current reporting process, FINRA member firms engage in a fair amount of analysis to help ensure that their Short-Interest Reporting is accurate both for quality of reporting purposes and also because firms are subject to regulatory fines by FINRA for inaccurate regulatory reporting. FINRA has brought many enforcement actions against firms that inaccurately calculate and report short interest, regardless of how immaterial those inaccuracies might be.

It would be operationally challenging for firms if FINRA were to require Short-Interest Reporting on a more frequent basis because the time that firms have allotted for quality assurance testing of data is significantly reduced, increasing firm risk of inaccurate reporting and regulatory exposure. We would also expect FINRA to continue to ask questions regarding data previously submitted to FINRA and would anticipate these questions to proliferate with increased reporting.

To this end, we recommend that if FINRA requires more frequent reporting of short interest data, broker-dealers should be able to provide this information in a raw data format as a way for firms to minimize the operational risk of reduced timeframes to provide this content to FINRA. Such reporting would be based on collecting gross short positions in reportable accounts from the firm's stock record and reporting such information to FINRA. Under this proposal, Short-Interest Reporting would not be based off only reporting short positions resulting from sales marked as "short," but excluding "deemed to own" short positions, as this is a highly manual and time-intensive process. Similarly, firms should have a right to cure any inaccuracies and should not be penalized by FINRA for inaccurate short interest reporting if firms have reasonable policies and procedures in place that govern this process. We believe that these suggestions offer a reasonable compromise between regulatory needs and operational risks imposed on FINRA member firms associated with reduced reporting timeframes.

FINRA's proposed clearing firm report on daily allocations to correspondent firms of fail-to-deliver positions would impose excessive costs that outweigh its potential incremental benefits. If FINRA determines to proceed with the proposed report, FINRA should eliminate the proposed data field noting the applicable close out obligation time period as the introducing, not clearing, firm is responsible for this information.

FINRA is considering requiring clearing firm members to submit to FINRA (for regulatory purposes) a report of daily allocations of fail-to-deliver positions to correspondent firms pursuant to Rule 204(d) of Regulation SHO ("Proposed Daily Allocation Report").[13] Today, FINRA may reach out to a clearing firm to request this information on an as needed basis, but FINRA believes that the Proposed Daily Allocation Report would allow it to directly identify the member that is responsible for a close-out obligation and therefore would allow FINRA to conduct more efficient Regulation SHO investigations.

FINRA's Proposed Daily Allocation Report would impose excessive costs on clearing firms to meet a simple regulatory need. We are not aware of challenges that FINRA has experienced with regard to obtaining this information from clearing firms directly. Rather than require clearing firms to design, implement and maintain a new report to provide to FINRA concerning this information, we recommend that FINRA maintain its current process of outreach to clearing firms, on an as needed basis, for this discrete information.

If FINRA proceeds with the Proposed Daily Allocation Report, clearing firms, with significant programmatic coding work and associated cost, could provide many of the proposed data fields to FINRA. However, clearing firms do not have the information necessary to provide FINRA the applicable close out obligation time period for correspondent firms, since, upon allocation, the responsibility to close-out under Rule 204 shifts to the correspondent firm and it has the obligation to determine the applicable close-out obligation time period (e.g., whether the extended close-out timeframe for fails to deliver due to bona-fide market making is available). For this reason, we recommend that FINRA eliminate this field in the Proposed Daily Allocation Report.

Rule 204 applies to all equity securities and requires that clearing firms track all fail-to-deliver positions (unsettled trades) resulting from both long and short sales and then borrow or buy-in sufficient securities to close-out those fails at the beginning of regular trading on T+3 (in the case of short sales), T+5 (in the case of long sales) and T+35 (in the case of sales of shares that are deemed to-own, such as a sale of restricted securities or warrant exercises). If the clearing firm does not close-out the position within that time-period, it may be temporarily prohibited from effecting short sales in that security for any client unless it pre-borrows that security.

The requirement to mark orders under Rule 200(g) of Regulation SHO belongs to the introducing firm, not the clearing firm. In the case of correspondent short sales, under current

[13] According to the Regulatory Notice, the Proposed Daily Allocation Report might include the following fields: 1) Security; 2) Identity of correspondent firm; 3) Amount allocated to correspondent firm (number of shares); 4) Trade date(s); 5) Allocation Date; 6) Close out Date; 7) Applicable close out obligation (T+3, T+5 or T+35).

practice, NFS will allocate the failure to deliver on settlement date and suggest a close out be performed by the correspondent prior 9:30 a.m. the following day. It may be the case that the correspondent is a market maker in that security and is entitled to additional time to close out the fail, i.e. T+5. Alternatively, depending on individual facts and circumstances of the correspondent firm, it may be eligible for a longer close out time-period, i.e. T+35. This can occur, for example, where the correspondent is availing itself to the deemed to own exception, which has a longer time-period for delivery.

Requiring the clearing firm to report the applicable close out obligation of an introducing firm position is inappropriate because this information is specific to the introducing firm, not the clearing firm. If FINRA requires this data field, clearing firms will likely either be subject to greater operational and regulatory risk, as they create a new process and incur a new obligation to obtain this information from the introducing firm[14] or will seek to allocate to the introducing firm a T+3 requirement regardless of whether the introducing firm is entitled to a T+5 or T+35 closeout date. In the alternative, we recommend that FINRA simply eliminate this field in the Proposed Daily Allocation Report.

If FINRA proceeds with the Proposed Daily Allocation Report, it should also provide precise definitions of terms used in the report. For example, it is not clear if "Close Out Date" is the actual date of a close out fail or the date that clean shares are sent in. We would propose that "close out date" be the date that the close out should occur, based on information that the clearing firm knows at that time.

Other Short Sale Related Initiatives.

FINRA requests comment on whether it should explore the creation of a reporting framework around stock lending activity. Reportable information could include loan terms, loan amount, and contra-party information. FINRA states that based on its experience with a potential framework, it could then consider whether it is appropriate to phase in public reporting of this information.

We support greater transparency in stock loan transactions. Transparency gives owners of securities a better sense of their security's true value in the stock lending market and the ability to compare providers based on common metrics. Fidelity offers transparency in stock loan transactions today across our retail and institutional platforms. Dealer rates to borrow a

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[14] If FINRA proceeds with the Proposed Enhancements, we suggest that FINRA provide guidance in the Regulatory Notice announcing these enhancements that clarifies introducing versus clearing firm obligations. In our comments to FINRA's Regulatory Notice 18-10, which requested comments on the effectiveness and efficiency of its Carrying Agreements Rule (Rule 4311), we noted that, "While we understand that amending Rule 4311 whenever a new regulatory requirement is enacted would not be feasible, we believe that guidance and interpretations connected with a rule requirement that incorporates the impact or implications specific to the clearing and/or the introducing firms and that discuss possible (but not required) means by which introducing firms and clearing firms can allocate responsibilities could help alleviate…concerns… We recommend that FINRA provide such guidance in the rule filings that FINRA submits to the SEC under Rule 19b-4 of the Securities Exchange Act of 1934 or in Regulatory Notices that accompany announcements of SEC approved FINRA rules and rule changes." Fidelity comments *available at* https://www.finra.org/sites/default/files/notice_comment_file_ref/18-16_NFS_Comment.pdf

stock are specific to a dealer's business and reflect several different factors including the cost of capital to that dealer and the regulatory regime under which it operates. For institutional customers, Fidelity's Prime Brokerage Optimize was designed to provide transparency into dealer spreads. For retail customers, Fidelity discloses the rate that is paid or charged to the retail customer respectively either to lend securities using Fidelity's fully paid lending program or to borrow to affect a short sale by way of Fidelity's margin account agreement.

As mentioned earlier in our letter, the SEC has stated that it is determining whether to propose rules concerning the transparency of information available to brokers, dealers, and investors, with respect to the loan or borrowing of securities.[15] We recommend that any FINRA work on a reporting framework around stock lending activity await potential SEC action on these topics to avoid duplicate and/or conflicting regulations.

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Fidelity appreciates the opportunity to comment on FINRA's short interest position reporting enhancements and other changes related to short sale reporting. If you have any questions concerning these comments or need additional information, please contact the undersigned or Krista Ryan, Vice President, Associate General Counsel at krista.ryan@fmr.com.

Very truly yours,

Michael Lyons

cc: Yvonne Huber, Vice President, Market Regulation Department, FINRA
Racquel Russell, Associate General Counsel, Office of General Counsel, FINRA

[15] *See* footnote 5 infra.