

# PUBLICATION

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## Fifth Circuit Sends Back SEC's Securities Lending and Short Sale Rules for Agency to Consider Cumulative Economic Impact

Authors: Paul B. Turner, Peyton H. Lacoste

September 03, 2025

In a decision that could reshape how securities lending and short sale market transactions are disclosed, the U.S. Court of Appeals for the Fifth Circuit (the Court) returned two key Securities and Exchange Commission (SEC) rules, citing the agency's failure to assess their cumulative economic impact. Affected entities should monitor the SEC's response and consider submitting additional comments during any reopened rulemaking period. Legal and compliance teams may also want to reassess internal reporting systems in anticipation of potential changes to disclosure requirements.

### Ruling

In a significant decision for investment managers and private fund advisers, the Court recently issued a decision in *National Ass'n of Private Fund Mgrs. v. SEC*, relating to the challenge of two SEC rules – the Securities Lending Rule and the Short Sale Rule (the Rules). The Rules aimed to increase transparency within their respective securities markets. The Court remanded the case to the SEC for further proceedings, finding that the agency had failed to consider and quantify the cumulative economic impact of the Rules. The Court's remand requires the SEC to assess the combined effects of the Rules, especially with respect to market participants subject to both rules.

### Background

As part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Congress gave the SEC additional rulemaking authority to adopt rules aimed at increasing transparency in the securities lending and short sale markets, as well as the reporting of information related to transactions in these markets. Pursuant to this authority, on November 18, 2021, the SEC proposed the Securities Lending Rule, under which securities loan transactions must be reported contemporaneously to the Financial Industry Regulatory Authority (FINRA), as well as additional information about the size of each individual security loan (which is provided later).

Those required to make such filings include brokers who borrow securities from posted margin accounts and those who function as intermediaries for lenders of the securities being borrowed. Shortly thereafter, the SEC proposed the Short Sale Rule. This rule requires institutional investment managers to report and publish aggregated short sale information monthly through the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system. After notice-and-comment periods, the SEC adopted the final rules on October 13, 2023, which are the subject of the appeal.

### The Appeal

The National Association of Private Fund Managers, et al. (the Petitioners), challenged the Rules asserting numerous deficiencies in the SEC's action – e.g., that the agency exceeded its rulemaking authority granted by

the Dodd-Frank Act; that it did not meet the notice-and-comment period requirements of the Administrative Procedure Act (APA); that it was arbitrary and capricious not to consider a less burdensome reporting requirement than EDGAR; and that it was agency whim for the SEC not to consider the cumulative economic impact because of the significant potential applicability of both rules to certain industry participant types.

The Court upheld the SEC's statutory authority to promulgate both the Securities Lending Rule and the Short Sale Rule, rejecting arguments that the rules conflicted with or exceeded the agency's mandate under the Dodd-Frank Act. It also found that the SEC provided adequate notice and opportunity for public comment and reasonably addressed concerns about reporting burdens. However, because the SEC adopted these rules simultaneously and they regulate overlapping market activities, the Court found them to be interrelated rules. According to the Court, for such rules, the agency must assess the combined effects of interrelated rules, which the SEC failed to do. As a result, the Court remanded both rules to the SEC for further economic analysis.

If you have questions about how the Court's decision could impact disclosure requirements, reach out to [Paul B. Turner](#) or [Peyton H. Lacoste](#).