

Global Principles for Sustainable Securities Lending



Creating a Global ESG Market Standard
for Owners, Lenders, Borrowers and
Impact Creators

November 1, 2022

Chair Gary Gensler
Secretary Vanessa Countryman
Director YJ Fischer, Division of International Affairs
U.S. Securities and Exchange Commission
100 F Street NE, Washington, DC 20549

Re: File No. S7-18-21: Reporting of Securities Loans (hereafter the proposed rule on securities loans)

Re: File No. S7-17-22: Environmental, Social, and Governance Disclosures for Investment Advisers and Investment Companies (hereafter the proposed rule on ESG disclosures)

Towards enhanced governance for transparent and sustainable global securities lending.

Dear Chair Gensler, Ms. Countryman and, YJ Fischer,

Thank you for the ongoing opportunity to engage with the Securities and Exchange Commission in relation to The Proposed Rule: Reporting of Securities Loans. I would like to emphasise that I am supportive of the SEC's goal to increase transparency in securities lending. Pursuant to our Transparency Principle¹, Global PSSSL mandate is to increase transparency in securities lending globally – it is a common interest with the SEC and other regulators.

I responded to the SEC in April and January and submitted my notes to facilitate our meeting on 3rd March this year².

¹ Global Principles for Sustainable Securities Lending (Global PSSSL) 2021. Available at: < <https://gpsl.org/wp-content/uploads/2021/09/Global-PSSL-2021-supported-by-opening-signatories.pdf> > accessed 31 October 2022, p. 2.

² My first paper called for more research and testing exercises; requested the SEC to provide more clarifications whether the proposed rule would enhance competition in the market; and emphasised the value in analysing securities lending through the whole value chain perspective. At the meeting with the SEC, I suggested that we build upon the SEC's work to increase transparency in the securities lending market through global checks and balances approach. My second submission related to my ongoing work on the checks and balances approach and emphasised the global risk of 'race to the bottom', i.e. a potential movement of some powerful stakeholders away from adequate standards/rules towards significantly lower standards internationally as well as the risk of overall misinformation. The current paper builds upon earlier papers and proposes 'enhanced governance' that effectively implements the checks and balances approach to polycentric securities lending (compare with note 38 below). See: Letter from Dr Radek Stech (1 April 2022).

Re: File No. S7-18-21: Reporting of Securities Loans. Global checks and balances to securities lending. Available



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I note that the Commission continues to admit further comments and engages with stakeholders through meetings. I have some interim updates following my ongoing analysis of the responses to SEC; engagement with the whole securities value chain, and reviews from our Research Opportunities for Sustainable Economy (ROSE) Centre³. These interim updates are also applicable to the proposed rule on ESG disclosures. My overall recommendation for the SEC to engage in enhanced governance re: securities lending in the context of sustainable finance is also appropriate for the SEC Division of International Affairs.

Key recommendations:

- 1. The SEC should continue its efforts to conclude the consultation on “Reporting of Securities Loans” to provide clear solutions that will benefit the US financial markets. In doing so, the SEC should have regard to the global securities lending market as well as the global sustainable finance market (GSFM).**
- 2. The SEC recognises that securities lending is *polycentric* as it includes both conflicting and overlapping interests that impact upon broader stakeholders (externalities). Securities lending is thus like a spider web with multiple centres of influence that cross many borders and are likely to change temporally. It is not a simple matrix with one centre and a periphery. Logically, regulation is not the only solution for achieving transparency in securities lending, especially in the global context and when taking into account the increasing importance of sustainable finance (or ESG). The SEC should not be alone in its goal to increase transparency in the US securities lending market – international players like Global PSSSL are willing, able and ready to collaborate with the SEC.**
- 3. Considering the *polycentric* nature of securities lending, the SEC should support *enhanced governance* for transparent and sustainable securities lending. Enhanced governance builds upon the existing web of interactions (or, governance), and relies upon a balanced use of regulation, principles (Global PSSSL), voluntary guidelines, regulatory supervision, and access to data with technological innovation. Enhanced governance should lead to building and maintaining bridges that cross jurisdictional limits. Enhanced governance must also encourage broader stakeholder engagement. The SEC should recognise value in the fact that its (direct or indirect) support for international**

at: <<https://www.sec.gov/comments/s7-18-21/s71821-20122346-278383.pdf>> accessed 31 October 2022; Letter from Dr Radek Stech (7 January 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111690-265026.pdf>> accessed 31 October 2022; The U.S. Securities and Exchange Commission, Division of Trading and Markets (2022). Memorandum. File No. S7-18-21. Meeting with Representatives of Global PSSSL. R. Stech’s discussion notes *Global checks and balances approach to securities lending: the role of the The U.S. Securities and Exchange Commission (SEC) regarding the proposed rule on Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20119066-271894.pdf>> accessed 31 October 2022.

³ I am writing this short paper in my personal academic capacity with a view to publishing longer pieces, subject to additional peer review.



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collaboration will ultimately enhance transparency in the US market and benefit US investors.

4. Enhanced governance will lead to new practical solutions such as global public-private partnerships that enable stakeholders with multiple interests to work towards shared/common goals. Global PSSSL is involved in one such evolving collaboration on operationalisation of the Securities Finance Transaction Regulations and a potential cross-border data repository.
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First recommendation

The SEC should continue its efforts to conclude the consultation on “Reporting of Securities Loans” to provide clear solutions that benefit the US financial markets. In doing so, the SEC should have regard to the global securities lending market as well as the global sustainable finance market (GSFM).

Given the cross-border nature of securities lending, the SEC should continue engaging stakeholders from outside the US. More importantly, the SEC should have regard to the evolving GSFM⁴, including greenwashing risks, in shaping the proposed rule on securities loans and/or new developments re: securities lending in shaping the proposed rule on ESG disclosures.

I agree with the Commission that ESG should not be defined in the proposed rule on ESG disclosures (Q1⁵). Following my early research on, and engagement with, Green Bond Principles⁶, the Principles for Responsible Investment (PRI), the World Bank Group and other organisations, I concluded that:

“It would be counterproductive to conceptualise sustainable finance through the review of existing definitions, because, at least at this stage, we would arrive at a list of

⁴ Stech, R. (2019). ‘Sustainable Finance, the Law and Stakeholders: Towards Responsible Social Movements.’ In: Onyeka, K. O, Ngwu, F. N. and Jamali. D. eds. *Corporate Social Responsibility in Developing and Emerging Markets. Institutions, Actors and Sustainable Development*. Cambridge University Press, pp. 365-394.

⁵ Enhanced Disclosures by Certain Investment Advisers and Investment Companies about Environmental, Social, and Governance Investment Practices, Release Nos. 33-11068, 34-94985, IA6034, IC-34594 (17 June 2022), p.24.

⁶ ICMA (2018). Green, Social and Sustainability Bond Principles. [online] Available at: <<https://www.icmagroup.org/green-social-and-sustainability-bonds/>> accessed 31 October 2022.



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sometimes vague or conflicting concepts. Such haste risks multiplying these definitions and spawning endless debates, similar to those centred on the nomenclature for sustainable development”⁷.

To move on and remain productive, I suggested to use three principles that explain the tenets of sustainable finance, i.e. that it should be aligned with overarching global agendas; co-created and adaptable⁸. I think that these three principles help us to capture the essence of sustainable finance and allow for drawing definitions and boundaries for more specialised concepts (such as the proposed ESG focussed fund).

Turning to securities lending, the proposed rule on securities loans has provided many mechanisms for increasing transparency in securities lending, and many respondents agreed that this is the right direction of travel⁹. Moreover, the SEC 2009 Roundtable¹⁰ highlighted that securities lending activity, when approached from the investment activity angle, would consider broader risks and the associated mitigation strategies. My view is that the 2009 Roundtable was visionary, given that, today, many securities lending developments take place in the broader context of sustainable development and ESG disclosures. As I argued in my earlier meeting with the SEC, it is important to consider the whole value chain perspective, in order to understand all opportunities (and risks) relating to securities lending, beyond the mere transfer of loans¹¹. Such an approach constitutes putting the roots of sustainability into action through appropriate balancing exercises.

Yet, given that securities lending is opaque and has been overlooked in the broader sustainable finance agenda, I emphasised the need for co-creation when I made proposals for the (global) principles for sustainable securities lending in 2018¹². This proposal was received enthusiastically by several beneficial owners. I then led an independent working group with these beneficial owners (including BlackRock and PGGM) with whom I co-created the first iteration of global PSSSL in 2019. In autumn that year, having draft principles in place, the group had a choice to 1) organise an autonomous governance for PSSSL, 2) fall within the structure of another organisation or 3) act as a semi-autonomous organisation at arms-length of a trade association. The group chose the third option.¹³ I drafted the appropriate governance structure to reflect the request of beneficial owners

⁷ Stech, *supra* note 4, p. 370.

⁸ *Ibid*, p. 371.

⁹ See comments on the proposed rule on securities loans: <<https://www.sec.gov/comments/s7-18-21/s71821.htm>> accessed 31 October 2022.

¹⁰ The U.S. Securities and Exchange Commission (SEC) (2009). *Securities lending and short sell roundtable*. Available at: <<https://www.sec.gov/news/openmeetings/2009/roundtable-transcript-092909.pdf>> accessed 31 October 2022.

¹¹ Letter from Dr Radek Stech (7 January 2022), *supra* note 2.

¹² University of Exeter Law School (2018). *SFLS CEO advocates Sustainable Finance principles at 2018 European Securities Lending Forum*. Available at: <<https://law.exeter.ac.uk/newsandevents/news/articles/sflsceoadvocatessustainabl.php>> accessed 31 October 2022.

¹³ Since the work was funded by the UK Economic and Social Research Council, I am able to make clarifications to the publicly available information with a view to removing any potential for misinformation. Mair, V. (2021).



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that I would guarantee their leadership at arms-length with the trade group. The GPIF's withdrawal from securities lending on ESG grounds¹⁴ provided further impetus for PSSSL. My mandate was to ensure that the beneficial owners are in the driving seat of the initiative. However, I responded to the requests from major custodians, agent lenders and other intermediaries to join the initiative as partners "on the understanding that they genuinely support global PSSSL"¹⁵. This has been a very important development for three major reasons:

- It was an early attempt to introduce *enhanced governance* into the securities lending field in the context of sustainable finance;
- PSSSL could not be maintained as part of a semi-autonomous group due to the polycentric nature of securities lending; specifically, the fact that trade groups are dominated by special interests and there is no single group that could represent the broader stakeholder base;
- This attempt proved to be a success in the long-term as it led to the emergence of a new independent and impartial Global PSSSL as a set of principles¹⁶ and an organisation¹⁷.

The establishment and broad adoption of Global PSSSL has enabled stakeholders from around the world to work towards enhanced governance and greater transparency in securities lending. In essence, Global PSSSL represents a unique example of a co-created principles-based mechanism; independent of any particular interest groups and regardless of jurisdiction.

New ESG standards on securities lending welcomed after falling-out. *Capital Monitor*. Available at: <<https://capitalmonitor.ai/asset-class/equity/new-esg-standards-on-securities-lending-welcomed-after-falling-out/>> accessed 31 October 2022; ISLA Council for Sustainable Finance (2020). *ISLA Council for Sustainable Finance & PSSSL*. Available at: <<https://www.islaemea.org/press-releases/isla-council-for-sustainable-finance-pssl/>> accessed 31 October 2022.

¹⁴ Government Pension Investment Fund GPIF (2019). *Suspension of Stock Lending Activities*. Available at: <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwio3eC5i4n7AhVNUcAKHV0GAr4QFnoECBMQAQ&url=https%3A%2F%2Fwww.gpif.go.jp%2Fen%2Ftopics%2FSuspension_of_Stock_Lending_Activities.pdf&usq=AOvVaw285AzYASnGyftaENTNj_Xu> accessed 31 October 2022.

¹⁵ Radek Stech, ISLA Council for Sustainable Finance (2020). *ICSF Update. COVID-19 | EU Renewed Sustainable Finance Strategy Consultation | New Members & Partners*. Available at: <<https://www.islaemea.org/blog/icsf-update-7july2020/>> accessed 31 October 2022; See also: Radek Stech, Radek Stech, *ISLA Council for Sustainable Finance (2020). ICSF Update. Global Principles for Sustainable Securities Lending | Renewed Sustainable Finance Strategy Consultation | New Partners*. Available at: <<https://www.islaemea.org/blog/icsf-update-07august2020/>> accessed 31 October 2022.

¹⁶ Global PSSSL 2021, *supra* note 1.

¹⁷ Global PSSSL (2021). Consolidated Terms and Conditions for Stakeholder Engagement. Available at: <<https://gpssl.org/wp-content/uploads/2021/12/Global-PSSL-consolidated-terms-Issue-1.0-23-December-2021.pdf>> accessed 31 October 2022; Global PSSSL (2022). The Research Opportunities for Sustainable Economy (ROSE) Centre. Terms and Conditions. Available at: <<https://gpssl.org/wp-content/uploads/2022/03/ROSE-Ts-and-Cs-final.pdf>> accessed 31 October 2022.



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Second recommendation

The SEC recognises that securities lending is polycentric as it includes both conflicting and overlapping interests that impact upon broader stakeholders (externalities). Securities lending is thus like a spider web with multiple centres of influence that cross many borders and are likely to change temporally. It is not a simple matrix with one centre and a periphery. Logically, regulation is not the only solution for achieving transparency in securities lending, especially in the global context and when taking into account the increasing importance of sustainable finance (or ESG). The SEC should not be alone in its goal to increase transparency in the US securities lending market – international players like Global PSSSL are willing, able and ready to collaborate with the SEC.

I need to first emphasise that securities lending is important for the markets, liquidity and price discovery. However, the whole value chain (including the beneficial owners) needs to appreciate that securities lending often involves short selling. Norges Bank Investment Management has described that link re: price discovery:

“The presence of a stock lending market increases the supply of shares available for sale. Investors with the lowest valuation for a stock would be willing to pay the fees to borrow a stock and sell it short, enabling investors with a (higher) valuation to buy. These marginal buyers are priced out of the market without stock lending. The net result is that the market price of the security will be lower (reflecting the valuation of the new marginal investor), and the views of a greater proportion of investors will be reflected in the market. From the perspective of a long-term investor, this can increase the future risk premia received from holding a long position.”¹⁸

I argue that securities lending has become *polycentric* that is, gradually encapsulating many, sometimes conflicting and/or overlapping, interests with increasing impacts upon other stakeholders (or interests) beyond those engaged directly in a narrowly defined *transfer* of securities from one party to another¹⁹. Some lenders may also be borrowers, or even engage in short selling with a view

¹⁸ Norges Bank Investment Management (2016). *The Role of Securities Lending in Well-Functioning Markets. Asset Manager Perspective*. Available at: <https://www.nbim.no/contentassets/fa779bdb63724b13a0b25fb976212a13/assetmanagerperspective_2-16_the-role-of-securities-lending.pdf> p. 3. accessed 31 October 2022.

¹⁹ Proposed rule on securities loans, p. 12



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to managing risks²⁰. Those stakeholders who engage in short selling as part of broader trading strategies *can* generate substantive wealth for pensioners and savers but are reluctant to disclose their trading strategies due to a fear of “copycatting”²¹. In some respects, organisational policies or broader regulatory frameworks may provide limits to transparency as some stakeholders are prevented from sharing confidential information with other parties²². Yet, there is an appetite to learn and potentially test various trading strategies in the context of pair trading that could lead to greater efficiencies in relation to the use of collateral for securities lending²³.

As I and other stakeholders noticed²⁴, the SEC needs to assess its jurisdictional limits in light of US laws but also potential implications of international frameworks such as the European Union. More importantly, as financial markets evolve, we cannot predict the trading choices of investors who may shift or balance various strategies over time, and potentially engage in short selling²⁵. This is especially true when regulators assess the past actions and provide up-to-date research²⁶.

²⁰ Some pension funds and other beneficial owners are both lenders and borrowers of securities. I consulted an EU shorts database by one Global PSSSL signatory (BreakoutPOINT) and discovered that several beneficial owners engaged in short selling. BreakoutPOINT. Available at: <<https://breakoutpoint.com/>> accessed 31 October 2022. I agree with the Commissions reading of Peter Molk and Frank Partnoy, (2019). *Institutional Investors as Short Sellers?* 99 B.U. L. REV. 837, 839, except that the Commission did not notice one of the author’s conclusions: “The fact that pension funds generally are not short sellers today does not mean they will not become short sellers tomorrow.” (p. 853). See Securities and Exchange Commission (2022). *Short Position and Short Activity Reporting by Institutional Investment Managers*. Available at: <<https://www.sec.gov/rules/proposed/2022/34-94313.pdf>> accessed 31 October 2022, p 97. Also, some beneficial owners may engage in short selling indirectly, through investments in hedge funds.

²¹ See for example: Letter from Stephen John Berger (4 April 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20122451-278475.pdf>> accessed 31 October 2022, p. 6.

²² See for example: Letter from Edward M. Marhefka (4 January 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111261-264904.pdf>> accessed 31 October 2022.

²³ SEC (2009), Securities lending roundtable, *supra* note 10, p. 86.

²⁴ Letter from Dr Radek Stech (7 January 2022), *supra* note 2.; U.S. Securities and Exchange Commission (SEC). Comments on Proposed Rule: Reporting of Securities Loans. [Release No. 34-93613; File No. S7-18-21]. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821.htm>> accessed 31 October 2022; Letter from Jennifer W. Han (7 January 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111683-265021.pdf>> accessed 31 October 2022.

²⁵ E.g. following pressures from the alternative investment fund managers in the current high-inflation market, see for example: Fletcher, L. and Oliver, J. (2022). Hedge funds take aim at UK fund management groups. *The Financial Times*. Available at: <<https://www.ft.com/content/cbdfcb42-6c70-499c-999d-7e1cda0e4bd4?shareType=nongift>> accessed 31 October 2022.

²⁶ AFM (2022). *French and Dutch market authorities publish analysis of impact temporary French short sell ban in 2020*. Available at: <<https://www.afm.nl/en/nieuws/2022/februari/onderzoek-verbod-short-sell>> accessed 31 October 2022.



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In light of the optimism regarding the role of new technologies and innovative data for securities lending²⁷, there are broader regulatory debates about the need for better governance to mitigate issues relating to the use of that data²⁸.

Furthermore, as evidenced by the responses to the SEC proposal, a growing number of retail investors are concerned with their interest. Despite that, there are attempts to democratise securities lending as part of an offering for retail investors that has received cautious attention from some regulators outside the US²⁹. Securities lending has an obvious positive impact upon markets' liquidity, yet, the broader community of stakeholders is yet to understand the relationship between securities lending and other mechanisms for liquidity, such as "repo"³⁰. Large custodian banks who play an important role in facilitating (directly or indirectly) efficient transfers of securities loans are subject to balance sheet pressures that might affect liquidity, and their relationships with long-standing clients including pension funds, mutual funds, and other beneficial owners³¹.

Finally, the multifaceted, dynamic and complex sustainable finance agenda further strengthens the polycentric nature of securities lending because of the need to make additional assessments that span across the whole value chain. This is best explained by our holistic and evolving³² nine

²⁷ See for example: Letter from Adrian Dale (7 January 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111342-264953.pdf>> accessed 31 October 2022; Letter from Gregory Babyak (31 January 2022). *Re: Reporting of Securities Loans. Release No. 34-93613 / File No. S7-18-21*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20113384-265750.pdf>> accessed 31 October 2022; Letter from Edmon W. Blount (7 January 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111696-265030.pdf>> accessed 31 October 2022.

²⁸ European Commission, Directorate-General for Communications Networks, Content and Technology (2020). *Impact Assessment accompanying the proposal for a Regulation of the European Parliament and of the Council on European data governance (Data Governance Act)*. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020SC0295&qid=1665063115117>> accessed 31 October 2022.

²⁹ Australian Securities & Investment Commission (2022). *22-239MR ASIC warns brokers considering high-risk offers to retail investors*. Available at: <<https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-239mr-asic-warns-brokers-considering-high-risk-offers-to-retail-investors/>> accessed 31 October 2022.

³⁰ Also admitted by the SEC in *the proposed rule on securities loans*, p. 147. See also Letter from Stephen Hall and Jason Grimes (7 January 2022). *Reporting of Securities Loans*, 86 Fed. Reg. 69,802 (Release No. 34-93613; File No. S7-18-21). Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111901-265131.pdf>> accessed 31 October 2022, p. 8 and Radek Stech, 'Sustainable finance principles and securities lending: a transparency update', Presentation delivered at the Securities Lending Committee of the Bank of England, 4th November 2021 (Global PSSSL 2021). Available at <<https://gsssl.org/wp-content/uploads/2021/12/Global-PSSSL-Bank-of-England-presentation-4th-November-2021.pdf>> accessed 31 October 2022, p. 4.

³¹ BIS. Basel III: international regulatory framework for banks. Available at: <<https://www.bis.org/bcbs/basel3.htm>> accessed 31 October 2022. See also: European Commission (2021). *Banking Package 2021: new EU rules to strengthen banks' resilience and better prepare for the future*. Press release. Available at: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5401> accessed 31 October 2022.

³² Global PSSSL 2021, *supra* note 1 evolved from an earlier version, i.e. Draft Global PSSSL 2020 available at: <<https://gsssl.org/archive-draft-global-psssl/>> accessed 31 October 2022 as well as the earlier version of PSSSL



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principles that call for interconnected collateral and the broader collaboration with tax authorities³³. Global PSSSL principle on voting and engagement recommends that stakeholders compare “the shareholder’s value of the vote balanced against the opportunity cost that impacts beneficial owners’ commercial interests and liquidity in the long-term”³⁴. Such assessments cannot be done in a vacuum of one side of the market and there is a clear need to include the broader stakeholders into making such assessments. Further, our principle on values-based short selling supports covered short selling that “contributes to achieving values beyond mere financial gain”³⁵. Given the nature of short selling, these values may be associated with enthusiasm for ESG, neutral stance with emphasis on weeding out green washing or, potentially, an overall negative stance on ESG³⁶.

The above constitute a non-exhaustive list of examples of a ‘web’ of fluid interactions between stakeholders who sometimes may have aligned interests and, occasionally, conflicting interests that may change over time. Securities lending is thus like “a spider web”³⁷ with multiple centres of influence that cross many borders and are likely to change temporally. It is not a simple matrix with one centre and a periphery³⁸. It is hard to capture such a state of affairs solely by regulation.

available at <https://www.eticanews.it/wp-content/uploads/2020/03/ICSF_Principles.pdf> accessed 31 October 2022.

³³ Global PSSSL 2021, *supra* note 1, Principle 4 and 5.

³⁴ *Ibid*, Principle 7, p. 4.

³⁵ *Ibid*, Principle 6, p. 3.

³⁶ MarketsMedia Group (2022). *Short Selling Can be Used to Achieve ESG Goals*. Available at: <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKewjf3IGNq4r7AhVRPcAKHTaGC8IQFnoECC8QAQ&url=https%3A%2F%2Fwww.marketsmedia.com%2Fshort-selling-can-be-used-to-achieve-esg-goals%2F&usg=AOvVaw3djf9Xumrlx-__2x3xsALs> accessed 31 October 2022; Mundy, S., Temple-West, P. and Bryan, K. (2022). Why feared short seller Carson Block has turned his sights on green stocks. *The Financial Times*. Available at: <<https://www.ft.com/content/9659b5f1-dc54-48f2-a53c-20417d037657>> accessed 31 October 2022; Global PSSSL (2021). Minimum Voluntary ESG Standard. Short-Long Investment Dynamic: Short Activism. Available at: <<https://gpssl.org/wp-content/uploads/2021/03/Global-PSSL-Market-standard-on-short-activism-30-March-as-introduced.pdf>> accessed 31 October 2022.

³⁷ In developing the concept of polycentricity for securities lending, I have drawn inspirations from Lon Fuller’s work on polycentricity and “spider web”. I applied his concept uniquely to securities lending through the regulatory lenses rather than the practice of adjudication. See: Fuller, L. (1978-1979). ‘The Forms and Limits of Adjudication’, 92, *The Harvard Law Review Association*, 353, 395. I have also applied Fuller’s concept of polycentricity to environmental justice: Stech, R. (2013). *Costs Barriers to Environmental Judicial Review: A Study in Environmental Justice*. Cardiff University. Cardiff. Available at: <https://orca.cardiff.ac.uk/47605/1/PhD_Radoslaw_Stech_0538599_final.pdf> accessed 31 October 2022.

³⁸ The proposed rule on securities loans, p. 115.



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Third recommendation

Considering the *polycentric* nature of securities lending, the SEC should support *enhanced governance* for transparent and sustainable securities lending. Enhanced governance builds upon the existing web of interactions (or, governance), and relies upon a balanced use of regulation, principles (Global PSSSL), voluntary guidelines, regulatory supervision, and access to data with technological innovation. Enhanced governance should lead to building and maintaining bridges that cross jurisdictional limits. Enhanced governance must also encourage broader stakeholder engagement. The SEC should recognise value in the fact that its (direct or indirect) support for international collaboration will ultimately enhance transparency in the US market and benefit US investors.

Enhanced governance builds upon the existing web of interactions and governance, and relies on a balanced use of regulation, principles, industry guidelines, regulatory supervision, data, and broader stakeholder engagement. It also relies on the existing stakeholder base and leverages its potential to move beyond individual or groups of intermediaries/investors' own interests towards common goals, whenever appropriate and possible. It puts the checks and balances approach into action by recognising the polycentric nature of securities lending³⁹.

As securities lending is *polycentric* (including regulatory limits), such a balancing act needs to also take place at the international level in addition to the actions taken at the national level and include more stakeholders. This will *enable* stakeholders to meet their minimum requirements relating to their constituent fields of expertise. It will also *empower* some stakeholders to develop more ambitious products and services for the benefit of the whole value chain. Crucially, those interactions can change over time. Stakeholders who are less active today may be developing solutions for tomorrow. Hence, I urged the SEC to perform a closer analysis of the ramifications of the proposed rule for the competition on the market⁴⁰.

The SEC should recognise value in the fact that its (direct or indirect) support for international collaboration will ultimately enhance transparency in the US market and benefit US investors. Such an international collaboration will require a greater input from international organisations beyond

³⁹ "Checks and balances" is a constitutional concept and can have slightly different meanings. Here, I rely on the European Union's framework that put checks and balances approach into action through multi-level governance because there are overlaps between the European Union institutions. It is in contrast with the concrete division of powers as understood by some state constitutions such as in the US. I am more than happy to explain more by reference to the Treaty on European Union and the Treaty on the Functioning of the European Union available at <<https://eur-lex.europa.eu/collection/eu-law/treaties/treaties-force.html>> accessed 31 October 2022.

⁴⁰ Letter from Dr Radek Stech, Global PSSSL (7 January 2022), *supra* note 2. See also broader ongoing developments relating to competition matters: Cohen Milstein (2022). Stock Loan Antitrust Litigation. Available at: <<https://www.cohenmilstein.com/case-study/stock-loan-antitrust-litigation>> accessed 31 October 2022.



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the Financial Stability Board⁴¹ and IOSCO⁴². The SEC, alongside other stakeholders such as the Principles for Responsible Investment (PRI)⁴³, should see value in recognising the efforts of stakeholders that foster such international collaboration on an impartial and independent basis. Global PSSSL is such a new impartial organisation, based on enhanced governance⁴⁴. ESG/Sustainability must not be a public relations exercise for securities lending, and there is a real risk that our work will become mere marketing tools in the securities lending debate.

Fourth recommendation

Enhanced governance will lead to new practical solutions such as global public-private partnerships that enable stakeholders with multiple interests to work towards shared/common goals. Global PSSSL is involved in one such evolving collaboration on operationalisation of the Securities Finance Transaction Regulations and a potential cross-border data repository.

Global PSSSL is interested in helping all stakeholders in finding new innovative solutions to improving sustainable finance⁴⁵ as well as securities lending through various avenues, including innovation and digitisation⁴⁶. I set out three examples of such practical solutions below.

a) Strengthened sustainable finance through principles-based approaches

I emphasised that it is important to choose the appropriate principles for relevant financial structures as part of my presentation to a Bank of England's external committee⁴⁷. Securities lending, as a polycentric finance dynamic, cannot rely solely on generalist top-down principles such as PRI or Principles for Responsible Banking⁴⁸. As with project finance (relying *inter alia* on Equator Principles⁴⁹), more securities lending experts, as well as the PRI Secretariat, should recognise the value in a dedicated set of principles for securities lending. This argument is further strengthened by an important finding that I managed to compile as part of my presentation to the independent group

⁴¹ Temple-West, P., Mundy, S. and Talman, K. (2022). Does short selling fit into the ESG agenda? *The Financial Times*. Available at: <<https://www.ft.com/content/320fc444-a00f-416f-ae6e-1caf221f7893>> accessed 31 October 2022.

⁴² IOSCO. Available at <<https://www.iosco.org/>> accessed 31 October 2022.

⁴³ PRI. Available at <<https://www.unpri.org/>> accessed 31 October 2022.

⁴⁴ See Global PSSSL Consolidated Terms, *supra* note 17.

⁴⁵ Global PSSSL (2021), *supra* note 1, Principle 1.

⁴⁶ *Ibid*, Principle 8.

⁴⁷ Radek Stech, Sustainable finance principles and securities lending, *supra* note 30, p. 4

⁴⁸ Principles for Responsible Banking. Available at <<https://www.unepfi.org/banking/bankingprinciples/>> accessed 31 October 2022.

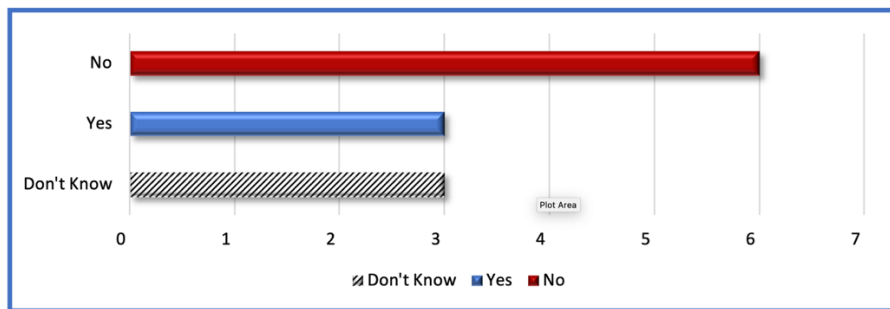
⁴⁹ Equator Principles (2020). Available at: <<https://equator-principles.com/>> accessed 31 October 2022.



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of major UK asset owners on May 4, 2022. I obtained permission from the PRI Secretariat (which was facilitated my presentation) to share this finding from surveyed asset owners with the SEC:

Do you think you currently have access to impartial and independent information in relation to ESG matter in securities lending?*



*Twelve respondents surveyed

Moreover, Global PSSSL launched its new project with United Nations reviewers⁵⁰ on board and I do call for more support from international organisations.

b) Operationalisation of securities finance data such as SFTR

Pursuant to one of Global PSSSL draft Recommendation, regulators, central banks may be involved in monitoring the progress of Global PSSSL⁵¹. This can foster trust between stakeholders and lead to forming working groups that would help in interpreting SFTR⁵² data for the benefit of the industry and broader stakeholders. Given its independence and impartiality, Global PSSSL enhances governance for such exchanges of knowledge by facilitating public-private partnerships. This is

⁵⁰ Global PSSSL (2022). *The Global PSSSL for UN Pathways welcomes the Botswana Stock Exchange as reviewer*. Press release. Available at: <<https://gpsl.org/the-global-pssl-for-un-pathways-welcomes-the-botswana-stock-exchange-as-reviewer/>> accessed 31 October 2022; Global PSSSL (2022). *Global PSSSL welcomes Sustainable Stock Exchanges Initiative as observer*. Press release. Available at: <<https://gpsl.org/global-pssl-welcomes-sustainable-stock-exchanges-initiative-as-observer/>> accessed 31 October 2022; Global PSSSL (2022). *The Global PSSSL for UN pathways welcomes The Central Bank of Eswatini as reviewer*. Press release. Available at: <<https://gpsl.org/the-global-pssl-for-un-pathways-welcomes-the-central-bank-of-eswatini-as-reviewer/>> accessed 31 October 2022.

⁵¹ Global PSSSL (2021). *Preparing securities lending for a sustainable world. Recommendations for a stronger, more engaging and more transparent value chain*. Consultation paper. Available at: <<https://gpsl.org/wp-content/uploads/2021/07/Global-PSSL-draft-recommendations-transparent-value-chain-published-20-July-2021.pdf>> p. 11, accessed 31 October 2022.

⁵² ESMA, SFTR Reporting, available at <<https://www.esma.europa.eu/policy-activities/post-trading/sftr-reporting>> accessed 31 October 2022.



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especially relevant given the various limitations just at the European level⁵³ and the ambition of EU national competent authorities to engage in international collaboration⁵⁴.

c) Public-private partnership for a cross-border data repository

As reported earlier⁵⁵, I have strengthened collaboration with The Center for the Study of Financial Market Evolution (CSFME) over CSFME's proposal to develop a cross-border data repository for securities lending. We have had numerous meetings, with inputs from the AFM (acting in its capacity as a Global PSSL Observer⁵⁶) and it became clear that there is a need for further collaboration on this matter.

Global PSSL engaged with the CSFME pursuant to our Principles on Transparency, Supportive Tax and Innovation and Digitalisation⁵⁷. The CSFME's work is appealing to Global PSSL, as both organisations take a holistic view of securities lending.

In several papers, CSFME has referred to the evolution of the debate regarding transparency in securities lending and has indicated how the current SEC proposed rule on securities loans sits within the FSB agenda⁵⁸. The centre proposed its own innovative solution for a cross-border repository and

⁵³ For example, as regards withholding tax, "ESMA is aware that such proposals will not be the perfect solution to the issue of WHT reclaim schemes, as their nature makes them a global phenomenon often taking place beyond the boundaries of the European Union, and ESMA's proposals would only affect information sharing within the EU. Nevertheless and notwithstanding the views collected during our consultation, we remain of the view that pursuing them would still be beneficial." Planta, F., European Securities and Markets Authority (ESMA) (2021). *European Parliament – FISC Sub Committee on Fiscal Matters. Public hearing on "Cum/Ex and Cum/Cum scandal"*. Available at: <https://www.esma.europa.eu/sites/default/files/library/esma70-155-11890_statement_cumex_cumcum_scandal_-_fabrizio_planta.pdf> accessed 31 October 2022.

⁵⁴ "SFTR data will enable the AMF to further optimise its analysis of market risks. The data will be used to inform thematic studies, provide the AMF Risk Committee with finer indicators and contribute to international work." Ezra, A., Pepin, F. and Deneut, M. (2021). *Initial Analysis of SFTR Reporting Data*. Available at: <<https://www.amf-france.org/sites/default/files/private/2021-06/210606-note-english-version-analysis-sftr-reporting.pdf>> accessed 31 October 2022, p. 5.

⁵⁵ Letter from Dr Radek Stech (1 April 2022), *supra* note 2.

⁵⁶ Global PSSL (2022). *Global PSSL welcomes Dutch regulator as observer*. Available at: <<https://gpssl.org/global-pssl-welcomes-dutch-regulator-as-observer/>> accessed 31 October 2022.

⁵⁷ Global PSSL 2021, *supra* note 1.

⁵⁸ Letter from Edmon W. Blount (15 December 2021). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20109658-264014.pdf>> accessed 31 October 2022; Letter from Edmon W. Blount (7 January 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111696-265030.pdf>> accessed 31 October 2022; Letter from Edmon W. Blount (26 April 2022). *Greening of Securities Finance. The Path Forward. Social Research Data Trusts for Securities Lending*. Presentation to the Securities and Exchange Commission. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20146484-311684.pdf>> accessed 31 October 2022; Letter from David S. Schwartz (7 January 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20111702-265034.pdf>> accessed 31 October 2022; Letter from David S. Schwartz (17 March 2022). *Re: File No. S7-18-21: Reporting of Securities Loans*. Available at: <<https://www.sec.gov/comments/s7-18-21/s71821-20119858-272649.pdf>> accessed 31 October



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drew from some cutting-edge work by IBM and Mastercard⁵⁹. CSFME set out arguments as to how the cross-border data repository would have helped to prevent some of the major scandals that have shaken the financial world in the last few years (e.g. Archegos)⁶⁰.

I wanted to update the SEC that this collaboration has entered an advanced preliminary stage where it has become clear that Global PSSL would work on some governance matters to also complement the FSB efforts in its governance group⁶¹. We will update the Commission and other stakeholders on progress through individual submission, joint papers and other communications in due course.

Conclusion

The SEC has correctly identified transparency as a key factor in promoting sustainable finance and improving the securities lending market. This is the same conclusion I have reached through my extensive research and engagement with stakeholders over the past several years. In this paper, I have furthered the thinking about the securities lending value chain in terms of a polycentric phenomenon, and outlined how enhanced governance is the most practicable and effective way to implement cross-jurisdictional change within this global industry.

I have set out four recommendations, for SEC consideration, aimed at promoting enhanced governance with an emphasis on a principles-based approach, in addition to regulation, self-regulation, regulatory supervision and access to data. I have also provided evidence of practical solutions that can be implemented through enhanced governance and I intend to provide more details soon.

As the Commission emphasised, securities lending is based on relationships and realised “often with a phone call.”⁶² I would not contest the need for these relationships, and understand that many stakeholders may have aligned interests and, occasionally, conflicting interests that may change over time. Various distinctive groups serve an important role within their respective boundaries within the industry, but I would argue that these distinct entities will always seek to enhance their own interests. Improving transparency in securities lending in the context of sustainable finance has a clear cross-border dimension. It is important to allow wider engagement through a unifying set of

2022; Global PSSL (2022). *Launch of the United Nations Pathways for Global PSSL Project*. Press release. Available at: <<https://gpssl.org/launch-of-the-united-nations-pathways-for-global-pssl-project/>> accessed 31 October 2022.

⁵⁹ Letter from David S. Schwartz (7 January 2022), *Ibid*, p. 4; Truata. Available at: <<https://www.truata.com/>> accessed 31 October 2022.

⁶⁰ Letter from David S. Schwartz (7 January 2022), *Ibid*, p. 6.

⁶¹ Financial Stability Board (2015). *Transforming Shadow Banking into Resilient Market-based Finance. Standards and processes for global securities financing data collection and aggregation*. Available at: <<https://www.fsb.org/wp-content/uploads/FSB-Standards-for-Global-Securities-Financing-Data-Collection.pdf>> p. 38, accessed 31 October 2022.

⁶² The proposed rule on securities loans p. 110.



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impartial principles entrenched into independent Global PSSL, in addition to existing international frameworks (such as FSB and IOSCO).

The SEC should recognise value in the fact that its (direct or indirect) support for international collaboration will ultimately enhance transparency in the US market and benefit US investors. Global PSSL is willing, able and ready to collaborate with the SEC, either directly or indirectly (e.g. through our “Global PSSL for UN Pathways’ project or our Observer mechanism).

I do hope that this worthwhile exercise will continue to stimulate the debate and drive progress, as I would hate to see it fall victim to the so-called securities lending “short memory”⁶³.

I included this proposal as part of the proposed rule on ESG disclosures to also ensure that my submission through Global PSSL sets in the *long memory* of the broader stakeholder base.

Dr Radek Stech

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Global Principles for Sustainable Securities Lending CIC

Executive Chair – Global PSSL for UN Pathways



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⁶³ SEC (2009), *Securities lending roundtable*, supra note 10, p. 80.