

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 240, 242, and 249

[Release No. 34–90610, File No. S7–03–20]

RIN 3235–AM61

Market Data Infrastructure

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is amending Regulation National Market System (“Regulation NMS”) under the Securities Exchange Act of 1934 (“Exchange Act”) to modernize the national market system for the collection, consolidation, and dissemination of information with respect to quotations for and transactions in national market system (“NMS”) stocks (“NMS information”). Specifically, the Commission is

expanding the content of NMS information that is required to be collected, consolidated, and disseminated as part of the national market system under Regulation NMS and is amending the method by which such NMS information is collected, calculated, and disseminated by fostering a competitive environment for the dissemination of NMS information via a decentralized consolidation model with competing consolidators.

DATES: *Effective date:* The final rules are effective June 8, 2021.

Compliance dates: The applicable compliance dates are discussed in Section III.H, titled “Transition Period and Compliance Dates.”

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SUPPLEMENTARY INFORMATION: The Commission is adopting 17 CFR 242.614 (new Rule 614) under the Exchange Act, Form CC to require registration of competing consolidators, and a requirement that the participants to the effective national market system plan(s) for NMS stocks amend such plan(s) to reflect the new role and functions of the plan(s). The Commission is also adopting amendments to the following rules:

Commission reference	CFR citation (17 CFR)
Exchange Act:	
Rule 3a51–1	§ 240.3a51–1.
Rule 13h–1	§ 240.13h–1.
Regulation NMS:	§§ 242.600 through 242.613.
Rule 600(b)(2)	§ 242.600(b)(2).
Rule 600(b)(5)	§ 242.600(b)(5).
Rule 600(b)(16)	§ 242.600(b)(16).
Rule 600(b)(19)	§ 242.600(b)(19).
Rule 600(b)(20)	§ 242.600(b)(20).
Rule 600(b)(21)	§ 242.600(b)(21).
Rule 600(b)(26)	§ 242.600(b)(26).
Rule 600(b)(50)	§ 242.600(b)(50).
Rule 600(b)(59)	§ 242.600(b)(59).
Rule 600(b)(68)	§ 242.600(b)(68).
Rule 600(b)(70)	§ 242.600(b)(70).
Rule 600(b)(78)	§ 242.600(b)(78).
Rule 600(b)(82)	§ 242.600(b)(82).
Rule 600(b)(83)	§ 242.600(b)(83).
Rule 600(b)(85)	§ 242.600(b)(85).
Rule 602	§ 242.602.
Rule 603	§ 242.603.
Rule 611	§ 242.611.
Regulation SCI:	§§ 242.1000 through 242.1007.
Rule 1000	§ 242.1000.
Forms, Exchange Act:	Part 249.
Form CC	§ 249.1002.
Form SCI	§ 249.1900.

Finally, the Commission is adopting conforming changes and updates to cross-references in:

Commission reference	CFR citation (17 CFR)
Exchange Act:	
Rule 105(b)(1)(i)(C)	§ 242.105(b)(1)(i)(C).
Rule 105(b)(1)(ii)	§ 242.105(b)(1)(ii).
Rule 201(a)(1)	§ 242.201(a)(1).
Rule 201(a)(2)	§ 242.201(a)(2).

that requires significant resources to compete effectively. For example, as noted above, the Commission estimates that new entrants to the competing consolidator market—entities without prior experience in the business of collecting, consolidating, and disseminating market data—will incur initial startup costs of \$2,683,000,²⁵⁵² and each competing consolidator will incur total ongoing annual costs of \$5,141,895 per entity.²⁵⁵³ While other competing consolidators may emerge and seek to register as competing consolidators with the Commission, the Commission does not believe that any such entities would be “small entities” as defined in 17 CFR 240.0–10(g). Accordingly, the Commission believes that any such registered competing consolidators will exceed the thresholds for “small entities” set forth in 17 CFR 240.0–10.

For the reasons described above, the Commission certifies that the amendments to Rules 600 and 603 and the new Rule 614 will not have a significant economic impact on a substantial number of small entities.

VII. Other Matters

Pursuant to the Congressional Review Act,²⁵⁵⁴ the Office of Information and Regulatory Affairs has designated these rules as a “major rule,” as defined by 5 U.S.C. 804(2). If any of the provisions of these final rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

VIII. Statutory Authority

Pursuant to the Exchange Act, and particularly Sections 3(b), 5, 6, 11A, 15, 17, and 23(a) thereof, 15 U.S.C. 78c, 78e, 78f, 78k–1, 78o, 78q, and 78w(a), the Commission is amending §§ 240.3a51–1, 240.13h–1, 242.105, 242.201, 242.204, 242.600, 242.602, 242.603, 242.611, and 242.1000 of chapter II of title 17 of the Code of Federal Regulations and adopts Rule 614, as set forth below.

List of Subjects

17 CFR Part 240

Brokers, Dealers, Registration, Securities.

17 CFR Parts 242 and 249

Brokers, Reporting and recordkeeping requirements, Securities.

Text of the Amendments

For the reasons stated in the preamble, the Commission is amending title 17, chapter II of the Code of Federal Regulations as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

■ 1. The authority citation for part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78l, 78m, 78n, 78n–1, 78o, 78o–4, 78o–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78dd, 78ll, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, and 7201 *et seq.*, and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; Pub. L. 111–203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112–106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

* * * * *

§ 240.3a51–1 [Amended]

■ 2. Amend § 240.3a51–1 by, in paragraph (a) introductory text, removing the text “§ 242.600(b)(48)” and adding in its place “§ 242.600(b)(55) of this chapter”.

§ 240.13h–1 [Redesignated as § 240.13h–1 and Amended]

■ 3. Section 240.13h–1 is redesignated as § 240.13h–1 and amended in paragraph (a)(5) by removing the text “Section 242.600(b)(47)” and adding in its place “§ 242.600(b)(54)”.

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

■ 4. The authority citation for part 242 continues to read as follows:

Authority: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k–1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd–1, 78mm, 80a–23, 80a–29, and 80a–37.

§ 242.105 [Amended]

■ 5. Amend § 242.105 by:

- a. In paragraph (b)(1)(i)(C), removing the text “§ 242.600(b)(23)” and adding in its place “§ 242.600(b)(30)”;
- b. In paragraph (b)(1)(ii), removing the text “§ 242.600(b)(68)” and adding in its place “§ 242.600(b)(77)”.

§ 242.201 [Amended]

■ 6. Amend § 242.201 by:

- a. In paragraph (a)(1), removing the text “§ 242.600(b)(48)” and adding in its place “§ 242.600(b)(55)”;

■ b. In paragraph (a)(2), removing the text “§ 242.600(b)(23)” and adding in its place “§ 242.600(b)(30)”;

■ c. In paragraph (a)(3), removing the text “the term “listing market” as defined in the effective transaction reporting plan for the covered security” and adding in its place “the term “primary listing exchange” as defined in § 242.600(b)(68)”;

■ d. In paragraph (a)(4), removing the text “§ 242.600(b)(43)” and adding in its place “§ 242.600(b)(50)”;

■ e. In paragraph (a)(5), removing the text “§ 242.600(b)(51)” and adding in its place “§ 242.600(b)(58)”;

■ f. In paragraph (a)(6), removing the text “§ 242.600(b)(59)” and adding in its place “§ 242.600(b)(67)”;

■ g. In paragraph (a)(7), removing the text “§ 242.600(b)(68)” and adding in its place “§ 242.600(b)(77)”;

■ h. In paragraph (a)(9), removing the text “§ 242.600(b)(82)” and adding in its place “§ 242.600(b)(95)”;

■ i. In paragraph (b)(1)(ii), removing the text “by a plan processor”;

■ j. In paragraph (b)(3):

■ i. Removing the text “notify the single plan processor responsible for consolidation of information for the covered security pursuant to § 242.603(b)” and adding in its place “make such information available as provided in § 242.603(b)”.

■ ii. Removing the last sentence of the paragraph.

§ 242.204 [Amended]

■ 7. In § 242.204, paragraph (g)(2) is amended by removing the text “§ 600(b)(68) of Regulation NMS (17 CFR 242.600(b)(68))” and adding in its place “§ 242.600(b)(77) (Rule 600(b)(77) of Regulation NMS)”.

■ 8. Amend § 242.600 by:

- a. Redesignating paragraphs (b)(73) through (87) as paragraphs (b)(86) through (100);
- b. Adding new paragraph (b)(85);
- c. Redesignating paragraph (b)(72) as paragraph (b)(84);
- d. Adding new paragraphs (b)(82) and (83);
- e. Redesignating paragraphs (b)(69) through (71) as paragraphs (b)(79) through (81);
- f. Adding new paragraph (b)(78);
- g. Redesignating paragraphs (b)(60) through (68) as paragraphs (b)(69) through (77);
- h. Revising newly redesignated paragraph (b)(70);
- i. Adding new paragraph (b)(68);
- j. Redesignating paragraphs (b)(52) through (59) as paragraphs (b)(60) through (67);
- k. Adding new paragraph (b)(59);

²⁵⁵² See *supra* note 1491 and accompanying text.

²⁵⁵³ See *supra* note 1526 and accompanying text.

²⁵⁵⁴ 5 U.S.C. 801 *et seq.*

Securities and Exchange Commission

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Brokers and dealers effecting transactions in municipal securities	11854	Nov. 20, 1975	40 FR 57786.
Financial responsibility requirements of brokers and dealers	11969	Jan 2, 1976	41 FR 5277.
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Interpretation of certain terms in item 10 of Form BD	12078	Feb. 17, 1976	41 FR 7089.
Brokers and dealers effecting transactions in municipal securities	12288	Apr. 15, 1976	41 FR 15842.
Standards for disclosure; oil and gas reserve	12435	May 12, 1976	41 FR 21764.
Brokers and dealers effecting transactions in municipal securities	12496	June 11, 1976	41 FR 23668.
Statement of informal proposals for the rendering of staff advice with respect to shareholder proposals.	12599	July 20, 1976	41 FR 29989.
Guides for statistical disclosure by bank holding companies	12748	Aug. 31, 1976	41 FR 39007.
Uniform net capital rule	12766	Sept. 14, 1976	41 FR 39014.
Uniform net capital rule	12927	Oct. 27, 1976	41 FR 48335.
Brokers and dealers effecting transactions in municipal securities	12932	Oct. 27, 1976	41 FR 48336.
Brokers and dealers effecting transactions in municipal securities	13108	Jan. 4, 1977	42 FR 759.
Brokers and dealers effecting transactions in municipal securities	13362	Mar. 21, 1977	42 FR 15310.
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Industry segment determination	14523	Mar. 3, 1978	43 FR 9599.
Securities transactions by members of national securities exchanges	14563	Mar. 14, 1978	43 FR 11542.
Application of registration requirements to certain tender offers and the application of tender offer provisions to certain cash-option mergers.	14699	Apr. 24, 1978	43 FR 18163.
Reporting by certain institutional investors of beneficial ownership of certain equity securities which as of the end of any month exceeds ten percent of the class.	14830	June 13, 1978	43 FR 25420.
Division of investment management's interpretative positions relating to Rule 13f-1 and related Form 13F.	15292	Nov. 2, 1978	43 FR 52697.
Guides for disclosure of projections of future economic performance	15305	Nov. 7, 1978	43 FR 53246.
Commission's statement regarding disclosure of impact of Wage and Price Standards for 1979 on the operations of issuers.	15371	Nov. 29, 1978	43 FR 57596.
Statement of the views of the Commission's Division of Corporation Finance with respect to disclosure in proxy statements containing certain sale of assets transactions.	15572	Feb. 15, 1979	44 FR 11541.
Short sales; interpretation of rule	16150	Aug. 30, 1979	44 FR 53159.
Shareholder communications, shareholder participation in the corporate electoral process and corporate governance generally.	16163	Sept. 6, 1979	44 FR 53426.
Environmental disclosure requirements	16224	Sept. 27, 1979	44 FR 56924.
Pooled income funds	16478	Jan. 10, 1980	45 FR 3258.
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Proxy rules	16833	May 23, 1980	45 FR 36374.
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Guides for statistical disclosure by bank holding companies	16961	July 8, 1980	45 FR 47142.
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Beneficial ownership rules	17354	Dec. 4, 1980	45 FR 81559.
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Foreign Corrupt Practices Act of 1977	17500	Jan. 29, 1981	46 FR 11544.
Analysis of results of 1980 proxy statement disclosure monitoring program ...	17518	Feb. 5, 1981	46 FR 11954.
Option and option-related transactions during underwritten offerings	17609	Mar. 6, 1981	46 FR 16670.
Going private transactions under rule 13e-3	17719	Apr. 13, 1981	46 FR 22571.
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Retail repurchase agreements by banks and savings and loan associations ..	18122	Sept. 25, 1981	46 FR 48637.
Analysis of results of 1981 proxy statement disclosure monitoring program ...	18532	Mar. 3, 1982	47 FR 10794.
Rescission of guides and redesignation of industry guides (effective May 24, 1982).	18525	Mar. 3, 1982	47 FR 11481.
Amendments to guides	19337	Dec. 15, 1982	47 FR 57911.
Revision of financial statement requirements and industry guide disclosure for bank holding companies..	19570	Mar. 7, 1983	48 FR 11104.
Commission's views on <i>Colema Realty Corp. v. R. D. Bibow, et al</i>	19756	May 11, 1983	48 FR 23173.
Revision of industry guide disclosures for bank holding companies	20068	Aug. 11, 1983	48 FR 37609.
Public statements by corporate representatives	20560	Jan. 13, 1984	49 FR 2468.
Research reports	21332	Sept. 19, 1984	49 FR 37574.
Commission views on computer brokerage systems	21383	Oct. 9, 1984	49 FR 40159.
Guide for disclosures concerning reserves for unpaid claims and claim adjustment expenses of property-casualty underwriters.	21521	Nov. 27, 1984	49 FR 47601.
Brokerage and research services concerning scope of section 28(e) of Securities Exchange Act of 1934.	23170	Apr. 23, 1986	51 FR 16012.
Application of Rule 10b-6 under the Securities Exchange Act of 1934 to persons participating in shelf distributions.	23611	Sept. 11, 1986	51 FR 33248.
Industry guides for statistical disclosure by bank holding companies	23846	Nov. 25, 1986	51 FR 43599.
Tender offers rules	24296	Apr. 3, 1987	52 FR 11458.
Statement of the Commission Regarding Disclosure Obligations of Companies Affected by the Government's Defense Contract Procurement Inquiry and Related Issues.	25951	Aug. 1, 1988	53 FR 29228.

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Statement of the Commission Regarding Disclosure by Issuers of interests in Publicly Offered Commodity Pools.	26508	Feb. 1, 1989	54 FR 5603.
Management's discussion and analysis of financial condition and results of operations; certain investment company disclosures.	26831	May 18, 1989	54 FR 22427.
Modifying and confirming the interpretation of municipal underwriter securities responsibilities.	26985	June 28, 1989	54 FR 28814.
Liquidation of Index Arbitrage Positions	27938	Apr. 30, 1990	55 FR 17949.
Ownership reports on trading by officers, directors and principal security holders.	29131	Apr. 26, 1991	56 FR 19928.
Limited partnership reorganizations and public offerings of limited partnership interests.	29314	June 17, 1991	56 FR 28986.
Registration of Successors to Broker-Dealers and Investment Advisors	31661	Jan. 4, 1993	58 FR 11.
Statement of the Commission regarding disclosure obligations of municipal securities issuers and others.	33741	Mar. 9, 1994	59 FR 12758.
Amendment of interpretation regarding substantive repossession of collateral Use of electronic media for delivery purposes	34061	May 12, 1994	59 FR 26109.
Use of electronic media for delivery purposes	36345	Oct. 6, 1995	60 FR 53467.
Statement of the Commission Regarding Use of Internet Web Sites to Offer Securities, Solicit Securities Transactions or Advertise Investment Services Offshore.	37182	May 9, 1996	61 FR 24651.
Confirmation and Affirmation of Securities Trades; Matching	39779	Mar. 23, 1998	63 FR 14813.
Statement of the Commission Regarding Disclosure of Year 2000 Issues and Consequences by Public Companies, Investment Advisers, Investment Companies, and Municipal Securities Issuers.	39829	Apr. 6, 1998	63 FR 17947.
Use of electronic media	40277	July 29, 1998	63 FR 41404.
Commission Guidance on Mini-Tender Offers and Limited Partnership Tender Offers.	42728	Apr. 28, 2000	65 FR 25856.
Commission Guidance to Broker-Dealers on the Use of Electronic Storage Media Under the Electronic Signatures in Global and National Commerce Act of 2000 With Respect to Rule 17a–4(f).	43069	July 24, 2000	65 FR 46588.
Application of the Electronic Signatures in Global and National Commerce Act to Record Retention Requirements Pertaining to Issuers.	44238	May 7, 2001	66 FR 22921.
Calculation of Average Weekly Trading Volume	44424	June 21, 2001	66 FR 33176.
Commission Guidance on the Scope of Section 28(e) of the Exchange Act ...	44820A	Sept. 27, 2001	66 FR 49274.
Commission Guidance on Trading in Security Futures Products	45194	Dec. 27, 2001	67 FR 8.
Electronic Storage of Broker-Dealer Records	46101	June 21, 2002	67 FR 43246.
Books and Records Requirements for Brokers and Dealers Under the Securities Exchange Act of 1934.	47806	May 7, 2003	68 FR 25283.
Commission Guidance on Rule 3b–3 and Married Put Transactions	47910	May 22, 2003	68 FR 32311.
Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations.	48795	November 17, 2003	68 FR 65822.
Commission Guidance Regarding the Public Company Accounting Oversight Board's Auditing and Related Professional Practice Standard No. 1.	48960	December 19, 2003	68 FR 75065.
Short Sales	49708	May 14, 2004	69 FR 29066.
Prohibited Conduct in Connection with IPO Allocations	50103	July 28, 2004	69 FR 48029.
Commission Guidance Regarding Accounting for Sales of Vaccines and Biodefense Countermeasures to the Federal Government for Placement Into the Pediatric Vaccine Stockpile or the Strategic National Stockpile.	51500	April 7, 2005	70 FR 19677.
Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities and Exchange Act of 1934.	52885	December 5, 2005	70 FR 73345.
Commission Guidance Regarding Management's Report on Internal Control Over Financial Reporting Under Section 13(a) or 15(d) of the Securities and Exchange Act of 1934.	54165	July 18, 2006	71 FR 41996.
Commission Guidance Regarding and Amendment to the Rules Relating to Organization and Program Management Concerning Proposed Rule Changes Filed by Self-Regulatory Organizations.	55929	June 20, 2007	72 FR 35343.
Commission Guidance on the Use of Company Web Sites	58024	June 25, 2008	73 FR 40152.
Commission Guidance and Revisions to the Cross-Border Tender Offer, Exchange Offer, Rights Offerings, and Business Combination Rules and Beneficial Ownership Reporting Rules for Certain Foreign Institutions.	58288	Aug. 1, 2008	73 FR 45874.
Regulation SHO Amendments	58597	Sept. 19, 2008	73 FR 60094.
Commission Guidance Regarding the Financial Accounting Standards Board's Accounting Standards Codification.	58775	Oct. 14, 2008	73 FR 61706.
Commission Guidance Regarding Disclosure Related to Climate Change	60519A	Aug. 25, 2009	74 FR 42773.
Amendment to Municipal Securities Disclosure	61469	Feb. 2, 2010	75 FR 62973.
Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis.	62184A	May 26, 2010	75 FR 33156.
Commission Guidance Regarding Auditing, Attestation, and Related Professional Practice Standards Related to Brokers and Dealers.	62934	Sept. 17, 2010	75 FR 59897.
Commission Guidance Regarding Definitions of Mortgage Related Security and Small Business Related Security.	62991	Sept. 24, 2010	75 FR 60617.
	67448	July 17, 2012	77 FR 42988.

Subject	Release No.	Date	Fed. Reg. Vol. and Page
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Application of "Security-Based Swap Dealer" and "Major Security-Based Swap Participant" Definitions to Cross-Border Security-Based Swap Activities.	34-72472	June 25, 2014	79 FR 47371
Commission Guidance Regarding the Definition of the Terms "Spouse" and "Marriage" Following the Supreme Court's Decision in <i>United States v. Windsor</i> .	34-75250	June 19, 2015	80 FR 37536
Interpretation of the SEC's Whistleblower Rules under Section 21F of the Securities Exchange Act of 1934.	34-75592	Aug. 4, 2015	80 FR 47831
Interpretation Regarding Automated Quotations Under Regulation NMS	34-78102	June 17, 2016	81 FR 40793
Commission Guidance Regarding Revenue Recognition for Bill-and-Hold Arrangements.	34-81428	Aug. 18, 2017	82 FR 41148
Updates to Commission Guidance Regarding Accounting for Sales of Vaccines and Bioterror Countermeasures to the Federal Government for Placement into the Pediatric Vaccine Stockpile or the Strategic National Stockpile.	34-81429	Aug. 18, 2017	82 FR 41150
Commission Interpretation and Guidance Regarding the Applicability of the Proxy Rules to Proxy Voting Advice.	34-86721	Aug. 21, 2019	84 FR 47419.
Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations.	34-88094	Jan. 30, 2020	85 FR 10571

PART 242—REGULATIONS M, SHO, ATS, AC, NMS, AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES

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AUTHORITY: 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, and 80a-37.

SOURCE: 62 FR 544, Jan. 3, 1997, unless otherwise noted.

REGULATION M

§ 242.100 Preliminary note; definitions.

(a) *Preliminary note:* Any transaction or series of transactions, whether or not effected pursuant to the provisions of Regulation M (§§ 242.100–242.105 of this chapter), remain subject to the antifraud and antimanipulation provi-

sions of the securities laws, including, without limitation, Section 17(a) of the Securities Act of 1933 [15 U.S.C. 77q(a)] and Sections 9, 10(b), and 15(c) of the Securities Exchange Act of 1934 [15 U.S.C. 78i, 78j(b), and 78o(c)].

(b) For purposes of regulation M (§§ 242.100 through 242.105 of this chapter) the following definitions shall apply:

ADTV means the worldwide average daily trading volume during the two full calendar months immediately preceding, or any 60 consecutive calendar days ending within the 10 calendar days preceding, the filing of the registration statement; or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, two full calendar months immediately preceding, or any consecutive 60 calendar days ending within the 10 calendar days preceding, the determination of the offering price.

Affiliated purchaser means:

(1) A person acting, directly or indirectly, in concert with a distribution participant, issuer, or selling security holder in connection with the acquisition or distribution of any covered security; or

(2) An affiliate, which may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder, that, directly or indirectly, controls the purchases of any covered security by a distribution participant, issuer, or selling security holder, whose purchases are controlled by any such person, or whose purchases are under common control with any such person; or

(3) An affiliate, which may be a separately identifiable department or division of a distribution participant, issuer, or selling security holder, that regularly purchases securities for its own account or for the account of others, or that recommends or exercises investment discretion with respect to the purchase or sale of securities; *Provided, however,* That this paragraph (3) shall not apply to such affiliate if the following conditions are satisfied:

(i) The distribution participant, issuer, or selling security holder:

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(A) Maintains and enforces written policies and procedures reasonably designed to prevent the flow of information to or from the affiliate that might result in a violation of §§ 242.101, 242.102, and 242.104; and

(B) Obtains an annual, independent assessment of the operation of such policies and procedures; and

(ii) The affiliate has no officers (or persons performing similar functions) or employees (other than clerical, ministerial, or support personnel) in common with the distribution participant, issuer, or selling security holder that direct, effect, or recommend transactions in securities; and

(iii) The affiliate does not, during the applicable restricted period, act as a market maker (other than as a specialist in compliance with the rules of a national securities exchange), or engage, as a broker or a dealer, in solicited transactions or proprietary trading, in covered securities.

Agent independent of the issuer means a trustee or other person who is independent of the issuer. The agent shall be deemed to be independent of the issuer only if:

(1) The agent is not an affiliate of the issuer; and

(2) Neither the issuer nor any affiliate of the issuer exercises any direct or indirect control or influence over the prices or amounts of the securities to be purchased, the timing of, or the manner in which, the securities are to be purchased, or the selection of a broker or dealer (other than the independent agent itself) through which purchases may be executed; *Provided, however,* That the issuer or its affiliate will not be deemed to have such control or influence solely because it revises not more than once in any three-month period the source of the shares to fund the plan the basis for determining the amount of its contributions to a plan, or the basis for determining the frequency of its allocations to a plan, or any formula specified in a plan that determines the amount or timing of securities to be purchased by the agent.

Asset-backed security has the meaning contained in § 229.1101 of this chapter.

At-the-market offering means an offering of securities at other than a fixed price.

Business day refers to a 24 hour period determined with reference to the principal market for the securities to be distributed, and that includes a complete trading session for that market.

Completion of participation in a distribution. Securities acquired in the distribution for investment by any person participating in a distribution, or any affiliated purchaser of such person, shall be deemed to be distributed. A person shall be deemed to have completed its participation in a distribution as follows:

(1) An issuer or selling security holder, when the distribution is completed;

(2) An underwriter, when such person's participation has been distributed, including all other securities of the same class that are acquired in connection with the distribution, and any stabilization arrangements and trading restrictions in connection with the distribution have been terminated; *Provided, however,* That an underwriter's participation will not be deemed to have been completed if a syndicate overallocation option is exercised in an amount that exceeds the net syndicate short position at the time of such exercise; and

(3) Any other person participating in the distribution, when such person's participation has been distributed.

Covered security means any security that is the subject of a distribution, or any reference security.

Current exchange rate means the current rate of exchange between two currencies, which is obtained from at least one independent entity that provides or disseminates foreign exchange quotations in the ordinary course of its business.

Distribution means an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods.

Distribution participant means an underwriter, prospective underwriter, broker, dealer, or other person who has agreed to participate or is participating in a distribution.

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Electronic communications network has the meaning provided in § 242.600.

Employee has the meaning contained in Form S-8 (§ 239.16b of this chapter) relating to employee benefit plans.

Exchange Act means the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Independent bid means a bid by a person who is not a distribution participant, issuer, selling security holder, or affiliated purchaser.

NASD means the National Association of Securities Dealers, Inc. or any of its subsidiaries.

Nasdaq means the electronic dealer quotation system owned and operated by The Nasdaq Stock Market, Inc.

Nasdaq security means a security that is authorized for quotation on Nasdaq, and such authorization is not suspended, terminated, or prohibited.

Net purchases means the amount by which a passive market maker's purchases exceed its sales.

Offering price means the price at which the security is to be or is being distributed.

Passive market maker means a market maker that effects bids or purchases in accordance with the provisions of § 242.103.

Penalty bid means an arrangement that permits the managing underwriter to reclaim a selling concession from a syndicate member in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions.

Plan means any bonus, profit-sharing, pension, retirement, thrift, savings, incentive, stock purchase, stock option, stock ownership, stock appreciation, dividend reinvestment, or similar plan; or any dividend or interest reinvestment plan or employee benefit plan as defined in § 230.405 of this chapter.

Principal market means the single securities market with the largest aggregate reported trading volume for the class of securities during the 12 full calendar months immediately preceding the filing of the registration statement; or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this

chapter, during the 12 full calendar months immediately preceding the determination of the offering price. For the purpose of determining the aggregate trading volume in a security, the trading volume of depository shares representing such security shall be included, and shall be multiplied by the multiple or fraction of the security represented by the depository share. For purposes of this paragraph, depository share means a security, evidenced by a depository receipt, that represents another security, or a multiple or fraction thereof, deposited with a depository.

Prospective underwriter means a person:

(1) Who has submitted a bid to the issuer or selling security holder, and who knows or is reasonably certain that such bid will be accepted, whether or not the terms and conditions of the underwriting have been agreed upon; or

(2) Who has reached, or is reasonably certain to reach, an understanding with the issuer or selling security holder, or managing underwriter that such person will become an underwriter, whether or not the terms and conditions of the underwriting have been agreed upon.

Public float value shall be determined in the manner set forth on the front page of Form 10-K (§ 249.310 of this chapter), even if the issuer of such securities is not required to file Form 10-K, relating to the aggregate market value of common equity securities held by non-affiliates of the issuer.

Reference period means the two full calendar months immediately preceding the filing of the registration statement or, if there is no registration statement or if the distribution involves the sale of securities on a delayed basis pursuant to § 230.415 of this chapter, the two full calendar months immediately preceding the determination of the offering price.

Reference security means a security into which a security that is the subject of a distribution ("subject security") may be converted, exchanged, or exercised or which, under the terms of the subject security, may in whole or in significant part determine the value of the subject security.

Restricted period means:

(1) For any security with an ADTV value of \$100,000 or more of an issuer whose common equity securities have a public float value of \$25 million or more, the period beginning on the later of one business day prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution; and

(2) For all other securities, the period beginning on the later of five business days prior to the determination of the offering price or such time that a person becomes a distribution participant, and ending upon such person's completion of participation in the distribution.

(3) In the case of a distribution involving a merger, acquisition, or exchange offer, the period beginning on the day proxy solicitation or offering materials are first disseminated to security holders, and ending upon the completion of the distribution.

Securities Act means the Securities Act of 1933 (15 U.S.C. 77a *et seq.*).

Selling security holder means any person on whose behalf a distribution is made, other than an issuer.

Stabilize or stabilizing means the placing of any bid, or the effecting of any purchase, for the purpose of pegging, fixing, or maintaining the price of a security.

Syndicate covering transaction means the placing of any bid or the effecting of any purchase on behalf of the sole distributor or the underwriting syndicate or group to reduce a short position created in connection with the offering.

30% ADTV limitation means 30 percent of the market maker's ADTV in a covered security during the reference period, as obtained from the NASD.

Underwriter means a person who has agreed with an issuer or selling security holder:

(1) To purchase securities for distribution; or

(2) To distribute securities for or on behalf of such issuer or selling security holder; or

(3) To manage or supervise a distribution of securities for or on behalf of such issuer or selling security holder.

[62 FR 544, Jan. 3, 1997, as amended at 62 FR 11323, Mar. 12, 1997; 70 FR 1623, Jan. 7, 2005; 70 FR 37619, June 29, 2005]

§ 242.101 Activities by distribution participants.

(a) *Unlawful Activity.* In connection with a distribution of securities, it shall be unlawful for a distribution participant or an affiliated purchaser of such person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period; *Provided, however,* That if a distribution participant or affiliated purchaser is the issuer or selling security holder of the securities subject to the distribution, such person shall be subject to the provisions of § 242.102, rather than this section.

(b) *Excepted Activity.* The following activities shall not be prohibited by paragraph (a) of this section:

(1) *Research.* The publication or dissemination of any information, opinion, or recommendation, if the conditions of § 230.138, § 230.139, or § 230.139b of this chapter are met; or

(2) *Transactions complying with certain other sections.* Transactions complying with §§ 242.103 or 242.104; or

(3) *Odd-lot transactions.* Transactions in odd-lots; or transactions to offset odd-lots in connection with an odd-lot tender offer conducted pursuant to § 240.13e-4(h)(5) of this chapter; or

(4) *Exercises of securities.* The exercise of any option, warrant, right, or any conversion privilege set forth in the instrument governing a security; or

(5) *Unsolicited transactions.* Unsolicited brokerage transactions; or unsolicited purchases that are not effected from or through a broker or dealer, on a securities exchange, or through an inter-dealer quotation system or electronic communications network; or

(6) *Basket transactions.* (i) Bids or purchases, in the ordinary course of business, in connection with a basket of 20 or more securities in which a covered security does not comprise more than 5% of the value of the basket purchased; or

(ii) Adjustments to such a basket in the ordinary course of business as a result of a change in the composition of a standardized index; or

(7) *De minimis transactions*. Purchases during the restricted period, other than by a passive market maker, that total less than 2% of the ADTV of the security being purchased, or unaccepted bids; *Provided, however*, That the person making such bid or purchase has maintained and enforces written policies and procedures reasonably designed to achieve compliance with the other provisions of this section; or

(8) *Transactions in connection with a distribution*. Transactions among distribution participants in connection with a distribution, and purchases of securities from an issuer or selling security holder in connection with a distribution, that are not effected on a securities exchange, or through an interdealer quotation system or electronic communications network; or

(9) *Offers to sell or the solicitation of offers to buy*. Offers to sell or the solicitation of offers to buy the securities being distributed (including securities acquired in stabilizing), or securities offered as principal by the person making such offer or solicitation; or

(10) *Transactions in Rule 144A securities*. Transactions in securities eligible for resale under § 230.144A(d)(3) of this chapter, or any reference security, if the Rule 144A securities are sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to purchasers that the seller and any person acting on behalf of the seller reasonably believes are qualified institutional buyers, in transactions exempt from registration under section 4(2) of the Securities Act (15 U.S.C. 77d(2)) or §§ 230.144A or § 230.500 *et seq* of this chapter; or

(ii) Persons not deemed to be “U.S. persons” for purposes of §§ 230.902(o)(2) or 230.902(o)(7) of this chapter, during a distribution qualifying under paragraph (b)(10)(i) of this section.

(c) *Excepted Securities*. The provisions of this section shall not apply to any of the following securities:

(1) *Actively-traded securities*. Securities that have an ADTV value of at least \$1 million and are issued by an

issuer whose common equity securities have a public float value of at least \$150 million; *Provided, however*, That such securities are not issued by the distribution participant or an affiliate of the distribution participant; or

(2) *Investment grade nonconvertible and asset-backed securities*. Nonconvertible debt securities, nonconvertible preferred securities, and asset-backed securities, that are rated by at least one nationally recognized statistical rating organization, as that term is used in § 240.15c3–1 of this chapter, in one of its generic rating categories that signifies investment grade; or

(3) *Exempted securities*. “Exempted securities” as defined in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)); or

(4) *Face-amount certificates or securities issued by an open-end management investment company or unit investment trust*. Face-amount certificates issued by a face-amount certificate company, or redeemable securities issued by an open-end management investment company or a unit investment trust. Any terms used in this paragraph (c)(4) that are defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) shall have the meanings specified in such Act.

(d) *Exemptive authority*. Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

[62 FR 544, Jan. 3, 1997, as amended at 77 FR 18685, Mar. 28, 2012; 78 FR 44805, July 24, 2013; 83 FR 64222, Dec. 13, 2018]

§ 242.102 Activities by issuers and selling security holders during a distribution.

(a) *Unlawful Activity*. In connection with a distribution of securities effected by or on behalf of an issuer or selling security holder, it shall be unlawful for such person, or any affiliated purchaser of such person, directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period; *Except*

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That if an affiliated purchaser is a distribution participant, such affiliated purchaser may comply with § 242.101, rather than this section.

(b) *Excepted Activity.* The following activities shall not be prohibited by paragraph (a) of this section:

(1) *Odd-lot transactions.* Transactions in odd-lots, or transactions to offset odd-lots in connection with an odd-lot tender offer conducted pursuant to § 240.13e-4(h)(5) of this chapter; or

(2) *Transactions by closed-end investment companies.* (i) Transactions complying with § 270.23c-3 of this chapter; or

(ii) Periodic tender offers of securities, at net asset value, conducted pursuant to § 240.13e-4 of this chapter by a closed-end investment company that engages in a continuous offering of its securities pursuant to § 230.415 of this chapter; *Provided, however,* That such securities are not traded on a securities exchange or through an inter-dealer quotation system or electronic communications network; or

(3) *Redemptions by commodity pools or limited partnerships.* Redemptions by commodity pools or limited partnerships, at a price based on net asset value, which are effected in accordance with the terms and conditions of the instruments governing the securities; *Provided, however,* That such securities are not traded on a securities exchange, or through an inter-dealer quotation system or electronic communications network; or

(4) *Exercises of securities.* The exercise of any option, warrant, right, or any conversion privilege set forth in the instrument governing a security; or

(5) *Offers to sell or the solicitation of offers to buy.* Offers to sell or the solicitation of offers to buy the securities being distributed; or

(6) *Unsolicited purchases.* Unsolicited purchases that are not effected from or through a broker or dealer, on a securities exchange, or through an inter-dealer quotation system or electronic communications network; or

(7) *Transactions in Rule 144A securities.* Transactions in securities eligible for resale under § 230.144A(d)(3) of this chapter, or any reference security, if the Rule 144A securities are sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to purchasers that the seller and any person acting on behalf of the seller reasonably believes are qualified institutional buyers, in transactions exempt from registration under section 4(2) of the Securities Act (15 U.S.C. 77d(2)) or §§ 230.144A or § 230.500 *et seq* of this chapter; or

(ii) Persons not deemed to be “U.S. persons” for purposes of §§ 230.902(o)(2) or 230.902(o)(7) of this chapter, during a distribution qualifying under paragraph (b)(7)(i) of this section.

(c) *Plans.* (1) Paragraph (a) of this section shall not apply to distributions of securities pursuant to a plan, which are made:

(i) Solely to employees or security holders of an issuer or its subsidiaries, or to a trustee or other person acquiring such securities for the accounts of such persons; or

(ii) To persons other than employees or security holders, if bids for or purchases of securities pursuant to the plan are effected solely by an agent independent of the issuer and the securities are from a source other than the issuer or an affiliated purchaser of the issuer.

(2) Bids for or purchases of any security made or effected by or for a plan shall be deemed to be a purchase by the issuer unless the bid is made, or the purchase is effected, by an agent independent of the issuer.

(d) *Excepted Securities.* The provisions of this section shall not apply to any of the following securities:

(1) *Actively-traded reference securities.* Reference securities with an ADTV value of at least \$1 million that are issued by an issuer whose common equity securities have a public float value of at least \$150 million; *Provided, however,* That such securities are not issued by the issuer, or any affiliate of the issuer, of the security in distribution.

(2) *Investment grade nonconvertible and asset-backed securities.* Nonconvertible debt securities, nonconvertible preferred securities, and asset-backed securities, that are rated by at least one nationally recognized statistical rating organization, as that term is used in § 240.15c3-1 of this chapter, in one of its

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generic rating categories that signifies investment grade; or

(3) *Exempted securities*. “Exempted securities” as defined in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)); or

(4) *Face-amount certificates or securities issued by an open-end management investment company or unit investment trust*. Face-amount certificates issued by a face-amount certificate company, or redeemable securities issued by an open-end management investment company or a unit investment trust. Any terms used in this paragraph (d)(4) that are defined in the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) shall have the meanings specified in such Act.

(e) *Exemptive Authority*. Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

[62 FR 544, Jan. 3, 1997, as amended at 62 FR 11323, Mar. 12, 1997; 77 FR 18685, Mar. 28, 2012; 78 FR 44805, July 24, 2013]

§ 242.103 Nasdaq passive market making.

(a) *Scope of section*. This section permits broker-dealers to engage in market making transactions in covered securities that are Nasdaq securities without violating the provisions of § 242.101; *Except That* this section shall not apply to any security for which a stabilizing bid subject to § 242.104 is in effect, or during any at-the-market offering or best efforts offering.

(b) *Conditions to be met*—(1) *General limitations*. A passive market maker must effect all transactions in the capacity of a registered market maker on Nasdaq. A passive market maker shall not bid for or purchase a covered security at a price that exceeds the highest independent bid for the covered security at the time of the transaction, except as permitted by paragraph (b)(3) of this section or required by a rule promulgated by the Commission or the NASD governing the handling of customer orders.

(2) *Purchase limitation*. On each day of the restricted period, a passive market

maker’s net purchases shall not exceed the greater of its 30% ADTV limitation or 200 shares (together, “purchase limitation”); *Provided, however*, That a passive market maker may purchase all of the securities that are part of a single order that, when executed, results in its purchase limitation being equalled or exceeded. If a passive market maker’s net purchases equal or exceed its purchase limitation, it shall withdraw promptly its quotations from Nasdaq. If a passive market maker withdraws its quotations pursuant to this paragraph, it may not effect any bid or purchase in the covered security for the remainder of that day, irrespective of any later sales during that day, unless otherwise permitted by § 242.101.

(3) *Requirement to lower the bid*. If all independent bids for a covered security are reduced to a price below the passive market maker’s bid, the passive market maker must lower its bid promptly to a level not higher than the then highest independent bid; *Provided, however*, That a passive market maker may continue to bid and effect purchases at its bid at a price exceeding the then highest independent bid until the passive market maker purchases an aggregate amount of the covered security that equals or, through the purchase of all securities that are part of a single order, exceeds the lesser of two times the minimum quotation size for the security, as determined by NASD rules, or the passive market maker’s remaining purchasing capacity under paragraph (b)(2) of this section.

(4) *Limitation on displayed size*. At all times, the passive market maker’s displayed bid size may not exceed the lesser of the minimum quotation size for the covered security, or the passive market maker’s remaining purchasing capacity under paragraph (b)(2) of this section; *Provided, however*, That a passive market maker whose purchasing capacity at any time is between one and 99 shares may display a bid size of 100 shares.

(5) *Identification of a passive market making bid*. The bid displayed by a passive market maker shall be designated as such.

(6) *Notification and reporting to the NASD*. A passive market maker shall

notify the NASD in advance of its intention to engage in passive market making, and shall submit to the NASD information regarding passive market making purchases, in such form as the NASD shall prescribe.

(7) *Prospectus disclosure.* The prospectus for any registered offering in which any passive market maker intends to effect transactions in any covered security shall contain the information required in §§ 228.502, 228.508, 229.502, and 229.508 of this chapter.

(c) *Transactions at prices resulting from unlawful activity.* No transaction shall be made at a price that the passive market maker knows or has reason to know is the result of activity that is fraudulent, manipulative, or deceptive under the securities laws, or any rule or regulation thereunder.

§ 242.104 Stabilizing and other activities in connection with an offering.

(a) *Unlawful activity.* It shall be unlawful for any person, directly or indirectly, to stabilize, to effect any syndicate covering transaction, or to impose a penalty bid, in connection with an offering of any security, in contravention of the provisions of this section. No stabilizing shall be effected at a price that the person stabilizing knows or has reason to know is in contravention of this section, or is the result of activity that is fraudulent, manipulative, or deceptive under the securities laws, or any rule or regulation thereunder.

(b) *Purpose.* Stabilizing is prohibited except for the purpose of preventing or retarding a decline in the market price of a security.

(c) *Priority.* To the extent permitted or required by the market where stabilizing occurs, any person stabilizing shall grant priority to any independent bid at the same price irrespective of the size of such independent bid at the time that it is entered.

(d) *Control of stabilizing.* No sole distributor or syndicate or group stabilizing the price of a security or any member or members of such syndicate or group shall maintain more than one stabilizing bid in any one market at the same price at the same time.

(e) *At-the-market offerings.* Stabilizing is prohibited in an at-the-market offering.

(f) *Stabilizing levels—(1) Maximum stabilizing bid.* Notwithstanding the other provisions of this paragraph (f), no stabilizing shall be made at a price higher than the lower of the offering price or the stabilizing bid for the security in the principal market (or, if the principal market is closed, the stabilizing bid in the principal market at its previous close).

(2) *Initiating stabilizing—(i) Initiating stabilizing when the principal market is open.* After the opening of quotations for the security in the principal market, stabilizing may be initiated in any market at a price no higher than the last independent transaction price for the security in the principal market if the security has traded in the principal market on the day stabilizing is initiated or on the most recent prior day of trading in the principal market and the current asked price in the principal market is equal to or greater than the last independent transaction price. If both conditions of the preceding sentence are not satisfied, stabilizing may be initiated in any market after the opening of quotations in the principal market at a price no higher than the highest current independent bid for the security in the principal market.

(ii) *Initiating stabilizing when the principal market is closed.* (A) When the principal market for the security is closed, but immediately before the opening of quotations for the security in the market where stabilizing will be initiated, stabilizing may be initiated at a price no higher than the lower of:

(1) The price at which stabilizing could have been initiated in the principal market for the security at its previous close; or

(2) The most recent price at which an independent transaction in the security has been effected in any market since the close of the principal market, if the person stabilizing knows or has reason to know of such transaction.

(B) When the principal market for the security is closed, but after the opening of quotations in the market where stabilizing will be initiated, stabilizing may be initiated at a price no higher than the lower of:

(1) The price at which stabilization could have been initiated in the principal market for the security at its previous close; or

(2) The last independent transaction price for the security in that market if the security has traded in that market on the day stabilizing is initiated or on the last preceding business day and the current asked price in that market is equal to or greater than the last independent transaction price. If both conditions of the preceding sentence are not satisfied, under this paragraph (f)(2)(ii)(B)(2), stabilizing may be initiated at a price no higher than the highest current independent bid for the security in that market.

(iii) *Initiating stabilizing when there is no market for the security or before the offering price is determined.* If no *bona fide* market for the security being distributed exists at the time stabilizing is initiated, no stabilizing shall be initiated at a price in excess of the offering price. If stabilizing is initiated before the offering price is determined, then stabilizing may be continued after determination of the offering price at the price at which stabilizing then could be initiated.

(3) *Maintaining or carrying over a stabilizing bid.* A stabilizing bid initiated pursuant to paragraph (f)(2) of this section, which has not been discontinued, may be maintained, or carried over into another market, irrespective of changes in the independent bids or transaction prices for the security.

(4) *Increasing or reducing a stabilizing bid.* A stabilizing bid may be increased to a price no higher than the highest current independent bid for the security in the principal market if the principal market is open, or, if the principal market is closed, to a price no higher than the highest independent bid in the principal market at the previous close thereof. A stabilizing bid may be reduced, or carried over into another market at a reduced price, irrespective of changes in the independent bids or transaction prices for the security. If stabilizing is discontinued, it shall not be resumed at a price higher than the price at which stabilizing then could be initiated.

(5) *Initiating, maintaining, or adjusting a stabilizing bid to reflect the current ex-*

change rate. If a stabilizing bid is expressed in a currency other than the currency of the principal market for the security, such bid may be initiated, maintained, or adjusted to reflect the current exchange rate, consistent with the provisions of this section. If, in initiating, maintaining, or adjusting a stabilizing bid pursuant to this paragraph (f)(5), the bid would be at or below the midpoint between two trading differentials, such stabilizing bid shall be adjusted downward to the lower differential.

(6) *Adjustments to stabilizing bid.* If a security goes ex-dividend, ex-rights, or ex-distribution, the stabilizing bid shall be reduced by an amount equal to the value of the dividend, right, or distribution. If, in reducing a stabilizing bid pursuant to this paragraph (f)(6), the bid would be at or below the midpoint between two trading differentials, such stabilizing bid shall be adjusted downward to the lower differential.

(7) *Stabilizing of components.* When two or more securities are being offered as a unit, the component securities shall not be stabilized at prices the sum of which exceeds the then permissible stabilizing price for the unit.

(8) *Special prices.* Any stabilizing price that otherwise meets the requirements of this section need not be adjusted to reflect special prices available to any group or class of persons (including employees or holders of warrants or rights).

(g) *Offerings with no U.S. stabilizing activities.* (1) Stabilizing to facilitate an offering of a security in the United States shall not be deemed to be in violation of this section if all of the following conditions are satisfied:

(i) No stabilizing is made in the United States;

(ii) Stabilizing outside the United States is made in a jurisdiction with statutory or regulatory provisions governing stabilizing that are comparable to the provisions of this section; and

(iii) No stabilizing is made at a price above the offering price in the United States, except as permitted by paragraph (f)(5) of this section.

(2) For purposes of this paragraph (g), the Commission by rule, regulation, or order may determine whether a foreign

statute or regulation is comparable to this section considering, among other things, whether such foreign statute or regulation: specifies appropriate purposes for which stabilizing is permitted; provides for disclosure and control of stabilizing activities; places limitations on stabilizing levels; requires appropriate recordkeeping; provides other protections comparable to the provisions of this section; and whether procedures exist to enable the Commission to obtain information concerning any foreign stabilizing transactions.

(h) *Disclosure and notification.* (1) Any person displaying or transmitting a bid that such person knows is for the purpose of stabilizing shall provide prior notice to the market on which such stabilizing will be effected, and shall disclose its purpose to the person with whom the bid is entered.

(2) Any person effecting a syndicate covering transaction or imposing a penalty bid shall provide prior notice to the self-regulatory organization with direct authority over the principal market in the United States for the security for which the syndicate covering transaction is effected or the penalty bid is imposed.

(3) Any person subject to this section who sells to, or purchases for the account of, any person any security where the price of such security may be or has been stabilized, shall send to the purchaser at or before the completion of the transaction, a prospectus, offering circular, confirmation, or other document containing a statement similar to that comprising the statement provided for in Item 502(d) of Regulation S-B (§ 228.502(d) of this chapter) or Item 502(d) of Regulation S-K (§ 229.502(d) of this chapter).

(i) *Recordkeeping requirements.* A person subject to this section shall keep the information and make the notification required by § 240.17a-2 of this chapter.

(j) *Excepted securities.* The provisions of this section shall not apply to:

(1) *Exempted securities.* “Exempted securities,” as defined in section 3(a)(12) of the Exchange Act (15 U.S.C. 78c(a)(12)); or

(2) *Transactions of Rule 144A securities.* Transactions in securities eligible for

resale under § 230.144A(d)(3) of this chapter, if such securities are sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to purchasers that the seller and any person acting on behalf of the seller reasonably believes are qualified institutional buyers, in a transaction exempt from registration under section 4(2) of the Securities Act (15 U.S.C. 77d(2)) or §§ 230.144A or § 230.500 *et seq* of this chapter; or

(ii) Persons not deemed to be “U.S. persons” for purposes of §§ 230.902(o)(2) or 230.902(o)(7) of this chapter, during a distribution qualifying under paragraph (j)(2)(i) of this section.

(k) *Exemptive authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

[62 FR 544, Jan. 3, 1997, as amended at 62 FR 11323, Mar. 12, 1997; 62 FR 13213, Mar. 19, 1997; 77 FR 18685, Mar. 28, 2012; 78 FR 44805, July 24, 2013]

§ 242.105 Short selling in connection with a public offering.

(a) *Unlawful activity.* In connection with an offering of equity securities for cash pursuant to a registration statement or a notification on Form 1-A (§ 239.90 of this chapter) or Form 1-E (§ 239.200 of this chapter) filed under the Securities Act of 1933 (“offered securities”), it shall be unlawful for any person to sell short (as defined in § 242.200(a)) the security that is the subject of the offering and purchase the offered securities from an underwriter or broker or dealer participating in the offering if such short sale was effected during the period (“Rule 105 restricted period”) that is the shorter of the period:

(1) Beginning five business days before the pricing of the offered securities and ending with such pricing; or

(2) Beginning with the initial filing of such registration statement or notification on Form 1-A or Form 1-E and ending with the pricing.

(b) *Excepted activity*—(1) *Bona fide purchase.* It shall not be prohibited for

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such person to purchase the offered securities as provided in paragraph (a) of this section if:

(i) Such person makes a bona fide purchase(s) of the security that is the subject of the offering that is:

(A) At least equivalent in quantity to the entire amount of the Rule 105 restricted period short sale(s);

(B) Effected during regular trading hours;

(C) Reported to an “effective transaction reporting plan” (as defined in § 242.600(b)(23)); and

(D) Effected after the last Rule 105 restricted period short sale, and no later than the business day prior to the day of pricing; and

(ii) Such person did not effect a short sale, that is reported to an effective transaction reporting plan, within the 30 minutes prior to the close of regular trading hours (as defined in § 242.600(b)(68)) on the business day prior to the day of pricing.

(2) *Separate accounts.* Paragraph (a) of this section shall not prohibit the purchase of the offered security in an account of a person where such person sold short during the Rule 105 restricted period in a separate account, if decisions regarding securities transactions for each account are made separately and without coordination of trading or cooperation among or between the accounts.

(3) *Investment companies.* Paragraph (a) of this section shall not prohibit an investment company (as defined by Section 3 of the Investment Company Act) that is registered under Section 8 of the Investment Company Act, or a series of such company (investment company) from purchasing an offered security where any of the following sold the offered security short during the Rule 105 restricted period:

(i) An affiliated investment company, or any series of such a company; or

(ii) A separate series of the investment company.

(c) *Excepted offerings.* This section shall not apply to offerings that are not conducted on a firm commitment basis.

(d) *Exemptive authority.* Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this sec-

tion, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities.

[62 FR 544, Jan. 3, 1997, as amended at 69 FR 48029, Aug. 6, 2004; 72 FR 45107, Aug. 10, 2007; 83 FR 58427, Nov. 19, 2018]

REGULATION SHO—REGULATION OF SHORT SALES

§ 242.200 Definition of “short sale” and marking requirements.

(a) The term *short sale* shall mean any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.

(b) A person shall be deemed to own a security if:

(1) The person or his agent has title to it; or

(2) The person has purchased, or has entered into an unconditional contract, binding on both parties thereto, to purchase it, but has not yet received it; or

(3) The person owns a security convertible into or exchangeable for it and has tendered such security for conversion or exchange; or

(4) The person has an option to purchase or acquire it and has exercised such option; or

(5) The person has rights or warrants to subscribe to it and has exercised such rights or warrants; or

(6) The person holds a security futures contract to purchase it and has received notice that the position will be physically settled and is irrevocably bound to receive the underlying security.

(c) A person shall be deemed to own securities only to the extent that he has a net long position in such securities.

(d) A broker or dealer shall be deemed to own a security, even if it is not net long, if:

(1) The broker or dealer acquired that security while acting in the capacity of a block positioner; and

(2) If and to the extent that the broker or dealer’s short position in the security is the subject of offsetting positions created in the course of bona fide arbitrage, risk arbitrage, or bona fide hedge activities.

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(e) A broker-dealer shall be deemed to own a security even if it is not net long, if:

(1) The broker-dealer is unwinding index arbitrage position involving a long basket of stock and one or more short index futures traded on a board of trade or one or more standardized options contracts as defined in 17 CFR 240.9b-1(a)(4); and

(2) If and to the extent that the broker-dealer's short position in the security is the subject of offsetting positions created and maintained in the course of bona-fide arbitrage, risk arbitrage, or bona fide hedge activities; and

(3) The sale does not occur during a period commencing at the time that the NYSE Composite Index has declined by two percent or more from its closing value on the previous day and terminating upon the end of the trading day. The two percent shall be calculated at the beginning of each calendar quarter and shall be two percent, rounded down to the nearest 10 points, of the average closing value of the NYSE Composite Index for the last month of the previous quarter.

(f) In order to determine its net position, a broker or dealer shall aggregate all of its positions in a security unless it qualifies for independent trading unit aggregation, in which case each independent trading unit shall aggregate all of its positions in a security to determine its net position. Independent trading unit aggregation is available only if:

(1) The broker or dealer has a written plan of organization that identifies each aggregation unit, specifies its trading objective(s), and supports its independent identity;

(2) Each aggregation unit within the firm determines, at the time of each sale, its net position for every security that it trades;

(3) All traders in an aggregation unit pursue only the particular trading objective(s) or strategy(s) of that aggregation unit and do not coordinate that strategy with any other aggregation unit; and

(4) Individual traders are assigned to only one aggregation unit at any time.

(g) A broker or dealer must mark all sell orders of any equity security as "long," "short," or "short exempt."

(1) An order to sell shall be marked "long" only if the seller is deemed to own the security being sold pursuant to paragraphs (a) through (f) of this section and either:

(i) The security to be delivered is in the physical possession or control of the broker or dealer; or

(ii) It is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction.

(2) A sale order shall be marked "short exempt" only if the provisions of § 242.201(c) or (d) are met.

(h) Upon written application or upon its own motion, the Commission may grant an exemption from the provisions of this section, either unconditionally or on specified terms and conditions, to any transaction or class of transactions, or to any security or class of securities, or to any person or class of persons.

[69 FR 48029, Aug. 6, 2004, as amended at 72 FR 36359, July 3, 2007; 72 FR 45557, Aug. 14, 2007; 75 FR 11323, Mar. 10, 2010]

§ 242.201 Circuit breaker.

(a) *Definitions.* For the purposes of this section:

(1) The term *covered security* shall mean any NMS stock as defined in § 242.600(b)(48).

(2) The term *effective transaction reporting plan for a covered security* shall have the same meaning as in § 242.600(b)(23).

(3) The term *listing market* shall have the same meaning as the term "listing market" as defined in the effective transaction reporting plan for the covered security.

(4) The term *national best bid* shall have the same meaning as in § 242.600(b)(43).

(5) The term *odd lot* shall have the same meaning as in § 242.600(b)(51).

(6) The term *plan processor* shall have the same meaning as in § 242.600(b)(59).

(7) The term *regular trading hours* shall have the same meaning as in § 242.600(b)(68).

(8) The term *riskless principal* shall mean a transaction in which a broker or dealer, after having received an order to buy a security, purchases the security as principal at the same price

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to satisfy the order to buy, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee, or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell, exclusive of any explicitly disclosed markup or markdown, commission equivalent, or other fee.

(9) The term *trading center* shall have the same meaning as in §242.600(b)(82).

(b)(1) A trading center shall establish, maintain, and enforce written policies and procedures reasonably designed to:

(i) Prevent the execution or display of a short sale order of a covered security at a price that is less than or equal to the current national best bid if the price of that covered security decreases by 10% or more from the covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day; and

(ii) Impose the requirements of paragraph (b)(1)(i) of this section for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.

(iii) *Provided, however*, that the policies and procedures must be reasonably designed to permit:

(A) The execution of a displayed short sale order of a covered security by a trading center if, at the time of initial display of the short sale order, the order was at a price above the current national best bid; and

(B) The execution or display of a short sale order of a covered security marked "short exempt" without regard to whether the order is at a price that is less than or equal to the current national best bid.

(2) A trading center shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (b)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(3) The determination regarding whether the price of a covered security has decreased by 10% or more from the

covered security's closing price as determined by the listing market for the covered security as of the end of regular trading hours on the prior day shall be made by the listing market for the covered security and, if such decrease has occurred, the listing market shall immediately notify the single plan processor responsible for consolidation of information for the covered security pursuant to §242.603(b). The single plan processor must then disseminate this information.

(c) Following any determination and notification pursuant to paragraph (b)(3) of this section with respect to a covered security, a broker or dealer submitting a short sale order of the covered security in question to a trading center may mark the order "short exempt" if the broker or dealer identifies the order as being at a price above the current national best bid at the time of submission; *provided, however*:

(1) The broker or dealer that identifies a short sale order of a covered security as "short exempt" in accordance with this paragraph (c) must establish, maintain, and enforce written policies and procedures reasonably designed to prevent incorrect identification of orders for purposes of this paragraph; and

(2) The broker or dealer shall regularly surveil to ascertain the effectiveness of the policies and procedures required by paragraph (c)(1) of this section and shall take prompt action to remedy deficiencies in such policies and procedures.

(d) Following any determination and notification pursuant to paragraph (b)(3) of this section with respect to a covered security, a broker or dealer may mark a short sale order of a covered security "short exempt" if the broker or dealer has a reasonable basis to believe that:

(1) The short sale order of a covered security is by a person that is deemed to own the covered security pursuant to §242.200, provided that the person intends to deliver the security as soon as all restrictions on delivery have been removed.

(2) The short sale order of a covered security is by a market maker to offset customer odd-lot orders or to liquidate an odd-lot position that changes such

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broker's or dealer's position by no more than a unit of trading.

(3) The short sale order of a covered security is for a good faith account of a person who then owns another security by virtue of which he is, or presently will be, entitled to acquire an equivalent number of securities of the same class as the securities sold; provided such sale, or the purchase which such sale offsets, is effected for the bona fide purpose of profiting from a current difference between the price of the security sold and the security owned and that such right of acquisition was originally attached to or represented by another security or was issued to all the holders of any such securities of the issuer.

(4) The short sale order of a covered security is for a good faith account and submitted to profit from a current price difference between a security on a foreign securities market and a security on a securities market subject to the jurisdiction of the United States, provided that the short seller has an offer to buy on a foreign market that allows the seller to immediately cover the short sale at the time it was made. For the purposes of this paragraph (d)(4), a depository receipt of a security shall be deemed to be the same security as the security represented by such receipt.

(5)(i) The short sale order of a covered security is by an underwriter or member of a syndicate or group participating in the distribution of a security in connection with an over-allotment of securities; or

(ii) The short sale order of a covered security is for purposes of a lay-off sale by an underwriter or member of a syndicate or group in connection with a distribution of securities through a rights or standby underwriting commitment.

(6) The short sale order of a covered security is by a broker or dealer effecting the execution of a customer purchase or the execution of a customer "long" sale on a riskless principal basis. In addition, for purposes of this paragraph (d)(6), a broker or dealer must have written policies and procedures in place to assure that, at a minimum:

(i) The customer order was received prior to the offsetting transaction;

(ii) The offsetting transaction is allocated to a riskless principal or customer account within 60 seconds of execution; and

(iii) The broker or dealer has supervisory systems in place to produce records that enable the broker or dealer to accurately and readily reconstruct, in a time-sequenced manner, all orders on which a broker or dealer relies pursuant to this exception.

(7) The short sale order is for the sale of a covered security at the volume weighted average price (VWAP) that meets the following criteria:

(i) The VWAP for the covered security is calculated by:

(A) Calculating the values for every regular way trade reported in the consolidated system for the security during the regular trading session, by multiplying each such price by the total number of shares traded at that price;

(B) Compiling an aggregate sum of all values; and

(C) Dividing the aggregate sum by the total number of reported shares for that day in the security.

(ii) The transactions are reported using a special VWAP trade modifier.

(iii) The VWAP matched security:

(A) Qualifies as an "actively-traded security" pursuant to § 242.101 and § 242.102; or

(B) The proposed short sale transaction is being conducted as part of a basket transaction of twenty or more securities in which the subject security does not comprise more than 5% of the value of the basket traded.

(iv) The transaction is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security.

(v) A broker or dealer shall be permitted to act as principal on the contra-side to fill customer short sale orders only if the broker's or dealer's position in the covered security, as committed by the broker or dealer during the pre-opening period of a trading day and aggregated across all of its customers who propose to sell short the same security on a VWAP basis, does not exceed 10% of the covered security's relevant average daily trading volume.