

Short Selling

Procedures for Submitting Written Attestation of Bona Fide Market Making Relating to Fail-to-Deliver Positions

Executive Summary

FINRA is advising firms of the process by which market makers, under SEC Rule 204T, can submit their written attestation to extend the close-out requirements for fail-to-deliver positions established solely for the purpose of meeting its bona fide market making obligations. Market makers must complete the form in Attachment A to qualify for the extension.

Questions regarding this *Notice* may be directed to:

- Short Sale Section, Market Regulation, at (240) 386-5126;
- FINRA Operations, at (866) 776-0800; or
- Office of General Counsel, at (202) 728-8071.

Background & Discussion

On September 17, 2008, the SEC issued an Emergency Order adopting a temporary rule to Regulation SHO, Rule 204T, which generally provides that if a participant of a registered clearing agency has a fail-to-deliver position at a registered clearing agency in any equity security for a long or short sale transaction in that equity security, the participant shall, by no later than the beginning of regular trading hours on the settlement day following the settlement date of the transaction that resulted in the fail-to-deliver position, immediately close out the fail-to-deliver position by borrowing or purchasing securities of like kind and quantity.¹ On September 24, 2008, the SEC's Division of Trading and Markets issued guidance regarding these temporary requirements. As part of this guidance, the SEC extended Rule 204T(a)'s close-out requirement for fail-to-deliver positions attributable to

September 2008

Notice Type

- Guidance

Suggested Routing

- Compliance
- Legal
- Operations
- Senior Management
- Systems
- Trading and Market Making

Key Topic(s)

- Bona Fide Market Making
- Fails to Deliver
- Short Selling
- Settlement

Referenced Rules & Notices

- SEC Rule 204T of Regulation SHO

bona fide market making activities by registered market makers, options market makers, or other market makers obligated to quote in the over-the-counter market (collectively, market makers).² Market makers that qualify for this extension are permitted to close out the fail-to-deliver position attributable to the market maker by no later than the beginning of regular trading hours on the morning of the third settlement day after the settlement date for the transaction that resulted in the fail-to-deliver position. To qualify for the extension, the market maker must attest in writing to the market on which it is registered that the fail-to-deliver position was established solely for the purpose of meeting its bona fide market making obligations and describe the steps it has taken to deliver the securities.

Alternative Display Facility (ADF) market makers or market makers in OTC equity securities (*e.g.*, OTC Bulletin Board and Pink Sheet securities) that intend to avail themselves of this extension must submit to FINRA their written attestation in the form provided in Attachment A.

Completed attestations must be faxed to FINRA Operations at (301) 978-8511 by the close of business on the settlement day following the original settlement date of the transaction(s).

Endnotes

1 See Exchange Act Release No. 58572 (September 17, 2008).

2 See Question #4, Division of Trading and Markets: Guidance Regarding the Commission's Emergency Order Concerning Rules to Protect Investors against "Naked" Short Selling Abuses (September 24, 2008).



FINRA MARKET MAKER WRITTEN ATTESTATION AND NOTICE RELATING TO THE CLOSE-OUT REQUIREMENTS OF RULE 204T OF REGULATION SHO

Member Name _____ Date _____

The above-referenced firm, a FINRA registered Market Maker, attests that it is subject to the closeout requirements of Rule 204T of Regulation SHO with respect to the position referenced below, which was acquired solely for the purpose of meeting its bona fide market making obligations. The firm understands that the extension of its close-out requirements under SEC Rule 204T applies only to those transactions in which it is acting as a bona fide Market Maker and that the applicant must close out the fail-to-deliver position no later than the beginning of regular trading hours on the morning of the third settlement day after the settlement date for the transaction that resulted in the fail-to-deliver position (T+6).

Security Name _____ Symbol _____

Trade Date of Relevant Activity _____

Settlement Date of Relevant Activity _____

Total Fail-to-Deliver Position as of Settlement Date _____

Amount of Fail-to-Deliver Position to be Closed Out by the Morning of Settlement Date +3 _____

Reason and circumstances for the fail-to-deliver position (*e.g.*, Market Maker obligation to maintain the market):

Specific actions taken by the Market Maker, including dates, in an effort to deliver the securities to its registered clearing agency (including the identity of all parties contacted for attempts to cover the position; attach additional sheets if necessary):

Extenuating circumstances (if any): _____

MEMBER FIRM ACKNOWLEDGES THAT THE SECURITIES AND EXCHANGE COMMISSION CAN WITHDRAW THIS GUIDANCE AT ANY TIME.

Officer's Signature _____

Print Name _____ Title _____ Phone Number _____

Fax Completed Form To: (301) 978-8511