

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 242

Release No. 34-61595; File No. S7-08-09

RIN 3235-AK35

Amendments to Regulation SHO

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is adopting amendments to Regulation SHO under the Securities Exchange Act of 1934 (“Exchange Act”). We are adopting a short sale-related circuit breaker that, if triggered, will impose a restriction on the prices at which securities may be sold short (“short sale price test” or “short sale price test restriction”). Specifically, the Rule requires that a trading center establish, maintain, and enforce written policies and procedures reasonably designed to 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. In addition, the Rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction 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. We believe it is appropriate at this time to adopt a short sale-related circuit breaker because, when triggered, it will prevent short selling, including potentially manipulative or abusive short selling,

from driving down further the price of a security that has already experienced a significant intra-day price decline, and will facilitate the ability of long sellers to sell first upon such a decline. This approach establishes a narrowly-tailored Rule that will target only those securities that are experiencing significant intra-day price declines. We believe that addressing short selling in connection with such declines in individual securities will help address erosion of investor confidence in our markets generally.

In addition, we are amending Regulation SHO to provide that a broker-dealer may mark certain qualifying sell orders “short exempt.” In particular, if the broker-dealer chooses to rely on its own determination that it is submitting the short sale order to the trading center at a price that is above the current national best bid at the time of submission or to rely on an exception specified in the Rule, it must mark the order as “short exempt.” This “short exempt” marking requirement will aid surveillance by self-regulatory organizations (“SROs”) and the Commission for compliance with the provisions of Rule 201 of Regulation SHO.

DATES: Effective Date: May 10, 2010

Compliance Date: November 10, 2010

FOR FURTHER INFORMATION CONTACT: Josephine J. Tao, Assistant Director; Victoria Crane, Branch Chief; Katrina Wilson, Staff Attorney; and Angela Moudy, Staff Attorney, Division of Trading and Markets, at (202) 551-5720, at the Commission, 100 F Street, NE, Washington, DC 20549-6628.

SUPPLEMENTARY INFORMATION: The Commission is amending Rules 200(g) and 201 of Regulation SHO [17 CFR 242.200(g) and 17 CFR 242.201] under the Exchange Act.

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I. Executive Summary

In July 2007, the Commission eliminated all short sale price test restrictions. Prior to that time, short sale price test restrictions included Rule 10a-1 under the Exchange Act, also known as the “uptick rule” or “tick test” (“former Rule 10a-1”), that applied to exchange-listed securities,¹ and the National Association of Securities Dealers, Inc.’s (“NASD”)² bid test, Rule 3350 (“NASD’s former bid test”), that applied to certain Nasdaq securities.³ The Commission’s removal of short sale price test restrictions followed a careful, deliberative rulemaking process, carried out in multiple stages from 1999 through 2006, and was open to the public at every stage.

The Commission took a number of steps as part of that process, including seeking extensive public comment and conducting a comprehensive staff study to assess whether then-current short sale price test restrictions were appropriate. For example, beginning in 1999, the Commission published a concept release in which it sought comment regarding short sale price test regulation, including comment on whether to eliminate such regulation.⁴ In 2004, the Commission initiated a year-long pilot (“Pilot”) to study the removal of short sale price tests for approximately one-third of the largest stocks.⁵ Short sale data was made publicly available during this Pilot to allow the public and Commission staff (the “Staff”) to study the effects of eliminating short sale price test restrictions. The findings of third party researchers were

¹ See infra note 41 and accompanying text.

² NASD is now known as the Financial Industry Regulatory Authority, Inc. (“FINRA”).

³ See infra note 43 and accompanying text.

⁴ See Exchange Act Release No. 42037 (Oct. 20, 1999), 64 FR 57996 (Oct. 28, 1999) (“1999 Concept Release”).

⁵ See Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (Aug. 6, 2004) (“Pilot Release”).

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