



Regulatory Circular RG 08-118

To: Members  
From: Division of Member and Regulatory Services  
Date: September 25, 2008  
Re: Close-Out and Pre-Borrow Penalty Requirements under Rule 204T

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The SEC Staff has issued the following guidance on Rule 204T with respect to Market Makers:

Market-Maker Close-Out Period Extended to T+6: Temporary Rule 204(a) 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 not later than the beginning of regular trading hours on the settlement day following the settlement date (T+4), immediately close out the fail to deliver position by borrowing or purchasing securities of like kind and quantity (the "close-out requirement").

- The SEC is extending temporary Rule 204(a)'s close-out requirement for fails to deliver attributable to 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"). Rather than T+4, a fail to deliver position attributable to a Market Maker must be closed out 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).
- Any Market Maker to which a fail to deliver position at a registered clearing agency is attributable must attest in writing to the market on which it is registered (e.g., CBOE or CBSX) that the fail to deliver position at issue was established solely for the purpose of meeting its bona fide market making obligations. In addition, such written attestation must describe the steps the Market Maker has taken in an effort to deliver securities to its registered clearing agency. The attached attestation form may be utilized. The CBOE will, however, accept a copy of a substantially similar attestation that you file with another market on which you are registered. Beginning on September 25, 2008 at 11:00 pm (central time) this attestation must be submitted to the CBOE via e-mail at [regsho@CBOE.com](mailto:regsho@CBOE.com). In the interim such attestations may be submitted via e-mail to [bresnahl@cboe.com](mailto:bresnahl@cboe.com).

Market Maker Exclusion from Pre-Borrow Penalty Requirement: Temporary Rule 204(b) provides that if a participant of a registered clearing agency has a fail to deliver in any equity security at a registered clearing agency and does not close out the fail to deliver position in accordance with the rule's requirements, the participant and any broker or dealer from which it receives trades for clearance and settlement, including Market Makers, may not accept a short sale order in the equity security from another person, or effect a short sale order in the equity security for its own account, to the extent that the broker or dealer submits its short sales to that participant for clearance and settlement, without first borrowing the security, or entering into a bona-fide arrangement to borrow the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity and that the purchase has cleared and settled at the registered clearing agency (the "pre-borrow penalty requirement"). To allow Market Makers to facilitate customer orders in fast moving markets without possible delays associated with the pre-borrow requirement, the SEC is not applying the pre-borrow penalty requirement to Market Makers provided the Market Maker can show that it does not have an open fail to deliver position at the time of any additional short sales.

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Please refer to Q&A 4 of the SEC Staff's guidance on Rule 204T, located at [www.sec.gov/divisions/marketreg/204tfaq.htm](http://www.sec.gov/divisions/marketreg/204tfaq.htm). Additional guidance on the close-out and pre-borrow penalty requirements for broker-dealers generally, not just Market Makers, is provided in Q&A 1 through 3. If you have any questions, please contact James Adams at 312-786-7718 or Larry Bresnahan at 312-786-7713.

**MARKET MAKER ATTESTATION  
RELATING TO THE CLOSE-OUT REQUIREMENTS  
OF TEMPORARY RULE 204T OF REGULATION SHO**

I, \_\_\_\_\_(name and title) on behalf of \_\_\_\_\_  
(name of member) hereby attest that the fail to deliver position in \_\_\_\_\_(symbol) in  
the amount of \_\_\_\_\_shares as of \_\_\_\_\_(date) was established solely for the  
purpose of meeting my bona fide market making obligations.

The following are the steps the member has taken in an effort to deliver these securities to its  
registered clearing agency:

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\_\_\_\_\_  
Officer's Signature

\_\_\_\_\_  
Name and Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Telephone Number