

AMENDED RULE 105 OF REGULATION M -- IMPORTANT INFORMATION FOR PERSONS SEEKING ALLOCATIONS OF PUBLIC OFFERING SECURITIES

The SEC has amended Rule 105 of Regulation M (17 C.F.R. § 242.105) to generally prohibit any person from purchasing in a public securities offering subject to the Rule if that person sold short the securities that are the subject of the offering within a specified period of time immediately preceding the pricing of such offering. This is an important change from prior Rule 105, which prohibited the use of offering shares to *cover* short sales effected within the days immediately preceding pricing.

Following is a set of frequently asked questions intended to provide a general understanding of the amended Rule's scope and application, as well as three important exceptions to the general prohibition. For additional information on the amendments to Rule 105, please see the SEC's adopting release, available at: <http://www.sec.gov/rules/final/2007/34-56206.pdf>.

1. What types of securities offerings are covered by amended Rule 105?

The Rule applies only to offerings that meet *all of the following criteria*:

- The securities being offered and sold are *equity securities*;
- The offering is conducted on a *firm-commitment basis*;¹ and
- The offering is either (i) a *SEC registered offering for cash* or (ii) a *Regulation A or E offering for cash*.²

Offerings subject to the amended Rule are referred to herein as “Covered Offerings,” and the securities that are the subject of a Covered Offering are referred to herein as “Subject Securities.” The SEC has stated that, in the case of a convertible securities offering (*e.g.*, a convertible debt offering), the convertible note is the “Subject Security,” whereas the underlying common stock or other underlying security is a “reference security” and not a “Subject Security.”

¹ As a practical matter, most underwritten public offerings are conducted on a firm-commitment basis.

² Regulation A provides an exemption from registration under the Securities Act of 1933 (“Securities Act”) allowing certain small businesses to publicly offer up to \$5 million of securities within any 12 month period. Regulation E provides an exemption from registration under the Securities Act for securities offerings by registered small business investment companies or investment companies that have elected to be regulated as business development companies pursuant to Section 54(a) of the Investment Company Act of 1940.

2. For Covered Offerings, what does the amended Rule prohibit?

The amended Rule generally prohibits a person from purchasing shares in a Covered Offering if the person effected any short sales of the Subject Securities during the Rule’s “Restricted Period” (see Q&A No. 3, below). There are three exceptions to this general prohibition, which are further discussed in Q&A No. 4, below.

3. When does the amended Rule’s “Restricted Period” begin and end?

The Rule’s “Restricted Period” **begins** on the *later of*:

- 5 business days prior to the pricing of the offering; or
- the initial filing of the registration statement (registered offerings) or a notification on Forms 1-A (Regulation A offerings) or 1-E (Regulation E offerings).

In each case, the Rule’s “Restricted Periods” **ends** with the pricing of the offering.

4. What are the exceptions to the general prohibition?

There are three separate and distinct exceptions to the amended Rule’s general prohibitions. A person who sold the Subject Securities short during the Restricted Period for a Covered Offering may still purchase in that offering if it is able to claim one of these exceptions:

- The bona fide purchase exception
- The separate accounts exception
- The investment company exception

5. What is the “bona fide” purchase exception?

A person who sold the Subject Securities short during the Rule’s Restricted Period may still purchase in a Covered Offering if the person makes one or more “bona fide” purchase(s) of the security. To qualify for this exception, the Restricted Period short sales and the subsequent “bona fide” purchases must satisfy the following criteria:

- The purchase(s) must occur after the last Restricted Period short sale and be at least equivalent to the aggregate amount of the person’s Restricted Period short sale(s).

- The purchase(s) must be reported transactions effected during regular trading hours and *no later than the end of the regular trading session on the business day prior to the day of pricing.*
- Any of the Restricted Period short sales that were reported transactions must have been effected prior to the last 30 minutes of the regular trading session on the business day prior to the day of pricing.
- The purchase(s) must be “bona fide” and not part of a plan or scheme to evade the Rule (*e.g.*, the SEC has stated that a transaction that does not include the economic elements of risk associated with a purchase would not qualify as bona fide).

6. What is the “separate accounts” exception?

This exception provides that, in the case of a single, legal person (*e.g.*, a fund) with separate trading units or accounts, one or more of such trading units or accounts may receive an allocation in a Covered Offering, even if *other* trading units or accounts sold the Subject Security short during the Rule’s Restricted Period, provided that trading decisions with respect to the individual accounts/units are made separately and without coordination or cooperation between or among them.

Please note that the SEC has provided specific guidance as to the nature of the procedures and information barriers different types of persons should have in place in order to claim this exception. Such determination will necessarily be very fact-sensitive. Persons seeking to rely upon this exception should consult with their in-house and/or outside securities counsel in order to assess their procedures and the ability to claim the exception with respect to one or more of their accounts, units or departments.

7. What is the investment company exception?

This exception allows a registered investment company, or any series of such an investment company, to purchase in a Covered Offering, even if a separate series of that same investment company, or an affiliated investment company (including a series of such affiliated investment company), sold the Subject Security short during the Rule’s Restricted Period.