

**PART 241—INTERPRETATIVE RELEASES RELATING TO THE SECURITIES EXCHANGE ACT OF 1934 AND GENERAL RULES AND REGULATIONS THEREUNDER—Continued**

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

**§ 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 provisions 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; *Pro-*

*vided, 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:

(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 General Instruction I.B.5. to Form S-3 (§239.13 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.

*Electronic communications network* has the meaning contained in §240.11Ac1-1(a)(8) of this chapter.

*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 Nasdaq system as defined in §240.11Ac1-2(a)(3) of this chapter.

*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 depositary shares representing such security shall be included, and shall be multiplied by the multiple or fraction of the security represented by the depositary share. For purposes of this paragraph, depositary share means a security, evidenced by a depositary receipt, that represents another security, or a multiple or fraction thereof, deposited with a depositary.

*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 secu-

rity") 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

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(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]

**§ 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 or 230.139 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 inter-dealer 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 offered or sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to offerees or 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 230.501 through 230.508 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.

**§ 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 That* if an affiliated purchaser is a dis-

tribution 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 offered or sold in the United States solely to:

(i) Qualified institutional buyers, as defined in §230.144A(a)(1) of this chapter, or to offerees or 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 230.501 through 230.508 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

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]

### §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 prin-

cipal 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 exchange 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 offered or sold in the United States solely to:

(i) Qualified institutional buyers, as defined in § 230.144A(a)(1) of this chapter, or to offerees or 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 230.501 through 230.508 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]

**§ 242.105 Short selling in connection with a public offering.**

(a) *Unlawful Activity.* In connection with an offering of securities for cash pursuant to a registration statement or a notification on Form 1-A (§ 239.90 of this chapter) filed under the Securities Act, it shall be unlawful for any person to cover a short sale with offered securities purchased from an underwriter or broker or dealer participating in the offering, if such short sale occurred during the shorter of:

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

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

(b) *Excepted Offerings.* This section shall not apply to offerings filed under § 230.415 of this chapter or to offerings that are not conducted on a firm commitment basis.

(c) *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 spec-

ified terms and conditions, to any transaction or class of transactions, or to any security or class of securities. By the Commission.

REGULATION ATS—ALTERNATIVE TRADING SYSTEMS

SOURCE: Sections 242.300 through 242.303 appear at 63 FR 70921, Dec. 22, 1998, unless otherwise noted.

EFFECTIVE DATE NOTE: At 63 FR 70921, Dec. 22, 1998, part 242 was amended by adding §§ 242.300 through 242.303, effective Apr. 21, 1999, except for § 242.301(b)(5)(i)(D) and (E) and § 242.301(b)(6)(i)(D) and (E), which become effective Apr. 1, 2000.

PRELIMINARY NOTES

1. An alternative trading system is required to comply with the requirements in this Regulation ATS, unless such alternative trading system:

(a) Is registered as a national securities exchange;

(b) Is exempt from registration as a national securities exchange based on the limited volume of transactions effected on the alternative trading system; or

(c) Trades only government securities and certain other related instruments.

All alternative trading systems must comply with the antifraud, antimanipulation, and other applicable provisions of the federal securities laws.

2. The requirements imposed upon an alternative trading system by Regulation ATS are in addition to any requirements applicable to broker-dealers registered under section 15 of the Act, (15 U.S.C. 78o).

3. An alternative trading system must comply with any applicable state law relating to the offer or sale of securities or the registration or regulation of persons or entities effecting transactions in securities.

4. The disclosures made pursuant to the provisions of this section are in addition to any other disclosure requirements under the federal securities laws.

**§ 242.300 Definitions.**

For purposes of this section, the following definitions shall apply:

(a) *Alternative trading system* means any organization, association, person, group of persons, or system:

(1) That constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by

a stock exchange within the meaning of § 240.3b-16 of this chapter; and

(2) That does not:

(i) Set rules governing the conduct of subscribers other than the conduct of such subscribers' trading on such organization, association, person, group of persons, or system; or

(ii) Discipline subscribers other than by exclusion from trading.

(b) *Subscriber* means any person that has entered into a contractual agreement with an alternative trading system to access such alternative trading system for the purpose of effecting transactions in securities or submitting, disseminating, or displaying orders on such alternative trading system, including a customer, member, user, or participant in an alternative trading system. A subscriber, however, shall not include a national securities exchange or national securities association.

(c) *Affiliate of a subscriber* means any person that, directly or indirectly, controls, is under common control with, or is controlled by, the subscriber, including any employee.

(d) *Debt security* shall mean any security other than an equity security, as defined in § 240.3a11-1 of this chapter, as well as non-participatory preferred stock.

(e) *Order* means any firm indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order.

(f) *Control* means the power, directly or indirectly, to direct the management or policies of an alternative trading system, whether through ownership of securities, by contract, or otherwise. A person is presumed to *control* an alternative trading system, if that person:

(1) Is a director, general partner, or officer exercising executive responsibility (or having similar status or performing similar functions);

(2) Directly or indirectly has the right to vote 25 percent or more of a class of voting security or has the power to sell or direct the sale of 25 percent or more of a class of voting securities of the alternative trading system; or

(3) In the case of a partnership, has contributed, or has the right to receive upon dissolution, 25 percent or more of the capital of the alternative trading system.

(g) *Covered security* shall have the meaning provided in § 240.11Ac1-1(a)(6) of this chapter, *provided, however*, that a debt or convertible debt security shall not be deemed a covered security for purposes of Regulation ATS.

(h) *Effective transaction reporting plan* shall have the meaning provided in § 240.11Aa3-1(a)(3) of this chapter.

(i) *Exchange market maker* shall have the meaning provided in § 240.11Ac1-1(a)(9) of this chapter.

(j) *OTC market maker* shall have the meaning provided in § 240.11Ac1-1(a)(13) of this chapter.

(k) *Investment grade corporate debt security* shall mean any security that:

(1) Evidences a liability of the issuer of such security;

(2) Has a fixed maturity date that is at least one year following the date of issuance;

(3) Is rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and

(4) Is not an exempted security, as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)).

(l) *Non-investment grade corporate debt security* shall mean any security that:

(1) Evidences a liability of the issuer of such security;

(2) Has a fixed maturity date that is at least one year following the date of issuance;

(3) Is not rated in one of the four highest ratings categories by at least one Nationally Recognized Statistical Ratings Organization; and

(4) Is not an exempted security, as defined in section 3(a)(12) of the Act (15 U.S.C. 78c(a)(12)).

(m) *Commercial paper* shall mean any note, draft, or bill of exchange which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is likewise limited.

**§ 242.301 Requirements for alternative trading systems.**

(a) *Scope of section.* An alternative trading system shall comply with the requirements in paragraph (b) of this section, unless such alternative trading system:

(1) Is registered as an exchange under section 6 of the Act, (15 U.S.C. 78f);

(2) Is exempted by the Commission from registration as an exchange based on the limited volume of transactions effected;

(3) Is operated by a national securities association;

(4)(i) Is registered as a broker-dealer under sections 15(b) or 15C of the Act (15 U.S.C. 78o(b), and 78o-5), or is a bank, and

(ii) Limits its securities activities to the following instruments:

(A) Government securities, as defined in section 3(a)(42) of the Act, (15 U.S.C. 78c(a)(42));

(B) Repurchase and reverse repurchase agreements solely involving securities included within paragraph (a)(4)(ii)(A) of this section;

(C) Any put, call, straddle, option, or privilege on a government security, other than a put, call, straddle, option, or privilege that:

(1) Is traded on one or more national securities exchanges; or

(2) For which quotations are disseminated through an automated quotation system operated by a registered securities association; and

(D) Commercial paper.

(5) Is exempted, conditionally or unconditionally, by Commission order, after application by such alternative trading system, from one or more of the requirements of paragraph (b) of this section. The Commission will grant such exemption only after determining that such an order is consistent with the public interest, the protection of investors, and the removal of impediments to, and perfection of the mechanisms of, a national market system.

(b) *Requirements.* Every alternative trading system subject to this Regulation ATS, pursuant to paragraph (a) of this section, shall comply with the requirements in this paragraph (b).

(1) *Broker-dealer registration.* The alternative trading system shall register

as a broker-dealer under section 15 of the Act, (15 U.S.C. 78o).

(2) *Notice.* (i) The alternative trading system shall file an initial operation report on Form ATS, §249.637 of this chapter, in accordance with the instructions therein, at least 20 days prior to commencing operation as an alternative trading system, or if the alternative trading system is operating as of April 21, 1999, no later than May 11, 1999.

(ii) The alternative trading system shall file an amendment on Form ATS at least 20 calendar days prior to implementing a material change to the operation of the alternative trading system.

(iii) If any information contained in the initial operation report filed under paragraph (b)(2)(i) of this section becomes inaccurate for any reason and has not been previously reported to the Commission as an amendment on Form ATS, the alternative trading system shall file an amendment on Form ATS correcting such information within 30 calendar days after the end of each calendar quarter in which the alternative trading system has operated.

(iv) The alternative trading system shall promptly file an amendment on Form ATS correcting information previously reported on Form ATS after discovery that any information filed under paragraphs (b)(2)(i), (ii) or (iii) of this section was inaccurate when filed.

(v) The alternative trading system shall promptly file a cessation of operations report on Form ATS in accordance with the instructions therein upon ceasing to operate as an alternative trading system.

(vi) Every notice or amendment filed pursuant to this paragraph (b)(2) shall constitute a "report" within the meaning of sections 11A, 17(a), 18(a), and 32(a), (15 U.S.C. 78k-1, 78q(a), 78r(a), and 78ff(a)), and any other applicable provisions of the Act.

(vii) The reports provided for in paragraph (b)(2) of this section shall be considered filed upon receipt by the Division of Market Regulation, Stop 10-2, at the Commission's principal office in Washington, DC. Duplicate originals of the reports provided for in paragraphs (b)(2)(i) through (v) of this section

must be filed with surveillance personnel designated as such by any self-regulatory organization that is the designated examining authority for the alternative trading system pursuant to §240.17d-1 of this chapter simultaneously with filing with the Commission. Duplicates of the reports required by paragraph (b)(9) of this section shall be provided to surveillance personnel of such self-regulatory authority upon request. All reports filed pursuant to this paragraph (b)(2) and paragraph (b)(9) of this section shall be deemed confidential when filed.

(3) *Order display and execution access.*

(i) An alternative trading system shall comply with the requirements set forth in paragraph (b)(3)(ii) of this section, with respect to any covered security in which the alternative trading system:

(A) Displays subscriber orders to any person (other than alternative trading system employees); and

(B) During at least 4 of the preceding 6 calendar months, had an average daily trading volume of 5 percent or more of the aggregate average daily share volume for such covered security as reported by an effective transaction reporting plan or disseminated through an automated quotation system as described in section 3(a)(51)(A)(ii) of the Act, (15 U.S.C. 78c(a)(51)(A)(ii)).

(ii) Such alternative trading system shall provide to a national securities exchange or national securities association the prices and sizes of the orders at the highest buy price and the lowest sell price for such covered security, displayed to more than one person in the alternative trading system, for inclusion in the quotation data made available by the exchange or association to quotation vendors pursuant to §240.11Ac1-1 of this chapter.

(iii) With respect to any order displayed pursuant to paragraph (b)(3)(ii) of this section, an alternative trading system shall provide to any broker-dealer that has access to the national securities exchange or national securities association to which the alternative trading system provides the prices and sizes of displayed orders pursuant to paragraph (b)(3)(ii)(A) of this section, the ability to effect a transaction with such orders that is:

(A) Equivalent to the ability of such broker-dealer to effect a transaction with other orders displayed on the exchange or by the association; and

(B) At the price of the highest priced buy order or lowest priced sell order displayed for the lesser of the cumulative size of such priced orders entered therein at such price, or the size of the execution sought by such broker-dealer.

(4) *Fees.* The alternative trading system shall not charge any fee to broker-dealers that access the alternative trading system through a national securities exchange or national securities association, that is inconsistent with equivalent access to the alternative trading system required by paragraph (b)(3)(iv) of this section. In addition, if the national securities exchange or national securities association to which an alternative trading system provides the prices and sizes of orders under paragraphs (b)(3)(ii) and (b)(3)(iii) of this section establishes rules designed to assure consistency with standards for access to quotations displayed on such national securities exchange, or the market operated by such national securities association, the alternative trading system shall not charge any fee to members that is contrary to, that is not disclosed in the manner required by, or that is inconsistent with any standard of equivalent access established by such rules.

(5) *Fair access.* (i) An alternative trading system shall comply with the requirements in paragraph (b)(5)(ii) of this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any covered security, 20 percent or more of the average daily volume in that security reported by an effective transaction reporting plan or disseminated through an automated quotation system as described in section 3(a)(51)(A)(ii) of the Act (15 U.S.C. 78c(a)(51)(A)(ii));

(B) With respect to an equity security that is not a covered security and for which transactions are reported to a self-regulatory organization, 20 percent or more of the average daily volume in that security as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 20 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States;

(E) With respect to non-investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States.

(ii) An alternative trading system shall:

(A) Establish written standards for granting access to trading on its system;

(B) Not unreasonably prohibit or limit any person in respect to access to services offered by such alternative trading system by applying the standards established under paragraph (b)(5)(ii)(A) of this section in an unfair or discriminatory manner; and

(C) Make and keep records of:

(1) All grants of access including, for all subscribers, the reasons for granting such access;

(2) All denials or limitations of access and reasons, for each applicant, for denying or limiting access.

(D) Report the information required on Form ATS-R, § 249.638 of this chapter, regarding grants, denials, and limitations of access.

(iii) Notwithstanding paragraph (b)(5)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(5)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan or through an automated quotation system as described in section 3(a)(51)(A)(ii) of the Act, (15 U.S.C. 78c(a)(51)(A)(ii)), or derived from such prices.

(6) *Capacity, integrity, and security of automated systems.* (i) The alternative trading system shall comply with the requirements in paragraph (b)(6)(ii) of

this section, if during at least 4 of the preceding 6 calendar months, such alternative trading system had:

(A) With respect to any covered security, 20 percent or more of the average daily volume reported by the effective transaction reporting plan or disseminated through an automated quotation system as described in Section 3(a)(51)(A)(ii) of the Act, (15 U.S.C. 78c(a)(51)(A)(ii));

(B) With respect to equity securities that are not covered securities and for which transactions are reported to a self-regulatory organization, 20 percent or more of the average daily volume as calculated by the self-regulatory organization to which such transactions are reported;

(C) With respect to municipal securities, 20 percent or more of the average daily volume traded in the United States;

(D) With respect to investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States;

(E) With respect to non-investment grade corporate debt, 20 percent or more of the average daily volume traded in the United States.

(ii) With respect to those systems that support order entry, order routing, order execution, transaction reporting, and trade comparison, the alternative trading system shall:

(A) Establish reasonable current and future capacity estimates;

(B) Conduct periodic capacity stress tests of critical systems to determine such system's ability to process transactions in an accurate, timely, and efficient manner;

(C) Develop and implement reasonable procedures to review and keep current its system development and testing methodology;

(D) Review the vulnerability of its systems and data center computer operations to internal and external threats, physical hazards, and natural disasters;

(E) Establish adequate contingency and disaster recovery plans;

(F) On an annual basis, perform an independent review, in accordance with

established audit procedures and standards, of such alternative trading system's controls for ensuring that paragraphs (b)(6)(ii)(A) through (E) of this section are met, and conduct a review by senior management of a report containing the recommendations and conclusions of the independent review; and

(G) Promptly notify the Commission staff of material systems outages and significant systems changes.

(iii) Notwithstanding paragraph (b)(6)(i) of this section, an alternative trading system shall not be required to comply with the requirements in paragraph (b)(6)(ii) of this section, if such alternative trading system:

(A) Matches customer orders for a security with other customer orders;

(B) Such customers' orders are not displayed to any person, other than employees of the alternative trading system; and

(C) Such orders are executed at a price for such security disseminated by an effective transaction reporting plan or through an automated quotation system as described in section 3(a)(51)(A)(ii) of the Act, (15 U.S.C. 78c(a)(51)(A)(ii)), or derived from such prices.

(7) *Examinations, inspections, and investigations.* The alternative trading system shall permit the examination and inspection of its premises, systems, and records, and cooperate with the examination, inspection, or investigation of subscribers, whether such examination is being conducted by the Commission or by a self-regulatory organization of which such subscriber is a member.

(8) *Recordkeeping.* The alternative trading system shall:

(i) Make and keep current the records specified in § 242.302; and

(ii) Preserve the records specified in § 242.303.

(9) *Reporting.* The alternative trading system shall:

(i) File the information required by Form ATS-R (§ 249.638 of this chapter) within 30 calendar days after the end of each calendar quarter in which the market has operated after the effective date of this section; and

(ii) File the information required by Form ATS-R within 10 calendar days

after an alternative trading system ceases to operate.

(10) *Procedures to ensure the confidential treatment of trading information.*

(i) The alternative trading system shall establish adequate safeguards and procedures to protect subscribers' confidential trading information. Such safeguards and procedures shall include:

(A) Limiting access to the confidential trading information of subscribers to those employees of the alternative trading system who are operating the system or responsible for its compliance with these or any other applicable rules;

(B) Implementing standards controlling employees of the alternative trading system trading for their own accounts; and

(ii) The alternative trading system shall adopt and implement adequate oversight procedures to ensure that the safeguards and procedures established pursuant to paragraph (b)(10)(i) of this section are followed.

(11) *Name.* The alternative trading system shall not use in its name the word "exchange," or derivations of the word "exchange," such as the term "stock market."

#### **§ 242.302 Recordkeeping requirements for alternative trading systems.**

To comply with the condition set forth in paragraph (b)(8) of § 242.301, an alternative trading system shall make and keep current the following records:

(a) A record of subscribers to such alternative trading system (identifying any affiliations between the alternative trading system and subscribers to the alternative trading system, including common directors, officers, or owners);

(b) Daily summaries of trading in the alternative trading system including:

(1) Securities for which transactions have been executed;

(2) Transaction volume, expressed with respect to equity securities in:

(i) Number of trades;

(ii) Number of shares traded; and

(iii) Total settlement value in terms of U.S. dollars; and

(3) Transaction volume, expressed with respect to debt securities in:

(i) Number of trades; and

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- (ii) Total U.S. dollar value; and
- (c) Time-sequenced records of order information in the alternative trading system, including:
  - (1) Date and time (expressed in terms of hours, minutes, and seconds) that the order was received;
  - (2) Identity of the security;
  - (3) The number of shares, or principal amount of bonds, to which the order applies;
  - (4) An identification of the order as related to a program trade or an index arbitrage trade as defined in New York Stock Exchange Rule 80A;
  - (5) The designation of the order as a buy or sell order;
  - (6) The designation of the order as a short sale order;
  - (7) The designation of the order as a market order, limit order, stop order, stop limit order, or other type or order;
  - (8) Any limit or stop price prescribed by the order;
  - (9) The date on which the order expires and, if the time in force is less than one day, the time when the order expires;
  - (10) The time limit during which the order is in force;
  - (11) Any instructions to modify or cancel the order;
  - (12) The type of account, *i.e.*, retail, wholesale, employee, proprietary, or any other type of account designated by the alternative trading system, for which the order is submitted;
  - (13) Date and time (expressed in terms of hours, minutes, and seconds) that the order was executed;
  - (14) Price at which the order was executed;
  - (15) Size of the order executed (expressed in number of shares or units or principal amount); and
  - (16) Identity of the parties to the transaction.

**§ 242.303 Record preservation requirements for alternative trading systems.**

- (a) To comply with the condition set forth in paragraph (b)(9) of § 242.301, an alternative trading system shall preserve the following records:
  - (1) For a period of not less than three years, the first two years in an easily accessible place, an alternative trading system shall preserve:

- (i) All records required to be made pursuant to § 242.302;
  - (ii) All notices provided by such alternative trading system to subscribers generally, whether written or communicated through automated means, including, but not limited to, notices addressing hours of system operations, system malfunctions, changes to system procedures, maintenance of hardware and software, instructions pertaining to access to the market and denials of, or limitations on, access to the alternative trading system;
  - (iii) If subject to paragraph (b)(5)(ii) of § 242.301, at least one copy of such alternative trading system's standards for access to trading, all documents relevant to the alternative trading systems decision to grant, deny, or limit access to any person, and all other documents made or received by the alternative trading system in the course of complying with paragraph (b)(5) of § 242.301; and
  - (iv) At least one copy of all documents made or received by the alternative trading system in the course of complying with paragraph (b)(6) of § 242.301, including all correspondence, memoranda, papers, books, notices, accounts, reports, test scripts, test results, and other similar records.
- (2) During the life of the enterprise and of any successor enterprise, an alternative trading system shall preserve:
    - (i) All partnership articles or, in the case of a corporation, all articles of incorporation or charter, minute books and stock certificate books; and
    - (ii) Copies of reports filed pursuant to paragraph (b)(2) of § 242.301 of this chapter and records made pursuant to paragraph (b)(5) of § 242.301 of this chapter.
  - (b) The records required to be maintained and preserved pursuant to paragraph (a) of this section must be produced, reproduced, and maintained in paper form or in any of the forms permitted under § 240.17a-4(f) of this chapter.
  - (c) Alternative trading systems must comply with any other applicable recordkeeping or reporting requirement in the Act, and the rules and regulations thereunder. If the information in a record required to be made pursuant to this section is preserved in a record

made pursuant to §240.17a-3 or §240.17a-4 of this chapter, or otherwise preserved by the alternative trading system (whether in summary or some other form), this section shall not require the sponsor to maintain such information in a separate file, provided that the sponsor can promptly sort and retrieve the information as if it had been kept in a separate file as a record made pursuant to this section, and preserves the information in accordance with the time periods specified in paragraph (a) of this section.

(d) The records required to be maintained and preserved pursuant to this section may be prepared or maintained by a service bureau, depository, or other recordkeeping service on behalf of the alternative trading system. An agreement with a service bureau, depository, or other recordkeeping service shall not relieve the alternative trading system from the responsibility to prepare and maintain records as specified in this section. The service bureau, depository, or other recordkeeping service shall file with the Commission a written undertaking in a form acceptable to the Commission, signed by a duly authorized person, to the effect that such records are the property of the alternative trading system required to be maintained and preserved and will be surrendered promptly on request of the alternative trading system, and shall include the following provision: With respect to any books and records maintained or preserved on behalf of (name of alternative trading system), the undersigned hereby undertakes to permit examination of such books and records at any time, or from time to time, during business hours by representatives or designees of the Securities and Exchange Commission, and to promptly furnish to the Commission or its designee a true, correct, complete and current hard copy of any, all, or any part of, such books and records.

(e) Every alternative trading system shall furnish to any representative of the Commission promptly upon request, legible, true, and complete copies of those records that are required to be preserved under this section.

## PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

Sec.

249.0-1 Availability of forms.

### Subpart A—Forms for Registration or Exemption of, and Notification of Action Taken by, National Securities Exchanges

249.1 Form 1, for application for, and amendments to applications for, registration as a national securities exchange or exemption from registration pursuant to Section 5 of the Exchange Act.

249.1a Form 1-A, for amendments to Form 1.

249.25 Form 25, for notification of removal from listing and registration of matured, redeemed or retired securities.

249.26 Form 26, for notification of the admission to trading of a substituted or additional class of security under Rule 12a-5 (§240.12a-5 of this chapter).

### Subpart B—Forms for Reports To Be Filed by Officers, Directors, and Security Holders

249.103 Form 3, initial statement of beneficial ownership of securities.

249.104 Form 4, statement of changes in beneficial ownership of securities.

249.105 Form 5, annual statement of beneficial ownership of securities.

### Subpart C—Forms for Applications for Registration of Securities on National Securities Exchanges and Similar Matters

249.208 [Reserved]

249.208a Form 8-A, for registration of certain classes of securities pursuant to section 12(b) or (g) of the Securities Exchange Act of 1934.

249.208b [Reserved]

249.208c [Reserved]

249.210 Form 10 and Form 10-SB, general form for registration of securities pursuant to section 12 (b) or (g) of the Securities Exchange Act of 1934.

249.210b Form 10-SB, optional form for the registration of securities of a small business issuer.

249.218 Form 18, for foreign governments and political subdivisions thereof.

249.220f Form 20-F, registration of securities of foreign private issuers pursuant to section 12(b) or (g) and annual and transition reports pursuant to sections 13 and 15(d).

249.240f Form 40-F, for registration of securities of certain Canadian issuers pursuant to section 12(b) or (g) and for reports pursuant to section 15(d) and Rule 15d-4 (§240.15d-4 of this chapter).