

SEC Adopts Final Rule 204 of Regulation SHO

On July 27, 2009, The Securities and Exchange Commission (“SEC”) adopts final Rule 204 of Regulation SHO, which requires that CNS participants such as Jefferies close-out any failed settlement that exists on the settlement date for an equity security (the third business day after trade date, or “T+3”). If the close-out does not take place at or before the opening of trading on T+4 (in the case of short sales), T+6 (in the case of long sales) or T+35 (in the case of long shares that are deemed-to-own, as with sale of restricted securities), respectively, Rule 204 imposes restrictions on Jefferies’ ability to affect future short sales in that security. The SEC also adopted Rule 10b-21, an anti-fraud provision designed to deter “naked” short selling. Jefferies has prepared this summary for your convenience. It is not intended to be legal advice or to be conclusive. You should consult your own counsel to assess the impact of Rule 204 on you.

Some of the essential elements of Rule 204 are set forth below.

- Rule 204 applies to all equity securities.
- Rule 204 requires that Jefferies track all fail to deliver positions (unsettled trades) resulting from both long and short sales and then borrow or buy-in sufficient securities to close-out those fails at the beginning of regular trading on T+4 (in the case of short sales) T+4 (in the case of long sales) and T+35 (in the case of long shares that are deemed-to-own, as with the sale of restricted securities).
- If Jefferies does not close-out the position with that time period, it may be temporarily prohibited from effecting short sales in that security for any client unless it pre-borrows that security ¹.
- Jefferies will generally attempt to close-out fail to deliver positions (unsettled trades) by borrowing securities. However, Jefferies will buy-in open fails when necessary.
- You should expect to be bought in without notification from Jefferies if you fail to deliver securities (unsettled trades) by the close of business on T+3 (T+5 in the case of long sales) and by T+35 (in the case of long shares that are deemed-to-own, as with the sale of restricted securities) and Jefferies is unable to borrow sufficient securities to close-out the fail. Jefferies will commence buy-ins of failed securities at the beginning of regular trading on T+4 (T+6 in the case of long sales) and on T+35 (in the case of long shares that are deemed-to-own, as with the sale of restricted securities).
- In some cases, though you may purchase securities to close-out a short position prior to or on settlement date, the SEC specifically prohibits Jefferies from reducing your short position by the amount of the shares purchased. Therefore, in those cases, Jefferies may still be required to buy-in the entire amount of the short position. **This may result in a net long position for your account.**
- There are additional Firm costs associated with pre-borrowing. These additional costs may be passed on to you. Please contact your Jefferies Account Executive or Relationship Manager directly to discuss the impact this may have on you.
- The SEC also adopted an antifraud rule, Rule 10b-21, aimed at short sellers who deceive specified persons, such as a broker or dealer, about their intention or ability to deliver securities in time for settlement and that fail to deliver securities by settlement date. Among other things, Rule 10b-21 will target short sellers who deceive their broker-dealers about their source of borrowable shares for purposes of complying with Regulation SHO’s “locate” requirement. Rule 10b-21 will also apply to sellers who misrepresent to their broker-dealers that they own shares being sold.

The adopted final release for Rule 204 may be found on the SEC’s website at <http://www.sec.gov/rules/final/2009/34-60388.pdf>.

¹A “locate” occurs when a short seller finds shares and ensures that they are available for delivery. A “pre-borrow” is not effected until the securities being sold short are actually the subject of a stock loan prior to execution of that short sale.