

and number of securities to be sold. In addition, the proposal would require that persons who claim to be long actually receive a specified number of securities at a specified price and at a specified time. The benefit of this proposal is that it would prevent abuse by individuals seeking to claim a long position merely to avoid application of the price test provisions in proposed Rule 201. Specifically, if the price must be in the contract, there would be no incentive to attempt to depress the market price of security, such as depressing the price prior to closing where a contract mandates that the security be purchased at the closing price.

b. Costs

The Commission does not anticipate any costs for this proposal. However, the Commission notes that some broker-dealers may claim that such a proposal would inhibit their trading strategy and increase the cost of doing business. The Commission seeks comment on how such a proposal would affect the trading of retail and institutional investors and the potential costs, if any, of limitations to the trading strategies of investors.

2. Securities Futures

a. Benefits

Proposed Rule 200 would codify existing guidance issued by the Commission as to when a person is deemed to own a security underlying a security futures contract.²³⁵ Codifying this guidance would provide ease of reference for compliance with the short sale rule for those trading in security futures.

b. Costs

The Commission acknowledges, however, that the existing interpretation may present costs associated with lost business opportunities for individuals who intended to use securities futures for trading strategies. In light of this, and in recognition that some participants may not have commented on the guidance when it was issued, the Commission requests data to quantify the costs and the value of the benefits identified.

3. Aggregation Units

a. Benefits

We have also proposed to incorporate aggregation unit netting into Rule 200.

This proposal would allow multi-service broker-dealers to calculate net positions in a particular security within defined trading units independently from the positions held by the other aggregation units within the firm, subject to certain conditions. This proposal is intended to allow multi-service firms to pursue different trading strategies under certain circumstances without being inhibited by the requirements of a price test when effecting short sales, which should increase efficiency and flexibility at large firms.

b. Costs

The Commission does not believe there are any costs associated with this proposal because firms are not required to use aggregation units.

E. Proposed Amendments to Regulation M, Rule 105

1. Benefits

The proposed amendment to Rule 105 of Regulation M would eliminate the exception for offerings filed under § 230.415, commonly referred to as the shelf offering exception. We believe the elimination of the shelf offering exception would update Rule 105 of Regulation M and provide a uniform treatment of shelf offerings and non-shelf offerings in light of our belief that both shelf offerings and non-shelf offerings are susceptible to the manipulative abuse that Rule 105 of Regulation M is intended to prevent.

We believe that the proposed amendment to Rule 105 of Regulation M would benefit issuers and investors by promoting shelf-offering prices that are based upon market prices that are not artificially influenced. We believe this should safeguard the integrity of the capital raising process with respect to shelf offerings and enhance investor confidence in our market. The proposal would also protect issuers conducting shelf offerings from receiving reduced offering proceeds as a result of manipulative conduct. These benefits are difficult to quantify. The Commission encourages commenters to provide data or other facts to support their views concerning these and any other benefits not mentioned here.

2. Costs

We request comment as to whether the proposed elimination of the shelf offering exception would impose greater costs on market participants than the current rule. We recognize that the proposed elimination of the shelf offering exception would diminish a short seller's ability to effect a covering

transaction by restricting the source of securities from which he may cover. Such costs are difficult to quantify and we solicit detailed description of the type and amount of any such costs from commenters. We believe, however, that any costs associated with restricting a short sellers' ability to cover with offering shares is balanced by the benefits derived from preventing the manipulative activity of effecting pre-pricing short sales and covering with offering shares. Additionally, we solicit comment concerning the costs to issuers, shareholders, and others of pre-pricing short sales prior to a shelf offering takedown and covering with shelf offering shares. Such costs may include costs associated with postponement or abandonment of an offering or a lower than anticipated offering price.

XX. Consideration on Burden and Promotion of Efficiency, Competition, and Capital Formation

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and must consider or determine if an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.²³⁶ In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.²³⁷ Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Proposed Regulation SHO is intended to promote regulatory simplification by applying a uniform bid test to short sales in exchange-listed and Nasdaq NMS securities that occur in various markets and enhanced locate and delivery requirements to all equity securities. The Commission preliminarily believes that proposed Regulation SHO would promote efficiency because market participants would have to apply only one price test to exchange-listed and Nasdaq NMS securities, and the pilot program would give the Commission the opportunity to study how the new price test affects a broad range of securities in different markets. We also preliminarily believe that the locate and delivery requirements would promote efficiency by addressing large failures to deliver

²³⁵ Commission Guidance on the Application of Certain Provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, and Rules thereunder to Trading in Security Futures Products, Securities Exchange Act Release No. 46101 (June 21, 2002), 67 FR 43234 (June 27, 2002).

²³⁶ 15 U.S.C. 78c(f).

²³⁷ 15 U.S.C. 78w(a)(2).