

stock and options are priced at market levels.²⁰

These married transactions have been used in connection with various trading strategies, including, but not limited to, the following:

- contemporaneously with or shortly after the purchase of a married put, stock sales are made without regard to the “tick test” as part of a day trading strategy dependent on trading without short sale price test execution delays in order to profit from rapid intra-day trades to take advantage of small price movements in stocks,

- contemporaneously with or shortly after the purchase of a married put, aggressive, rapid stock sales on successive minus or zero-minus ticks as part of a short-term momentum play in which a trader’s strategy is aligned with a downward movement of the stock’s price, or

- contemporaneously with or shortly after the purchase of a married put, aggressive stock sales are made during the 5-day period prior to the pricing of a secondary or repeat offering where the trader’s strategy is aligned with a downward movement of the stock’s price in an effort to profit from the difference between the sales prices and the offering price.

We believe it is important to disabuse traders of any notion that the use of married puts, as described above,

²⁰ Even viewed in the most favorable light, these married put transactions appear to be nothing more than temporary stock lending agreements designed to give the appearance of a “long” position in order to effect sales of stock in a manner that would otherwise be prohibited. However, borrowed stock does not confer an ownership position under Rule 3b-3. Therefore, the sale of borrowed securities must be effected in compliance with short sale rules.

complies with Commission rules. As such, we are issuing this interpretative release as a means of providing all market participants with guidance regarding the use of married put transactions when determining their net positions under Rule 3b-3. Married puts with the characteristics described above are sham transactions that do not give rise to security ownership under Rule 3b-3.²¹ Therefore, sellers who use these types of married puts may violate Rule 10a-1 and Rule 105.²² Moreover, if sham married puts are used as part of a fraudulent or manipulative scheme, the conduct may also violate the Commission’s anti-fraud and anti-manipulation provisions, including, but not limited to, Sections 9(a) and 10(b) of the Exchange Act.²³

²¹ A variation on the married put transaction used to facilitate day trading strategies that also may be problematic is a “conversion” arrangement. In this arrangement, the trader that purchases the married put is long the stock, long a put option, and short a call option. The facilitator has the opposite side of the transaction, *i.e.*, short the stock, short a put option, and long a call option. Often, the put and call options have the same strike prices. This arrangement provides the facilitator with the right to call the stock to cover its short position at a prearranged price in the event the counter party to the transaction does not exercise the put option. As with married put transactions, where these arrangements, or other similar arrangements, have the characteristics described above, they do not give rise to security ownership under Rule 3b-3.

²² Scienter is not required to establish a violation of Rule 10a-1. *See U.S. v. Mandel*, 296 F. Supp. 1038, 1039 (S.D.N.Y. 1969). Rule 105, as the successor to Rule 10b-21, does not require a showing of scienter. In adopting Rule 10b-21, the Commission made it clear that there was not a requirement to show a specific manipulative intent. *See* Exchange Act Release No. 26028, fn. 6, *supra*. *See, e.g., Paul Giles et al.*, Exchange Act Release No. 36118 (August 18, 1995), 1995 WL 509484.

²³ 15 U.S.C. 78e (a) and 78j (b). *See also* Securities Act Section 17(a), 15 U.S.C. 77q(a), and Exchange Act Section 15(c) and Rule 15c1-2 thereunder, 17 CFR 240.15c1-2.

In publishing this interpretative guidance, we recognize that married put transactions may be used as part of a legitimate hedging strategy, and we do not want to discourage their use for that purpose. Rather, we are calling attention to abusive married put transactions that have characteristics described above and are used in a scheme to create sham long positions in order to evade Commission rules.

III. Conclusion

For the foregoing reasons, we find that this interpretation is consistent with Rule 3b-3 of the Exchange Act.²⁴

List of Subjects in 17 CFR Part 241

Securities.

Amendments to the Code of Federal Regulations.

■ For the reasons set forth above, the Commission is amending title 17, chapter II of the Code of Federal Regulations as set forth below:

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

■ Part 241 is amended by adding Release No. 34-48795 and the release date of November 17, 2003 to the list of interpretative releases.

Dated: November 17, 2003.

By the Commission.

Margaret H. McFarland,
Deputy Secretary.

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²⁴ 17 CFR 240.3b-3.