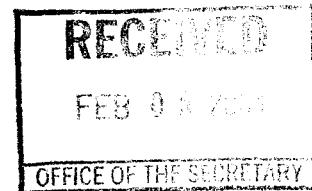


ITG

371



February 4, 2004

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

Re: Securities Exchange Act Release No. 48709 (October 29, 2003); File No.
S7-23-03

Dear Mr. Katz:

ITG Inc. ("ITG") is pleased to offer its comments with respect to the above-referenced release ("Proposing Release"), which proposes significant changes to the regulation of short sales in exchange-listed and Nasdaq NM securities. Generally, proposed Regulation SHO ("Reg. SHO") would (i) replace the existing "tick test" of Rule 10a-1 of the Securities Exchange Act of 1934 ("Exchange Act") for exchange-listed securities and the Nasdaq bid test for Nasdaq NM securities with a new bid test that would apply to all exchange-listed and Nasdaq NM securities, (ii) impose a uniform affirmative determination or "locate" rule, (iii) impose strict delivery requirements with respect to securities that are the subject of significant levels of "failed" transactions, (iv) clarify the terms pursuant to which a person may deem themselves "long" for purposes of the new bid test, (v) modify Rule 105 of Regulation M, which governs short selling in connection with public offerings, and (vi) establish a two year pilot program temporarily suspending the proposed short sale bid test for certain specified securities. We understand that the Commission has or will be receiving a significant number of comment letters from industry groups and market participants discussing proposed Reg. SHO in detail. Therefore, we have limited our comments to the three issues discussed below.

Uniform Locate Requirement. Proposed Rule 203 would prohibit a broker-dealer from executing a short sale order for its own account or the account of another person, unless the broker-dealer, or the person for whose account the short sale is executed (1) borrowed the security, or entered into an arrangement for the borrowing of the security, or (2) had reasonable grounds to believe that it could borrow the security so that it would be capable of delivering the securities on the date delivery is due. The Commission requests comment on the appropriate manner by which short sellers can comply with the requirement to have reasonable grounds to believe that securities sold short can be borrowed.

Jonathan G. Katz

February 4, 2004

Page 2

ITG supports the proposed uniform locate requirement, including that aspect of the proposal that would allow a broker-dealer to rely on reasonable assurances from a customer regarding its ability to borrow a security for delivery on the settlement date. We also urge the Commission to recognize that the precise manner by which a broker-dealer demonstrates compliance with proposed Rule 203 will vary from firm-to-firm and should be left to the discretion of each broker-dealer. The business models and operational aspects of broker-dealers vary significantly, and firms should have flexibility in determining how best to reflect and record their compliance with the affirmative determination requirement. ITG commends NASD Rule 3370(b)(4) to the Commission in this regard.

Definition of "Long Sale." Proposed Rule 200 would replace Exchange Act Rule 3b-3 to, among other things, allow a person to deem itself "long" only if it has entered into a binding, unconditional contract to purchase a security that specifies an irrevocable fixed price and amount of securities to be delivered under the contract. ITG urges the Commission to reconsider that aspect of the proposed rule that would require that a binding, unconditional contract also have a fixed price for purposes of determining "long" status. As the Commission is aware, it is common within the industry for broker-dealers facilitating customer orders to sell at volume weighted average, market closing or other formulaic prices pursuant to binding, unconditional contracts to consider themselves long when subsequently selling out of these positions. We are not aware of any abuses caused by this practice, notwithstanding the absence of a "fixed" price in the initial transaction with the customer. As a practical matter, a broker-dealer facilitating a customer sell order would have very little incentive to thereafter manipulate the market price of these securities since it now owns and, typically, will seek to sell out of its new position. Finally, the requirement of a fixed price in order to deem oneself long would provide a tremendous advantage to larger firms that have significant securities lending operations over broker-dealers that do not have such operations without any demonstrated need for such a distinction.

Uniform Bid Test. As the Commission notes in the Proposing Release, the proposed bid test would accommodate the recent growth of matching systems that execute trades at an independently derived price above the consolidated best bid. We note, however, that there may be instances in which an independently derived price is above the consolidated best bid but not by the one penny increment that would be required by the Commission for a "legal" short sale. For example, systems such as ITG's Portfolio System for Institutional Trading ("POSIT"), which price orders at the midpoint between the best bid and asked quotation, may on occasion where the spread for a security is less than two cents, price a short sale transaction at a price that is less than one penny above the consolidated best bid. Notwithstanding this, both the Commission and the NASD have recognized that prices derived independently via passive pricing systems do not present concerns the Rule 10a-1 "tick" test or Nasdaq "bid test" are meant to address. As a result, short sale executions on these systems have been completely

Jonathan G. Katz
February 4, 2004
Page 3

exempted from such pricing tests.¹ We urge the Commission to codify these exemptions in proposed Rule 201.

We hope that our comments have been helpful. Should you wish to discuss any of these comments further, please give me a call at 212-444-6327.

Very truly yours,

P. Mats Goebels

P. Mats Goebels
General Counsel

cc: Andre E. Owens (Wilmer Cutler & Pickering LLP)

¹ Rule 10a-1 Exemptive Relief, POSIT (April 23, 2003); NASD Rule 3350 Exemptive Relief, POSIT (June 11, 2003).