

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 95487 / August 12, 2022

ADMINISTRATIVE PROCEEDING
File No. 3-20961

In the Matter of

IMC CHICAGO, LLC

Respondent.

**ORDER INSTITUTING
ADMINISTRATIVE AND CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 15(b) AND 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING
REMEDIAL SANCTIONS AND A CEASE-
AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against IMC Chicago, LLC (“IMC” or “Respondent”).

II.

In anticipation of the institution of these proceedings, Respondent has submitted an Offer of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent consents to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 15(b) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondent's Offer, the Commission finds that:

Summary

1. This proceeding involves IMC's Single-Dealer Platform ("SDP"), which began operations in June 2017, and on which IMC was the exclusive counterparty to trades that it executed in a principal capacity with other registered broker-dealers. From approximately June 2017 through November 2020, IMC violated Regulation SHO by executing millions of short sale trades through the SDP while improperly relying on the bona-fide market making exception to the "locate requirement" for short sales in Rule 203(b)(2)(iii). IMC did not qualify for the bona-fide market making exception to the locate requirement because it was not engaged in bona-fide market making on the SDP at the time of these short sales. Among other things, IMC did not post continuous, firm quotations at or near the market on both sides, but instead posted indications of interest ("IOIs") that IMC said should not be considered to be bids or offers. The IOIs posted on the SDP by IMC included only the firm's current side and size in a particular symbol and did not include a price, and all orders submitted by the users of the SDP were immediate-or-cancel. As a result, IMC willfully violated Rule 203(b)(1) of Regulation SHO.

Respondent

2. IMC, which does business under the name IMC Financial Markets, was formed in Illinois in April 2000, with its U.S. headquarters in Chicago, Illinois. It is affiliated with other trading operations in New York, New York, Amsterdam, The Netherlands, Sydney, Australia, and Hong Kong, China which all operate under the same parent company, IMC B.V. IMC is registered with the Commission as a broker-dealer pursuant to Section 15 of the Exchange Act. IMC operates as a proprietary trading firm and is registered as a market maker in every symbol it trades on numerous U.S. stock exchanges.

Facts

Background

3. Rule 203(b)(1) of Regulation SHO generally prohibits a broker-dealer from accepting a short sale order in any equity security, or effecting a short sale order in an equity security for the broker-dealer's own account, unless the broker-dealer has: borrowed the security, entered into a bona-fide arrangement to borrow the security, or has reasonable grounds to believe that the security can be borrowed so that it can be delivered on the delivery date, and has documented compliance with the requirement. 17 CFR 242.203(b)(1). This is generally referred to as the "locate requirement."

4. Rule 203(b)(2)(iii) of Regulation SHO provides an exception to the “locate requirement” for short sales effected by a market maker in connection with “bona-fide market making activities” in the security for which the exception is claimed. 17 CFR 242.203(b)(2)(iii). This exception is available only to U.S.-registered broker-dealers who are engaged in bona-fide market making activities.

5. Section 3(a)(38) of the Exchange Act defines the term “market maker” as “any specialist permitted to act as a dealer, any dealer acting in the capacity of block positioner, and any dealer who, with respect to a security, holds himself out (by entering quotations in an inter-dealer communications system or otherwise) as being willing to buy and sell such security for his own account on a regular or continuing basis.” The Commission has stated that for purposes of Regulation SHO, a market maker engaged in bona-fide market making is a “broker-dealer that deals on a regular basis with other broker-dealers, actively buying and selling the subject security as well as regularly and continuously placing quotations in a quotation medium on both the bid and ask side of the market.” Amendments to Regulation SHO, 73 Fed. Reg. 61690, 61699 (Oct. 17, 2008) (“2008 Amendments”).

6. The Commission has further stated that, for purposes of claiming the bona-fide market making exception to the locate requirement, a market maker must be a market maker in the security being sold, and must also be engaged in bona-fide market making in that security at the time of the short sale. *See* Amendments to Regulation SHO (Interim Final Temporary Rule), 73 Fed. Reg. 61706, 61708 n.12 (Oct. 14, 2008). Determining whether or not a market maker is engaged in bona-fide market making “depends on the facts and circumstances of the particular activity.” *See* 2008 Amendments at 61699. *See also* 85 Fed. Reg. 69802, 69805 n. 27 (Dec. 8, 2021) (referencing 2008 Amendments).

7. In the 2008 Amendments, the Commission provided examples of the types of activities that indicate that a market maker is engaged in bona-fide market making activities for purposes of claiming the bona-fide market making exception to the locate requirement in Rule 203(b)(1). Indicia that a market maker is engaged in bona-fide market making include: (i) if a market maker incurs economic or market risk with respect to the securities (e.g., by putting their own capital at risk to provide continuous two-sided quotes in markets); (ii) a pattern of trading that includes both purchases and sales in roughly comparable amounts to provide liquidity to customers or other broker-dealers; and (iii) continuous quotations that are at or near the market on both sides and that are communicated and represented in a way that makes them widely accessible to investors and other broker-dealers. *See* 2008 Amendments at 61699.

8. Examples of the types of activities that indicate a market maker is not engaged in bona-fide market making activities include: (i) activity that is related to speculative selling strategies or investment purposes of the broker-dealer and is disproportionate to the usual market making patterns or practices of the broker-dealer in that security; (ii) where a market maker posts continually at or near the best offer, but does not also post at or near the best bid; and (iii) where a market maker that continually executes short sales away from its posted quotes. *See* 2008 Amendments at 61699.

9. Further, it is incumbent on the person asserting an exemption to demonstrate eligibility for the exemption.¹

IMC's Single Dealer Platform

10. IMC began operating the SDP in June 2017 as a new trading platform through which IMC was the exclusive counterparty to trades that it executed in a principal capacity solely with other registered broker-dealers who executed a User Agreement with IMC. The User Agreement included a number of disclosures regarding the manner in which the SDP operated and IMC's related responsibilities to the broker-dealers who utilized the SDP. IMC provided those broker-dealers with an IOIs data feed, which displayed the current side and size for particular securities in which IMC may have interest in transacting. The IOIs did not include a price and the User Agreement stated that the IOIs should not be considered a bid or an offer. All orders sent by the broker-dealers to the SDP were submitted as immediate-or-cancel. IMC's execution system made a determination as to whether to execute those orders and at what price. IMC acted as the counterparty in a principal capacity with other broker-dealers for each trade that was executed through the SDP.

11. From June 2017 through November 2020, IMC executed millions of short sales through its SDP and did not borrow or locate any shares of the relevant stocks.

12. IMC's short sales through its SDP did not qualify for the bona-fide market making exception to the locate requirement because it was not engaged in bona-fide market making activities on the SDP at the time of its sales. In particular, IMC did not put its capital at risk by posting continuous quotations at or near the market through the SDP. IMC's IOIs were not quotes because they only included the firm's current side and size in a particular security, and did not include a price. IMC stated in its User Agreement that the IOIs should not be considered a bid or offer. IMC did not incur market risk as a direct result of the IOIs because it did not have any obligation, contractual or otherwise, to execute a customer order in response. IMC did not maintain "firm", or non-negotiable, quotes on the SDP. All orders were submitted as immediate-or-cancel, and IMC exercised discretion in determining whether to execute the orders and at what price. Thus, IMC was not holding itself out as willing to continuously buy and sell securities on its SDP, but was instead only willing to transact at its own discretion after the customer order had been submitted.

13. In August 2020, staff in the Commission's Division of Examinations raised concerns about IMC's failure to comply with the locate requirement for its short sales through its SDP. In November 2020, IMC voluntarily ceased all operations of the SDP.

¹ "[T]he general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits . . ." *FTC v. Morton Salt Co.*, 334 U.S. 37, 44 (1948).

Violations

14. As a result of the conduct described above, IMC willfully² violated Rule 203(b)(1) of Regulation SHO.

IMC's Remedial Efforts

15. In determining to accept the Offer, the Commission considered remedial acts promptly undertaken by Respondent.

IV.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondent IMC's Offer.

Accordingly, pursuant to Sections 15(b) and 21(C) of the Exchange Act, it is hereby ORDERED that:

A. Respondent IMC cease and desist from committing or causing any violations and any future violations of Rule 203(b) of Regulation SHO.

B. Respondent IMC is censured.

C. Respondent IMC shall, within twenty-one (21) days of the entry of this Order pay a civil monetary penalty in the amount of \$125,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofm.htm>; or

² "Willfully," for purposes of imposing relief under Section 15(b) of the Exchange Act "means no more than that the person charged with the duty knows what he is doing." *Wonsover v. SEC*, 205 F.3d 408, 414 (D.C. Cir. 2000) (quoting *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949)). There is no requirement that the actor "also be aware that he is violating one of the Rules or Acts." *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965). The decision in *The Robare Group, Ltd. v. SEC*, which construed the term "willfully" for purposes of a differently structured statutory provision, does not alter that standard. 922 F.3d 468, 478-79 (D.C. Cir. 2019) (setting forth the showing required to establish that a person has "willfully omit[ted]" material information from a required disclosure in violation of Section 207 of the Advisers Act).

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying IMC as a Respondent in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Anne C. McKinley, Assistant Regional Director, Chicago Regional Office, Securities and Exchange Commission, 175 W. Jackson Street, Suite 1450, Chicago, IL 60604.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondent agrees that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondent's payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondent agrees that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondent by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Vanessa A. Countryman
Secretary