

## **Rule 102 of Regulation M Supporting Statement**

### **A. Justification**

#### **1. Necessity of Information Collection**

##### **a. Background**

Congress granted broad rulemaking authority to the Commission in Sections 9(a)(2), 10(b), and 15(c) under the Securities Exchange Act of 1934 (Exchange Act) to combat manipulative abuses in whatever form they may take. In exercising its authority, the Commission has focused on the market activities of persons participating in a securities offering and determined that securities offerings present special opportunities for manipulation that require specific regulatory attention. On December 20, 1996, the Commission adopted Regulation M, consisting of new Rules 100 through 105, which govern the activities of underwriters, issuers, selling security holders, and others in connection with a securities offering. Regulation M significantly eased regulatory burdens on offering participants by eliminating the trading restrictions for underwriters of actively traded securities; reducing the scope of coverage for other securities; reducing restrictions on issuer plans; providing a more flexible framework for stabilizing transactions; and deregulating rights offerings.

##### **b. Overview of Rules**

Rule 102 covers issuers and other persons on whose behalf a distribution is being made and their affiliated purchasers ("issuer participants"). Rule 102 applies only during a "restricted period," which commences one or five business days prior to the day of the pricing of the offered security and continues until the distribution is over. The length of the restricted period is based on the trading volume of the offered security. Rule 102, unlike Rule 101 of Regulation M, does not contain a general exception for actively traded securities, although a limited exception is included for certain actively-traded reference securities.

##### **c. Information Collection Requirements**

Rule 102 requires persons participating in a distribution to collect certain information to determine whether the rule would apply, and if so, for what period of time. Regulation M incorporated many previously-existing requirements of the trading practices rules, together with their information collection requirements. However, by removing many categories of activities, securities, and persons from anti-manipulation regulation, Regulation M reduced the burdens of anti-manipulation regulation.

**(i). Exceptions from Rule 102**

**(a). Exclusion of Actively-Traded Securities**

Rule 102 excepts reference securities with an average daily trading volume (ADTV) valued at \$1 million or more that are issued by an issuer whose common equity securities have a public float value of at least \$150 million. Rule 102 requires the ADTV to be calculated for the two full calendar months preceding the filing of the registration statement. To use this exception, a distribution participant must examine publicly available market data to calculate the ADTV.

**(b). Other Securities**

The ADTV of other securities remaining subject to the restrictions of Rule 102 determines the length of the restricted period for a particular security. As with excepted securities, distribution participants and issuer participants may obtain publicly available data to calculate ADTV of a particular security.

**(c). "Affiliated Purchasers"**

Rule 102 applies to any "affiliated purchaser" of a distribution participant, issuer, or selling security holder. Regulation M, however, provides an exception to the definition of affiliated purchaser where the distribution participant or issuer participant have certain information barriers in place. This exception requires the participant to establish, maintain, and enforce written policies and procedures to prevent the flow of information between itself and its affiliates. Such participants must also obtain an annual, independent assessment of the operation of such policies and procedures.

**2. Purpose of, and Consequences of Not Requiring, the Information Collection**

A distribution participant (i.e., the syndicate manager) performs ADTV calculations to determine whether a reference security is excepted from Rule 102, or to determine the applicable restricted period. This information is not used by the Commission.

A distribution participant may establish information barriers to segregate the activities of itself and its affiliates. Construction of these barriers permits the affiliates of a distribution participant, issuer or selling security holder to be excepted from Rule 102. The annual audit assures such distribution participant that the policies are effective. The Commission only

examines the policy and audit in investigations of potential violations of the rule.

### **3. Role of Improved Information Technology and Obstacles to Reducing Burden**

Improvements in telecommunication and data processing technology reduce regulatory burdens that might otherwise result from Rule 102. The Commission is not aware of any technical or legal obstacles to reducing the burden through the use of improved information technology.

### **4. Efforts to Identify Duplication**

The information required by each of the rules described herein does not duplicate that required by any other federal regulation. At the time Regulation M and related amendments were proposed, the Commission solicited and received comments without receiving any reference to federal regulations that may duplicate the requirements mandated by Regulation M. The Commission continues to believe that there is no duplication of the information required by the rules described herein.

### **5. Effects on Small Entities**

The information requirements of Rule 102 apply equally to all entities engaging in an offering, regardless of the entity's size. The Commission believes that the requirements of Rule 102 are not unduly burdensome on small entities.

### **6. Consequences of Less Frequent Collection**

Not applicable.

### **7. Inconsistencies With Guidelines in 5 CFR 1320.5(d)(2)**

The collection of information requested in the rules described herein is conducted in a manner consistent with the guidelines in 5 C.F.R.1320.5(d)(2).

### **8. Consultations Outside the Agency**

The amendments adopted by the Commission in 1996 were subject to public review and comment following the issuance of a Concept Release in 1994 and a Proposing Release in 1996.

### **9. Payment or Gift to Respondents**

Not applicable.

**10. Assurance of Confidentiality**

No assurance of confidentiality is provided.

**11. Sensitive Questions**

No questions of a sensitive nature are asked.

**12. Estimates of Respondent Reporting Burden**

**a. Restricted Periods.**

The syndicate manager of each secondary offering calculates the ADTV and issuer public float value to determine the restricted period, if any, that must be observed under Rules 102. In 2006, there were 795 underwritten offerings. For each of these, the Commission estimates it takes approximately one hour to calculate the ADTV and determine the applicable restricted period. Thus, in 2006, approximately 795 hours in the aggregate are required for these calculations under Rule 102. In addition, the Commission estimates that in approximately 50 self-underwritten offerings per year the issuer would calculate the ADTV. Approximately 50 hours are required annually for these calculations by issuers. In many circumstances, however, the collection of information is unnecessary because the ADTV is self-evident (*i.e.*, the ADTV is extremely high or extremely low).

**b. Information Barriers.**

The Commission estimates that approximately 100 broker-dealers acting as distribution participants in offerings covered by Regulation M seek to exempt the activities of an affiliate from the regulations of Rule 102. The Commission estimates that the annual audit of the written policies and procedures concerning information barriers takes approximately 10 hours, therefore approximately 1,000 hours (10 hours times 100 broker-dealers) are required by this exemption.

**c. Total Respondent Reporting Burden.**

The Commission estimates that a total of 945 respondents would collect information pursuant to Rule 102 (795 respondents plus 50 self-underwritten offering respondents plus 100 affiliate exemption respondents). The Commission estimates that the total reporting burden under Rule 102 is 1,845

hours (795 hours plus 50 hours for self-underwritten offerings plus 1,000 hours to audit policies concerning affiliate information barriers).

**13. Estimates of Total Annualized Cost Burden**

There is no cost burden to respondents other than the internal cost associated with the reporting burden.

**14. Estimated Cost to the Federal Government**

The government does not experience significant costs based on the recordkeeping required pursuant to Rule 102. The information collected by the respondents is normally reviewed only pursuant to an investigation, not as a matter of routine.

**15. Explanation of Changes in Burden**

The increase in burden hours is due to an increase in the amount of underwritten offerings in 2006 from the underwritten offering calculation used in prior years. The increase in total annualized cost burden is due to inflation adjustments to the annual compensation for the typical employee charged with compliance with Commission regulations. There are no other changes in the burden.

**16. Information Collection Planned for Statistical Purposes**

Not applicable. There are no plans to require the publication of these records in the future.

**17. Explanation of Why Expiration Date Will Not Be Displayed**

Not applicable.

**18. Exceptions to the Certification**

Not applicable.

**B. Collecting Information Employing Statistical Methods**

Not applicable.