

Notice to Members

DECEMBER 2004

SUGGESTED ROUTING

Corporate Finance
Legal and Compliance
Operations
Senior Management
Technology
Trading and Market Making
Training

KEY TOPICS

Debt Securities
Operations
Rule 6200 Series
TRACE Rules
Transaction Reporting

GUIDANCE

Corporate Debt Securities

NASD Issues Interpretive Guidance Regarding Various Trade Reporting and Compliance Engine (TRACE) Rules

Executive Summary

NASD provides interpretive guidance on the meaning of the terms “foreign private issuer” and “issue date” as set forth in Rule 6210, notification obligations under Rule 6260, and reporting the time of execution in seconds under Rule 6230.

Questions/Further Information

Questions concerning this *Notice* should be directed to tracefeedback@nasd.com; Elliot Levine, Chief Counsel, Market Operations, Markets, Services and Information, at (202) 728-8405; or Sharon K. Zackula, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8985.

Interpretive Guidance

1. Foreign Private Issuer

NASD recently made minor, clarifying amendments to the term “TRACE-eligible security.” As amended, the term includes “debt securities that are . . . issued by United States and/or foreign private issuers.” The amendments clarified that TRACE-eligible securities include the debt securities of all U.S. and foreign private issuers, regardless of the business model used by the issuer.¹ For purposes of TRACE, NASD interprets the term “foreign private issuer” as a foreign issuer that is *not* eligible to use the SEC’s Schedule B for registering a debt offering in the U.S.²

Under Section 7 of the Securities Act, when a foreign government or a political subdivision of such foreign government is issuing a security and seeks registration in the U.S., it is required to file a registration statement containing the information and documents required in Schedule B.³ In addition, the SEC has interpreted Section 7 to allow certain supranational organizations, certain issuers of government-guaranteed securities, and certain other issuers closely aligned and identified with a sovereign, in addition to national, state, provincial, and municipal governments, to use Schedule B.⁴ For purposes of TRACE, NASD views such Schedule B-eligible issuers as issuers that are *not* “foreign private issuers,” and their debt securities as outside the definition of “TRACE-eligible security.” Conversely, foreign issuers that are not Schedule-B-eligible issuers are considered “foreign private issuers” as that term is used in the definition of “TRACE-eligible security.”

2. Issue Date

Rule 6210(a) states, “For purposes of the Rule 6200 Series, the term ‘money market instrument’ means a debt security that at issuance has a maturity of one year or less.” NASD is responding to inquiries about how NASD determines the date of “issuance” in Rule 6210(a). For purposes of TRACE, the term “issuance” is the date that a security is issued or the issue date. It is often industry convention to use the term “dated date” as a substitute for the term “issue date,” as the term “dated date” is commonly defined as the effective date of a new issuance. Accordingly, it is often the same date as the issue date. In certain circumstances, however, such as when a bond is issued with accrued interest, the dated date is prior to the issue date. When an issue date is not ascertainable from public sources, NASD will look to the dated date as the issue date to determine if a debt security is a money market instrument under Rule 6210(a). When both the dated date and the issue date are ascertainable from public sources and do not fall on the same date, NASD will look to the issue date for purposes of Rule 6210(a).⁵

3. Rule 6260 Obligations—Early Closing of TRACE System

Rule 6260, in part, requires firms involved in distributing new TRACE-eligible securities to provide information to NASD Market Operations. The deadlines for notification, which are set forth in Rule 6260(b), vary depending on the type of offering and the time it is priced or the effectiveness of the registration statement.

On days when NASD decides that the TRACE System will close early, NASD will announce the early closing and specify when NASD Market Operations will cease accepting information pursuant to Rule 6260 (e.g., NASD may close the TRACE System early, such as at 4:00 p.m. Eastern Time, around major holidays, such as the day after Thanksgiving). When early closings in TRACE occur, NASD interprets Rule 6260 as requiring a firm to provide the information required under Rule 6260 by the early closing time, rather than by 5:00 p.m. Eastern Time. (A calendar noting early closings can be found at www.nasd.com/mkt_sys/trace_calendar.asp)

4. Rule 6260 Obligations—“Underwriter”

Rule 6260 requires that a managing underwriter, or if a managing underwriter is not appointed, the group of underwriters, of a new TRACE-eligible security must provide notice to NASD of the new TRACE-eligible security in the form and manner specified in the rule. For purposes of Rule 6260, the term “underwriter” has the same meaning as set forth in Section 2(a)(11) of the Securities Act. NASD reminds firms that the statutory definition of “underwriter” includes firms acting as agents for issuers of new TRACE-eligible securities.⁶

5. Time of Execution

Rule 6230 requires that firms provide the time of execution in their transaction reports to TRACE. Version 1.05 of the TRACE User Guide provides, in part, the following guidance on reporting the time of execution of a transaction:

All reported times are Eastern Time, and must be entered in military time format, HHMMSS (except that seconds may be entered as “00” if your system is not capable of reporting seconds).

As a result, some firms are reporting trades with time stamps in seconds and some are not (because they may not be capable of reporting in seconds). NASD believes that the actual reporting requirement should be uniform for all firms. Accordingly, at this time, NASD will not require TRACE trade reports to be entered in seconds. However, NASD encourages firms that are currently reporting in seconds, or are capable of reporting in seconds, to continue or begin to do so. NASD will provide advance notice when all trade reports must include seconds so that firms can take the steps necessary to provide the level of detail required in reporting the time of execution.

Endnotes

1. See *Notice to Members 04-39* (May 2004).
2. The SEC has defined the term “foreign private issuer” in certain provisions of the federal securities laws primarily to determine whether an issuer is considered a U.S. or foreign private issuer for purposes of various filing and reporting requirements. See, e.g., Rule 405, 17 CFR §239.405, promulgated pursuant to the Securities Act of 1933, as amended (Securities Act), and Rule 3b-4(c), 17 CFR §240.3b-4(c), promulgated pursuant to the Securities Exchange Act of 1934, as amended (Exchange Act). In both rules, the term “foreign private issuer” means any foreign issuer *other than a foreign government*, except an issuer having significant U.S. contacts that are specified in both rules (*i.e.*, an issuer is not a “foreign private issuer” if more than 50 percent of the outstanding voting securities are directly or indirectly owned of record by U.S. citizens or residents; a majority of officers or executive directors are U.S. citizens or residents; more than 50 percent of the assets are located in the U.S.; or, the business of the issuer is administered principally in the U.S.). In Rule 3b-4(a) under the Exchange Act “foreign government” is defined as “the government of any foreign country or any political subdivision of a foreign country.”

Neither the definition of “foreign government” nor “foreign private issuer” directly addresses the status of foreign issuers that are government-sponsored. Transactions in securities issued by governmental as well as government-sponsored issuers are not subject to TRACE reporting.
3. Section 7 of the Securities Act provides in pertinent part: “The registration statement . . . when relating to a security issued by a foreign government, or political subdivision thereof, shall contain the information, and be accompanied by the documents, specified in Schedule B . . .” 15 U.S.C. § 77f. Schedule B is found at 15 U.S.C. § 77aa (Schedule B).
4. See SEC No-Action Letter dated June 2, 1993 (Bank of Greece); and SEC No-Action Letter dated February 1, 1982 (Nordiska Investerings Banken).
5. NASD does not expect a “dated date” to occur after an issue date. In addition, NASD will not look to the first settlement date or any other day after the issue date to establish the date of issuance.
6. Section 2(a)(11) of the Securities Act provides: The term “underwriter” means any person who has purchased from an issuer with a view to, or offers or sells for an issuer in connection with, the distribution of any security, or participates or has a direct or indirect participation in any such undertaking, or participates or has a participation in the direct or indirect underwriting of any such undertaking; but such term shall not include a person whose interest is limited to a commission from an underwriter or dealer not in excess of the usual and customary distributors’ or sellers’ commission. As used in this paragraph the term “issuer” shall include, in addition to an issuer, any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer.

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