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Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Submitted via email: Secretarys-Office@SEC.gov

September 16, 2025

Dear Secretary Countryman:

Petition for Rulemaking to Amend Rule 105 of Regulation M

The Alternative Investment Management Association ("AIMA")[1] respectfully petitions the Securities and Exchange Commission ("SEC" or "Commission") for a rulemaking to amend Rule 105 of SEC Regulation M ("Rule 105" or the "Rule").[2] Alternatively, AIMA requests that, to the extent practical, the SEC provide relief or interpretive guidance through an Exemptive Order or no-action relief provided by SEC staff.

Rule 105 governs short selling in connection with public offerings and concerns short sales that are effected prior to the pricing of an offering. Specifically, it is designed to safeguard the integrity of the capital raising process by ensuring investors in a follow-on or secondary registered offering of equity securities do not artificially depress market prices through short selling in advance of the offering. The Commission's stated goal of Rule 105 is a laudable one that we fully endorse: "to foster secondary and follow-on offering prices that are determined by independent market dynamics and not by potentially manipulative activity."[3] Unfortunately, Rule 105 has not been updated in almost two decades and does not take into account market developments in how equity securities are offered to investors,

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1 AIMA is the world's largest membership association for alternative investment managers. Its membership has more firms, managing more assets than any other industry body, and through our 10 offices located around the world, we serve over 2,000 members in 60 different countries. AIMA's mission, which includes that of its private credit affiliate, the Alternative Credit Council, is to ensure that our industry of hedge funds, private market funds and digital asset funds is always best positioned for success. Success in our industry is defined by its contribution to capital formation, economic growth and positive outcomes for investors while being able to operate efficiently within appropriate and proportionate regulatory frameworks. AIMA's many peer groups, events, educational sessions, publications and practical tools like its Due Diligence Questionnaires and industry sound practice guidance available exclusively to members, enable firms to actively refine their business practices, policies and processes to secure their place in that success.

2 17 C.F.R. § 242.105.

3 *See* SEC, "Short Selling in Connection With a Public Offering", 72 Fed. Reg. 45094 (Aug. 10, 2007) (the "2007 Adopting Release").

particularly the dramatic growth of overnight offerings. Further, it is interfering in some respects with the equally laudable goal of facilitating capital formation.

Rule 105, as currently interpreted and enforced by SEC staff, unnecessarily limits investor participation in equity offerings, in effect penalizing short selling done without any knowledge of any future offering, thereby stifling capital formation and hindering market efficiency, to the detriment of issuers attempting to raise capital. These provisions and interpretations also present significant implementation challenges to investment firms as they both manage risk and seek to participate in offerings, potentially impairing markets and the broader economy.

We would appreciate the opportunity to work with the SEC to achieve common-sense solutions to modernize Regulation M to reflect current market dynamics, while ensuring the Rule works for overnight offerings, which now constitute the vast majority of all follow-on and secondary offerings. These solutions are outlined in more detail below.

Background

Since Rule 105 was last amended nearly 20 years ago, the market for registered offerings of equity securities has evolved, and issuers now frequently use overnight shelf offerings to raise additional capital. In fact, the vast majority of all follow-on and secondary offerings are now overnight offerings (and most of the other offerings are announced and priced within one day). Overnight shelf offerings are typically both disclosed to the public and priced after core market trading sessions have ended, i.e., they are publicly disclosed after the market closes at 4:00 p.m. Eastern Time and priced before the core market re-opens the next day. In turn, one-day deals are typically announced after core market trading sessions have ended and priced post-close the next day. Our analysis of offerings announced during 2025 finds that approximately 90% were either overnight or one-day offerings.

Rule 105 simply does not work for overnight or one-day offerings as currently drafted. This is because it prohibits participation in registered offerings of publicly traded securities by accounts that have effected a short sale of the relevant securities during the "restricted period".[4] This prohibition was drafted with the assumption that there will typically be a multi-day period between offering announcement and pricing, and it excludes investors who engage in short selling of the issuer's securities during this five-day period prior to pricing in order to prevent efforts to artificially depress the price of the offering. However, with the dramatic growth of overnight and one-day offerings, the rigid five-day period now captures many investors who, just by chance, happened to engage in short selling prior to the announcement of the offering (and therefore without any intent to artificially depress the price of the issuer's securities). This outcome is inconsistent with the goal and spirit of Rule 105 and harms both issuers and investors, as interested investors are excluded.

Certain more technical implementation-related aspects of Rule 105 also deserve another look. In particular, the second exception in Rule 105 which centers on trading activity undertaken by separate accounts (the "Separate Accounts Exception").[5] The Separate Accounts Exception permits participation in an offering as long as a "separate account" of the firm sold short during the restricted period. This exception is only available if the decisions regarding the transactions for each account

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4 The "restricted period" is defined as the shorter of the period (i) beginning five business days before the pricing of the offering and ending with such pricing or (ii) beginning with the initial filing of a registration statement or notification on Form 1-A or Form 1-E and ending with pricing. We note that the "bona fide purchase" exception (discussed further below) in the current Rule is not available for these offerings either.

5 17 C.F.R. § 242.105(b)(2).

are made separately and "without coordination of trading or cooperation among or between the accounts."[6]

In the 2007 Adopting Release, the Commission cited indicia of a "separate account" for this purpose, clearly indicating that those indicia were merely that – indicia – and not mandatory requirements. In practice, however, SEC examination and enforcement staff have treated them as mandatory conditions, all of which must be adhered to in any given situation. These overly restrictive interpretations, which are inconsistent with the intent expressed in the 2007 Adopting Release, have led a number of firms to withhold their participation from many offerings.

1. The SEC should update the definition of "restricted period" in Rule 105 to account for overnight shelf offerings.

In order to promote capital formation, while maintaining consistency with the core regulatory objectives of Rule 105, we recommend that the Commission initiate a rulemaking to amend the "restricted period" definition in Rule 105 to provide that the restricted period cannot begin prior to the public disclosure of an offering. We suggest amending the definition of the "restricted period" in Rule 105(a)(1) to read (new language in bold and underline):[7]

> (1) Beginning five business days before the pricing of the offered securities **or, if shorter, the time at which the offering is first publicly disclosed** and ending with such pricing

The proposed revisions will ensure that investors are not excluded from participating in registered offerings solely due to the fortuitous circumstances of engaging in short selling during the five-day restricted period without any knowledge of the upcoming offering. This revised Rule will also be efficient to administer and enforce. As with other offerings, overnight and one-day offerings are publicly announced via an email from the bookrunner that is widely distributed and subsequently picked up by market data service providers. These bookrunner public announcements would be part of a registered firm's books and records and would be available during the SEC examination process for monitoring compliance with Rule 105. Given that the Commission already monitors and enforces Rule 105 through its examination process, keying off of the bookrunner's email instead of the date that is five days prior to pricing should not represent a material change.[8]

In our view, implementing this change to the "restricted period" definition would strengthen the Rule, rather than undermine it. Firms would still be prohibited from engaging in short selling activities in the issuer's securities for the full period between public announcement and pricing. With the growth of 24-hour trading in the U.S. equities market, this prohibition remains meaningful and material in preventing manipulative short-selling activity across all issuers and offerings, even if the relevant

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6 *Id.*

7 The Commission could also consider updating the rule's "bona fide purchase" exception. The current exception permits firms – whether or not they had actual knowledge of the offering at the time of their short selling activity – to participate in the offering if they cover the open short position as set forth in the Rule. This exception, however, is not fulfilling its stated goal in that it is not available for overnight shelf offerings or one-day offerings because the offering is disclosed and priced in quick succession. Therefore, the investor is unable to effect a bona fide purchase under the timeframe required by the Rule and thus cannot avail itself of the exception.

8 Alternatively, the SEC could leverage EDGAR and amend the Rule 424 filing requirements to require issuers to submit a "final" prospectus with a timestamp that can be incorporated into its surveillance efforts.

period of time between public announcement and pricing is often much smaller than it was two decades ago.

We also acknowledge that, in certain limited circumstances, a firm may become aware of an upcoming offering prior to the public announcement. This, however, would be handled in accordance with the firm's policies and procedures with respect to material non-public information that are separately examined by the SEC. In regard to Rule 105 compliance specifically, firms conduct compliance trainings on Rule 105, send out email reminders on its importance and restrictions and engage in email monitoring. Some firms will ensure that their broker-dealers direct all requests for a wall-cross to the firm's compliance team on a no-names basis. If a firm takes in a wall-crossing, an announcement is made to the investment team, and a Rule 105 restriction is put in place. Industry standard practice is to consider wall-crosses as requiring trading restrictions and to prohibit the sharing of information received in a wall-cross both within and outside of the recipient firm.

2. The Commission should restore the original intent of the Separate Accounts Exception that is consistent with the purpose and provisions of the Rule.

We also recommend that the Commission, as part of a modified Rule or by way of Interpretive Guidance, clarify the Separate Accounts Exception to permit greater involvement of affected firms in public offerings, thereby facilitating capital formation. Many institutional investment managers have become reluctant to commit capital to participate in offerings due to fear of aggressive enforcement under a strict liability approach to the Separate Accounts Exception. In appropriate circumstances (and the Rule modification or guidance should expand on this concept), this trading activity does not raise the concerns that Rule 105 is designed to address. This would permit participation in offerings by affected firms in the billions of dollars annually that are today being withheld from such transactions.

Moreover, to the limited extent firms are utilizing the Separate Accounts Exception, the current overly restrictive interpretation of the indicia of separateness, which is inconsistent with the Rule, creates a disincentive for managers to receive complete information about short sale activities in related accounts, lest the managers' awareness of information be taken as a violation of separateness. Unnecessarily blinding managers to such information is an impediment to their ability to manage risk effectively.

Restoring the original intent of the Separate Accounts Exception will facilitate the investment of capital in public offerings consistent with the purpose and provisions of the Rule. Specifically, we urge the Commission to affirm and emphasize that the "indicia of separateness" outlined in the 2007 Adopting Release are "provided to assist entities in determining whether they qualify for the exception,"[9] and "[d]epending on the facts and circumstances, accounts not satisfying each of these conditions may nonetheless fall within the exception if the accounts are separate and operating without coordination of trading or cooperation."[10] The Commission also should make clear that the indicia should not be

[9] 2007 Adopting Release, *supra* note 3, at 45100.
[10] *Id.* at 45099.

interpreted more broadly to apply to other activity by oversight or managerial personnel that is unrelated to the particular public offering in question.[11]

Institutional investment managers have carefully constructed processes, policies and procedures to enable them to both meet their fiduciary obligations and simultaneously comply with the Separate Accounts Exception, but today, those processes, policies and procedures are considerably more restricted than should be necessary for investor protection.

Oversight or managerial personnel should be able to fully engage in risk management functions and should be encouraged to utilize strategies designed to optimize and deploy capital in an efficient and cost-effective manner across the firm. While oversight or managerial personnel may receive certain information as part of managing the risk of the separate accounts, they should be strictly prohibited from sharing any information learned in the course of their functions and activities to influence or control the policy in a separate account involving a security transaction. Firms are required to implement surveillance programs to alert compliance management of any breach of such requirements.

This is consistent with the guidance from the 2007 Adopting Release, which states it is:

> designed to ensure non-coordination by a single person with control over multiple accounts. Thus, such person may neither direct an account to sell short during the restricted period, nor direct another account to purchase securities in an offering. In some circumstances, the manager may receive allocations and his allocating offering shares to an account that has a restricted period short sale would be a violation of Rule 105.[12]

To be clear, AIMA believes that the Rule, as stated and as explained in the 2007 Adopting Release, permits risk management and optimization access for a firm. However, due to years of misinterpretation of the Rule by SEC staff, AIMA requests that the SEC clarify that it is permissible for oversight or managerial personnel to utilize strategies, including for individual equity securities, which are designed to exercise proper risk management and optimization functions, consistent with their fiduciary duties to investors, without frustrating the ability to rely on the Separate Accounts Exception.

3. The Commission should clarify the treatment of options exercises.

Finally, we recommend that the Commission clarify the treatment of options exercises that relate to options entered into prior to the commencement of the restricted period and prior to any actual knowledge of an upcoming offering. More specifically, to the extent such options exercises/assignments occur during the restricted period, they should not be treated as "short sales" for purposes of Rule 105, even if they result in the establishment of a short position.

Not only would this be consistent with the approach taken in connection with the 2007 Adopting Release to not deem short positions established through derivatives to be subject to Rule 105, but

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[11] Additionally, we believe the Commission should clarify the "black box" indicia example referenced in the 2007 Adopting Release. Specifically, a modified example would note that even if an algorithmic trading unit and a discretionary unit (or two separate algorithmic trading units) trade on behalf of the same entity or send aggregated orders to the market, such trading units can still be considered separate accounts if their trading activities are arrived at independently.

[12] 2007 Adopting Release, *supra* note 3, at 45099.

exercises/assignments of options are not "trades" that are subject to FINRA trade reporting and therefore could not have the negative impact on an issuer's price that the Rule is designed to address.

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We appreciate the engagement with staff from the Division of Trading and Markets and look forward to continued dialogue. For further information on the points raised in this petition, please contact Daniel Austin, Head of U.S. Markets Policy and Regulation, by email at daustin@aima.org.

Yours sincerely,

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