Ladies and Gentlemen:

It seems to me that the current close-out requirement of 13 consecutive settlement days for Rule 144 restricted threshold securities under Regulation 203 should be extended to 35 settlement days for the following reasons:

1. There are frequently delays in transfers of restricted securities that arise solely from the nature of the securities as restricted securities.
2. Once transferred, the certificates for the securities must be physically delivered to the clearing corporation and processed, which takes additional time. In other words, because the subject securities were restricted and are being cleared, they are coming from outside the system which is a significant difference from securities that can be repurchased within the system and be deemed to be delivered concurrently with the purchase.
3. Rule 15c3-3(m) requires that a broker buy in a customer that fails to deliver a security within 10 settlement days after the settlement date or 14 days from the trade date. That may be one day longer than the Rule 203 close out date and, Rule 15c3-3(m) only requires that the securities be in the possession of the broker-dealer in order to avoid the buy in requirement, not that the securities be received by the broker dealer and then be forwarded to and received in by the clearing corporation by that date.
4. The above comments are demonstrated by the following real life example. A broker dealer sold Rule 144 stock for a client. The broker does not handle margin accounts and does not accept retail short sales. The broker was not a market maker for the issuer's securities and merely sold the shares under Rule 144 for the customer's account. The securities were threshold securities. The securities were deposited in the client's account prior to sale and it was reasonably expected that they would be returned from transfer by the settlement date. As such, the sale was not a short sale. The issuer and its transfer agent construed Rule 144 strictly and would not pre-clear the transaction on the theory that Rule 144 requires that the securities "be sold in a broker's transaction" and they could not make that determination until the sale had taken place. Accordingly, after it was determined that the requirements of Rule 144 (other than the brokers transaction requirement) had been satisfied, the securities were sold for the customer's account and sent to transfer with the appropriate documentation. The transfer agent did not return the transferred, unrestricted certificates until the 14^{th} day following the trade date. The broker was not required to buy in securities for the account of the customer under Rule 15c3-3(m) because the securities were received by the broker within ten settlement days of the settlement date. Nevertheless, the broker still had to send the certificates to the clearing corporation where it took several days to process the securities into the system. As a result, although the broker and the customer attempted to

take all actions required of them to comply with applicable law, the broker violated Regulation 203 because it had a fail to deliver position with the clearing corporation for more than 13 consecutive settlement days and it failed to close out the fail to deliver by purchasing securities of like kind and quantity. As mentioned above, Rule 15c3-3 did not require a buy in until the 10th settlement day after the settlement date and the securities were physically received by the broker on that date. Had the broker purchased securities for the customer's account, the customer would have immediately been long the securities and the broker would have had to sell the securities again, which may have resulted in a loss to the customer. The NASD is taking action against the broker-dealer for violating Regulation 303. In this case, Regulation 303 clearly produced an inequitable result not contemplated by the regulation. The only thing the broker could do differently in the future is to refuse to accept sell orders from customers in Rule 144 securities whose issuers refuse to pre-clear Rule 144 sales or have the customer agree that it will be bought in if the securities are not received in by the clearing corporation (as opposed to the broker-dealer) within thirteen settlement days. Again the received in date is often a day two after the certificates have been physically delivered to the clearing corporation.

Sincerely,

Mark N. Schneider