

investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act⁷ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁸

Nasdaq has requested that the Commission waive the 30-day operative delay period for “non-controversial” proposals and make the proposed rule change effective and operative upon filing. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, because the proposed rule change is intended to protect the integrity of the Nasdaq market by reducing the incidence of the submission of grossly mis-priced orders into the market. For this reason, the Commission designates the proposal to be effective and operative upon filing with the Commission.⁹

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission’s Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR–NASD–2006–019 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASD–2006–019. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission’s Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASD–2006–019 and should be submitted on or before March 3, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Nancy M. Morris,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–53224; File No. SR–NASD–2005–112]

Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Approving Proposed Rule Change Relating to Amendments to Rule 3360 To Expand Short Interest Reporting to OTC Equity Securities

February 3, 2006.

I. Introduction

On September 20, 2005, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NASD Rule 3360 to expand short interest

reporting requirements to over-the-counter (“OTC”) equity securities.³ The proposed rule change was published for comment in the **Federal Register** on November 3, 2005.⁴ The Commission received seven comment letters on the proposal.⁵ The NASD filed a response to the comment letters on January 20, 2006.⁶ This order approves the proposed rule change.

II. Description of the Proposal

The proposal would amend Rule 3360, Short-Interest Reporting, to require that members maintain and report on a monthly basis total short positions in OTC equity securities in all customer and proprietary firm accounts.⁷ Currently, Rule 3360(a) requires members to maintain a record of total short positions⁸ in all customer and proprietary firm accounts in Nasdaq securities (and listed securities if not reported to another self-regulatory organization (“SRO”)) and requires members to report such information to the NASD on a monthly basis. The NASD believes that expanding the monthly short interest reporting requirements to OTC equity securities will increase the information available to public investors and other interested parties related to trading in OTC equity securities. Accordingly, the NASD

³ The term “OTC equity securities” means any equity securities that are neither included in the Nasdaq Stock Market nor traded on a national securities exchange.

⁴ See Securities Exchange Act Release No. 52679 (Oct. 26, 2005), 70 FR 66875 (Nov. 3, 2005) (the “Proposing Release”).

⁵ See e-mail from Greg Hogberg to enforcement@sec.gov, dated December 30, 2005 (attaching letter from Dr. Jim DeCosta to Jonathan G. Katz, Secretary, SEC, dated November 24, 2005); e-mail from Donald L. Smith to rule-comments@sec.gov, dated December 16, 2005; letter from Dr. Jim DeCosta to Jonathan G. Katz, Secretary, SEC, dated November 24, 2005 (“DeCosta”); e-mail from Paul Vuksich to rule-comments@sec.gov, dated November 22, 2005 (“Vuksich”); e-mail from David Patch to rule-comments@sec.gov, dated November 17, 2005 (“Patch”); e-mail from Daniel Opdyke to rule-comments@sec.gov, dated November 10, 2005; e-mail from Chris Meredith to rule-comments@sec.gov, dated November 1, 2005 (“Meredith”).

⁶ See letter from Andrea D. Orr, Assistant General Counsel, NASD, to Nancy M. Morris, Secretary, SEC, dated January 20, 2006.

⁷ Non-self-clearing broker-dealers generally are considered to have satisfied their reporting requirement by making appropriate arrangements with their respective clearing organizations. See NASD Notice to Members 03–08 (Jan. 2003).

⁸ Rule 3360(b) provides that short positions required to be reported under the rule are those resulting from short sales as the term is defined in Rule 200 of Regulation SHO under the Act (“Regulation SHO”), with limited exceptions. Rule 200 of Regulation SHO provides, in part, the following: “The term ‘short sale’ shall mean any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.” 17 CFR 242.200(a).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ 17 CFR 240.19b-4(f)(6).

⁹ For the purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

proposes to amend Rule 3360(a) to require that members maintain and report to the NASD short sale positions for OTC equity securities. For purposes of the proposed rule change, OTC equity securities would be defined as any equity security that is not listed on The Nasdaq Stock Market or a national securities exchange.

The NASD will announce the effective date of the proposed rule change in a *Notice to Members* to be published no later than 60 days following Commission approval. In the proposed rule change, the NASD stated that in recognition of the technological and systems changes the proposed rule change may require, the effective date for the proposed rule change will be 90 days following publication of the NASD's *Notice to Members* announcing Commission approval.⁹

In the Proposing Release,¹⁰ the Commission specifically requested comment regarding whether the implementation period for the proposed rule change could be shorter.¹¹ The Commission did not receive any comments regarding this specific request for comment. Thus, the Commission has determined not to request that the NASD shorten the implementation period.

III. Summary of Comments

The Commission received seven comment letters on the proposal.¹² The commenters generally supported the proposal. Some commenters, however, recommended additional changes to the proposed rule and to other rules relating to short selling. The following is a summary of the major concerns the commenters raised.

Two commenters questioned the exceptions to the short interest reporting requirements contained in current Rule 3360 and in the proposed rule change.¹³ Both current Rule 3360 and the proposed rule change provide that NASD members must report short interest positions that result from "short sales," as that term is defined in Rule 200 of Regulation SHO,¹⁴ with the exception of positions that meet the requirements of subsections (e)(1), (6), (7), (8) and (10) of Rule 10a-1 under the Act.¹⁵

The commenters recommended that the exceptions be eliminated from the proposed rule change and all short interest positions be reported and publicly disseminated.¹⁶ One commenter argued that all short interest positions should be disclosed to the investing public so that investors have an understanding of exactly how much supply is actually in the system because the short interest position affects the overall valuation of a security.¹⁷

One commenter proposed amendments to Rule 3360 that would require issuers to cause their transfer agents to report long and short interest positions to the NASD at the close of each trading day.¹⁸ This commenter's recommendation would also require transfer agents on behalf of issuers to report certain share information to the NASD at the close of each trading day, such as authorized shares, total shares outstanding, and shares held in street name.¹⁹

Some commenters asserted that further action in the short selling area is necessary, in particular to address naked short selling abuses and what they believe to be certain loopholes in Regulation SHO.²⁰ Other commenters raised concerns regarding hedge fund regulation, the National Securities Clearing Corporation's Continuous Net Settlement System and the Depository

of Rule 10a-1 contains exceptions to the price test restrictions. The exceptions in Rule 10a-1(e) were designed to permit certain types of trading activities that were intended to benefit the markets or that were believed to carry little risk of the kind of manipulative or destabilizing trading that the rule was designed to address. See Securities Exchange Act Release No. 48709 (Oct. 28, 2003), 68 FR 62972 (Nov. 6, 2003). Subsection (e)(1) of Rule 10a-1 permits short sales to be effected without regard to the price test restrictions in the rule if the seller owns the security sold and intends to deliver such security as soon as possible without undue inconvenience or expense. See 17 CFR 240.10a-1(e)(1). Subsection (e)(6) of Rule 10a-1 contains an exception for certain sales of a security effected with the approval of an exchange which are necessary to equalize the price of such security with the current price of such security on another national securities exchange, which is the principal exchange market. See 17 CFR 240.10a-1(e)(6). Subsection (e)(7) of Rule 10a-1 contains an exception for certain bona fide domestic arbitrage transactions. See 17 CFR 240.10a-1(e)(7). Subsection (e)(8) of Rule 10a-1 contains an exception for certain international domestic arbitrage transactions. See 17 CFR 240.10a-1(e)(8). Subsection (e)(10) of Rule 10a-1 generally excepts sales of securities by underwriters or syndicate members participating in a distribution in connection with an over-allotment, and any lay-off sales by such a person in connection with a distribution of securities through rights or a standby underwriting commitment. See 17 CFR 240.10a-1(e)(10).

¹⁶ See Patch at 1; Meredith at 1.

¹⁷ See Patch at 1.

¹⁸ See Vuksich at 1.

¹⁹ See *id.*

²⁰ See *e.g.*, DeCosta.

Trust & Clearing Corporation's stock loan program.²¹

IV. NASD's Response

In its response letter,²² the NASD stated that it believed that all the comments were outside the scope of its rule filing because the proposed rule change is limited to expanding the current short interest reporting requirements to OTC equity securities.²³ The NASD stated in its letter that because the changes recommended by the commenters were not germane to the proposal, were beyond the purview of the NASD, or related to amendments to another SRO's rules or SEC rules, the NASD was not responding to those recommendations specifically in its response letter.²⁴ In addition, the NASD stated that it would review and analyze these recommendations in the same manner in which it would consider any requests for rulemaking, and, based on such review and analysis, would determine whether further action on these recommendations is appropriate.²⁵

With respect to comments regarding the exceptions to short interest reporting contained in current NASD Rule 3360 and the proposed rule change, the Commission urges the NASD to conduct an in-depth review of the exceptions to short interest reporting to determine whether future rulemaking regarding the exceptions is appropriate.

V. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, the requirements of Section 15A of the Act²⁶ and the rules and regulations thereunder. Specifically, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,²⁷ which requires, among other things, that the NASD's rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to a free and open market and a national market system, and, in general, to protect investors and the public interest.²⁸

²¹ See *e.g.*, Meredith at 1; DeCosta at 2-8.

²² See supra note 6.

²³ *Id.* at 3.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 15 U.S.C. 78o-3.

²⁷ 15 U.S.C. 78o-3(b)(6).

²⁸ In approving this proposed rule change the Commission notes that it has considered the

⁹ See 70 FR at 66876.

¹⁰ See supra note 4.

¹¹ 70 FR at 66876.

¹² See supra note 5.

¹³ See Patch at 1; Meredith at 1.

¹⁴ See 17 CFR 242.200(a).

¹⁵ See NASD Rule 3360(b); supra note 4. Rule 10a-1 provides that, subject to certain exceptions, a short sale in an exchange-registered security may be effected only pursuant to the price test restrictions contained in Rule 10a-1. Subsection (e)

The Commission believes that expanding short interest reporting to OTC equity securities will protect investors and the public interest by requiring NASD members to increase the information available to investors and other interested parties related to trading in OTC equity securities.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁹ that the proposed rule change (SR-NASD-2005-112) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.³⁰

Nancy M. Morris,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53213; File No. SR-NYSE-2005-80]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto Relating to NYSE Rule 36, RCMMs' Ability to Use Exchange Authorized and Issued Portable Phones on the NYSE Floor

February 2, 2006.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 22, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On January 18, 2006, NYSE filed Amendment No. 1 to the proposed rule change.³ NYSE filed this proposal pursuant to Section 19(b)(3)(A) of the Act⁴ and Rule 19b-4(f)(6) thereunder⁵ as non-controversial, and therefore the proposed rule change is effective

proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁹ 15 U.S.C. 78s(b)(2).

³⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ In Amendment No. 1, the Exchange clarified proposed NYSE Rule 36.22 and added in the purpose section a new footnote relating to surveillance and examination procedures to monitor the activities of RCMMs.

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(6).

immediately upon filing. The Commission is publishing this notice, as amended, to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

This filing amends NYSE Rule 36 to permit Registered Competitive Market Makers ("RCMMs"), as defined in NYSE Rule 107A, to use Exchange authorized and provided portable phones and consists of proposed member education bulletins which describe the conditions under which Floor brokers and RCMMs may use such phones pursuant to the Exchange's portable phone pilot ("Pilot"). The conditions under which a Floor broker and a RCMM may use a portable phone pursuant to the Pilot are proposed as NYSE Rules 36.21 and 36.22.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

The Commission approved implementation of the Exchange's amendment to NYSE Rule 36 allowing Floor brokers to use Exchange authorized and provided portable phones on the Exchange Floor as a six-month pilot⁶ beginning no later than June 23, 2003.⁷ Since the inception of the Pilot, the Exchange has extended the Pilot five times, with the current Pilot expiring on January 31, 2006.⁸ In

⁶ See Securities Exchange Act Release No. 47671 (April 11, 2003), 68 FR 19048 (April 17, 2003) (SR-NYSE-2002-11) ("Original Order").

⁷ See Securities Exchange Act Release No. 47992 (June 5, 2003), 68 FR 35047 (June 11, 2003) (SR-NYSE-2003-19) (delaying the implementation date for portable phones from on or about May 1, 2003 to no later than June 23, 2003).

⁸ See Securities Exchange Act Release Nos. 48919 (December 12, 2003), 68 FR 70853 (December 19, 2003) (SR-NYSE-2003-38) (extending the Pilot for an additional six months ending on June 16, 2004);

addition, the Exchange filed for permanent approval of this rule.⁹ The Exchange represents that no administrative or technical problems, other than routine telephone maintenance issues, have resulted from the Pilot over the past few months.¹⁰

NYSE Rule 36

NYSE Rule 36 (Communications Between Exchange and Members' Offices) governs the establishment of telephone or electronic communications between the Exchange Floor and any other location. Today, NYSE Rule 36.20 permits a Floor broker to use an Exchange authorized and provided portable telephone on the Exchange Floor. NYSE Rule 36.20 does not apply to specialists who are prohibited under this rule from communicating with off-Floor locations from the Exchange Floor.¹¹

Currently, under the Pilot, with the approval of the Exchange, a Floor broker is permitted to engage in direct voice communication from the point of sale to an off-Floor location, such as a member firm's trading desk or the office of one of the Floor broker's customers.¹² Such

49954 (July 1, 2004), 69 FR 41323 (July 8, 2004) (SR-NYSE-2004-30) (extending the Pilot for an additional five months ending on November 30, 2004); 50777 (December 1, 2004), 69 FR 71090 (December 8, 2004) (SR-NYSE-2004-67) (extending the Pilot for an additional four months ending March 31, 2005); 51464 (March 31, 2005), 70 FR 17746 (April 7, 2005) (SR-NYSE-2005-20) (extending the Pilot for additional four months ending July 31, 2005); and 52188 (August 1, 2005), 70 FR 46252 (August 9, 2005) (SR-NYSE-2005-53) (extending the Pilot for an additional six months ending January 31, 2006).

⁹ See SR-NYSE-2004-52, pending with the Commission.

¹⁰ The Exchange notes that it began receiving records of incoming telephone calls in June 2005 and will continue to receive monthly updates. With respect to regulatory actions concerning the Pilot, there is an open investigation into possible insider trading in an NYSE listed security in which the trading activity of two RCMMs has been identified and is under review. With respect to one of these RCMMs, the use by the RCMM of an Exchange authorized and provided portable phone in or about January 2005 is under review as part of the investigation. Telephone conversation between Jeff Rosenstock, Senior Special Counsel, NYSE, and Molly M. Kim, Attorney, Division of Market Regulation, Commission, on January 27, 2006.

¹¹ NYSE Rule 36.30 provides that, with the approval of the Exchange, a specialist unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the specialist unit or the unit's clearing firm. Such telephone connection shall not be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities but may be used to enter options or futures hedging orders through the unit's off-Floor office or the unit's clearing firm or through a member (on the floor) of an options or futures exchange.

¹² Floor brokers receiving orders from the public over portable phones must be properly qualified to engage in such direct access business under NYSE