

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-51054; File No. SR-NYSE-2005-07)

January 18, 2005

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Proposed Changes to Exchange Rules 440F (“Public Short Sale Transactions Effected on the Exchange”) and 440G (“Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations”)

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Exchange Act”),<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on January 11, 2005, the New York Stock Exchange, Inc. (the “NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “SEC” or the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice 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

The NYSE is filing with the SEC proposed amendments to Exchange Rules 440F (“Public Short Sale Transactions Effected on the Exchange”) and 440G (“Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations”) to include certain short-exempt sales on Reports of Short Interest (i.e.,

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<sup>1</sup> 15 U.S.C. 78s(b)(1)

<sup>2</sup> 15 U.S.C. 78a et seq.

<sup>3</sup> 17 CFR 240.19b-4.

Forms SS20 and 121). The text of the proposed amendments is available from the NYSE and the Commission.<sup>4</sup>

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 and discussed any comments it received on 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

Exchange Rule 440F requires members and member organizations to report round-lot short sale transactions for public customers on Form SS20. Exchange Rule 440G requires members and member organizations to report round-lot short sale transactions for members, allied members or member organizations on Form 121. Rule 440F.10 (“Requirements for filing”) and 440G.10 (“Requirements for filing”) also provide “General Instructions” to complete “Reports on Form SS20” and “Reports on Form 121,” respectively.

Currently, short-exempt sales are excluded when computing the total short interest on the forms, under Rules 440F and 440G, respectively. However, the SEC greatly increased the number of short-exempt sales transactions when they adopted

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<sup>4</sup> Both Exhibits A and B are available at <http://www.nyse.com/regulation/> and <http://www.sec.gov/rules/sro.shtml>.

Regulation SHO. Concurrently with the adoption of Regulation SHO, the SEC issued the Pilot Order<sup>5</sup> providing for a one-year Pilot program under which the provisions of Rule 10a-1 and any SRO short sale price test, including the tick test contained in Exchange Rule 440B, are suspended. Subsequently, on November 29, 2004, the SEC issued a Second Pilot Order<sup>6</sup> postponing its previously announced one-year pilot suspending the provisions of Rule 10a-1 and any short sale price test of any exchange or national securities association for short sales of designated securities.

The Pilot was established as part of the SEC's review of short sale regulations in conjunction with the adoption of Regulation SHO. Pursuant to Regulation SHO, broker-dealers are required to mark short sale orders of securities enumerated in the Pilot Order effected during any Pilot period as "short exempt" so that such orders are not subject to price tests. A large number of broker-dealers had informed the Commission that it would be inefficient and very costly for them to comply with this marking requirement for Pilot stocks, requiring significant systems changes for both firms and customers. In addition, these broker-dealers had raised the possibility that these significant systems changes may be in effect for only the duration of the one-year Pilot. As a result, the Exchange, along with other market centers, have agreed to "mask" short sale orders in Pilot stocks for the duration of the Pilot, as it would be more efficient than having broker-dealers and their customers make the changes. However, as it would take some time to make necessary changes to the various market centers systems, the market centers will not be able to

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<sup>5</sup> See Securities Exchange Act Release No. 50104 (July 28, 2004), 69 FR 48032 (August 6, 2004).

<sup>6</sup> See Securities Exchange Act Release No. 50747 (November 29, 2004) ("Second Pilot Order"), available at <http://www.sec.gov/rules/other/34-50747.htm>.

“mask” orders until May 2, 2005. As a result, the Commission issued the Second Pilot Order extending the implementation of the Pilot until that date.

The Pilot is now scheduled to begin on May 2, 2005 and end on April 28, 2006. All other terms of the Pilot Order<sup>7</sup> remain unchanged,<sup>8</sup> which requires these Pilot “designated securities” to be marked “short-exempt” sales. Accordingly, the Exchange proposes to amend the instructions to Forms SS20 and 121, pursuant to Rules 440F and 440G to include these certain short-exempt sales on Reports of Short Interest.

The Exchange is proposing amendments to Rules 440F.10 and 440G.10 to conform the instructions to Forms SS20 and 121, respectively, to the Pilot Order. The purpose of Rules 440F and 440G is to capture short interest for reporting purposes, which is meant to include the designated securities subject to the Pilot Order – regardless as to whether they are marked “short-exempt.” In addition, the Exchange is proposing some minor amendments to the rules to remove obsolete references.

## (2) Statutory Basis

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<sup>7</sup> See Securities Exchange Act Release No. 50104 (July 28, 2004), 69 Fed. Reg. 48032 (August 6, 2004) (“Pilot Order”), available at <http://www.sec.gov/rules/other/34-50104.htm>. The Pilot Order provided for a one-year pilot program (“Pilot Program”), under which the provisions of Rule 10a-1 and any self-regulatory organization (“SRO”) short sale price test, including the tick test contained in Exchange Rule 440B, are suspended for short sales in: (1) certain “designated securities” identified in Appendix A to the SEC’s Pilot Order; (2) any security included in the Russell 1000 Index effected between 4:15 p.m. EST and the open of the consolidated tape on the following day; and (3) any security not included in (1) and (2) above effected in the period between the close of the consolidated tape (i.e., after 8:00 p.m. EST) and the open of the consolidated tape the following day. During the Pilot, all other provisions of Rule 10a-1 and Regulation SHO – including the marking, locate and delivery requirements – remain in effect. The SEC also noted in the Pilot Order that SROs, including the Exchange, would actively monitor trading in the Pilot Program securities to identify any abusive short selling.

<sup>8</sup> See SEC, Division of Market of Regulation, Responses to Frequently Asked Questions Concerning Regulation SHO (December 17, 2004), available at <http://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm>.

The statutory basis for the proposed rule change is Sections 6(b)(5)<sup>9</sup> and 17A<sup>10</sup> of the Exchange Act which require, among other things, that the rules of the Exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to perfect the mechanism of a free and open market and national market system, and in general to protect investors and the public interest; and the prompt and accurate clearance and settlement of securities transactions.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or

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<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78q-1.

(ii) as to which the Exchange consents, the Commission: (a) by order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2005-07 in the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609.

All submissions should refer to File Number SR-NYSE-2005-07. This file number should be included on the subject line of 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 NYSE. 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 submission should refer to File Number SR-NYSE-2005-07 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Margaret H. McFarland  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).

**New York Stock Exchange**

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New language is italicized; deletions are in brackets.

**Rule 440F**

**Public Short Sale Transactions Effected on the Exchange**

*Supplementary Material:*

**Reports on Form SS20**

**.10 Requirements for filing.**-Every ROUND-LOT short sale transaction in stocks (or certificates therefor) or warrants effected on the floor of the Exchange for the accounts of PUBLIC customers is required to be reported on Form SS20. Reports are to be filed by the member organization through which the transaction is cleared/settled.

Public customers are all customers OTHER THAN NYSE members, allied members or member organizations. Included as public are limited/special partners and non-voting stockholders who are not also NYSE members or allied members. Also included are employees of member organizations.

**General Instructions.**

- (1) Report by TRADE (not settlement) DATES.
- (2) The term "Round-Lot" means 100 shares or 10 shares or multiples thereof depending on the unit of trading of the securities included.
- (3) Exclude short-exempt sales, except for short-exempt sales in securities subject to the SEC's Pilot Order (SEA Release No. 34-50104) (July 28, 2004), as amended by the SEC's Second Pilot Order (SEA Release No. 34-50747) (November 29, 2004), and any subsequent orders.
- (4) Exclude transactions in rights.
- (5) If there are no reportable transactions for a specific week, a form should be filed marked "None".

(6) File this report with [Data Control Section] Credit Regulation Department, [20 Broad St., New York, N.Y. 10005,] via the New York Stock Exchange's Electronic Filing Platform ("EFP") as soon as possible, but not later than 12:00 noon on the Friday of the week following the week covered by the report.

(7) Inquiries should be addressed to [Data Control] Credit Regulation Department, telephone 212-656-8572.

(8) [Additional copies of this form may be obtained from the Printing and Distribution Section. 20 Broad Street, New York, N.Y. 10005.] Reserved.

**Specific Instructions.-**

(1) For the purpose of this report, "short sales" are those defined in the Securities and Exchange Commission's Rule [X-3B-3] 200 to Regulation SHO. [, but do not include any sale exempted by paragraph (d) of Rule X-10A-1.] The classification of a sale as "short" should be determined by the manner in which the order was marked. However, in the case of an order erroneously marked and so executed, the resulting transaction should be classified in accordance with its correct status.

(2) Short sales for hedging accounts and short sales executed as such for arbitrage accounts should be included. Sales made on a "short-exempt" basis for arbitrage accounts should not be included.

(3) Exclude from the report the following:

- (a) All odd-lot transactions;
- (b) all transactions in bonds;
- (c) stocks loaned or borrowed;
- (d) transactions executed in over-the-counter markets or on other exchanges.

**New York Stock Exchange**

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New language is italicized; deletions are in brackets.

**Rule 440G**

**Transactions in Stocks and Warrants for the Accounts of Members, Allied Members and Member Organizations**

*Supplementary Material:*

**Reports on Form 121**

**.10 Requirements for filing.**-Any ROUND-LOT purchase or sale of stock (or certificates therefor) or warrant effected on the floor of the New York Stock Exchange for the accounts of:

- a) NYSE members;
- b) NYSE Allied members; or
- c) NYSE member organizations,

must be reported on Form 121 regardless of where the order originated or by whom it was executed.

**Instructions.-**

(1) – (7) No Change

(8) Short sales, in addition to being included with total sales, should also be reported separately.

(9) Short-exempt sales are to be included with total sales only. Solely for purposes of Rule 440G and Form 121, “short-exempt sales” in securities subject to the SEC’s Pilot Order (SEA Release No. 34-50104) (July 28, 2004), as amended by the SEC’s Second Pilot Order (SEA Release No. 34-50747) (November 29, 2004), and any subsequent orders, are to be included with short sales on Form 121.

(10) Transactions are to be classified into one of the following three categories

(a) AS SPECIALIST. (Box 1) This includes transactions made, WHILE RUNNING THE BOOK, for the account of regular or relief specialists in the stocks or

warrants in which they are registered as specialists, by them or by a partner or an officer of their organization or by a member with whom they have a joint account;

(b) ALL OTHER transactions initiated ON THE FLOOR, (Box 2) This includes all round-lot transactions reportable on Form 82A (by Registered Traders) and Form 82B (all other ON FLOOR transactions which are exempt from reporting daily on Form 82A). Included are all transactions (except "as specialist") initiated by a member (either a registered trader or any other member) while on the trading floor, regardless of whether or not they were executed by the initiating member or where the initiating member happened to be at the time of the execution. Included are transactions for the accounts of specialists in the stocks or warrants in which they are registered as specialists, if made by the specialist or his agent while they were NOT running the book. Also included are transactions for the accounts of specialists in stocks or warrants in which they are not registered as specialists;

(c) Transactions initiated OFF THE FLOOR. (Box 3) This includes all member transactions not included above.

(11) If a reporting member or member organization does not have reportable transactions during a given week, a Form 121 report should be filed marked "No transactions".

(12) The Member Firm Regulation Division will consider written requests for exemption from filing REGULAR weekly reports on Form 121. Exemption may be granted for a period of time not to exceed one year, renewable annually if the applicant does not expect to have any, or expects to have only an occasional, reportable transaction during this time. THE EXEMPTION, WHEN GRANTED, IS FROM FILING REGULARLY EACH WEEK AND, IF DURING THE EXEMPTION PERIOD A REPORTABLE TRANSACTION IS EFFECTED. A FORM 121 REPORT, FOR THE WEEK IN WHICH THE TRANSACTION(S) TOOK PLACE, MUST BE FILED IMMEDIATELY.

(13) File this report with the [Data Control Section] Credit Regulation Department, [20 Broad Street, 22nd Fl., New York, N.Y. 10005,] via the New York Stock Exchange's Electronic Filing Platform ("EFP") as soon as possible but not later than 12:00 noon on the Friday following the week covered by the report.

(14) Inquiries should be addressed to the [Member Firm Regulation Division] Credit Regulation Department, telephone 212-656-8572.

(15) [Additional copies of the form may be obtained from the Subscription and Distribution Services Division, 20 Broad Street, 5th Fl., New York, N.Y. 10005.]  
Reserved.