

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-55245; File No. SR-NASD-2007-009)

February 5, 2007

Self-Regulatory Organizations: National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change Relating to Extension of NASD's Short Sale Rule Contained in Rule 5100 and Short Sale Standard Contained in IM-5100

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 26, 2007, the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. For the reasons discussed below, the Commission is granting accelerated approval of the proposed rule change.

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

NASD is proposing to extend retroactively to December 16, 2006, and prospectively through December 15, 2007, the pilot effectiveness of Rule 5100 (Short Sale Rule). NASD is also seeking to extend the pilot effectiveness of the penny (\$0.01) legal short sale standard contained in Interpretive Material (IM) 5100. Without such extension, these pilots would have expired on December 15, 2006. NASD does not propose any substantive changes to the pilots; the only changes are making the pilots effective on a retroactive basis to December 16, 2006 and extending the pilots' expiration

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

<sup>2</sup> 17 CFR 240.19b-4.

dates to December 15, 2007.

Below is the text of the proposed rule change. Proposed new language is in underline; proposed deletions are in brackets.<sup>3</sup>

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#### 5100. Short Sale Rule

(a) through (k) No Change.

(l) This section shall be in effect until December 15, 200[6]7.

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

In its filing with the Commission, NASD 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. NASD 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

##### Proposal to Extend Penny Short Sale Rule

Section 10(a) of the Act gives the Commission plenary authority to regulate short sales<sup>4</sup> of securities registered on a national securities exchange, as needed to protect

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<sup>3</sup> There are no proposed changes to the text of IM-5100.

<sup>4</sup> A short sale is a sale of a security that the seller does not own or any sale that is consummated by the delivery of a security borrowed by, or for the account of, the

investors. Rule 10a-1(a)(1) provides that, subject to certain exceptions, a listed security may be sold short (A) at a price above the price at which the immediately preceding sale was effected (plus tick), or (B) at the last sale price if it is higher than the last different price (zero-plus tick).<sup>5</sup>

On June 29 1994, the Commission granted temporary approval to NASD's short sale rule, Rule 5100 (formerly Rule 3350),<sup>6</sup> applicable to Nasdaq Global Market ("NGM") securities<sup>7</sup> on a pilot basis.<sup>8</sup> Rule 5100 applies to short sales of OTC transactions reported to the Alternative Display Facility ("ADF") or a Trade Reporting Facility ("TRF"). Rule 5100 provides that, with respect to trades reported to the ADF or the TRF, no member shall effect a short sale in a NGM security otherwise than on an exchange at or below the current national best (inside) bid when the current national best (inside) bid is below the preceding national best (inside) bid (referred to as the "bid test").

Since approval, NASD proposed, and the Commission approved, numerous extensions of NASD's short sale rule and it continues to operate on a pilot basis.<sup>9</sup> NASD

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seller. See Rule 200(a) of Regulation SHO under the Act.

<sup>5</sup> See 17 CFR 240.10a-1(a)(1).

<sup>6</sup> NASD has renumbered Rule 3350 and IM-3350 as Rule 5100 and IM-5100, respectively. See Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006) (File No. SR-NASD-2005-087).

<sup>7</sup> Nasdaq Global Market securities were formerly known as Nasdaq National Market securities. See Securities Exchange Act Release No. 54084 (June 30, 2006), 71 FR 38935 (July 10, 2006).

<sup>8</sup> See Securities Exchange Act Release No. 34277 (June 29, 1994), 59 FR 34885 (July 7, 1994) ("Short Sale Rule Approval Order").

<sup>9</sup> See Securities Exchange Act Release No. 53093 (January 10, 2006), 71 FR 2966

has determined to seek an extension of the pilot until December 15, 2007 and to make it effective on a retroactive basis to December 16, 2006. NASD believes that such an extension provides an appropriate continuation of NASD's short sale price test contained in Rule 5100 while the Commission considers whether changes to short sale price tests are necessary in light of current market practices and the purposes underlying short sale regulation.<sup>10</sup>

Proposal to Extend Penny Short Sale Standard

On March 2, 2001, the Commission approved, on a pilot basis,<sup>11</sup> the proposal to establish a \$0.01 above the bid standard for legal short sales in NGM securities as part of the Decimals Implementation Plan for the Equities and Options Markets. This pilot program has been continuously extended since that date and expired on December 15, 2006.<sup>12</sup> NASD now proposes to extend retroactively to December 16, 2006, and prospectively through December 15, 2007, the penny short sale pilot program. Extension of the pilot will allow NASD and the Commission to maintain the status quo until the Commission takes further action on short sale price tests.

If approved, NASD will continue during the pilot period to require NASD

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(January 18, 2006) (Notice of Immediate Effectiveness of SR-NASD-2005-149 extending the Short Sale Rule and continued suspension of Primary Market Maker standards).

<sup>10</sup> See Securities Exchange Act Release No. 54891 (December 7, 2006), 71 FR 75067 (December 13, 2006) (proposed amendments to Regulation SHO and Rule 10a-1 under the Act).

<sup>11</sup> See Securities Exchange Act Release No. 44030 (March 2, 2001), 66 FR 14235 (March 9, 2001) (SR-NASD-2001-09).

<sup>12</sup> See supra note 9.

members seeking to effect “legal” short sales when the current national best (inside) bid is lower than the preceding national best (inside) bid, to execute those short sales at a price that is at least \$0.01 above the current national best (inside) bid in that security. NASD believes that such an extension provides for an appropriate continuation of the current penny short sale standards while the Commission continues to consider the effectiveness of short sale price tests. NASD is not proposing any other changes to the pilot at this time.

NASD is requesting that the Commission accelerate the effectiveness of the proposed rule change and is seeking to make the proposed rule change effective on a retroactive basis to December 16, 2006.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>13</sup> which requires, among other things, that NASD rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. NASD believes it is in the best interest of investors and the public to extend the short sale regulation pilot program. NASD also believes that it is important to continue the pilot while the Commission continues to consider the effectiveness of short sale price tests.<sup>14</sup>

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<sup>13</sup> 15 U.S.C. 78o-3(b)(6).

<sup>14</sup> See supra note 10.

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

NASD does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments were neither solicited nor received.

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

NASD has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act<sup>15</sup> for approving the proposed rule change prior to the 30th day after publication in the Federal Register. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NASD and, in particular, the requirements of Section 15A of the Act and the rules and regulations thereunder.<sup>16</sup> The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing thereof in that accelerated approval will allow the short sale pilot program to operate without interruption.

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:

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<sup>15</sup> 15 U.S.C. 78s(b)(2).

<sup>16</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2007-009 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-2007-009. 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 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-2007-009 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act that the proposed rule change (SR-2007-009) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

Florence E. Harmon  
Deputy Secretary

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