

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52679; File No. SR-NASD-2005-112)

October 26, 2005

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

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 September 20, 2005, the National Association of Securities Dealers, Inc. (“NASD”) filed with the Securities and Exchange Commission (“SEC” or “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.

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

NASD is proposing to amend Rule 3360 to expand the short interest reporting requirements to over-the-counter (“OTC”) equity securities. Below is the text of the proposed rule change. Proposed new language is underlined; proposed deletions are in brackets.

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**3360. Short-Interest Reporting**

(a) Each member shall maintain a record of total "short" positions in all customer and proprietary firm accounts in OTC Equity Securities, securities included in The Nasdaq Stock Market, and in each other security listed on a registered national securities exchange and not otherwise reported to another self-regulatory organization and shall regularly report such

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

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

information to NASD in such a manner as may be prescribed by NASD. [For the purposes of this rule, the term "customer" includes a broker/dealer.] Reports shall be made as of the close of the settlement date designated by NASD. Reports shall be received by NASD no later than the second business day after the reporting settlement date designated by NASD.

(b) For purposes of this Rule[.];

(1) "short" positions to be reported are those resulting from "short sales" as that term is defined in SEC Rule 200 of Regulation SHO, with the exception of positions that meet the requirements of Subsections (e)(1), (6), (7), (8), and (10) of SEC Rule 10a-1 adopted under the Act[.];

(2) the term "customer" includes a broker-dealer; and

(3) the term "OTC Equity Securities" shall mean any equity security that is not listed on The Nasdaq Stock Market or a national securities exchange.

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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**

NASD is proposing to 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.<sup>3</sup> Currently, Rule 3360(a) requires members to maintain a record of total short positions<sup>4</sup> in all customer<sup>5</sup> 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 NASD on a monthly basis. 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, NASD proposes to amend Rule 3360(a) to require that members maintain and report to 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.

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 recognition

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<sup>3</sup> Non-self-clearing broker-dealers generally are considered to have satisfied their reporting requirement by making appropriate arrangements with their respective clearing organizations. See Notice to Members 03-08 (January 2003).

<sup>4</sup> 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 SEC Rule 200 of Regulation SHO, with limited exceptions. SEC 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).

<sup>5</sup> Short sale positions held for other broker-dealers that fall within the definition of short position provided in Rule 3360(b) must be reported under Rule 3360(a), unless these positions already are reported to an SRO. See Notice to Members 03-08 (January 2003).

of the technological and systems changes the proposed rule change may require, the effective date will be 90 days following publication of the Notice to Members announcing Commission approval.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>6</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 that the proposed rule change will increase the information available to public investors and other interested parties related to trading in OTC equity securities.

**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**

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 (ii) as to which the self-regulatory organization consents, the Commission will:

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

- 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**

The Commission notes that the NASD is proposing an implementation period for proposed NASD Rule 3360. Specifically, the Commission notes that the NASD is proposing that it 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 and that the effective date of the proposed rule change will be 90 days following publication of the Notice to Members announcing Commission approval. The Commission specifically requests comment regarding whether this implementation period could be shorter.

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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2005-112 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NASD-2005-112. 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, 100 F Street, NE, Washington, DC 20549. 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 the File Number SR-NASD-2005-112 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>7</sup>

Jonathan G. Katz  
Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).