



August 23, 2005

Mr. Jonathan Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: File No. **SR-NASD-2005-093**

Dear Mr. Katz:

Automated Trading Desk, LLC (“ATD”) appreciates this opportunity to comment on the aforementioned rule filing by the National Association of Securities Dealers (“NASD”). We respectfully request that the Commission exercise its authority to summarily abrogate the re-adopted NASD rule 3370 and, should the NASD elect to re-propose the rule, require that it be done so in accordance with the provisions of the Securities Exchange Act of 1934, as amended (“Exchange ACT”) section 19(b)(1) and reviewed in accordance with Exchange Act section 19(b)(2).

ATD is a technology firm that develops software and systems for the use of its brokerage subsidiaries to trade NASDAQ and listed equities on an automated basis. In addition, ATD provides execution services for a broad spectrum of retail order-sending firms through Automated Trading Desk Financial Services, LLC (“AUTO”). Year-to-date, ATD has accounted for approximately 5% of all NASDAQ daily trades and 3% of all NYSE daily trades.

I. Background of NASD Rule 3370

On November 14, 2003, the SEC approved an amendment to NASD Rule 3370, expanding the scope of the affirmative determination requirements to include short orders from non-NASD member broker/dealers.¹ The initial effective date for the amendment was February 20, 2004.² However, the NASD delayed the effective date of the amendments until April 1, 2004, to allow additional time for members to make the technological changes necessary to comply with these new requirements.³ Beginning April 1, 2004, NASD member broker/dealers were required to make an affirmative determination prior to accepting short sales from non-NASD member broker/dealers. Importantly, NASD Rule 3370(b)(1) did not contain a similar requirement for long sales (“Long Sales”).

Under the original Rule 3370(b)(1)⁴, member firms were required to make an affirmative determination prior to accepting long sales from a “customer.” The definition of “customer,” found in NASD Rule 0120 specifically

¹ NASD Notice to Members 04-03, January 2004, amending NASD Rule 3370(b)(2)(A).

² NASD Notice to Members 04-03, January 2004.

³ NASD Notice to Members 04-08, February 2004.

⁴ NASD Rule 3370(b)(1):

(1) Long Sales

No member or persons associated with a member shall accept a long sale order from any **customer** in any security (except exempt securities other than municipals) unless:

- (A) The member has possession of the security;
- (B) The customer is long in his account with the member;
- (C) The member or person associated with a member makes an affirmative determination that the customer owns the security and will deliver it in good deliverable form within three (3) business days of execution of the order; or

The security is on deposit in good deliverable form with a member of the Association, a member of a national securities exchange, a broker/dealer registered with the Commission, or any organization subject to state or federal banking regulations and that instructions have been forwarded to that depository to deliver the securities against payment.

excludes both brokers and dealers.⁵ Consequently, under the old rule, a member firm could accept long sales from any broker or dealer without performing an affirmative determination.

II. Adoption of Regulation SHO

On June 23, 2004, the Commission adopted certain provisions of a new short sale regulation, designated Regulation SHO.⁶ Regulation SHO defines ownership of securities, specifies aggregation of long and short positions, and requires broker-dealers to mark sales in all equity securities “long,” “short,” or “short exempt.” Regulation SHO also requires short sellers in all equity securities to locate securities to borrow before selling, and also imposes additional delivery requirements on broker-dealers for securities in which a substantial number of failures to deliver have occurred.⁷ Recognizing that Regulation SHO and NASD Rule 3370(b) were duplicative and overlapped, the NASD filed for immediate effectiveness a proposed rule change to repeal NASD Rule 3370(b). See NASD Notice to Members 04-93. The repeal of 3370(b) was effective on January 3, 2005.

III. SR-NASD-2005-093

Now, the NASD has adopted, without comment, a NEW Rule 3370(b), representing that it wished to “re-adopt expressly the affirmative determination requirements as they now relate to member obligations with respect to long sales under Regulation SHO.” This new rule was effective on July 27, 2005 and was published in the Federal Register on August 3, 2005.⁸ In this “re-adopting release” the NASD states that it is re-adopting the rule to clarify that members must make certain affirmative determinations when effecting long sales, setting specific affirmative documentation requirements. However, the new re-adopted rule has a much longer reach than its original counterpart. Now, for purposes of 3370(b) a customer is also defined as a non-NASD member broker or a dealer. For the first time, long sale orders from non-NASD member broker-dealers are subject to the affirmative determination requirements.

IV. Conflict between Regulation SHO and new NASD Rule 3370(b)

Regulation SHO outlines the requirements for broker/dealers to accept both long and short sales. Pursuant to lengthy discussion and comments, the SEC required specific record-keeping requirements to evidence the requisite affirmative determination for short sales. For long sales, a firm must have a reasonable basis to believe that delivery will be made on time by settlement date. However, the SEC did not require a specific record-keeping requirement to evidence the affirmative determination on long sale.

Moreover, the SEC provided a specific exception from the affirmative determination requirement for broker/dealers accepting short sale orders from other broker/dealers.⁹ The old NASD Rule requiring documentation for affirmative determination prior to accepting a short sale order from a non-NASD member broker/dealer was in clear conflict with this new SEC rule.¹⁰ Therefore, the NASD repealed the conflicting provisions of the old NASD rule.

Now, however, the NASD is attempting to add significant new requirements with its “non-controversial” new rule. Specifically, the NASD now requires a firm to evidence its affirmative determination prior to accepting long sales from non-NASD member firms.¹¹ Under this rule, it is significantly easier to accept short sales from non-NASD member broker/dealers than long sales. This appears to be a nonsensical result.

NASD Rule 3370(b)(1) (emphasis added).

⁵ NASD Rule 0120 (g)

⁶ Securities Exchange Release No. 50103 (July 28, 2004), 69 Fed. Reg. 48008 (August 6, 2004).

⁷ Id.

⁸ Securities Exchange Release No. 52131 (July 27, 2005), 70 Fed. Reg. 44707 (August 3, 2005).

⁹ See SEC Rule 203(b)(2)(i).

¹⁰ Old NASD Rule 3370(b)(2)(A).

¹¹ The new rule also imposes significant new order marking requirements where the security for sale is on deposit with a bank or other broker/dealer and appears to prohibit a member firm from accepting a customer long sale order if the member treated the security as a margin security.

V. Conclusion

The NASD requested the SEC make the filing immediately effective, designating this proposed rule change as “non-controversial” under paragraph (f)(6) of Rule 19b-4 under the Exchange Act,¹² rendering the proposal effective upon receipt of its filing with the Commission. We respectfully disagree that this proposal is “non-controversial:

- The re-adopted rule greatly expands the definition of customer to include non-NASD member broker-dealers
- The re-adopted rule imposes obligations not imposed by Regulation SHO with respect to long sales
- The re-adopted rule imposes significant technological burdens and the immediacy of the effectiveness does not allow firms adequate time to make necessary changes to comply
- The re-adopted rule in both original and new form is not consistent with either Regulation SHO or the provisions of the Exchange Act.

ATD believes that consistency of regulation is a core objective of the National Market System. The re-adopted rule does not serve this purpose. Moreover, it conflicts with the SEC’s determination that it is reasonable business practice to rely upon other registered broker-dealers for affirmative determination compliance.

For these reasons, ATD believes that the SEC should abrogate this re-adopted rule, in particular that portion of requiring an affirmative determination prior to the acceptance of a long sale from a non-NASD member broker/dealer. At a minimum, the SEC should require the NASD to re-propose Rule 3370(b) in accordance with the provision of section 19(b)(1), allowing members and others the opportunity to comment fully on the scope and impact of the proposal.

ATD appreciates the opportunity to submit its viewpoints on these matters, and we would be happy to discuss these issues further.

Sincerely,



Shane Swanson
General Counsel and Director of Compliance
Automated Trading Desk, LLC

¹² 17 CFR 240.19b-4