

# Notice to Members

FEBRUARY 2003

## SUGGESTED ROUTING

Legal & Compliance  
Operations

## KEY TOPICS

Rule 3360  
Short Interest Reporting  
Short Sales

## INFORMATIONAL

### Short Interest Reporting

NASD Clarifies the Application of Short Interest Reporting Rule

#### Executive Summary

On January 10, 2003, the Securities and Exchange Commission (SEC) issued an order announcing the immediate effectiveness of amendments to NASD Rule 3360 (Rule 3360 or the Rule) that clarify that short sale positions held by members for other broker/dealers must be reported under Rule 3360(a), unless these positions already are reported to a self-regulatory organization (SRO).<sup>1</sup> Attachment A contains the text of the amendments.

#### Questions/Further Information

Questions regarding this *Notice* may be directed to the NASD Office of General Counsel, Regulatory Policy and Oversight, at 202-728-8071, or Jocelyn Rena, Market Regulation Department, at 240-386-5091.

#### Background And Discussion

NASD Rule 3360(a) requires members to maintain a record of total short positions in all customer and proprietary firm accounts in NASDAQ securities (and listed securities if not reported to another SRO) and requires members to report such information to NASD on a monthly basis. 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 3b-3 under the Securities Exchange Act of 1934 (Exchange Act),<sup>2</sup> with limited exceptions.

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NASD staff has received inquiries from members concerning the application of Rule 3360 in light of the definition of "customer" in NASD Rule 0120(g). Specifically, Rule 0120(g) provides that the term "customer" does not include a broker or dealer, unless the context otherwise provides. As a result, members have inquired whether short sale positions of accounts held for other broker/dealers are required to be reported under Rule 3360.

In response to such inquiries, the staff has advised members that 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. This long-standing position is consistent with that taken by other SROs with respect to their short interest reporting requirements.<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. In addition, because non-member broker/dealers are not subject to NASD rules and, therefore, are not required to comply with Rule 3360, it is particularly important that members understand that they must report such positions under the Rule, unless these positions are otherwise reported to an SRO. Accordingly, to eliminate all ambiguity, NASD has amended Rule 3360(a) to clarify that short sale positions of accounts held for other broker/dealers must be reported, unless the position is otherwise reported to an SRO.

## Endnotes

- 1 Exchange Act Release No. 47158 (January 10, 2003) (File No. SR-NASD-2002-178), 68 *Federal Register* 2382 (January 16, 2003).
- 2 Rule 3b-3 under the Exchange Act provides, in part, the following: "The term 'short sale' means 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."
- 3 See Exchange Act Release No. 35287 (January 27, 1995), approving amendments to short interest reporting rules of NASD, New York Stock Exchange, Philadelphia Stock Exchange, Pacific Stock Exchange, Boston Stock Exchange, Chicago Stock Exchange, and Chicago Board Options Exchange, to ensure uniform short position reporting across each of the SROs.

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## ATTACHMENT A

New language is underlined; deletions are in brackets.

### 3360. Short-Interest Reporting

(a) Each member shall maintain a record of total "short" positions in all customer and proprietary firm accounts in 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 information to [the Association] NASD in such a manner as may be prescribed by [the Association] 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 [the Association] NASD. Reports shall be received by [the Association] NASD no later than the second business day after the reporting settlement date designated by [the Association] NASD.

(b) No change.