

440B.20, and the ITS Plan.<sup>230</sup> Nasdaq NMS and Nasdaq SmallCap securities are also currently subject to marking requirement pursuant to NASD Rule 4991. Proposed Regulation SHO, Rule 201 would simply codify current industry practice for exchange-listed and Nasdaq securities into a uniform marking requirement.

Proposed Regulation SHO, Rule 201 would also apply to securities not currently covered under Rule 10a-1. Proposed Regulation SHO's marking requirement would apply to all sell orders of equity securities registered under Section 12(g) of the Exchange Act, including, exchange-listed, Nasdaq NMS and SmallCap, OTCBB, Pink Sheets, and any other securities registered under 12(g).

As a result, the collection of information under proposed Regulation SHO is the requirements that all sell orders of equity securities registered under the Exchange Act be marked "long," "short," or "short exempt."

#### *B. Proposed Use of Information*

The information required by proposed Regulation SHO is necessary for the execution of the Commission's mandate under the Exchange Act to prevent fraudulent, manipulative and deceptive acts and practices by broker-dealers. The purpose of the information collected is to enable a national securities exchange or national securities association to monitor whether a person effecting a short sale covered by proposed Regulation SHO is acting in accordance with Regulation SHO. In particular, requiring each order be marked either "long," "short," or "short exempt" would aid in ensuring compliance with proposed Rules 201 and 203. Moreover, the "short exempt" category would aid in surveillance for compliance with the proposed limited exception from the bid test for riskless principal transactions.

#### *C. Respondents*

The marking provision in Rule 201 would apply to all 6,752 active brokers or dealers that are registered with the Commission. The Commission has considered each of these respondents for the purposes of calculating the reporting burden under proposed Regulation SHO.

#### *D. Total Annual Reporting and Recordkeeping Burdens*

Proposed Rule 201 of Regulation SHO would require all brokers or dealers to mark all sell orders appropriately as "long," "short," or "short exempt" for

all securities registered under Section 12(g) of the Exchange Act. We assume that all of the approximately 6,752 registered broker-dealers effect sell orders in securities covered by proposed Regulation SHO. For purposes of the Paperwork Reduction Act, the Commission staff has estimated that a total of 1,164,755,007 trades are executed annually.<sup>231</sup>

This is an average of approximately 172,505 annual responses by each respondent. Each response of marking orders "long," "short," or "short exempt" takes approximately .000139 hours (.5 seconds) to complete.<sup>232</sup> Thus, the total approximate estimated annual hour burden per year is 161,900 burden hours (1,164,755,007 responses @ 0.000139 hours/response). A reasonable estimate for the paperwork compliance for the proposed rules for each broker-dealer is approximately 24 burden hours (172,505 responses @ .000139 hours/response) or (a total of 161,900 burden hours / 6,752 respondents).

#### *E. Request for Comment*

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609, with reference to File No. S7-23-

03. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7-23-03, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services, 450 Fifth Street, NW., Washington, DC 20549-0609. As OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

#### **XIX. Consideration of Proposed Regulation SHO's Costs and Benefits**

The Commission is considering the costs and the benefits of proposed Regulation SHO, which would replace Rules 3b-3, 10a-1, and 10a-2, as well as proposed amendments to Rule 105 of Regulation M. The Commission is sensitive to these costs and benefits, and encourages commenters to discuss any additional costs or benefits beyond those discussed here. In particular, the Commission requests comment on the potential costs for any modification to both computer systems and surveillance mechanisms and for information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposals for registrants, issuers, investors, brokers or dealers, other securities industry professionals, regulators, and others. Commenters should provide analysis and data to support their views on the costs and benefits associated with proposed Regulation SHO and proposed amendments to Rule 105 of Regulation M.

#### *A. Proposed Rule 201: Price Test and Marking Requirements*

##### *1. The Proposed Uniform Bid Test*

###### *a. Benefits*

We believe that the proposed bid test would simplify the application of the price test and provide flexibility to those seeking to sell short, especially in the current decimals environment. This increased ability to execute short sales in securities currently subject to Rule 10a-1 may lead to a reduction in transaction costs. Moreover, we believe that a uniform rule is preferable to applying different tests in different markets, which can require market participants to apply different rules to different securities, and thus may also reduce transaction costs. Also, there would be benefits associated with systems and surveillance mechanisms

<sup>231</sup> In calendar year 2002 there were approximately 545,556,000 trades on the NYSE, and 607,824,500 on Nasdaq NMS and Nasdaq SmallCap, and 11,374,507 in OTCBB, Pink Sheet, and other (gray market) securities.

<sup>232</sup> We believe it is reasonable that it would only take 0.5 seconds or .00039 hours to mark an order "long," "short," or "short exempt."

<sup>230</sup> See Section IX.A regarding Marking Orders.