

enable FICC to act quickly to protect itself and its members and participants and which will better enable FICC to safeguard the securities and funds in its custody or control or for which it is responsible.

*(B) Self-Regulatory Organization's Statement on Burden on Competition*

FICC does not believe that the proposed rule change will have any impact or impose any burden on competition.

*(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

Written comments relating to the proposed rule change have not yet been solicited or received. FICC will notify the Commission of any written comments received by FICC.

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

Within thirty-five 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 ninety 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:

(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**

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-FICC-2005-02 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-FICC-2005-02. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of FICC and on FICC's Web site at <http://www.ficc.com>. 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-FICC-2005-02 and should be submitted on or before February 18, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>10</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. E5-316 Filed 1-27-05; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-51075; File No. SR-NASD-2004-179]

**Self Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Amendments to Section 13 of Schedule A to the NASD By-Laws (Review Charge for Advertisement, Sales Literature, and Other Such Material Filed With or Submitted to NASD)**

January 24, 2005.

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 December 8, 2004, 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. NASD has designated the proposed rule change as "establishing or changing a due, fee or other charge" under section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. 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 Section 13 of Schedule A to the NASD By-Laws ("Section 13") governing the review charges for advertisements, sales literature, and other such material filed with or submitted to NASD's Advertising Regulation Department (the "Department"). Below is the text of the proposed rule change. Proposed new language is *italicized*; proposed deletions are in [brackets].

\* \* \* \* \*

SCHEDULE A TO NASD BY-LAWS

\* \* \* \* \*

Section 13—Review Charge for Advertisement, Sales Literature, and Other Such Material Filed or Submitted

There shall be a review charge for each and every item of advertisement, sales literature, and other such material, whether in printed, video or other form, filed with or submitted to NASD, except for items that are filed or submitted in response to a written request from NASD's Advertising Regulation Department issued pursuant to the spot check procedures set forth in NASD's Rules as follows: (1) For printed material reviewed, [\$75.00] *\$100.00*, plus \$10.00 for each page reviewed in excess of 10 pages; and (2) for video or audio media, [\$75.00] *\$100.00*, plus \$10.00 per minute for each minute of tape reviewed in excess of 10 minutes.

Where a member requests expedited review of material submitted to the Advertising Regulation Department there shall be a review charge of \$500.00 per item plus \$25 for each page reviewed in excess of 10 pages. Expedited review shall be completed within three business days, not

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(3).

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

including the date the item is received by the Advertising Regulation Department, unless a shorter or longer period is agreed to by the Advertising Regulation Department. The Advertising Regulation Department may, in its sole discretion, refuse requests for expedited review.

\* \* \* \* \*

## 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

The Department is responsible for ensuring that all NASD member firms' communications with the public are fair, balanced, and not misleading. The mission of the Department, as provided in Rule 2210 and the Interpretations issued thereunder, is to ensure that all member communications with the public, including advertisements, sales literature, and correspondence, are based on principles of fair dealing and good faith, are fair and balanced, and provide a sound basis for evaluating the facts in regard to any particular security or type of security, industry, or service. Among other things, the Department reviews member communications with the public for false, exaggerated, unwarranted, misleading statements or claims, and exaggerated or unwarranted claims, opinions or forecasts.

The purpose of the proposed rule change is to amend Section 13 to raise the fee that may be charged by the Department for reviewing each and every item of advertisement, sales literature, and other such material, whether in printed, video or other form, filed with or submitted to NASD (except for items that are filed or submitted in response to a written request from the Department issued pursuant to the spot check procedures set forth in NASD's Rules).

Despite annual cost increases, NASD has not adjusted the charge to members for submitting advertisements, sales

literature, and other such material to the Department since 1999. A recent analysis of the Department's operating and technology costs showed that NASD's costs have increased significantly due to increased responsibilities, economic conditions and the need for enhanced technology. Based on this review, NASD proposes to raise the fee charged for the review of printed material and video or audio media from \$75.00 to \$100.00 to offset these cost increases.

#### 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of section 15A of the Act<sup>5</sup> in general and with section 15A(b)(5) of the Act<sup>6</sup> in particular, which requires, among other things, that NASD's rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that NASD operates or controls. NASD believes that the rule change is consistent with section 15A(b)(5) of the Act in that the proposed review charge is reasonable based on NASD's costs and equitably allocated among all members that file or submit advertisements, sales literature, and other such material, whether in printed, video or other form.

### 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, as amended.

### 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

The foregoing rule change has become effective upon filing with the Commission, pursuant to section 19(b)(3)(A)(ii) of the Act<sup>7</sup> and paragraph (f)(2) of Rule 19b-4 thereunder,<sup>8</sup> because it establishes or changes a due, fee, or other charge imposed by NASD. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the

Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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:

### 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-2004-179 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-179. 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 the filing will also 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-2004-179 and should be submitted on or before February 18, 2005.

<sup>5</sup> 15 U.S.C. 78o-3.

<sup>6</sup> 15 U.S.C. 78o-3(b)(5).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>9</sup>

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. E5-320 Filed 1-27-05; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51048; File No. SR-NYSE-2004-70]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto by the New York Stock Exchange, Inc. To Amend Exchange Rule 104 to Require Specialists To Yield Orally-Consummated Proprietary Trades to Later-Arriving System Orders

January 18, 2005.

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 December 13, 2004, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in items I, II, and III below, which items have been prepared by the Exchange. On January 7, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The Exchange proposes to amend NYSE Rule 104, Dealings by Specialists, to require that in transactions between a specialist and a contra order that have been orally agreed to but not yet reported, the specialist must yield to any system orders that enter the specialist’s book and can take the specialist’s position in the orally-consummated transaction.

The text of the proposed amendments is set forth below. Italics indicate additions.

#### Rule 104

##### Dealings by Specialists

\* \* \* \* \*

##### Supplementary Material

##### Functions of Specialists

.10

\* \* \* \* \*

(11)(i) *Notwithstanding the ability of a specialist to trade for his or her dealer account, dealer transactions by a specialist that have not yet been reported by the specialist must yield to any order or orders received through an Exchange order delivery system after the oral commitment to transact, provided that such order or orders are capable of trading in place of the specialist in the consummated transaction.*

(ii) *The provisions of subparagraph (i) above shall not apply if the specialist’s trade for his or her dealer account:*

(a) *Is to correct an error on a previously reported transaction;*

(b) *Is executed in satisfaction of the specialist’s obligation to give up a trade to an agency order;*

(c) *Is a non-regular way trade between the specialist and a Crowd broker;*

(d) *Is the result of the election of “stop” orders as required in Rule 123A.40;*

(e) *Is in connection with the execution of “stop” orders or CAP orders executed as part of the opening of trading;*

(f) *Participates on the closing transaction in a security to offset a market-at-the-close and/or limit-at-the-close order imbalance; or*

(g) *Is a report of principal participation on a commitment sent to another market center through the ITS system.*

(iii) *Transactions by a specialist pursuant to subparagraph (ii) above must be documented and reported to the Exchange in such manner and within such time as the Exchange shall designate.*

\* \* \* \* \*

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

In its filing with the Commission, the Exchange 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. The Exchange 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

The Exchange proposes to amend NYSE Rule 104 to provide that where a specialist has completed, but not yet reported, a transaction as principal with an order in the book or in the crowd, the specialist must yield to any order received through SuperDOT® that could take the specialist’s place in the unreported principal transaction.

Exchange rules provide that specialists must always yield to customer orders on the book when trading in the specialist’s specialty securities for the dealer account. When no other interest is present on the book, specialists may trade for their own account with interests represented on the book or by a broker in the crowd; in such situations, the specialist may trade either fully or in parity with other contra interests represented in the crowd, as the case may be. The Exchange proposes to amend NYSE Rule 104.10 to include new section (11) to require that, notwithstanding the ability of a specialist to trade as principal with either a system order or a broker in the crowd, if a marketable order arrives on the book before the report of the specialist’s trade as principal is completed, the specialist must yield to such order. Where the specialist is required to yield, the customer whose order entered the book would be reported as the contra party for the trade instead of the specialist.

The proposed rule would provide seven limited exceptions, representing situations in which it would continue to be appropriate for the specialist to act as principal, notwithstanding the presence of a new customer order on the book. These exceptions are:

(1) Corrections of bona fide specialist errors;

(2) Trading in satisfaction of the specialist’s obligation to give up a trade to an agency order;

(3) Reports of non-regular-way principal-to-crowd transactions;

(4) Principal participation on stop order electing transactions;

(5) Principal participation in connection with opening transactions;

(6) Closing transactions involving market-on-close (“MOC”) imbalances; and

(7) Report of principal participation on a commitment sent to another market

<sup>9</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Form 19b-4 dated January 7, 2004 (“Amendment No. 1”). In Amendment No. 1, the NYSE changed the basis under which the proposed rule change was filed from section 19(b)(3) of the Act to section 19(b)(2) of the Act.