

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 the ISE. 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-ISE-2004-01 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁹

Jill M. Peterson,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50335; File No. SR-NASD-2004-136]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Implementation Date of Notice to Members 04-50 (Treatment of Commodity Pool Trail Commissions Under Rule 2810)

September 9, 2004.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 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 constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of NASD under Section 19(b)(3)(A)(i) of the Act³

and Rule 19b-4(f)(1) thereunder,⁴ which renders the proposal effective upon receipt of this filing by 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 filing with the Commission a proposed rule change to delay the implementation date of *Notice to Members* 04-50 ("NtM 04-50") until October 12, 2004.

No changes to the text of NASD rules are required by this proposed rule change.

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

On July 13, 2004, NASD filed *NtM* 04-50 with the SEC. In *NtM* 04-50, NASD announced that it was no longer going to exclude the payment of any trail commissions for commodity pool direct participation programs ("DPPs") from the underwriting compensation limits of Rule 2810 ("Direct Participation Programs" or "DPP Rule"). *NtM* 04-50 announced that, "effective immediately, in determining whether to issue a 'no objections' opinion in connection with a commodity pool DPP filed with the [NASD Corporate Financing] Department under Rule 2810, NASD staff will consider, among other things, whether the level of underwriting compensation, including the types of trail commission previously excluded, exceeds the 10% limitation in the DPP Rule." On July 22, 2004, the SEC published the Notice of Filing and

Immediate Effectiveness of the *NtM* 04-50.⁵

In view of certain comments submitted to the SEC in response to SR-NASD-2004-108,⁶ NASD is delaying the implementation date of *NtM* 04-50 until October 12, 2004. Thus, the policy announced in *NtM* 04-50 will not apply to commodity pool DPPs filed with the NASD Corporate Financing Department before October 12, 2004.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,⁷ which requires, among other things, that NASD's 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 is in the public interest and will benefit investors in commodity pool DPPs by limiting the compensation that can be paid to members for selling commodity pool DPPs, and servicing the accounts that hold such investments, to the same amounts that apply to all other DPP investments. At the same time, the proposed rule change also provides additional time for commodity pool DPPs to adjust to the policy of *NtM* 04-50.

(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

NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with

⁵ Release No. 34-50065 (July 22, 2004), 69 FR 45870 (July 30, 2004) [File No. SR-NASD-2004-108] ("SR-NASD-2004-108").

⁶ Eight comment letters were submitted to the Commission during the comment period. The NASD responded to these comment letters on August 31, 2004. These comment letters, the NASD response to these comment letters, and comment letters received after the end of the comment period may be examined at the places specified in Item IV below.

⁷ 15 U.S.C. 78o-3(b)(6).

⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(1).

respect to the meaning, administration, or enforcement of an existing rule of NASD under Section 19(b)(3)(A)(i) of the Act⁸ and Rule 19b-4(f)(1) thereunder,⁹ which renders the proposal effective upon receipt of this filing by the Commission.

At any time within 60 days of the filing of such 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. Please include File Number SR-NASD-2004-136 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-2004-136. 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 the 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 File Number SR-NASD-2004-136 and should be submitted on or before October 7, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁰

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-50337; File No. SR-NYSE-2004-06]

Self-Regulatory Organizations; Order Granting Approval To Proposed Rule Change and Amendment Nos. 1 and 2 Thereto by the New York Stock Exchange, Inc. Relating to Amendments to Exchange Rule 104 and Rule 123

September 9, 2004.

On February 6, 2004, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act") and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Rule 104.10 (Dealings by Specialists) to provide that customers may limit the ability of specialists to trade along with their orders or to invoke precedence based on size when the specialist is liquidating a position in its specialty security for its dealer account, and to make a corresponding change to NYSE Rule 123 (Records of Orders) concerning record keeping. On April 5, 2004, the Exchange amended the proposed rule change.³ On July 14, 2004, the Exchange again amended the

proposed rule change.⁴ The proposed rule change, as amended, was published for comment in the **Federal Register** on August 2, 2004.⁵ The Commission received no comments on the proposal. This order approves the proposed rule change, as amended.

The Commission finds that the proposed rule change is consistent with the requirements of Section 6 of the Act,⁶ applicable to a national securities exchange.⁷ In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,⁸ which requires, among other things that an exchange have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

Currently, when a specialist liquidates a position in his or her specialty security, the specialist is permitted to trade on parity with the crowd or may invoke precedence based on size.⁹ The Exchange believes that there may be circumstances in which a customer will wish to preclude a specialist from trading on parity or invoking precedence based on size. Accordingly, the Exchange has proposed to amend NYSE Rule 104.10(6)(i) to include new paragraph (C) to provide that transactions by a specialist for his or her dealer account in liquidating or decreasing a position in a specialty security must yield to a customer's order in the crowd upon the request of the member representing such order, where such request has been documented as a term of the order, to the extent of the volume of such order

⁴ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division, Commission, dated July 13, 2004 and accompanying Form 19b-4 ("Amendment No. 2"). In Amendment No. 2, NYSE amended the proposed rule text and added additional explanatory material to clarify the proposal. Amendment No. 2 replaced the Exchange's original filing and Amendment No. 1 thereto in their entirety.

⁵ See Securities Exchange Act Release No. 50090 (July 27, 2004), 69 FR 46197.

⁶ See 15 U.S.C. 78f.

⁷ In approving this proposed rule change, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f(b)(5).

⁹ Specialist dealer transactions when liquidating a position are subject to specific affirmative market-making standards and review. NYSE Rule 104 requires that specialists' proprietary dealings be reasonably necessary to permit the specialist to maintain a fair and orderly market. In addition, specialists are required to obtain Floor Official approval for any liquidating sale transactions on a direct minus tick or purchase transactions on a direct plus tick.

¹⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation ("Division"), Commission, dated April 2, 2004 and accompanying Form 19b-4 ("Amendment No. 1"). In Amendment No. 1, the NYSE clarified that, under the proposed rule change, customers may limit specialists from trading along with their orders and from invoking precedence based on size.

⁸ 15 U.S.C. 78s(b)(3)(A)(i).

⁹ 17 CFR 240.19b-4(f)(1).