

The Commission notes the objections of certain commenters to the \$5 million minimum equity requirement. The Commission believes that the requirement circumscribes the number of accounts able to participate and adds safety in that such accounts are more likely to be of significant financial means and investment sophistication.

Finally, the Commission notes that several commenters recommended expanding the products eligible for portfolio margining. The Exchange's proposed rule limits the instruments eligible for portfolio margining to listed products based on broad-based US securities indices, which tend to be less volatile than narrow-based indices and non-index equities. The Commission believes this limitation is appropriate for the pilot program, which should serve as a first step toward the possible expansion of portfolio margining to other classes of securities.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>45</sup> that the proposed rule change (File No. SR-CBOE-2002-03), as amended, is approved on a pilot basis to expire on July 31, 2007.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>46</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-52043; File Nos. SR-DTC-2005-04, SR-FICC-2005-10, and SR-NSCC-2005-05]

#### Self-Regulatory Organizations; The Depository Trust Company, Fixed Income Clearing Corporation, and National Securities Clearing Corporation; Notice of Filing of Proposed Rule Changes To Establish a Fine for Members Failing To Conduct Connectivity Testing

July 15, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on May 13, 2005, The Depository Trust Company ("DTC"), on May 3, 2005, the Fixed Income Clearing Corporation

("FICC"), and on May 4, 2005, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule changes described in Items I, II, and III below, which items have been prepared primarily by DTC, FICC, and NSCC. On June 7, 2005, NSCC amended its proposed rule change.<sup>2</sup> The Commission is publishing this notice to solicit comments on the proposed rule changes from interested parties.

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

DTC, FICC, and NSCC are seeking to establish a fine for members who fail to conduct connectivity testing for business continuity purposes.

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

In its filing with the Commission, DTC, FICC, and NSCC included statements concerning the purpose of and basis for the proposed rule changes and discussed any comments they received on the proposed rule changes. The text of these statements may be examined at the places specified in Item IV below. DTC, FICC, and NSCC have prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.<sup>3</sup>

#### (A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of these filings is to modify the rules of DTC, FICC, and NSCC to provide that DTC, FICC, and NSCC may impose a fine on any member that is required to conduct connectivity testing for business continuity purposes and fails to do so.

In the aftermath of September 11, 2001, and in conjunction with a financial industry white paper, DTC, FICC, and NSCC require connectivity testing for critical ("Top Tier") members.<sup>4</sup> The criteria used by DTC,

FICC, and NSCC to identify their respective Top Tier members were revenues, clearing fund contributions, settlement amounts, and trading volumes. Connectivity testing for the Top Tier members was initiated on January 1, 2004. Due to the critical importance of being able to assess whether a Top Tier member has sufficient operational capabilities, DTC, FICC, and NSCC have determined that they need the ability to fine any Top Tier member that does not test.<sup>5</sup>

Currently, each member of DTC, FICC, and NSCC that is designated as Top Tier is advised of this status and is provided with information on the testing requirements. Under DTC, FICC, and NSCC's current procedures, if testing is not completed by a Top Tier member by the end of June, a reminder notice is sent to the member. Thereafter, another reminder notice is sent in October and, if necessary, again in December.

The reminder notice sent in December would advise that if testing is not completed by December 31, a fine of \$10,000 will be imposed. These fines would be collected from members in January of the following year. The Membership and Risk Management Committee would be notified of all members that were fined for failing to complete connectivity testing.

In the event that any member fails to complete connectivity testing for two successive years, the fine that would be imposed at that time would be \$20,000. Failure to complete testing for more than two successive years would result

FICC, and NSCC, and others in the financial industry to manage business continuity capabilities. DTC, FICC, and NSCC developed their testing of Top Tier firms based on the guidelines outlined in the white paper.

<sup>5</sup> Pursuant to DTC Rule 2, "Participants and Pledges," participants must furnish, upon DTC's request, information sufficient to demonstrate operational capability. In addition, DTC Rule 21, "Disciplinary Sanctions," allows DTC to impose fines on participants for any error, delay or other conduct detrimental to the operations of DTC.

Pursuant to GSD Rule 3, "Responsibility, Operational Capability, and Other Membership Standards of Comparison-Only Members and Netting Members," the GSD may require members to fulfill operational testing requirements as the GSD may at any time deem necessary. Pursuant to MBSD Rule 1, Section 3 of Article III, all MBSD applicants and members agree to fulfill operational testing requirements and related reporting requirements that may be imposed to ensure the continuing operational capability of the applicant.

Pursuant to NSCC Rule 15, "Financial Responsibility and Operational Capability," members must furnish to NSCC adequate assurances of their financial responsibility and operational capability as NSCC may at any time deem necessary. In addition, NSCC Rule 48, "Disciplinary Procedures", allows NSCC to impose a fine on participants for any error, delay, or other conduct that is determined to be detrimental to the operations of NSCC.

12, 1997) (discussing in Part II.A. the use of TMS versus other pricing models).

<sup>45</sup> 15 U.S.C. 78s(b)(2).

<sup>46</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> The NSCC amendment proposes to amend NSCC Rule 48, Section 1, to increase the maximum disciplinary fine for a single offense from \$10,000 to \$20,000.

<sup>3</sup> The Commission has modified the text of the summaries prepared by DTC, FICC, and NSCC.

<sup>4</sup> The Federal Reserve, Office of the Comptroller of the Currency, and the Commission issued "Interagency Paper on Sound Practices to Strengthen the Resilience of the U.S. Financial System." [68 FR 17809 (April 11, 2003)]. This document provided guidelines that required core clearing and settlement organizations, such as DTC,

in disciplinary action, including potential termination of membership.

DTC, FICC, and NSCC believe that the proposed rule changes are consistent with the requirements of Section 17A of the Act<sup>6</sup> and the rules and regulations thereunder because the implementation of the proposals should help DTC, FICC, and NSCC to enforce compliance with their connectivity testing rules for business continuity purposes and as a result should better enable them to ensure the safeguarding of securities and funds which are in their custody or control.

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

DTC, FICC, and NSCC do not believe that the proposed rule changes 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*

DTC, FICC, and NSCC have not solicited or received any written comments on these proposals. DTC, FICC, and NSCC will notify the Commission of any written comments they receive.

**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 changes are 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-DTC-2005-04, SR-FICC-2005-10, and SR-NSCC-2005-05 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-0609.

All submissions should refer to File Number SR-DTC-2005-04, SR-FICC-2005-10, and SR-NSCC-2005-05. These file numbers 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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, 100 F Street, NE, Washington, DC 20549. Copies of such filings also will be available for inspection and copying at the principal offices of DTC, FICC, and NSCC and on DTC's Web site at <http://www.dtc.org>, and on FICC's Web site at <http://www.ficc.com>, and on NSCC's Web site at <http://www.nsc.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-DTC-2005-04, SR-FICC-2005-10, and SR-NSCC-2005-05 and should be submitted on or before August 5, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**J. Lynn Taylor,**

*Assistant Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-52045; File No. SR-NASD-2005-023]

**Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Representation in Arbitration and Mediation**

July 15, 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 the National Association of Securities Dealers, Inc. ("NASD"), through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution"), filed with the Securities and Exchange Commission ("SEC" or "Commission"), on February 9, 2005 and on July 8, 2005 (Amendment No. 1), the proposed rule change as described in items I, II, and III below, which items have been prepared by NASD Dispute Resolution. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**1. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

NASD Dispute Resolution is proposing to amend Rule 10316 and to adopt Rule 10408 of the NASD Code of Arbitration Procedure ("Code"), to address attorney representation in arbitration and mediation.<sup>3</sup> Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

\* \* \* \* \*

10316. Representation *in Arbitration* [by Counsel]

*(a) Representation by a Party*

*Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the*

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

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

<sup>3</sup> These provisions will be renumbered as appropriate following Commission approval of the following proposed rule changes published on June 23, 2005: Revision of Customer Portion of Code of Arbitration Procedure, Exchange Act Rel. No. 51856 (June 15, 2005), 70 FR 36442 (June 23, 2005) (SR-NASD-2003-1580); Revision of Industry Portion of Code of Arbitration Procedure, Exchange Act Rel. No. 51857 (June 15, 2005), 70 FR 36430 (June 23, 2005) (SR-NASD-2004-011); and the NASD Arbitration Rules for Mediation Proceedings, Exchange Act Rel. No. 51855 (June 15, 2005), 70 FR 36440 (June 23, 2005) (SR-NASD-2004-013).

<sup>6</sup> 15 U.S.C. 78q-1.

<sup>7</sup> 17 CFR 200.30-3(a)(12).