will help to allocate to those specialists and ROTs transacting in options on the iShares Lehman U.S. Aggregate Bond Fund, a fair share of the related costs of offering such options. Accordingly, the Exchange believes that the proposed fee is reasonable.

2. Basis

The Exchange believes the proposed rule change is consistent with Section 6 of the Act,[6] in general, and with Section 6(b)(4) of the Act,[7] in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members.

B. Self-Regulatory Organization's Statement on Burden on Competition

Amex does not believe that the proposed rule change will impose any burden on competition.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The foregoing proposed rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[8] and subparagraph (f)(2) of Rule 19b–4[9] thereunder, because it establishes or changes a due, fee, or other charge.

At any time within 60 days of October 1, 2003, 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.[10]

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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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 such filing will also be available for inspection and copying at the principal office of Amex. All submissions should refer to File No. SR-Amex-2003–85 and should be submitted by November 21, 2003.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[11]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–27462 Filed 10–30–03; 8:45 am]

BILLING CODE 8010–01–P

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78s(b)(3)(A)(ii).

[9] 17 CFR 240.19b–4(f)(2).

[10] *See* 15 U.S.C. 78s(b)(3)(C).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48702; File No. SR–CBOE–2003–36])

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Chicago Board Options Exchange, Inc. To Adopt a New Rule Relating to Trading Crowd Space Dispute Resolution Procedures

October 27, 2003.

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 October 20, 2003, the Chicago Board Options Exchange, Inc. (''CBOE'' 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 CBOE. 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

The CBOE proposes to adopt new CBOE Rule 24.21, ''Index Crowd Space Dispute Resolution Procedures,'' which establishes guidelines and procedures for resolving disputes between members over the right to occupy a particular space in an index option trading crowd. In addition, the CBOE proposes to revise its fee schedule to include a proposed trading crowd dispute resolution fee.

The text of new CBOE Rule 24.21, and the revised fee schedule, appear below. Proposed new language is *italicized.*

* * * * *

Chicago Board Options Exchange, Incorporated

Rules

CHAPTER XXIV

Index Options

* * * * *

Index Crowd Space Dispute Resolution Procedures

Rule 24.21

This Rule applies only to members who trade OEX, SPX, DJX and DIA options on the floor of the Exchange, or who trade any other index option not located at a station shared with equity options as determined by the appropriate Floor Procedure Committee.

(a) *Crowd Space Disputes Subject to Resolution.* A member may request the assistance of the Exchange to resolve a dispute over the ability to use a trading space in an index option trading crowd where the space is currently being occupied by another member, or where the space has been abandoned or unoccupied, and more than one member now wish to trade there.

(b) *Requesting the Assistance of the Exchange. A member shall request the assistance of the Exchange in resolving a crowd space dispute by calling the Office of the Secretary of the Exchange, which shall promptly refer the request in writing to the Chairman of the appropriate Floor Procedure Committee that governs trading in the trading station where the dispute has arisen (hereafter ''the Chairman'').*

(c) *Mediation by the Chairman. When the Chairman receives the request from the Office of the Secretary, the Chairman or an individual designated by the Chairman (hereafter ''the Chairman's designee'') shall attempt to mediate an amicable resolution of the dispute among the members involved. All members involved in the dispute shall cooperate with the Chairman or the Chairman's designee in his efforts to mediate.*

(d) *Temporary Resolution. If the Chairman, the Chairman's designee, or two Floor Officials determine that the maintenance of a fair and orderly market requires an immediate temporary resolution of a crowd space dispute, the Chairman, the Chairman's designee, or two Floor Officials in consultation with the Chairman or the Chairman's designee may instruct the*

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

parties to the dispute on where to stand until the outcome of further proceedings under this Rule. This temporary resolution may be revised by the individual(s) issuing it, but is otherwise not subject to appeal.

(e) *Hearing Requests and Hearing Fee. If the Chairman or the Chairman's designee is unable to mediate an amicable resolution of the dispute among the members involved, any of them may request a hearing in the dispute by completing and submitting a Hearing Request form to the Office of the Secretary along with the payment of a Hearing Fee. The amount of the Hearing Fee shall be a minimum of one thousand dollars ($1,000) per member, and may be greater under certain circumstances set forth in this subsection. The Exchange may increase the Minimum Hearing Fee periodically pursuant to Exchange Rule 2.22 in order to maintain the Minimum Hearing Fee at a level that the Exchange deems sufficient to encourage amicable resolution of crowd space disputes. Upon receipt of the Hearing Request form and Hearing Fee, the Office of the Secretary shall instruct the Exchange to collect the appropriate Hearing Fee from each additional party to the dispute pursuant to Exchange Rule 3.23. For any party who has previously been a party to a crowd dispute resolution hearing within the past twelve months, the Hearing Fee that party will pay for being a party to a subsequent hearing within twelve months of the last hearing will be twice the Hearing Fee that party paid for the previous hearing. After the hearing on the dispute is held and all rights of appeal are exhausted, only the prevailing party in the dispute shall obtain a refund of the Hearing Fee from the Exchange. A prevailing party who becomes a party in a subsequent hearing within twelve months of the hearing in which he prevailed shall not pay a higher Hearing Fee because of the hearing in which he prevailed.*

(f) *Limitations on Hearing Requests. No member may request a hearing involving the same parties that participated in a prior hearing unless the requesting member makes an adequate preliminary showing in his subsequent hearing request that new circumstances warrant another hearing involving the same parties, based upon the Crowd Dispute Resolution Guidelines contained in this Rule. The Chairman shall exercise sole and final judgment as to the adequacy of this preliminary showing.*

(g) *CSDR Panel. After the member submits his Hearing Fee to the Office of the Secretary, the Chairman shall select a Crowd Space Dispute Resolution Panel (''Panel'') composed of seven Exchange members to hear and resolve the dispute. The Chairman shall select two members of the Panel from members of the Chairman's Floor Procedure Committee (other than the Chairman himself), and four members of the Panel from members of the Exchange who are not members of the Chairman's Floor Procedure Committee. Two of the latter four members of the Panel shall be members who trade in the trading station where the dispute has arisen and two shall be members who do not trade in the trading station where the dispute has arisen. In selecting the Panel members who are not members of the Chairman's Floor Procedure Committee, preference will be given to members who serve on another Floor Procedure Committee or a Market Performance Committee. Notwithstanding such preference, the selection of all Panel members will be according to the sole discretion of the Chairman. The seventh Panel member shall be the Chairman of the Floor Officials Committee, or another member of the Floor Officials Committee designated by the Chairman of the Floor Officials Committee. The Chairman shall also designate the Panel member who shall serve as the Panel Chairman. In the event the Chairman must recuse himself from the dispute (see subsection (h) below), then the Vice Chairman of the Chairman's Committee will designate the Panel and the Panel Chairman. If the Vice-Chairman of the Chairman's Committee must also recuse himself, then the Vice-Chairman of the Exchange will designate the Panel and the Panel Chairman.*

(h) *Recusals and Challenges of Panel Members. The Exchange's recusal rules and policies shall apply with respect to participation by the Chairman, Panel members, and others in the crowd space dispute resolution process pursuant to this Rule. Parties to the dispute shall be informed of the composition of the Panel, as well as the date, time, and place of the hearing, at least 72 hours prior to the scheduled hearing in the matter by the Chairman. A Party may challenge the selection of one or more Panel members no later than 48 hours prior to the scheduled hearing in the matter by providing to the Chairman or the Panel Chairman a brief written statement explaining why the challenged Panel member has a conflict of interest or any other reason that would make the Panel member unable to participate in a fair and impartial manner. Notice of any replacement Panel member will be provided to the parties no later than 24 hours prior to the scheduled hearing. A Party may challenge the selection of any replacement Panel member no later than 8 hours prior to the scheduled hearing. The Chairman shall have sole and final authority to rule on any challenge and replace any Panel member.*

(i) *Hearings. The hearing shall be held at such time and place as may be designated by the Panel. In hearings before the Panel, the Parties to the dispute will be allowed to present witnesses and/or documentary evidence to argue their claim, provided that they have furnished a list of all such witnesses and a copy of all such documents to the Panel Members and to all opposing parties at least 48 hours prior to the date of the hearing. The legal counsel to the Chairman's Committee, or another attorney designated by the legal counsel to the Chairman's Committee, shall act as legal counsel to the Panel. The Panel shall determine all questions concerning admissibility of evidence, and shall otherwise regulate the conduct of the hearing. Formal rules of evidence shall not apply. The Panel shall decide any issues of fact based on the evidence admitted at the hearing, and shall apply the Crowd Space Dispute Resolution Guidelines set forth below to each dispute. The party receiving at least a majority vote by the Panel will prevail.*

(j) *Crowd Space Dispute Resolution Guidelines. In resolving a crowd space dispute, the Panel's guiding principles shall be: (i) to determine what shall ''best promote a liquid and competitive market'', (ii) to give no preference to market-makers, floor brokers, or representatives of DPMs merely because of their status as such, and (iii) to recognize and apply the principles that no member has any ownership ''rights'' in any crowd space, and that no member may sell or assign any supposed ''right'' to use a particular space in a trading crowd. The Panel shall examine the following factors and determine, in the Panel's sole judgment, how each relates to each of the parties competing for the space (the numerical ranking of the factors does not necessarily indicate the relative importance to be given to any particular factors in any particular case):*

1. *Quality and Quantity of Business:*

The Panel shall review the quality and quantity of business that each party to the dispute conducts. Evidence of the quality and quantity of each party's business shall include, but is not limited to, evidence of the average daily number of contracts traded, the percentage of transactions that are traded in-person,

participation on RAES, and the typical size of markets made by each party.

2. *Tenure in the trading crowd:*

''Tenure'' refers to the length of time each party has spent in the trading crowd where the space in dispute is located.

3. *Association/affiliation with a member firm that has occupied the space:*

If a nominee or employee of a member firm has had to leave a space, then the Panel will consider to what extent there will be a negative impact on the trading in the crowd if another nominee of the member firm is or is not permitted to continue to use the space.

4. *Need for accommodation:*

The Panel will consider to what extent each party's existing business is already satisfied by their existing space or whether the new space is needed to facilitate either existing or anticipated new business.

5. *Proximity of competing parties:*

The Panel will give consideration to whether any party stood near the spot in question, or whether any party occupied the space in the past.

6. *Sight lines or Access:*

The Panel will consider to what extent each party needs sight lines or access to other parts of the crowd or the trading floor.

7. *Technology considerations:*

The Panel will consider to what extent each party's needs may be satisfied by trading technology or communication technology.

8. *Equitable considerations:*

In addition to the above factors, the Panel will consider any other factor it deems relevant in order to achieve a fair and equitable resolution.

(k) *Panel Decision. The Panel Chairman shall communicate the Panel's decision to the Chairman and all parties to the dispute. The Panel decision shall take effect on the first trading day after all parties have been notified of the decision by the Panel Chairman. The Panel shall also promptly provide a written Statement of Decision explaining the reason(s) for its decision. However, the effective date of the Panel's decision shall not be postponed until the release of the Statement of Decision. If the Panel makes its decision about a party's right to use a space contingent upon that party's satisfaction of certain conditions, those conditions shall be set forth in the Statement of Decision.*

(l) *Appeal. Any party may appeal the decision of the Panel to the Appeals Committee pursuant to Chapter XIX of the Exchange Rules by filing an Application pursuant to CBOE Rule 19.2(a) within thirty days after the date of release of the Panel's Statement of Decision. The Panel decision, however, shall remain in effect during any such appeal.*

(m) *Failure to Comply. Any member or person associated with a member who fails to comply with a decision reached through these Crowd Space Dispute Resolution Procedures, or who otherwise fails to comply with any provision of this CBOE Rule 24.21, may be subject to disciplinary proceedings in accordance with Chapter 17 of the CBOE Rules for violation of this rule and Rule 4.1 (''Just and Equitable Principles of Trade'').*

* * * * *

FEE SCHEDULE

1. –15. Unchanged.

16. MISCELLANEOUS

Crowd Space Dispute Resolution Hearing Fee (per hearing, per member (10)): $1,000

17–18. Unchanged.

MEMBER TRANSACTION FEE POLICIES AND REBATE PROGRAMS

Unchanged.

Footnotes

(1)–(9) Unchanged.

(10) The Crowd Space Dispute Resolution Hearing Fee is $1,000 per hearing for each party to the dispute and will escalate under certain circumstances pursuant to CBOE Rule 24.21(e). After the hearing is held and all rights of appeal are exhausted, the prevailing party in the dispute shall obtain a refund of the Hearing Fee from the Exchange.

* * * * *

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

In its filing with the Commission, CBOE included statements concerning the purpose of and basis for the proposed rule and discussed any comments it received on the proposed rule. The text of these statements may be examined at the places specified in Item IV below. The CBOE 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

Background

CBOE proposes to adopt new CBOE Rule 24.21, which establishes guidelines to resolve disputes concerning the right of Exchange members to occupy a certain space in an index option trading pit and procedures through which these disputes may be resolved. Over the past several years, an increase in the trading volume and the size of trading crowds for certain index options has created a lack of trading spots in certain trading pits. Up until this point, the Exchange has never adopted any formal policy about the right of members to occupy particular spaces on the trading floor. In the past, members have been able to resolve amicably disputes concerning the right to trade from a particular location in the pit. Also, the Exchange's SPX Floor Procedure Committee has been successful in mediating such disputes when they have occurred in the SPX trading crowd.

The Exchange believes it is appropriate at this time to adopt a rule to give the Chairman of the appropriate Floor Procedure Committee (''FPC'') the authority to mediate, and if necessary, to convene hearing panels of members to resolve space disputes in index option trading crowds, and the Exchange the ability to enforce the results of any such mediation. Proposed CBOE Rule 24.21 shall apply only to members who trade OEX, SPX, DJX and DIA options on the floor of the Exchange, or who trade any other index option not located at a station shared with equity options as determined by the appropriate FPC.

Mediation by the FPC Chairman

The proposed rule provides that a member may seek the assistance of the Exchange to resolve a crowd space dispute and the Chairman of the appropriate FPC or his designee shall attempt to mediate an amicable resolution of the dispute among the members involved.[3] The proposed rule also provides for immediate temporary resolutions of crowd space disputes pending the outcome of further proceedings under the rule.[4] The proposed rule is designed to encourage amicable, mediated settlements, as opposed to hearings, by requiring mediation first by the FPC Chairman (or his designee) before members may resort to the hearing process provided for under the proposed rule.

Initiation of Hearings

In the event members cannot come to a resolution on the use of a trading space, a member may initiate a hearing by completing and submitting a Hearing

[3] *See* paragraphs (a), (b), and (c) of proposed CBOE Rule 24.21.

[4] *See* proposed CBOE Rule 24.21(d).

Request form to the Office of the Secretary along with the payment of a Hearing Fee, which shall be a minimum of one thousand dollars ($1,000) per member.[5] The Exchange also proposes to amend the CBOE Fee Schedule to provide for a Crowd Space Dispute Resolution Hearing Fee of $1,000. Hearing fees will escalate for those members who frequently use the hearing process to resolve such disputes, again with the purpose of encouraging amicable, mediated settlements. Repetitive, meritless claims involving the same parties are prohibited.[6]

Hearing Panel

The FPC Chairman shall select a Crowd Space Dispute Resolution Panel (''Panel'') composed of seven Exchange members to hear and resolve the dispute.[7] The Chairman shall select two members of the Panel from members of the Chairman's FPC (other than the Chairman himself), and four members of the Panel from members of the Exchange who are not members of the Chairman's FPC. Two of the latter four members of the Panel shall be members who trade in the trading station where the dispute has arisen and two shall be members who do not trade in the trading station where the dispute has arisen. In selecting the Panel members who are not members of the Chairman's FPC, preference will be given to members who serve on another Floor Procedure Committee or a Market Performance Committee. The seventh Panel member shall be the Chairman of the Floor Officials Committee, or another member of the Floor Officials Committee designated by the Chairman of the Floor Officials Committee. The Exchange's recusal rules and policies shall apply with respect to participation by the Chairman, Panel members, and others in the crowd space dispute resolution process under the proposed rule.[8]

Guidelines for Resolving Disputes

In resolving a crowd space dispute, the Panel's guiding principles shall be: (i) To determine what shall ''best promote a liquid and competitive market'', (ii) to give no preference to market-makers, floor brokers, or representatives of DPMs merely because of their status as such, and (iii) to recognize and apply the principles that no member has any ownership ''rights'' in any crowd space, and that no member may sell or assign any supposed ''right'' to use a particular space in a trading crowd.[9] The Panel will examine eight factors (set forth in proposed CBOE Rule 24.21(j)) and determine, in the Panel's sole judgment, how each relates to each of the parties competing for the space.

Procedures for Hearings

The hearing shall be held at such time and place as may be designated by the Panel. In hearings before the Panel, the Parties to the dispute will be allowed to present witnesses and/or documentary evidence to argue their claim. The legal counsel to the Chairman's Committee, or another attorney designated by the legal counsel to the Chairman's Committee, shall act as legal counsel to the Panel. The Panel shall determine all questions concerning admissibility of evidence, and shall otherwise regulate the conduct of the hearing. Formal rules of evidence shall not apply. The Panel shall decide any issues of fact based on the evidence admitted at the hearing, and shall apply the Crowd Space Dispute Resolution Guidelines set forth in proposed CBOE Rule 24.21(j). The party receiving at least a majority vote by the Panel will prevail.[10]

The Panel Chairman shall communicate the Panel's decision to the Chairman of the Exchange and all parties to the dispute. The Panel decision shall take effect on the first trading day after all parties have been notified of the decision by the Panel Chairman. The Panel shall also promptly provide a written Statement of Decision explaining the reason(s) for its decision.[11] Any party may appeal the decision of the Panel to the Appeals Committee pursuant to Chapter XIX of the Exchange Rules.[12] Any member or person associated with a member who fails to comply with a decision reached through proposed CBOE Rule 24.21, or who otherwise fails to comply with any provision of the proposed rule, may be subject to disciplinary proceedings.[13]

2. Statutory Basis

By establishing guidelines and procedures for the amicable resolution of pit space disputes, CBOE believes the proposed rule change is consistent with and furthers the objectives of section 6(b)(5) of the Act,[14] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market, and to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule changes.

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

Within 35 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 90 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 Exchange 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 is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. 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 such filing will also be available for inspection and copying at the principal office of the CBOE. All submissions should refer to File No. SR-CBOE–2003–36 and should be submitted by November 21, 2003.

[5] *See* proposed CBOE Rule 24.21(e).

[6] *See* proposed CBOE Rule 24.21(f).

[7] *See* proposed CBOE Rule 24.21(g).

[8] *See* proposed CBOE Rule 24.21(h).

[9] *See* proposed CBOE Rule 24.21(j).

[10] *See* proposed CBOE Rule 24.21(i).

[11] *See* proposed CBOE Rule 24.21(k).

[12] *See* proposed CBOE Rule 24.21(l).

[13] *See* proposed CBOE Rule 24.21(m).

[14] 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[15]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 03–27461 Filed 10–30–03; 8:45 am]

BILLING CODE 8010–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–48701; File No. SR–NASD–99–60]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment Nos. 1 Through 4 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 5 Thereto by the National Association of Securities Dealers, Inc. Relating to Restrictions on the Purchases and Sales of Initial Public Offerings of Equity Securities

October 24, 2003.

I. Introduction

On October 15, 1999, the National Association of Securities Dealers, Inc. (''NASD'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change that would govern purchases and sales of ''hot equity'' offerings. On December 21, 1999, the NASD submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on January 18, 2000.[4] On October 11, 2000, the NASD submitted Amendment No. 2 to the proposal[5] which, among other things, changed the subject of the proposed rule from ''hot issues'' to ''new issues.'' Amendment No. 2 was published for comment in the **Federal Register** on December 6, 2000.[6] The NASD submitted Amendment No. 3 to the proposal on March 20, 2001,[7] and Amendment No. 4 to the proposal on June 27, 2002.[8] The Commission published the proposal as revised by Amendment Nos. 3 and 4 in the **Federal Register** on December 10, 2002.[9] On October 23, 2003, the NASD submitted Amendment No. 5 to the proposal.[10] This notice and order approves the proposed rule change and Amendment Nos. 1 to 4 thereto, solicits comment on Amendment No. 5, and approves Amendment No. 5 on an accelerated basis.

II. Executive Summary

Currently, NASD Interpretative Material (''IM'') 2110–1, commonly known as the ''Free-Riding and Withholding Interpretation'' (''Interpretation''), governs the manner in which NASD members may distribute ''hot issues.'' The NASD has proposed to restructure and make substantive amendments to the Interpretation; the result would be codified as new NASD Rule 2790. The NASD has stated that the new rule, like the Interpretation it would replace, is designed to protect the integrity of the public offering process by ensuring that: (1) NASD members make *bona fide* public offerings of securities at the offering price; (2) members do not withhold securities in a public offering for their own benefit or use such securities to reward persons who are in a position to direct future business to members; and (3) industry insiders, including NASD members and their associated persons, do not take advantage of their ''insider'' position to purchase new issues for their own benefit at the expense of public customers. The NASD believes that the proposed rule is better designed to further the purposes of the Interpretation, while at the same time being easier to understand.

Under new NASD Rule 2790, an NASD member generally would be prohibited from selling a ''new issue'' to any account in which a ''restricted person'' had a beneficial interest. As discussed further below, the term ''restricted person'' would include most broker-dealers, most owners and affiliates of a broker-dealer, and certain other classes of person. The proposed rule would require a member, before selling a new issue to any account, to meet certain ''preconditions for sale.'' These preconditions generally would require the member to obtain a representation from the beneficial owner of the account that the account is eligible to purchase new issues in compliance with the rule. The rule would provide several general exemptions, the basic rationale of which is that sales to and purchases by entities that have numerous beneficial owners—and, therefore, are likely to have only a small percentage of restricted persons owners—are not the types of transactions the rule should proscribe. The details of proposed NASD Rule 2790 are discussed in Section IV below.

III. Procedural History and Comments Received

The proposal, as revised by Amendment No. 1, was published for comment in the **Federal Register** on January 18, 2000.[11] The Commission received 24 comments on the original notice.[12] In response to these comments,

[15] 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 Gary L. Goldsholle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated December 20, 1999 (''Amendment No. 1'').

[4] Securities Exchange Act Release No. 42325 (January 10, 2000), 65 FR 2656.

[5] *See* Letter from Alden S. Adkins, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated October 10, 2000 (''Amendment No. 2'').

[6] Securities Exchange Act Release No. 43627 (November 28, 2000), 65 FR 76316.

[7] *See* Letter from Patrice M. Gliniecki, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated March 20, 2001 (''Amendment No. 3'').

[8] *See* Letter from Gary L. Goldshalle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated June 27, 2002 (''Amendment No. 4'').

[9] *See* Securities Exchange Act Release No. 46942 (December 4, 2002), 67 FR 75889.

[10] *See* Letter from Gary L. Goldsholle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated October 22, 2003 (''Amendment No. 5'').

[11] *See supra* note 4.

[12] *See* Letter from Willkie Farr & Gallagher to Jonathan G. Katz, SEC, dated January 28, 2000 (''Willkie''); Letter from Faith Colish to Jonathan G. Katz, SEC, dated January 31, 2000 (''Colish''); Letter from Katten Muchin Zavis to Jonathan G. Katz, SEC, dated January 28, 2000 (''Katten''); Letter from Sandra K. Smith to Jonathan G. Katz, SEC, dated February 1, 2000 (''Smith''); Letter from Driehaus Capital Management, Inc. to Jonathan G. Katz, SEC, dated February 4, 2000 (''Driehaus''); Letter from Cadwalader, Wickersham & Taft to Jonathan G. Katz, SEC, dated February 4, 2000 (''Cadwalader''); Letter from Fu Associates, Ltd. to Jonathan G. Katz, SEC, dated February 7, 2000 (''Fu''); Letter from Schulte Roth & Zabel LLP to Jonathan G. Katz, SEC, dated February 7, 2000 (''Schulte''); Letter from Rosenman & Colin LLP to Jonathan G. Katz, SEC, dated February 7, 2000 (''Rosenman''); Letter from Ropes & Gray to Jonathan G. Katz, SEC, dated February 8, 2000 (''Ropes''); Letter from The Washington Group to Jonathan G. Katz, SEC, dated February 8, 2000 (''Washington''); Letter from Testa, Hurwitz & Thibeault, LLP to Jonathan G. Katz, SEC, dated February 8, 2000 (''Testa''); Letter from Northern Trust Global Advisors, Inc. to Jonathan G. Katz, SEC, dated February 13, 2000 (''Northern Trust''); Letter from Chicago Board Options Exchange to Jonathan G. Katz, SEC, dated February 14, 2000 (''CBOE''); Letter from Sullivan & Cromwell to Jonathan G. Katz, SEC, dated February 15, 2000 (''Sullivan''); Letter from Charles Schwab to Jonathan G. Katz, SEC, dated February 15, 2000 (''Schwab''); Letter from Sidley & Austin to Jonathan G. Katz, SEC, dated February 16, 2000 (''Sidley''); Letter from North American Securities Administrators Association, Inc. to Jonathan G. Katz, SEC, dated February 18, 2000 (''NASAA''); Letter from Securities Industry Association to Jonathan G. Katz, SEC, dated February 18, 2000 (''SIA''); Letter from Mayor, Day, Caldwell & Keeton, L.L.P. to SEC, dated March 8, 2000 (''Mayor Day''); Letter from Morgan Stanley Dean Witter to Jonathan G. Katz, SEC, dated March 17, 2000 (''MSDW''); Letter from Covington & Burling to Jonathan G. Katz, SEC, dated April 14, 2000 (''Covington''); Letter from Orrick, Herrington & Sutcliffe LLP to Jonathan G. Katz, SEC, dated May 2, 2000 (''Orrick''); Letter from Fried, Frank, Harris, Shriver & Jacobson to Jonathan G. Katz, SEC, dated May 9, 2000 (''Fried'').