

and such other information presented to the Fund's Board in connection with the review required by conditions 12 and 13.

16. The Credit Facility Team will prepare and submit to the Board(s) for review, an initial report describing the operations of the credit facility and the procedures to be implemented to ensure that all Funds are treated fairly. After the commencement of operations of the credit facility, the Adviser will report on the operations of the credit facility at the quarterly Board meetings.

In addition, for two years following the commencement of the credit facility, the independent public accountant for each Fund shall prepare an annual report that evaluates the Adviser's assertion that it has established procedures reasonably designed to achieve compliance with the conditions of the order. The report shall be prepared in accordance with the Statements on Standards for Attestation Engagements No. 10 and filed pursuant to Item 77Q3 of Form N-SAR, as such Statements or Form may be revised, amended, or superseded from time to time. In particular, the report shall address procedures designed to achieve the following objectives: (a) That the Interfund Loan Rate will be higher than the Repo Rate and, if applicable, the yield of the money market Funds, but lower than the Bank Loan Rate; (b) compliance with the collateral requirements as set forth in the Application; (c) compliance with the percentage limitations on interfund borrowing and lending; (d) allocation of interfund borrowing and lending demand in an equitable manner and in accordance with procedures established by the Board(s); and (e) that the interest rate on any Interfund Loan does not exceed the interest rate on any third party borrowings of a borrowing Fund at the time of the Interfund Loan.

After the final report is filed, the Fund's external auditors, in connection with their Fund audit examinations, will continue to review the operation of the credit facility for compliance with the conditions of the application and their review will form the basis, in part, of the auditor's report on internal accounting controls in Form N-SAR.

17. No Fund will participate in the credit facility upon receipt of requisite regulatory approval unless it has fully disclosed in its SAI all material facts about its intended participation.

18. A Fund's borrowings through the credit facility, as measured on the day when the most recent loan was made, will not exceed the greater of 125% of the Fund's total net cash redemptions

and 102% of sales fails for the preceding seven calendar days.

For the Commission, by the Division of Investment Management, under delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

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BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49545; File No. SR-NASD-2003-164]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by the National Association of Securities Dealers, Inc. Relating to the Adjournment of a Hearing Within Three Business Days of the First Scheduled Hearing Session A

April 8, 2004.

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 November 4, 2003, the National Association of Securities Dealers, Inc. ("NASD" or "Association") through its wholly owned subsidiary, NASD Dispute Resolution, Inc. ("NASD Dispute Resolution"), 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. On March 5, 2004, NASD filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On April 1, 2004, NASD filed Amendment No. 2 to the proposed rule change.<sup>4</sup> 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 Dispute Resolution is proposing to amend NASD IM-10104, Rule 10306, and Rule 10319 of the NASD Code of Arbitration Procedure ("Code") of the NASD, to impose a fee on parties of \$100 and to compensate arbitrators in the event a hearing is

adjourned within three business days before a scheduled hearing session. Below is the text of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

\* \* \* \* \*

#### IM-10104. Arbitrators' Honorarium

All persons selected to serve as arbitrators pursuant to the Association's Code of Arbitration Procedure shall be paid an honorarium for each hearing session (including a prehearing conference) in which they participate.

The honorarium shall be \$200 for each hearing session[, \$50 for travel to a canceled hearing,] and \$75 per day additional honorarium to the chairperson of the panel. The honorarium for a case not requiring a hearing shall be \$125.

*The honorarium for travel to a canceled hearing session shall be \$50. If a hearing session other than a prehearing conference is adjourned pursuant to Rule 10319(d), each arbitrator shall receive an additional honorarium of \$100.*

#### 10306. Settlements

(a) Parties to an arbitration may agree to settle their dispute at any time.

*(b) If the parties agree to settle their dispute, they will remain responsible for payment of fees incurred, including fees for previously scheduled hearing sessions and fees incurred as a result of adjournments, pursuant to Rule 10319.*

[(b)] (c) The terms of a settlement agreement do not need to be disclosed to the Association. However, [the parties will remain responsible for payment of fees incurred, including fees for previously scheduled hearing sessions. If] if the parties fail to agree on the allocation of outstanding fees, the fees shall be divided equally among all parties.

#### 10319. Adjournments

(a) The arbitrator(s) may, in their discretion, adjourn any hearing(s) either upon their own initiative or upon the request of any party to the arbitration.

(b) If an adjournment requested by a party is granted after arbitrators have been appointed, the party requesting the adjournment shall pay a fee equal to the initial deposit of hearing session fees for the first adjournment and twice the initial deposit of hearing session fees, not to exceed \$1,500, for a second or subsequent adjournment requested by that party. The arbitrators may waive these fees in their discretion. If more than one party requests the adjournment, the arbitrators shall

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

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

<sup>3</sup> See letter dated March 5, 2004 from Mignon McMemore, Counsel, NASD Dispute Resolution, to Katherine England, Assistant Director, Division of Market Regulation.

<sup>4</sup> See letter dated April 1, 2004 from Mignon McMemore, Counsel, NASD Dispute Resolution, to Katherine England, Assistant Director, Division of Market Regulation.

allocate the fees among the requesting parties.

(c) Upon receiving a third request consented to by all parties for an adjournment, the arbitrator(s) may dismiss the arbitration without prejudice to the Claimant filing a new arbitration.

(d) *If an adjournment request is made by one or more parties and granted within three business days before a scheduled hearing session, the party or parties making the request shall pay an additional fee of \$100 per arbitrator. If more than one party requests the adjournment, the arbitrators shall allocate the \$100 per arbitrator fee among the requesting parties. The arbitrators may allocate all or portion of the \$100 per arbitrator fee to the non-requesting party or parties, if the arbitrators determine that the non-requesting party or parties caused or contributed to the need for the adjournment. In the event that a request results in the adjournment of consecutively scheduled hearing sessions, the additional fee will be assessed only for the first of the consecutively scheduled hearing sessions. In the event that an extraordinary circumstance prevents a party or parties from making a timely adjournment request, arbitrators may use their discretion to waive the fee, provided verification of such circumstance is received.*

\* \* \* \* \*

## 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

NASD Dispute Resolution proposes to amend NASD IM-10104, Rule 10306, and Rule 10319 of the Code to impose a fee of \$100 per arbitrator on parties and to compensate arbitrators in the event a hearing is adjourned within three business days before a scheduled hearing session.

## Background

The NASD Code has several provisions dealing with postponements and cancellations of hearings (both situations are included in the term "adjournments"). Rule 10319(b) requires parties to pay fees for first and subsequent adjournments; Rules 10332(f) and 10205(f) provide for the forfeiture of the initial hearing deposit for matters that are settled or withdrawn within eight business days of the first scheduled hearing session (other than a prehearing conference); and Rules 10332(g) and 10205(g) provide that matters that are settled or withdrawn after the commencement of the first hearing session (which may include a prehearing conference) are subject to assessment of forum fees for hearings held or scheduled within eight business days after NASD receives notice of the settlement or withdrawal.

Over the past 13 years, NASD has taken several steps to address the delays caused by adjournments. In 1990, NASD proposed<sup>5</sup> and the SEC approved<sup>6</sup> an amendment to the Code to increase the adjournment fee and establish a timeframe by which an arbitration case could be settled or withdrawn without parties' forfeiting their hearing session deposit. In one provision, NASD proposed to increase the adjournment fee from \$100 to an amount equal to the initial hearing session deposit, because it found that "adjournments [were] the single most significant cause of delays in resolving disputes and result[ed] in the lengthening of the overall processing time for arbitration cases."<sup>7</sup> In another provision, NASD proposed that if a case were settled or withdrawn within eight business days of the first scheduled hearing session, NASD would retain the initial hearing session deposit.<sup>8</sup> NASD expected these changes to "reduce delays by discouraging frivolous requests for adjournments in the arbitration process and to encourage more efficient use of this process by parties to arbitration proceedings."<sup>9</sup> In 2001, in an effort to ensure that the adjournment fees would operate as a deterrent to repeated adjournment requests, NASD amended Rule 10319(b) to increase the cap for second or

subsequent adjournments from \$1,000 to \$1,500.<sup>10</sup>

These Code provisions have not had the expected impact on curbing adjournment requests, particularly those requested at the last minute. NASD has found that parties often seek to adjourn scheduled hearing sessions on short notice for various reasons, which may include scheduling conflicts of parties or their counsel, ongoing settlement discussions, or unrelated matters.

The issue of last minute hearing cancellations was raised as a concern by arbitrators at each of the regional arbitrator focus groups held by NASD Dispute Resolution in 2001 and 2002. Arbitration hearing dates are scheduled often months in advance and arbitrators, once assigned to hear a case, must reserve those dates. Thus, if a party requests that a hearing be adjourned at the last minute, the arbitrators lose not only the time that they spent preparing for the hearing and the honoraria from the adjourned hearing (or series of hearings), but also other income they could have earned on the reserved dates. Therefore, NASD Dispute Resolution believes that the proposed rule change is necessary to provide arbitrators with some compensation in the event that a scheduled hearing is adjourned at the last minute and to encourage parties, when appropriate, to settle their disputes earlier to avoid additional fees.

### The Proposed Rule Change and its Application

The proposed rule change would amend Rule 10319 to require that an additional \$100 fee per arbitrator be paid by one or more parties if their request for an adjournment is made and granted within three business days before a scheduled hearing session or before the first of a number of consecutively scheduled hearing sessions.<sup>11</sup> If one hearing session had been scheduled, the arbitrators would assess this fee for adjourning that hearing session. If a number of consecutively scheduled hearing sessions were scheduled, the fee would be assessed only for adjourning the first hearing in that group of consecutively scheduled hearing sessions, not for all hearing sessions in that group. The Rule will not apply to the adjournment of a prehearing conference. Further, for purposes of determining whether the timing of an adjournment would trigger a fee assessment, holidays recognized by

<sup>5</sup> See Securities Exchange Act Rel. No. 27900 (April 12, 1990), 55 FR 15048 (April 20, 1990) (File No. 90-3).

<sup>6</sup> See Securities Exchange Act Rel. No. 28086 (June 1, 1990), 55 FR 23493 (June 8, 1990) (File No. 90-3).

<sup>7</sup> See Rel. No. 28086 at 23494.

<sup>8</sup> See Rel. No. 27900 at 15052.

<sup>9</sup> See Rel. No. 28086 at 23494.

<sup>10</sup> See Securities Exchange Act Rel. No. 44573 (July 18, 2001), 66 FR 38773 (July 25, 2001) (File No. 2001-21).

<sup>11</sup> Conforming changes are being made to IM-10104 and Rule 10306.

NASD will not be counted as business days.

The following example illustrates how the Rule will work. An arbitrator schedules five consecutive hearing sessions to begin on a Tuesday, following a Monday holiday. If a party's adjournment request is made and granted no later than the preceding Tuesday, the party would not be assessed the \$100 per-arbitrator fee, because the request was made and granted more than three business days before the first scheduled day of the hearing session.<sup>12</sup> If, however, a party's request is made and granted on the preceding Wednesday or later in that week, then the party would be assessed the \$100 per-arbitrator fee for the adjournment of the first day in a group of consecutively scheduled hearing sessions, which, in the example, is the following Tuesday.<sup>13</sup> The party would not be assessed a \$100 per-arbitrator fee for the subsequently scheduled hearing sessions that have now been canceled.

Generally, when NASD Dispute Resolution receives a party's adjournment request, a decision on the request is usually made in a short timeframe (*i.e.*, from a few hours to a few days). Staff of NASD Dispute Resolution makes every effort to process adjournment requests expeditiously, but the requesting party should allow for delays over which the staff has no control. If a requesting party asks for an adjournment within the three days before a scheduled hearing session and the arbitrators cannot be reached, the request will not be granted and the hearing will proceed as scheduled, unless extraordinary circumstances exist, as explained below.

The proposed rule change would allow arbitrators to assess the \$100 per-arbitrator fee against the requesting party, after the request is granted. There may be instances, however, in which the arbitrators determine that a non-requesting party has caused or contributed to the need for the adjournment. In these instances, the requesting party can ask for a reallocation of the fees to the non-requesting party or a sharing of the fees. The arbitrators can review the circumstances and, in their discretion, allocate all or a portion of the fee to the non-requesting party. In instances where more than one party requests an adjournment, arbitrators must allocate the fees among those parties.<sup>14</sup>

The proposed rule change also will apply to final settlements reached by the parties. If staff is notified of a final settlement within three business days before a scheduled hearing session, and the hearing must be canceled, this will be considered to be an adjournment request that is "made and granted" for purposes of proposed Rule 10319(d), and the allocation of the \$100 per-arbitrator fee will be handled pursuant to Rule 10306.<sup>15</sup>

If an adjournment is requested and granted within three business days before a scheduled hearing session, NASD Dispute Resolution believes that arbitrators should assess the \$100 per-arbitrator fee in all cases, regardless of the reason for the request. For example, this fee should be assessed even if arbitrators determine to waive the fees established under Rule 10319(b). NASD Dispute Resolution believes that by applying this standard, arbitrators will not be inundated with requests to waive the fee. NASD Dispute Resolution recognizes, however, that there are some extraordinary circumstances that could prevent a party from making an adjournment request in time to avoid the additional fee assessment (*e.g.*, a serious accident or a sudden severe illness). In these cases, arbitrators will have the discretion to waive the fee, provided they receive verification of such circumstances.<sup>16</sup>

The NASD will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Notice to Members announcing Commission approval.

## 2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>17</sup> which require, among other things, that the Association'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 will help NASD Dispute Resolution maintain a deep pool of qualified arbitrators by assuring them of some compensation in the event a scheduled hearing is adjourned at the

last minute. NASD believes maintaining depth and quality of arbitrators protects investors and the public interest by providing a more efficient forum for investors to address grievances.

## 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

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 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 proposal 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. Comments should be submitted electronically at the following e-mail address: [rule-comments@sec.gov](mailto:rule-comments@sec.gov). All comment letters should refer to File No. SR-NASD-2003-164. 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, comments should be sent in hard copy or by e-mail but not by both methods. 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

<sup>12</sup> The party could be subject to other fees and costs as a result of adjourning the hearing, however. See Rules 10319(b) and 10332(f).

<sup>13</sup> *Id.*

<sup>14</sup> See Rule 10319(b).

<sup>15</sup> Rule 10306 is being amended to include a specific reference to fees for adjournments under Rule 10319; however, the provisions of the Rule addressing fee allocation remain unchanged.

<sup>16</sup> A waiver of the fee, pursuant to Rule 10319(d), will not affect the payment of the honorarium, described in IM-10104.

<sup>17</sup> 15 U.S.C. 78o-3(b)(6).

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 NASD. All submissions should refer to File No. SR-NASD-2003-164 and be submitted by May 5, 2004.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>18</sup>

**Margaret H. McFarland,**  
Deputy Secretary.

[FR Doc. 04-8444 Filed 4-13-04; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-49536; File No. SR-NYSE-2003-37]

### 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 124 To Change the Way Odd-Lot Orders Are Priced and Executed Systemically

April 7, 2004.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on November 18, 2003, 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 March 31, 2004, the Exchange amended 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 proposed rule change seeks to amend NYSE Rule 124 to change the way odd-lot orders are priced and executed systemically. Below is the text

of the proposed rule change. Proposed new language is in *italics*; proposed deletions are in [brackets].

\* \* \* \* \*

*Rule 124. (a) Except as provided below, all orders for less than the unit of trading ("odd-lot orders") shall be received, processed, and executed by means of the Exchange system designated for such purpose ("the System"). The specialist for the subject security shall be the contra party to all such executions. No differential or commission may be charged with respect to any odd-lot order received by the System. All odd-lot orders entered for execution to the System shall contain the appropriate account type identification code according to specified account type categories in accordance with the reporting requirements of Rule 132.*

*(b) Market Orders. Odd-lot market orders received by the System shall be executed in time priority of receipt by the System at the price of the next round-lot transaction on the Exchange in the subject security following receipt of the orders by the System, subject to the following:*

*(i) Odd-lot buy orders and odd-lot sell orders will be executed at the price of such round-lot transaction with the specialist as the contra side to the extent that such odd-lot orders total an equal number of shares bought and sold.*

*(ii) The total number of additional shares of odd-lot orders executed at the price of such round lot transaction shall not exceed the number of shares of such round-lot transaction, except that an odd-lot order which would otherwise receive a partial execution shall be executed in full.*

*(iii) Odd-lot market orders not executed pursuant to paragraph (i) or (ii) above shall be executed, in time priority order, at the price of the subsequent round-lot transactions, subject to the same procedures stated in paragraph (i) and (ii) as to volume of round-lot transactions.*

*(iv) Any odd-lot market order not executed within 30 seconds of receipt by the System pursuant to paragraphs (i), (ii) or (iii) above shall be executed, in the case of an order to buy, at the price of the adjusted ITS offer after 30 seconds, and in the case of an order to sell, at the price of the adjusted ITS bid after 30 seconds.*

*(v) Odd-lot market orders entered before the opening of the subject security shall be executed at the price of the opening transaction.*

*(vi) If odd-lot market orders are entered within 30 seconds of the close of trading and have not been executed*

*prior to the closing transaction, an odd-lot market order to buy shall be executed at the price of the adjusted ITS offer at 4:00 p.m. (or such other closing time), and an order to sell shall be executed at the price of the adjusted ITS bid at 4:00 p.m. (or such other closing time).*

*(vii) An odd-lot market order to sell short shall be executed at the price of the next sale in the round-lot market on the Exchange following entry of the order which is higher than the last different round-lot price.*

*(c) Limit Orders. Odd-lot limit orders received by the System shall be executed in time priority of receipt by the System at prices of round-lot transactions effected subsequent to receipt of the orders by the System, that are at or better than the limit prices on the odd-lot orders, subject to the principles of paragraphs (b) (i), (ii) and (iii) above.*

*(d) Limit Orders to Sell Short. An odd-lot limit order to sell short shall be executed at the price of the first round-lot transaction on the Exchange which is at or above the specified limit of the order, and which is also higher than the last different round-lot transaction (a "plus" or "zero plus" tick).*

*(e) Market Stop Orders. Odd-lot market stop orders shall be executed as follows:*

*(i) Buy Stop Orders. A buy stop order shall become a market order when a round-lot transaction takes place at or above the stop price. The order shall then be filled at the price of the next round-lot transaction, as provided in (b) above.*

*(ii) Sell Stop Orders, Marked "Long". A sell stop order marked "long" shall become a market order when a round-lot transaction takes place at or below the stop price. The order shall then be filled at the price of the next round-lot transaction, as provided in (b) above.*

*(iii) Sell Stop Orders, Marked "Short". A sell stop order marked "short" shall become a market order when a round-lot transaction takes place at or below the stop price. The order shall then be filled at the price of the next round-lot transaction, which is higher than the last different round-lot transaction (a "plus" or "zero plus" tick) as provided in (b) above.*

*(f) Limit Stop Orders. Odd-lot stop limit orders shall be executed as follows:*

*(i) Buy Stop Limited Orders. A buy stop limited order shall become a limited order when a round-lot transaction takes place at or above the stop price. The order shall then be filled in the manner prescribed in (c) above for handling a limited order to buy.*

<sup>18</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 letter, from Darla C. Stuckey, Corporate Secretary, NYSE, to Nancy J. Sanow, Assistant Director, Division of Market Regulation, Commission, dated March 30, 2004 and accompanying Form 19b-4. ("Amendment No. 1"). Amendment No. 1 replaced the original rule filing in its entirety.