

to OTC transactions, NASD has taken the position that a broker-dealer charging excessive compensation in a transaction with a customer executed on an exchange violates NASD Rule 2110, which requires that a member must, in the conduct of its business, "observe high standards of commercial honor and just and equitable principles of trade."⁴

To further clarify members' obligations to charge fair commissions and mark-ups (or mark-downs), NASD is proposing to amend NASD Rule 2440 and IM-2440 to apply these provisions expressly to all securities transactions, whether they occur in the OTC market or on an exchange.⁵ NASD believes that commission and mark-up (mark-down) requirements should be uniform and not vary based solely on where the transaction occurs. Therefore, a member that charges unfair and excessive commissions or mark-ups (mark-downs) in any customer transaction, whether it is an OTC or exchange transaction, would violate NASD Rule 2440 and IM-2440.⁶

Should the Commission approve the proposed rule change, NASD will implement the proposed rule change upon SEC approval. NASD will announce the approval in a *Notice to Members* to be published no later than 30 days following 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,⁷ which requires, among other things, that NASD rules be designed to prevent fraudulent and manipulative acts and practices,

⁴ See NASD Rule 2110. See also *Atlanta-One, Inc. v. SEC*, 100 F.3d 105, 107 n.1 (9th Cir. 1996), which states "[a]lthough [Rule 2440 and IM-2440] deals with the appropriate level of compensation in retail transactions in the over-the-counter market, the [rule] provides guidance by analogy as to appropriate commissions for exchange transactions."

⁵ Currently, NASD Rule 2440 and IM-2440 do not apply to transactions in municipal securities and exempt securities, and this would not be changed by the proposal. See NASD Rule 0116. See also Sections 3(a)(12) and 3(a)(29) of the Act. It is important to note, however, that Municipal Securities Rulemaking Board ("MSRB") Rule G-30, Prices and Commissions, applies to transactions in municipal securities, and requires a municipal securities dealer engaging in a transaction with a customer, as a principal, to buy or sell securities at an aggregate price that is "fair and reasonable," or, as an agent, to charge a commission or service charge that is not more than a "fair and reasonable amount." See MSRB Rule G-30.

⁶ The proposed amendments would expand the scope of NASD Rule 2440 and IM-2440 to include all securities transactions with or for a customer only. The proposal would not alter the fact that NASD Rule 2440 and IM-2440 do not apply to member-to-member transactions.

⁷ 15 U.S.C. 78o-3(b)(6).

promote just and equitable principles of trade, and, in general, protect investors and the public interest. NASD believes that the proposed rule change will deter members from charging their customers unfair, unreasonable, or excessive mark-ups or commissions for effecting securities transactions, and will thereby promote investor protection.

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 NASD consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File No. SR-NASD-2006-005 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASD-2006-005. This file

number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of NASD. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASD-2006-005 and should be submitted on or before April 25, 2006.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁸

Nancy M. Morris,
Secretary.

[FR Doc. E6-4822 Filed 4-3-06; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53568; File No. SR-NFA-2006-01]

Self-Regulatory Organization; National Futures Association; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Interpretive Notice to Compliance Rule 2-9

March 29, 2006.

Pursuant to Section 19(b)(7) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-7 under the Exchange Act,² notice is hereby given that on February 27, 2006, National Futures Association ("NFA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change described in

⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(7).

² 17 CFR 240.19b-7.

Items I, II, and III below, which Items have been prepared by NFA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons. NFA also has filed the proposed rule change with the Commodity Futures Trading Commission ("CFTC").

NFA, on February 27, 2006, requested that the CFTC make a determination that review of the proposed rule change is not necessary. By letter dated March 8, 2006, the CFTC notified NFA of its determination not to review the proposed rule change.³

I. Self-Regulatory Organization's Description of the Proposed Rule Change

Section 15A(k) of the Exchange Act⁴ makes NFA a national securities association for the limited purpose of regulating the activities of NFA members ("Members") who are registered as brokers or dealers in security futures products under Section 15(b)(11) of the Exchange Act.⁵ NFA's Interpretive Notice titled "Compliance Rule 2-9: Enhanced Supervisory Requirements" ("Interpretive Notice") applies to all Members, including Members registered under Section 15(b)(11), who meet the criteria specified in the Interpretive Notice.

The proposed rule change, which would modify the Interpretive Notice, would exempt certain associated persons ("APs") from being counted in the calculation for determining whether a Member is required, pursuant to NFA Compliance Rule 2-9(b) (discussed below), to adopt the enhanced supervisory procedures described in the Interpretive Notice. In particular, the proposed rule change would exclude from the calculation the individuals who meet all of the following criteria:

- The AP has only worked for one Disciplined Firm;⁶

- The AP has not worked for a Disciplined Firm in more than ten years;

- The AP has not worked for a Member that has been subject to a sales practice action by NFA or the CFTC since leaving the Disciplined Firm;

- The AP has not been personally subject to a disciplinary action by NFA or the CFTC; and

- The AP has been an NFA Member or Associate Member for at least eight of the preceding ten years.

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

NFA has prepared statements concerning the purpose of, and basis for, the proposed rule change, burdens on competition, and comments received from members, participants, and others. The text of these statements may be examined at the places specified in Item IV below. These statements are set forth in Sections A, B, and C below.

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

1. Purpose

NFA Compliance Rule 2-9, titled "Supervision," provides in paragraph (b) that the NFA's Board of Directors ("Board") may require Members that meet specific criteria established by the Board, relating to the employment history of their APs, to adopt supervisory procedures specified by the Board for the supervision of telemarketing. The Interpretive Notice describes these enhanced supervisory procedures and provides that a Member would be required to undertake these procedures if its sales force included a specified number of APs who have previously worked at Disciplined Firms. The Interpretive Notice and an enabling provision of NFA Compliance Rule 2-9(b) provide that affected Members may petition the Telemarketing Procedures Waiver Committee ("Waiver Committee") for relief from the enhanced supervisory procedures.

From time to time, the Board has amended the Interpretive Notice's numerically-based criteria to exempt certain APs who have worked at Disciplined Firms from having to be counted for purposes of determining whether a Member that hires them is required to adopt the enhanced supervisory procedures. According to NFA, these exempted APs, based upon

their history, are not likely to pose a risk to the public.⁷

APs who may not pose a risk to the public remain in the population of APs who could trigger enhanced supervisory procedures. For example, a prospective AP who worked at one Disciplined Firm for more than sixty days a number of years ago but who otherwise had an unblemished personal and employment history in the industry would currently be afforded relief only if the firm seeking to hire the AP applied for a waiver. NFA's Waiver Committee often takes these individual factors into consideration when deciding whether to grant a waiver to a firm.

Without an exemption, these individuals may not ever reach the Waiver Committee. Employers, and small firms in particular, may be wary of hiring these individuals merely because their hiring might trigger enhanced supervisory procedures and require the firm to apply for a waiver. In addition, some firms are simply loath to hire an individual who would be counted on their staff as having come from a Disciplined Firm even if hiring them would not trigger enhanced supervisory procedures.

NFA performed an analysis of registration and disciplinary data and found that a significant number of currently active APs who have long tenures in the industry meet the criteria proposed for the exemption. Specifically, applying the proposed criteria would exempt 82 currently active APs, who are employed by 67 Member firms, from being counted as APs who had worked at a Disciplined Firm for purposes of determining whether their current sponsor or any prospective sponsors would trigger an obligation to undertake the enhanced supervisory procedures.

NFA believes that adding these exemptions will reduce the burden on the membership while still imposing enhanced supervision on firms that cause concern. Exempting APs who worked at a single Disciplined Firm more than ten years ago, have since been employed by compliant Members, and have good personal compliance histories could help to make the Waiver Committee more efficient since an increased number of non-problematic

³ See Letter from Lawrence B. Patent, Deputy Director, CFTC, to Thomas W. Sexton, III, Esq., General Counsel, NFA (Mar. 8, 2006).

⁴ 15 U.S.C. 78o-3(k).

⁵ 15 U.S.C. 78o(b)(11).

⁶ For purposes of the Interpretive Notice, a Disciplined Firm is defined as one that meets the following three criteria: (1) The firm has been formally charged by either the CFTC or NFA with deceptive telemarketing practices or promotional material; (2) those charges have been resolved; and (3) the firm has been permanently barred from the industry as a result of those charges. In addition, a Disciplined Firm is defined to include any broker-dealer that, in connection with sales practices involving the offer, purchase, or sale of any security futures product, as defined in Section 1a(32) of the CEA has been expelled from membership or participation in any securities industry self-regulatory organization or is subject to an order of the SEC revoking its registration as a broker-dealer. See Interpretive Notice, p. 4.

⁷ For example, in 2003, the Interpretive Notice was amended to exempt APs who had worked at Disciplined Firms for less than sixty days more than ten years ago. Securities Exchange Act Release No. 47533 (Mar. 19, 2003); 68 FR 14733 (Mar. 26, 2003). Last year the Board amended the Interpretive Notice to reduce this period from ten years to five years, while retaining the requirement that the individual must have worked at such a firm for less than sixty days. Securities Exchange Act Release No. 52808 (Nov. 18, 2005); 70 FR 71347 (Nov. 28, 2005).

firms and individuals will be removed from the waiver process.

2. Statutory Basis

The rule change is authorized by, and consistent with, Section 15A(k) of the Exchange Act.⁸

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

The rule change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act and the Commodity Exchange Act ("CEA"). In fact, it will lessen the burden on competition by exempting additional firms and individuals from the enhanced supervision requirement.

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

NFA did not publish the rule change to the membership for comment. NFA did not receive comment letters concerning the rule change.

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

NFA submitted, on February 27, 2006, the proposed amendments to the Interpretive Notice regarding NFA Compliance Rule 2-9 to the CFTC for approval. NFA invoked the "ten-day" provision of Section 17(j) of the CEA, stating that it intended to make the proposed amendments effective ten days after receipt of the proposals by the CFTC, unless the CFTC determined to review the proposed amendments for approval and notified NFA of this determination. By letter dated March 8, 2006, the CFTC notified NFA of its determination not to review the proposed rule change.⁹ The proposed rule change has become effective on March 8, 2006.

Within 60 days of the date of effectiveness of the proposed rule change, the Commission, after consultation with the CFTC, may summarily abrogate the proposed rule change and require that the proposed rule change be refiled in accordance with the provisions of Section 19(b)(1) of the Exchange 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 conflicts with the Exchange 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 No. SR-NFA-2006-01 on the subject line.

Paper Comments

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File No. SR-NFA-2006-01. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the NFA. 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 No. SR-NFA-2006-01 and should be submitted on or before April 25, 2006.

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

Nancy M. Morris,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-53565; File No. SR-NYSE-2005-86]

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Order Approving Proposed Rule Change and Amendment No. 1 Thereto To Conform NYSE Rules 123C and 476A With NYSE Rule 80A

March 29, 2006.

On December 7, 2005, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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 to amend: (a) NYSE Rule 123C (Market on the Close Policy and Expiration Procedures); and (b) the Supplementary Material to NYSE Rule 476A (Imposition of Fines for Minor Violation(s) of Rules), to conform such rules with the current provisions of NYSE Rule 80A (Index Arbitrage Trading Restrictions). On February 9, 2006, the Exchange filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on February 24, 2006.³ The Commission received no comments regarding the proposal.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁴ In particular, the Commission believes that the proposal is consistent with Section 6(b)(5) of the Act,⁵ because the proposal promotes transparency and accuracy of the rules of the Exchange for Exchange members by making clarifying changes to NYSE Rule 123C and conforming NYSE Rules 123C and 476A with the provisions of NYSE Rule 80A. A proposed rule change that is reasonably designed to make the Exchange's rules more consistent and transparent should help protect investors and the public interest.

The Commission further believes that the proposal is consistent with Sections 6(b)(1) and 6(b)(6) of the Act,⁶ which

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 53327 (February 16, 2006), 71 FR 9629.

⁴ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁵ 15 U.S.C. 78f(b)(5).

⁶ 15 U.S.C. 78f(b)(1) and 78f(b)(6).

⁸ 15 U.S.C. 78o-3(k).

⁹ See Letter, *supra* note 3.

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ 17 CFR 200.30-3(a)(73).