

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, 450 Fifth Street, NW., Washington, DC 20549. 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 the File Number SR-NASD-2005-001 and should be submitted on or before February 9, 2005.

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

Jill M. Peterson,

Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51023; File No. SR-NASD-2004-174]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change and Amendment No. 1 Thereto Relating to Frequency of Updates From the National Do-Not-Call Registry

January 11, 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 on November 24, 2004 the National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I and II below, which Items have been prepared by NASD. On January 6, 2005, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> The Commission is publishing

this notice to solicit comments on the proposed rule change from interested persons and is approving the proposed rule change, as amended, on an accelerated basis.

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

NASD is proposing to amend NASD Rule 2212, to require a member that seeks to qualify for the safe harbor set forth in NASD Rule 2212 to, among other things, use a process to prevent telephone solicitations to any telephone number in a version of the national do-not-call registry obtained from the administrator of the registry no more than thirty-one (31) days prior to the date any call is made. This proposed amendment is consistent with recent amendments to the comparable do-not-call rules of the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC"). Below is the text of the proposed rule change. Proposed new language is in *italics*. Proposed deletions are in [brackets].

#### 2200. Communications With Customers and the Public

2210. Communications with the Public

\* \* \* \* \*

2212. Telemarketing

- (a) No Change.
- (b) No Change.
- (c) Safe Harbor Provision.
- (1)-(3) No Change.

(4) Accessing the national do-not-call database. The member uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than [three months] *thirty-one (31) days* prior to the date any call is made, and maintains records documenting this process.

- (d)-(g) No Change.

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

In its filing with the Commission, NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it had received on the proposed rule change. The text of these

statements may be examined at the places specified in Item III 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

In 2003, the FTC, via its Telemarketing Sales Rule, and the FCC, via its Miscellaneous Rules Relating to Common Carriers, established requirements for sellers and telemarketers to participate in a national do-not-call registry.<sup>4</sup> Since June 2003, consumers have been able to enter their home telephone numbers into the national do-not-call registry, which is maintained by the FTC. Under rules of the FTC and FCC, sellers and telemarketers generally are prohibited from making telephone solicitations to consumers whose numbers are listed in the national do-not-call registry. The FCC's do-not-call rules apply to broker-dealers while the FTC's rules do not.<sup>5</sup>

In July 2003, the SEC requested that NASD amend its telemarketing rules to require NASD members to participate in the national do-not-call registry.<sup>6</sup> Because broker-dealers are subject to the FCC's do-not-call rules, NASD modeled its rules in this area after those of the FCC and codified these do-not-call requirements in NASD Rule 2212, with minor modifications tailoring the rules to broker-dealer activities and the securities industry. The SEC approved these rules in January 2004.<sup>7</sup>

<sup>4</sup> The do-not-call rules of the FCC and FTC are very similar in terms of substance, in part, because Congress directed the FCC to consult with the FTC to maximize consistency between their respective do-not-call rules. See The Do-Not-Call Implementation Act, 108 Public Law 10, 117 Stat. 557 (March 11, 2003).

<sup>5</sup> See 15 U.S.C. 6102(d)(2)(A), which provides that "The rules promulgated by the Federal Trade Commission under subsection (a) shall not apply to \* \* \* [among other persons, brokers or dealers] \* \* \* ." The FTC's do-not-call rules were promulgated under 15 U.S.C. 6102. The FCC's rules are not subject to this limitation and apply to all sellers and telemarketers. See NASD Notice to Members 04-15 for a more extensive discussion of the concurrent application of FCC and NASD rules in this area.

<sup>6</sup> The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 (codified at 15 U.S.C. 6102) requires the SEC to promulgate telemarketing rules substantially similar to those of the FTC or to direct self-regulatory organizations to promulgate such rules unless the SEC determines that such rules are not in the interest of investor protection.

<sup>7</sup> See Securities Exchange Act Release No. 49055 (January 12, 2004); 69 FR 2801 (January 20, 2004) (SR-NASD-2003-131).

<sup>7</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> In Amendment No. 1, NASD filed a partial amendment to request that the Commission approve the proposed rule change on an accelerated basis pursuant to Section 19(b)(2) of the Securities

Exchange Act of 1934 ("Act"). The partial amendment also changes the effective date of the proposed rule change from January 1, 2005 to March 1, 2005.

### Safe Harbor Provision for the National Do-Not-Call Registry Requirements

The FCC and FTC each provided persons subject to their respective do-not-call rules a "safe harbor" providing that a seller or telemarketer is not liable for a violation of the do-not-call rules that is the result of an error if the seller or telemarketer's routine business practice meets certain specified standards. NASD has provided a parallel safe harbor in paragraph (c) of NASD Rule 2212; this safe harbor is limited to a violation of subparagraph (a)(3) of NASD Rule 2212, which prohibits initiating any telephone solicitation to any person who has registered his or her phone number with the national do-not-call registry.

Today, to be eligible for this NASD Rule 2212 safe harbor, a member or person associated with a member must demonstrate that the member's routine business practice meets four standards. First, the member must have established and implemented written procedures to comply with the national do-not-call rules. Second, the member must have trained its personnel, and any entity assisting it in its compliance, in procedures established pursuant to the national do-not-call rules. Third, the member must have maintained and recorded a list of telephone numbers that the member may not contact. Fourth, the member must use a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the FTC no more than *three months* prior to the date any call is made, and must maintain records documenting this process.

Shortly after NASD's rules were approved, Congress instructed the FTC to amend its telemarketing rules to require use of a national do-not-call registry no more than thirty-one days old.<sup>8</sup> Accordingly, in March 2004, the FTC amended its Telemarketing Sales Rule to require sellers and telemarketers seeking to qualify for the FTC's do-not-call safe harbor to use a version of the national do-not-call registry obtained from the FTC no more than thirty-one days prior to the date any call is made. In August 2004, the FCC adopted a conforming amendment to its Miscellaneous Rules Relating to Common Carriers, requiring that

<sup>8</sup> The FTC indicated that it was directed to amend its rules by Congress in the Consolidated Appropriations Act of 2004, Public Law 108-199, 188 Stat 3 (requirement in Division B, Title V). See The Telemarketing Sales Rule—Part III, 69 FR 16368 (March 29, 2004).

persons who seek to qualify for a similar safe harbor provided in the rule use a version of the national do-not-call registry obtained from the administrator of the national do-not-call registry (*i.e.*, the FTC) no more than thirty-one days prior to the date any call is made.<sup>9</sup> The FTC and FCC rule amendments take effect on January 1, 2005.

NASD is proposing to amend NASD Rule 2212 to conform to this change in the rules of the FTC and FCC. NASD believes that this change is necessary to maintain the consistency between the telemarketing rules of NASD and the FTC and FCC (particularly given that the FCC's rules already directly apply to broker-dealers), and that investors generally expect NASD's telemarketing standards to be comparable to those of the FTC and FCC. Additionally, under The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994 the SEC has requested that NASD amend its do-not-call rules to conform to the recent amendments to the FTC's do-not-call rules.

NASD's proposed rule change would take effect on March 1, 2005. Accordingly, under the proposed rule change, effective March 1, 2005, an NASD member seeking to qualify for the safe harbor in NASD Rule 2212 would be required to use a process to prevent telephone solicitations to any telephone number in a version of the national do-not-call registry obtained from the administrator of the registry (*i.e.*, the FTC) no more than *thirty-one days* prior to the date any call is made.

NASD will announce the effective date of the proposed rule change 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 of the Act,<sup>10</sup> in general, and with Section 15A(b)(6) of the Act,<sup>11</sup> in particular, which requires, among other things, that NASD 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

<sup>9</sup> See 69 FR 60311 (October 8, 2004); CG Docket No. 02-278, FCC 04-204 (adopted August 25, 2004; released September 21, 2004). The FCC indicated that while Congress did not direct the FCC to amend its do-not-call rule, it determined to do so, in part, because it is required to consult and coordinate with the FTC with respect to, and maximize the consistency of, their respective do-not-call rules. See 69 FR 60313.

<sup>10</sup> 15 U.S.C. 78o-3.

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

will increase the protection of investors by enabling investors who do not want to receive telephone solicitations to receive the benefits and protections of the national do-not-call registry sooner.

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

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

#### 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. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, 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](mailto:rule-comments@sec.gov). Please include File Number SR-NASD-2004-174 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609.

All submissions should refer to File Number SR-NASD-2004-174. 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 the filing also will be

available for inspection and copying at the principal offices 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–2004–174 and should be submitted on or before February 9, 2005.

#### IV. Commission's Finding and Order Granting Accelerated Approval of Proposed Rule Changes

NASD has requested that the Commission find good cause pursuant to Section 19(b)(2) of the Act for approving the proposed rule change prior to the 30th day after publication in the **Federal Register**. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to NASD and, in particular, the requirements of Section 15A and the rules and regulations thereunder. After careful review the Commission finds that the proposed rule change is consistent with the requirements of Section 15A(b)(6) of the Act<sup>12</sup> because it is 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.<sup>13</sup> Specifically, the proposed rule change will make the NASD rules consistent with the telemarketing rules of the FTC and FCC, and lessens the possibility of any confusion about a broker-dealer's responsibility to use the national do-not-call registry.

Based on the above, the Commission believes that there is good cause, consistent with Section 15A(b)(6)<sup>14</sup> and Section 19(b)(2) of the Act<sup>15</sup> to approve the proposal, as amended, on an accelerated basis.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>16</sup> that the proposed rule change (SR–NASD–2004–174) is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>17</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51033; File No. SR–NSX–2004–12]

#### Self-Regulatory Organizations; Order Granting Approval to a Proposed Rule Change by the National Stock Exchange To Eliminate the "CBOE Exerciser Member" Membership Class, To Eliminate the Exchange's Special Nominating Committee, and To Remove Certain Special Restrictions on Changes to Certain NSX By-Laws and Rules

January 13, 2005.

#### I. Introduction

On October 21, 2004, the National Stock Exchange ("NSX" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend its by-laws and rules in order to eliminate the "CBOE Exerciser Member" membership class, to eliminate NSX's Special Nominating Committee, and to remove certain special restrictions on making changes to various NSX by-laws and rules. Notice of the proposed rule change was published for comment in the **Federal Register** on December 10, 2004.<sup>3</sup> No comments were received regarding the proposal. This order approves the proposed rule change.

#### II. Background

On November 14, 1986, the Cincinnati Stock Exchange ("CSE"), now known as the NSX, and CBOE entered into an agreement of affiliation pursuant to which CBOE currently holds 162 certificates of proprietary membership of NSX and CBOE and its members have certain rights associated with NSX. The rights CBOE gained as a result of the affiliation include the right for CBOE members to become Proprietary Members of NSX without having to purchase or own certificates of proprietary membership, provided that

each such CBOE member meets all other eligibility requirements for NSX membership (such CBOE members are referred to as "Proprietary Members without certificates" or "CBOE Exerciser Members"). CBOE also gained the right to hold six out of the thirteen seats on the NSX's Board of Directors and the right to hold three of the six seats on the newly created Special Nominating Committee, which is tasked with nominating the Public Directors to the NSX board. Furthermore, as part of the agreement of affiliation, the NSX agreed to adopt special restrictions on amending certain provisions of the NSX by-laws and rules. These terms of the agreement of affiliation were implemented through changes to NSX's by-laws and rules.<sup>4</sup>

NSX and CBOE recently agreed to amend and terminate certain aspects of their affiliation and entered into a termination of rights agreement on September 27, 2004 ("Termination Agreement"). Under the Termination Agreement, CBOE agreed to transfer certain of its certificates of proprietary membership to NSX and to relinquish certain rights associated with NSX in exchange for certain cash payments and other undertakings by NSX, subject to the terms and conditions set forth in the Termination Agreement. The initial closing for the Termination Agreement is conditioned upon Commission approval of the amendments to the NSX by-laws and rules contained in this proposed rule change.

#### III. Description of the Proposal

Under the proposal, NSX would eliminate the CBOE Exerciser Member membership class and the related special privilege for CBOE members to become NSX members without purchasing certificates of proprietary membership. In eliminating this class of membership and this special privilege, the Exchange would provide a transition period whereby all CBOE Exerciser Members would have ninety days from the date of the approval of this proposed rule change to purchase certificates of proprietary membership from NSX. During such ninety day period, a CBOE Exerciser Member who has not purchased a certificate of propriety membership would continue to have the rights and obligations of a Proprietary Member without certificate as those rights and obligations existed prior to

<sup>4</sup> See Securities Exchange Act Release Nos. 23868 (December 9, 1986), 51 FR 44958 (December 15, 1986) (notice of proposed changes to CSE by-laws and rules to implement agreement of affiliation) and 24090 (February 12, 1987), 52 FR 5225 (February 19, 1987) (order approving changes to CSE by-laws and rules to implement agreement of affiliation).

<sup>12</sup> 15 U.S.C. 78o–3(b)(6).

<sup>13</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>14</sup> 15 U.S.C. 78o–3(b)(6).

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

<sup>16</sup> 15 U.S.C. 78s(b)(2).

<sup>17</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 Securities Exchange Act Release No. 50796 (December 6, 2004), 69 FR 32639.