member first having knowledge of its falling out of compliance with the particular membership standard.[7] Members would be afforded the same due process as is currently available under FICC's rules with respect to other types of fines. As with all fines, FICC will notify the Commission of all fines that are imposed pursuant to this rule change.

In addition, members that fail to timely notify FICC of falling out of compliance with any membership standard will automatically be placed on the Watch List and will be subject to more frequent and thorough monitoring as provided for in GSD Rule 4, Section 3 and MBSD Article IV, Rule 6.

3. Notification of Pending Investigations

The proposed rule change also requires applicants and members to notify FICC within two business days of first having knowledge of a pending investigation or similar proceeding or condition that could lead them to violate a membership standard. The proposed rule change will provide an exception to this requirement in cases where disclosure to FICC would cause the applicant or member to violate an applicable law, rule, or regulation.

4. Definitions

Finally, MBSD is proposing to add two definitions to Article I, ''Definitions and General Provisions.'' The term ''Associated Person'' will be defined to mean, when applied to any ''person,'' any partner, officer, or director of such ''person'' or any ''person'' directly or indirectly controlling or controlled by such ''person,'' including an employee of such ''person.'' The term ''Person'' will mean a partnership, corporation, or other organization, entity or individual.

III. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible.[8] The Commission finds that FICC's proposed rule change is consistent with this requirement because it will help FICC monitor its members' compliance with membership standards. This should better enable FICC to act quickly to protect itself and its members and as a result will better enable FICC to safeguard the securities and funds in its custody or control or for which it is responsible. The Commission also finds that FICC's proposed rule change is consistent with this requirement because while it will make an action of statutory disqualification only a criteria to be considered in membership matters and not an automatic bar, FICC has designed the proposed rule change in a manner that will not compromise its membership review process.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR–FICC–2005–02) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[9]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. E5–1102 Filed 3–14–05; 8:45 am]

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[7] Once FICC is notified of an applicant or member's statutory disqualification, it will follow the provisions of Rule 19h–1 of the Act.

[8] 15 U.S.C. 78q–1(b)(3)(F).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51339; File No. SR–NASD–2004–164]

Self-Regulatory Organizations; Order Approving Proposed Rule Change and Amendment No. 1 Thereto by National Association of Securities Dealers, Inc. Relating to the Random Selection of Arbitrators by the Neutral List Selection System

March 9, 2005.

On October 28, 2004, the National Association of Securities Dealers, Inc. (''NASD''), through its subsidiary, NASD Dispute Resolution, Inc. (''NASD Dispute Resolution''), submitted to the Securities and Exchange Commission (''SEC'' or ''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 NASD Rule 10308 of the NASD Code of Arbitration Procedure (''Code''). On January 5, 2005, NASD filed Amendment No. 1 to the proposed rule change.[3] The **Federal Register** published the proposed rule change, as amended, for comment on February 2, 2005.[4] The Commission received four comment letters in response to the proposed rule change.[5] This order approves the proposed rule change, as amended.

The proposed amendment to NASD Rule 10308 would change the method used by the Neutral List Selection System (''NLSS'') to select arbitrators from a rotational to a random selection function by incorporating the random selection provision of the proposed Customer and Industry Code revisions.[6]

The Greenberg letter supported the change to a random selection system. The Sugerman letter commented that a rotational system is more fair, asserting that under such a system an arbitrator's name is presented for possible selection with the same frequency as every other arbitrator. The Zimmerman letter suggested that NASD also use a random selection function for selecting mediators. The Levine letter, while addressing issues relating to arbitrators, did not specifically address the change from a rotational to a random arbitrator selection system.[7]

The Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national

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

[2] 17 CFR 240.19b–4.

[3] *See* letter from Mignon McLemore, NASD, to Catherine McGuire, SEC, dated January 5, 2005. In this letter, NASD stated that it will hire an outside consultant to audit the random selection system after it has been operational for one year and independently verify that the random selection system is operating as described in the proposed rule change. NASD also stated that it will keep statistics on the arbitrators selected by the random selection system who appear on an arbitrator list in order to monitor the effectiveness of the random selection system.

[4] Securities Exchange Act Release No. 51083, 70 FR 5497 (''Notice'').

[5] *See* letters to Jonathan Katz, Secretary, Commission, from Les Greenberg, dated February 10, 2005 (''Greenberg letter''); Arnold Levine, dated February 19, 2005 (''Levine letter''); Philip Zimmerman, dated February 21, 2005 (''Zimmerman letter''); and Irwin Sugerman, dated February 21, 2005 (''Sugerman letter'').

[6] NASD Dispute Resolution has filed with the SEC a proposed rule change to the Code to reorganize the current rules, simplify the language, codify current practices, and implement several substantive changes. The rule filing was submitted in three parts: Customer Code, Industry Code, and Mediation Code. The Customer Code was filed on October 15, 2003, and amended on January 3, 2005 and January 19, 2005 (SR–NASD–2003–158); the Industry Code was filed on January 16, 2004, and amended on February 26, 2004 and January 3, 2005 (SR–NASD–2004–011). The Mediation Code was filed on January 23, 2004, and amended on January 3, 2005 (SR–NASD–2004–013). It does not contain any provisions concerning the NLSS. The three new codes will replace the current Code in its entirety. The Code revision is undergoing SEC staff review and has not yet been published for comment.

[7] The Levine letter commented that NASD should only use professional arbitrators and suggested qualifications that should be required of such arbitrators.

securities association.[8] In particular, the Commission believes that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[9] which requires, among other things, that NASD's rules 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. The Commission believes that a random selection function incorporated into the NASD Dispute Resolution arbitration forum provides a fair and equitable system for parties to select arbitrators.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[10] that the proposed rule change (SR–NASD–2004–164), as amended, is approved.

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

Jill M. Petersen,

Assistant Secretary.

[FR Doc. E5–1103 Filed 3–14–05; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–51338; File No. SR–NASD–2003–141]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. To Adopt an Additional Mark-Up Policy for Transactions in Debt Securities Except Municipal Securities

March 9, 2005.

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 September 17, 2003, the National Association of Securities Dealers, Inc. (''NASD'') 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.[3] On June 29, 2004, NASD filed Amendment No. 1 to the proposed rule change.[4] On February 17, 2005, NASD filed Amendment No. 2 to the proposed rule change.[5] 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

NASD is proposing to adopt a second interpretation, proposed IM–2440–2, to Rule 2440 to provide additional mark-up guidance for transactions in debt securities except municipal securities. Below is the text of the proposed rule change. Proposed new language is in *italics*. Text in bold would appear in italics in the Rule as published in the NASD Manual.

* * * * *

IM–2440–*1*. Mark-Up Policy

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IM–2440–*2*. Additional Mark-Up Policy for Transactions in Debt Securities, Except Municipal Securities [1]

[1] The Interpretation does not apply to transactions in municipal securities. Single terms in parentheses within sentences, such as the terms ''(sales)'' and ''(to)'' in the phrase, ''contemporaneous dealer purchases (sales) in the security in question from (to) institutional accounts,'' refer to scenarios where a member is charging a customer a mark-down.

IM–2440–1 applies to debt securities transactions, and this IM–2440–2 supplements the guidance provided in IM–2440–1.

A dealer that is acting in a principal capacity in a transaction with a customer and is charging a mark-up or mark-down must mark-up or mark-down the transaction from the prevailing market price. Presumptively for purposes of this IM–2440–2, the prevailing market price for a debt security is established by referring to the dealer's contemporaneous cost as incurred, or contemporaneous proceeds as obtained, consistent with NASD pricing rules. (See, e.g., Rule 2320).

*When the dealer is **selling** the security to a customer, countervailing evidence of the prevailing market price may be considered only where the dealer made no **contemporaneous purchases** in the security or can show that in the particular circumstances the dealer's **contemporaneous cost** is not indicative of the prevailing market price. When the dealer is **buying** the security from a customer, countervailing evidence of the prevailing market price may be considered only where the dealer made no **contemporaneous sales** in the security or can show that in the particular circumstances the dealer's **contemporaneous proceeds** are not indicative of the prevailing market price.*

A dealer that effects a transaction in debt securities with a customer and identifies the prevailing market price using a measure other than the dealer's own contemporaneous cost or proceeds must be prepared to provide evidence that is sufficient to overcome the presumption that the dealer's contemporaneous cost or proceeds provide the best measure of the prevailing market price. A dealer may be able to show that its contemporaneous cost or proceeds are not indicative of prevailing market price, and thus overcome the presumption, in instances where (i) interest rates or the credit quality of the security changed significantly after the dealer's contemporaneous trades, or (ii) the dealer's contemporaneous trade was with an institutional account with which the dealer regularly effects transactions in the same or a ''similar'' security, as defined below, and in the case of a sale to such account, was executed at a price higher than the then prevailing market price, or, in the case of a purchase from such account, was executed at a price lower than the then prevailing market price, and the execution price was away from the prevailing market price because of the size and risk of the transaction (a ''Specified Institutional Trade''). In the case of a Specified Institutional Trade, when a dealer seeks to overcome the presumption that the dealer's contemporaneous cost or proceeds provide the best measure of the prevailing market price, the dealer must provide evidence of the then prevailing market price by referring exclusively to inter-dealer trades in the same security executed contemporaneously with the dealer's Specified Institutional Trade.

In instances other than those pertaining to a Specified Institutional Trade, where the dealer has presented evidence that is sufficient to overcome the presumption that the dealer's contemporaneous cost or proceeds provide the best measure of the

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[8] 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. 78(c)(f).

[9] 15 U.S.C. 78*o*–3(b)(6).

[10] 15 U.S.C. 78s(b)(2).

[11] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] Commission staff made certain changes to the description of the proposed rule change with the consent of NASD, to enhance clarity and accuracy. Telephone conversation between Sharon K. Zackula, Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, NASD, Richard Strasser, Attorney-Fellow, and Andrew Shipe, Special Counsel, Division of Market Regulation, Commission, March 3, 2005.

[4] *See* letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine England, Assistant Director, Division of Market Regulation, Commission, dated June 29, 2004.

[5] *See* Form 19b–4, filed February 17, 2005. Amendment No. 2 replaced the previous filings in their entirety.