

connection with the Exchange's withdrawal from the clearance and settlement and securities depository businesses is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act.<sup>7</sup> Section 6(b)(5) requires, among other things, that the rules of an exchange are designed to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Commission believes that the proposed amendments to Article XXI, Rules 3 and 4, regarding members' submission of trade data to the Exchange and maintenance of accounts with Qualified Clearing Agencies for recording purposes, fosters such cooperation and coordination with Qualified Clearing Agencies by providing an appropriate mechanism for the submission and recording of CHX members' trade information.

The Commission also believes that Article XXI, Rules 12 and 13, as amended, which allows the Exchange to adopt procedures for the closure of overdue contracts in securities and to provide certain special services for its members (including making deposits or withdrawals from a bank account, borrowing securities, providing and keeping reports and records, and special cashing), respectively, give the Exchange appropriate authority to perform such services and thereby facilitates the implementation of the proposed arrangements relating to the CHX's decision to withdraw from the businesses it conducted through MCC and MSTC.<sup>8</sup>

Finally, the Commission believes that the proposed Article XXI, Rule 14, which indemnifies the Exchange for providing a guaranty to DTC or a Qualified Clearing Agency to guarantee the obligations of MSTC and MCC to DTC or such Qualified Clearing Agency, should ensure that the Exchange is not discouraged from providing such guaranties, thus fostering cooperation and coordination with those persons engaged in the clearance and settlement of Exchange transactions.

The Commission finds good cause for approving the proposed rule change

prior the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. The Commission believes that accelerated approval of the proposal is appropriate to ensure that adequate rules are in place as of January 16, 1996, the date by which CHX members must find substitute service providers as a result of the Exchange's withdrawal from the securities clearing services and depository businesses it conducted through MCC and MSTC. Further, the proposal involving the arrangements relating to the CHX's decision to withdraw from such businesses was noticed previously in the Federal Register for the full statutory period and has been approved by the Commission.<sup>9</sup>

It is therefore ordered, pursuant to Section 19(b)(2)<sup>10</sup> that the proposed rule change is hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Margaret H. McFarland,  
Deputy Secretary.

[FR Doc. 96-833 Filed 1-22-96; 8:45 am]

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[Release No. 34-36717; File No. SR-NASD-95-62]

**Self-Regulatory Organizations; Notice of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Members' Use of Blanket or Standing Assurances as to Stock Availability To Satisfy Their Affirmative Determination Requirements Under the Prompt Receipt and Delivery of Securities Interpretation When Effecting Short Sales**

January 16, 1996.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on January 11, 1996,<sup>1</sup> the National Association of Securities Dealers, Inc. ("NASD" or "Association") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the NASD. The Commission is publishing this notice to

<sup>9</sup> See *supra* text accompanying note 3.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> The proposed rule change was initially submitted on December 27, 1995, but was amended prior to publication in the Federal Register. The amendment corrects a technical error in the proposed amended language and is available for copying in the Commission's Public Reference Room.

solicit comments on the proposed rule change from interested persons.

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

The NASD is proposing to change the NASD's Prompt Receipt and Delivery of Securities Interpretation ("Interpretation") issued by the NASD Board of Governors under Article III, Section 1 of the NASD Rules of Fair Practice. Specifically, the NASD proposes to amend the Interpretation to provide that under certain circumstances members may rely on "blanket" or standing assurances as to stock availability to satisfy their affirmative determination requirements under the Interpretation. The following is the complete text of the proposed rule change. Additions are italicized and deletions are bracketed.

••• Interpretation of the Board of Governors  
Prompt Receipt and Delivery of Securities

\* \* \* \* \*

Section (b)(4)(c)

The manner by which a member or person associated with a member annotates compliance with the "affirmative determination" requirement contained in subsection (b)(2) above (e.g., marking the order ticket, recording inquiries in a log, etc.) is not specified by this Interpretation and, therefore, shall be decided by each member. [However, an affirmative determination and annotation of that affirmative determination must be made for each and every transaction since a "blanket" or standing assurance that securities are available for borrowing is not acceptable to satisfy the affirmative determination requirement.] *Members may rely on "blanket" or standing assurances that securities will be available for borrowing on settlement date to satisfy their affirmative determination requirements under this Interpretation, provided: (1) the information used to generate the "blanket" or standing assurance is less than 24-hours old; and (2) the member delivers the security on settlement date. Should a member relying on a blanket or standing assurance fail to deliver the security on settlement date, the Association shall deem such conduct inconsistent with the terms of this Interpretation, absent mitigating circumstances adequately documented by the member.*

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> See *supra* note 4 and accompanying text.

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

In its filing with the Commission, the 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. The 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

On September 12, 1994, the SEC approved an NASD rule change (SR-NASD-94-32) that amended the Interpretation.<sup>2</sup> Specifically, the Interpretation, as amended, requires members to annotate, on the trade ticket or on some other record maintained for that purpose by the member firm, the following information when effecting a short sale transaction:<sup>3</sup>

1. If a customer assures delivery, the member must annotate that conversation noting the present location of the securities; whether the securities are in good deliverable form; and whether they will be delivered to the firm within time for settlement; or

2. If the member locates the stock, the member must annotate the identity of the individual and firm contacted who offered assurance that the shares would be delivered or were available for borrowing by settlement date; and the number of shares needed to cover the short sale.

The amendment also provided that the manner by which a member or person associated with a member annotates compliance with this "affirmative determination" requirement (e.g., marking the order ticket, recording inquiries in a log, etc.) is left for each individual firm to decide.

<sup>2</sup> Securities Exchange Act Release No. 34653 (September 12, 1994), 59 FR 47965 (September 19, 1994).

<sup>3</sup> The rule change did not modify any exemptions from the affirmative determination requirements that are presently contained in the Interpretation. Specifically, transactions in corporate debt securities, bona fide market making transactions by members in securities in which they are registered as Nasdaq market makers, bona fide market maker transactions in non-NASDAQ securities in which the market maker publishes two-sided quotations in an independent quotation medium, and proprietary transactions by members that result in fully hedged or arbitrated positions, are still exempt from the affirmative determination requirements for short sales.

In addition, the amendment also clarified that an affirmative determination and annotation of that affirmative determination must be made for each and every transaction since a "blanket" or standing assurance that securities are available for borrowing is not acceptable to satisfy the affirmative determination requirement ("standing assurance provision"). Thus, by requiring firms to annotate each and every affirmative determination, the amendment made clear the NASD's policy that firms cannot rely on daily fax sheets of "borrowable stocks" to satisfy their affirmative determination requirements under the Interpretation.

In NASD Notice to Members 94-80, the NASD announced that the effective date of the amendments to the Interpretation would be November 30, 1994. Based upon feedback from a broad spectrum of NASD members that compliance with the amended Interpretation would not be possible by November 30, 1994, due to a variety of operational adjustments that needed to be made, the NASD decided to postpone the effective date of the amendments to the Interpretation until January 9, 1995, to give member firms sufficient time to prepare for the rule change.

In addition, in light of the NASD's concern that the prohibition against the use of daily fax sheets and other "blanket" or standing assurances may have created an unnecessarily burdensome regulatory requirement for NASD members, the NASD decided to postpone the effective date of the standing assurance provision until February 20, 1996, to give the NASD the opportunity to determine whether to amend or delete the rule or let it go into effect as approved by the SEC.<sup>4</sup> Even though the NASD has delayed the effective date of the standing assurance provision, the Interpretation, as amended, still requires members to make an affirmative determination as to stock availability for every short sale transaction and annotate that such a determination was made.

Accordingly, after having had an opportunity to reexamine the standing assurance provision, the operational impact it would have on member firms, and other regulatory requirements applicable to short sales, the NASD is now proposing to delete the standing assurance provision and replace it with a provision that would allow NASD members to rely on daily fax sheets under some circumstances. Specifically,

<sup>4</sup> See Securities Exchange Act Release Nos. 35207 (January 10, 1995), 60 FR 3445 (January 17, 1995); and 36245 (September 18, 1995), 60 FR 49307 (September 22, 1995).

under the proposal, a member could rely on a "blanket" or standing assurance that securities will be available for borrowing on settlement date to satisfy its affirmative determination requirement under the Interpretation, provided: (1) The information used to generate the "blanket" or standing assurance is less than 24-hours old; and (2) the member delivers the security on settlement date. The proposal also provides that, should a member relying on a "blanket" or standing assurance fail to deliver the security on settlement date, the NASD will deem such conduct inconsistent with the terms of the Interpretation, absent mitigating circumstances adequately documented by the member.

The NASD believes this proposal strikes a reasonable balance between the need to prevent naked, potentially abusive short selling activity and the need to avoid the imposition of rules that impose unnecessarily burdensome regulatory requirements. Specifically, while the proposal does not categorically prohibit the use of daily fax sheets to make affirmative determinations, it does impose conditions on the use of fax sheets (*i.e.*, they cannot be based on information older than 24 hours) and it clearly alerts members relying on daily fax sheets to the risk that they shall be in violation of the Interpretation if they subsequently fail to deliver the security sold short. Thus, contrary to the standing assurance provision, members would have the flexibility under the proposal to exercise their judgement as to whether it would or would not be appropriate to rely on a fax sheet. As noted above, however, even though firms would have the flexibility to use fax sheets under the proposal, should a member use a fax sheet and subsequently fail to deliver the stock, the NASD would view such failure to deliver to be conduct inconsistent with the Interpretation. In this connection, in instances where a member fails to deliver after having relied on a fax sheet, the proposal also provides that the NASD may consider mitigating circumstances adequately documented by the member. The NASD believes this further illustrates the reasonableness of its proposal.

For the above reasons, the NASD believes the proposed rule change is consistent with Section 15A(b)(6) of the Act. Section 15A(b)(6) requires that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in

regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest. In addition, the NASD believes that its proposal will serve to conform the NASD's affirmative determination rule with the New York Stock Exchange's ("NYSE") affirmative determination rule, thereby promoting uniformity and consistency in the application and interpretation of parallel NASD and NYSE rules and avoiding member firm confusion. In sum, the NASD believes the proposal will ease some of the operational concerns raised by members with respect to the standing assurance provision, without compromising the regulatory purposes served by the Interpretation.

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

The NASD believes that the proposed rule change will not result in 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*

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 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. In particular, the Commission seeks comment on whether the benefits associated with the annotation requirement contained in the Interpretation outweigh those associated with the use of a fax sheet to an extent necessary to justify a presumption that

reliance on a fax sheet will be deemed conduct inconsistent with the Interpretation in the case of a "fail to deliver" situation. In addition, the Commission seeks comment on the extent to which interested persons perceive a problem associated with the possibility of an arbitrary application of the Interpretation. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. 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 NASD. All submissions should refer to file number SR-NASD-95-62 and should be submitted by February 13, 1996.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>5</sup>

Jonathan G. Katz,  
Secretary.

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[Release No. 34-36714; File No. SR-NSCC-95-13]

#### **Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change Enabling Members Settling Mutual Fund Transactions in Same Day Funds To Settle Through a Settling Bank**

January 16, 1996.

On November 3, 1995, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") a proposed rule change (File No. SR-NSCC-95-13) pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> Notice of the proposal was published in the Federal Register on November 28, 1995.<sup>2</sup> No comment letters were received. For the reasons

<sup>5</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. § 78s(b)(1) (1988).

<sup>2</sup> Securities Exchange Act Release No. 36495 (November 20, 1995), 60 FR 58697.

discussed below, the Commission is approving the proposed rule change.

#### I. Description

NSCC's proposed rule change modifies NSCC's rules to enable members settling mutual fund transactions in same day funds to settle their obligations with NSCC through a settling bank. The proposal establishes a new membership category for settling banks. To become a settling bank, a bank will be required to meet the operational and financial requirements established by NSCC. These requirements include that a settling bank must have a short-term obligation rating of at least A-2 by Standard and Poor's Corporation or P-2 by Moody's Investor Services Incorporated.<sup>3</sup> Banks that do not meet this standard may be considered on an exception basis. Each bank that qualifies as a settling bank will be required to enter into a separate agreement with each member on whose behalf it will perform settlement functions.

Under the rules, settling banks will have the opportunity to refuse to settle for one or more members by notifying NSCC within the time established by NSCC. The proposed rules also specify that settling banks will be required to wire funds by the deadline imposed by NSCC or be subject to a penalty fee. In addition, any settling bank that fails to pay on settlement day will be required to cover NSCC's interest costs resulting from its failure to settle in a timely manner. NSCC's proposed rule change also makes conforming changes to relevant sections of NSCC's rules.

#### II. Discussion

Section 17A(b)(3)(F)<sup>4</sup> requires that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions and 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. The Commission believes the proposed rule change is consistent with NSCC's obligations under the Act because the proposal will help facilitate NSCC's conversion to a same day funds settlement system on February 22, 1996 by establishing a structure by which

<sup>3</sup> A-2 and P-2 are credit ratings issued, respectively, by Standard and Poor's Corporation and Moody's Investor Services, Inc., to recommend the credit worthiness of various financial institutions with regard to certain financial obligations. These agencies may look at many factors, including profitability, capital, asset quality, liquidity, and management, before assigning a rating to the obligations of a financial institution.

<sup>4</sup> 15 U.S.C. 78q-1(b)(3)(F) (1988).