

functions are noncustodial in that it does not hold its members' funds or securities. It is reasonable for NSCC, which is member-owned and governed, and its members to agree through board approval of the proposed rule change and to contract with one another in a cooperative arrangement as to how to allocate NSCC's liability among NSCC and its members. Therefore, the Commission has determined that given the noncustodial nature of NSCC's services, a gross negligence standard of care and limitation of liability is allowable for NSCC.<sup>12</sup>

#### 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-NSCC-2004-09) be and hereby is approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>13</sup>

**Jill Peterson,**

*Assistant Secretary.*

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high degree of clearing agency care with the effect resulting liabilities may have on clearing agency operations, costs, and safeguarding of securities and funds. Securities Exchange Act Release No. 22940 (February 24, 1986), 51 FR 7169. Subsequently, in a release granting temporary registration as a clearing agency to The Intermarket Clearing Corporation, the Commission stated that a gross negligence standard of care may be appropriate for certain noncustodial functions that, consistent with minimizing risk mutualization, a clearing agency, its board of directors, and its members determine to allocate to individual service users. Securities Exchange Act Release No. 26154 (October 3, 1988), 53 FR 39556. Finally, in a release granting the approval of temporary registration as a clearing agency to the International Securities Clearing Corporation, the Commission indicated that historically it has left to user-governed clearing agencies the question of how to allocate losses associated with noncustodial, data processing, clearing agency functions and has approved clearing agency services embodying a gross-negligence standard of care. Securities Exchange Act Release No. 26812 (May 12, 1989), 54 FR 21691.

<sup>12</sup> The Commission notes that the rule change does not alleviate NSCC from liability for violation of the Federal securities laws where there exists a private right of action and therefore is not designed to adversely affect NSCC's compliance with the Federal securities laws and private rights of action that exist for violations of the Federal securities laws.

<sup>13</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51674; File No. SR-NSCC-2005-03]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of a Proposed Rule Change Relating to the Collecting of Fees for Services Provided by Other Entities

May 9, 2005.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on April 26, 2005, National Securities Clearing Corporation ("NSCC") 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 primarily by NSCC. 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

The proposed rule change would amend NSCC's rules to allow NSCC to collect fees for services provided by unregulated subsidiaries of The Depository Trust and Clearing Corporation ("DTCC") and by other entities.

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

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.<sup>2</sup>

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

NSCC is a subsidiary of DTCC. Members of NSCC and their affiliates may from time to time utilize the services of DTCC subsidiaries that are not registered as clearing agencies with the Commission. Such subsidiaries

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

<sup>2</sup> The Commission has modified parts of these statements.

include Global Asset Solutions LLC and DTCC Deriv/Serv LLC. In addition, members of NSCC and their affiliates may utilize the services of other third parties. NSCC has determined that it would be more efficient and less costly if the fees that members agree to pay for such services were collected by NSCC rather than through independent billing mechanisms that would otherwise have to be established by each subsidiary of DTCC and third party that is not a registered clearing agency.

NSCC's rules currently allow for fee collection arrangements with respect to collection of fees from members. The proposed rule change would further clarify this practice and facilitate collection of fees with respect to affiliates of members. NSCC will enter into appropriate agreements with such subsidiaries and others regarding the collection of fees.

NSCC believes that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder because NSCC will implement the service in a manner whereby NSCC will be able to assure the safeguarding of securities and funds which are in its custody or control or for which it is responsible.

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

NSCC does not believe that the proposed rule change would have any impact or impose any burden on competition.

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

Written comments relating to the proposed rule change have not been solicited or received.

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

Within thirty-five 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 ninety 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 the 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](mailto:rule-comments@sec.gov). Please include File Number SR–NSCC–2005–03 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–NSCC–2005–03. 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 Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NSCC and on NSCC's Web site at <http://www.nsc.com>. 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–NSCC–2005–03 and should be submitted on or before June 3, 2005.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>3</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34–51665; File No. SR–NYSE–2005–23]**

#### **Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Seek Permanent Approval of the Pilot Relating to the Allocation Policy for Trading of Exchange-Traded Funds on an Unlisted Trading Privileges Basis (NYSE Rule 103B)**

May 6, 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 March 29, 2005, 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 and II below, which items have been prepared by the NYSE. The proposed rule change has been filed by the NYSE as a “non-controversial” rule change under Rule 19b–4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission.<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**

The proposed rule change seeks to adopt on a permanent basis the pilot program relating to the allocation policy for trading certain Exchange-Traded Funds (“ETFs”), which has been codified in NYSE Rule 103B, section VIII. This policy applies to ETFs which are traded on an Unlisted Trading

Privileges Basis (“UTP”). The pilot is set to expire on May 8, 2005. For purposes of the allocation policy, ETFs include both Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) and Trust Issued Receipts (as defined in Rule 1200). The text of the proposed rule change is below. Proposed new language is *italicized*.

\* \* \* \* \*

#### **Rule 103B Specialist Stock Allocation I–VII. No Changes**

\* \* \* \* \*

#### **VIII. Policy for Allocation of Exchange Traded Funds Admitted To Trading on the Exchange on an Unlisted Trading Privileges Basis**

Investment Company Units (as defined in paragraph 703.16 of the Listed Company Manual) and Trust Issued Receipts (as defined in Exchange Rule 1200) (collectively known as Exchange-Traded Funds) (“ETFs”) admitted to trading on the Exchange on an unlisted trading privileges basis shall be allocated pursuant to this Policy rather than the Exchange's policy for allocating securities to be listed on the Exchange.

ETFs shall be allocated by a special committee consisting of the Chairman of the Allocation Committee, the three most senior Floor broker members of the Allocation Committee, and four members of the Exchange's senior management as designated by the Chief Executive Officer of the Exchange. This committee shall solicit allocation applications from interested specialist units, and shall review the same performance and disciplinary material with respect to specialist unit applicants as would be reviewed by the Allocation Committee in allocating listed stocks. The committee shall reach its decisions by majority vote with any tie votes being decided by the Chief Executive Officer of the Exchange. Specialist unit applicants may appear before the committee.

##### **Special Criteria**

In their allocation applications, specialist units must demonstrate:

- (a) An understanding of the trading characteristics of ETFs;
- (b) Expertise in the trading of derivatively-priced instruments;
- (c) Ability and willingness to engage in hedging activity as appropriate;
- (d) Knowledge of other markets in which the ETF to be allocated trades;
- (e) Willingness to provide financial and other support to Exchange marketing and educational initiatives with respect to the ETF to be allocated.

<sup>3</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> 17 CFR 240.19b–4(f)(6).

<sup>4</sup> Rule 19b–4(f)(6) under the Act requires the NYSE to provide the Commission with five business days notice of its intention to file a non-controversial proposed rule change. The NYSE did not provide such notice but requested that the Commission waive the notice requirement. The NYSE also requested that the Commission waive the 30-day operative delay. See Rule 19b–4(f)(6)(iii) under the Act. 17 CFR 240.19b–4(f)(6)(iii).