

19b-4 thereunder.¹¹ At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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 at the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the MSRB. All submissions should refer to File No. SR-MSRB-00-05 and should be submitted by April 28, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹²

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42601; File No. SR-NASD-99-74]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 by the National Association of Securities Dealers, Inc. Relating to an Exemption From NASD Conduct Rule 2710 for Closed-End Management Companies That Make Periodic Repurchases of Their Securities Under Rule 23c-3(b) of the Investment Company Act of 1940

March 30, 2000.

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 December 20, 1999, the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly owned subsidiary, NASD Regulation, Inc. ("NASD Regulation"), 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 NASD Regulation. The Association filed an amendment to the proposed rule change on February 29, 2000, which Amendment entirely replaces and supersedes the initial proposal.³ On March 20, 2000, the Association filed Amendment No. 2.⁴ 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 Regulation proposes to amend NASD Conduct Rules 2710 ("Corporate Financing Rule") and 2830 to exempt public offerings by closed-end investment management companies that make periodic tender offers for their securities in compliance with Rule 23c-3(b)⁵ of the Investment Company Act of

1940⁶ (the "1940 Act") from the filing requirements and limitations on underwriting compensation of the corporate Financing Rule and, instead, subject such offerings to the sales charge limitations of NASD Conduct Rule 2830. Below is the text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

2710. Corporate Financing Rule—Underwriting Terms and Arrangements

- (a) No change.
- (b) Filing Requirements.
- (1)–(7) No change.
- (8) Exempt Offerings.

Notwithstanding the provisions of subparagraph (1) above, the following offerings are exempt from this Rule, Rule 2720, and rule 2810. Documents and information relating to the following offerings need not be filed for review:

(A)–(B) No Change.

(C) securities of [investment companies registered under the Investment Company Act of 1940, as amended, except securities of a management company defined as a "closed-end company" in Section 5(a)(2) of that Act] *"open-end" investment companies as defined in Section 5(a)(1) of the Investment Company Act of 1940 and securities of any "closed-end" investment company as defined in Section 5(a)(2) of that Act that:*

- (i) *makes periodic repurchase offers pursuant to Rule 23c-3(b) under the Investment Company Act of 1940; and*
- (ii) *offers its shares on a continuous basis pursuant to Rule 415(a)(1)(xi) under the Securities Act of 1933.*

(D)–(J) No change.

(9)–(12) No change.

(c)–(d) No change.

* * * * *

2830. Investment Company Securities

(a)–(c) No change.

(d) Sales Charge.

No members shall offer or sell the shares of any open-end investment company, *any Closed-end investment company that makes periodic repurchase offers pursuant to Rule 23c-3(b) under the 1940 Act and offers its shares on a continuous basis pursuant to Rule 415(a)(1)(xi) under the Securities Act of 1933, or any "single payment" investment plan issued by a unit investment trust (collectively "investment companies") registered under the 1940 Act if the sales charges described in the prospectus are excessive. Aggregate sales charges shall*

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See February 28, 2000 letter and attachments from Joan C. Conley, Secretary, NASD Regulation, Inc. to Katherine A. England, Assistant Director, Division of Market Regulation ("Division"), SEC ("Amendment No. 1"). In Amendment No. 1, NASD Regulation made changes to the language of the proposed new rule. Exhibits 2 through 4 that were attached to the original filing are incorporated by reference in Amendment No. 1.

⁴ See March 17, 2000 letter from Suzanne E. Rothwell, Chief Counsel, Corporate Financing, NASD Regulation, Inc. to Katherine A. England, Assistant Director, Division, SEC, ("Amendment No. 2"). Amendment No. 2 made minor technical changes to the proposal.

⁵ 17 CFR 270.23c-3(b).

⁶ 15 U.S.C. 80a.

¹¹ 17 CFR 240.19b-4(f)(1).

¹² 17 CFR 200.30-3(a)(12).

be deemed excessive if they do not conform to the following provisions:

(1)–(5) No change.

(e)–(i) No change.

(j) Repurchase from Dealer.

No member who is a principal underwriter of a security issued by an open-end [management] investment company or a closed-end investment company that makes periodic repurchase offers pursuant to Rule 23c–3(b) under the 1940 Act and offers its shares on a continuous basis pursuant to Rule 415(a)(1)(xi) under the Securities Act of 1933 shall repurchase such security, either as principal or as agent for the issuer, from a dealer acting as principal who is not a party to a sales agreement with a principal underwriter, nor from any investor, unless such dealer or investor is the record owner of the security so tendered for repurchase. No member who is a principal underwriter shall participate in the offering or in the sale of any such security if the issuer voluntarily redeems or repurchases its securities from a dealer acting as principal who is not a party to such a sales agreement nor from any investor, unless such dealer or investor is the record owner of the security so tendered for repurchase. Nothing in this paragraph shall relate to the compulsory redemption of any security upon presentation to the issuer pursuant to the terms of the security.

Nothing in this Rule shall prevent any member, whether or not a party to a sales agreement, from selling any such security for the account of a record owner to the underwriter or issuer at the bid price next quoted by or for the issuer and charging the investor a reasonable charge for handling the transaction, provided that such member discloses to such record owner that direct redemption of the security can be accomplished by the record owner without incurring such charges.

(k)–(n) 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 Regulation 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. NASD Regulation 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

The Corporate Financing Rule regulates the underwriting terms and other arrangements of public offerings of securities. Subparagraph (b)(8)(C) of the Corporate Financing Rule provides that securities of investment companies registered under the 1940 Act⁷ are exempt from filing and compliance with the Corporate Financing Rule, unless the offering is of securities of a management company defined as a "closed-end" company in Section 5(a)(2)⁸ of the 1940 Act⁹ ("closed-end funds").¹⁰ Thus, closed-end funds are subject to the filing requirements, filing fees, and regulations of the Corporate Financing Rule. Open-end investment management companies ("open-end funds") that continuously offer redeemable securities are exempt from filing with NASD Regulation under the Corporate Financing Rule and a member's receipt of their sales charges is regulated under NASD Conduct Rule 2830.

Closed-end funds are subject to the core provisions of the 1940 Act¹¹ that also apply to open-end funds, including prohibitions on affiliated transactions, obligations requiring shareholder approval of advisory contracts, anti-pyramiding restrictions, and board composition requirements. However, such funds are not subject to other 1940 Act¹² restrictions applicable to open-end funds, including limitations on leverage and obligations pertaining to the liquidity of investments. The Corporate Financing Rule and its predecessor rule have long been applied to members' sales of the securities of closed-end funds on the basis that closed-end fund offerings are structured and marketed in a manner that is more similar to and competitive with corporate securities offerings than to open-end funds. At the time the Corporate Financing Rule was adopted, closed-end funds conducted offerings of a fixed number of common shares at specified times; priced their shares

periodically; limited sales compensation of broker/dealers to a discount from a fixed offering price; did not redeem their securities; and generally listed their securities on a securities market.

Certain closed-end funds, commonly known as "interval funds," have developed a hybrid structure in which they engage in continuous offerings of their securities under Rule 415¹³ under the Securities Act of 1933;¹⁴ price their shares daily; pay broker/dealers initial and continuing compensation that meets the sales charge limitations of NASD Conduct Rule 2830; do not list their securities on a securities market; and redeem shares by making periodic self-tenders in compliance with Rule 23c–3(b)¹⁵ of the 1940 Act.¹⁶ Rule 23c–3(b)¹⁷ requires that the interval fund establish as a fundamental policy, changeable only by a majority vote of the outstanding voting securities of the company, that it will make periodic repurchase offers. Because the shares of interval funds are not redeemable on a daily basis, they are nonetheless classified as "closed-end" under the 1940 Act.¹⁸

In *Notice to Members 98–81* (October, 1998), NASD Regulation requested public comment on whether any of the NASD's rules are obsolete. One commenter, the Investment Company Institute, proposed exempting interval funds from regulation by the Corporate Financing Rule. In addition, the Corporate Financing Department has received a rulemaking petition requesting an exemption from the Corporate Financing Rule for interval funds. NASD Regulation believes that the distribution of interval fund shares is conducted and financed in a manner more similar to that used by open-end management investment companies than the method used by traditional closed-end funds. Therefore, the calculation of members' compensation for the distribution of interval fund shares is more properly regulated by provision (d) of NASD Conduct Rule 2830 (provision (d) hereinafter, the "Sales Charge Rule"), rather than by the limitations on underwriting compensation in the Corporate Financing Rule.

Consequently, NASD Regulation proposes to amend the Corporate Financing Rule and NASD Conduct Rule 2830 to exempt interval funds from the filing requirements, filing fees, and

⁷ 15 U.S.C. 80a.

⁸ 15 U.S.C. 80a–5(a)(2).

⁹ 15 U.S.C. 80a.

¹⁰ Section 5(a)(1) of the 1940 Act defines "open-end company" as "a management company which is offering for sale or has outstanding any redeemable security for which it is the issuer." Section 5(a)(2) of the 1940 Act defines "closed-end company" as "any management company other than an open-end company." 15 U.S.C. 80a–5(a)(1) and (2).

¹¹ 15 U.S.C. 80a.

¹² *Id.*

¹³ 17 CFR 230.415.

¹⁴ 15 U.S.C. 77a *et seq.*

¹⁵ 17 CFR 270.23c–3(b).

¹⁶ 15 U.S.C. 80a.

¹⁷ 17 CFR 270.23c–3(b).

¹⁸ 15 U.S.C. 80a.

regulations of the Corporate Financing Rule and to, instead, subject them to NASD Conduct Rule 2830, which regulates the distribution and sales charges of open-end funds.¹⁹ The proposed amendment to the Corporate Financing Rule would amend subparagraph (b)(8)(C) to provide that closed-end fund offerings are exempt if the fund makes periodic repurchase offers pursuant to Rule 23c-3(b)²⁰ and it offers its shares on a continuous basis pursuant to Rule 415²¹ under the Securities Act of 1933.²² Closed-end funds that do not meet these requirements will continue to be subject to the Corporate Financing Rule. The proposed amendment to NASD Conduct Rule 2830 would amend paragraphs (d) and (j) to provide that interval funds are subject to the provisions regulating sales charges and the repurchases of fund securities.²³

2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,²⁴ which requires, among other things, that the Association's 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 Regulation believes that the calculation of members' compensation for the distribution of interval fund shares is more properly regulated by the Sales

Charge Rule, rather than by the limitations on underwriting compensation in the Corporate Financing Rule.

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

NASD Regulation 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

NASD Notice to Members 98-81 (October, 1998) requested comment on whether any NASD rules are obsolete. A copy of the comment letter received from the Investment Company Institute in response to the Notice that requested the amendments proposed herein was filed with the proposed rule change. A copy of a petition for rulemaking requesting the amendments proposed herein submitted by the law firm of Stradley Ronon Stevens & Young on behalf of Franklin/Templeton Distributors, Inc. was also attached to the proposed rule change.

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:

- By order approve such proposed rule change, or
- 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. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. 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-99-74 and should be submitted by April 28, 2000.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.²⁵

Margaret H. McFarland,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-42606; File No. SR-NASD-00-02]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Amending NASD Code of Arbitration Rules 10335 and 10205(h) Regarding Injunctive Relief

April 3, 2000.

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 January 13, 2000,³ the National Association of Securities Dealers, Inc. ("NASD" or "Association"), through its wholly-owned subsidiary NASD Regulation, Inc. ("NASD Regulation") filed with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD Regulation. 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

NASD Regulation is proposing to amend Rules 10335 and 10205(h) of the

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On March 9, 2000 and March 15, 2000 the NASD submitted Amendments No. 1 and 2 to the proposed rule change, respectively, the substance of which is incorporated into the notice. See letters to Katherine A. England, Assistant Director, Division of Market Regulation, Commission, from Patrice Gliniecki, Vice President and Deputy General Counsel, NASD Regulation, dated March 7, 2000 ("Amendment No. 1") and March 24, 2000 (Amendment No. "2").

¹⁹ Interval funds are distinguished from other hybrid closed-end funds that make periodic self-tenders in compliance with Rule 13e-4 and Schedule 13E-4 under the Act ("tender offer funds"). See 17 CFR 240.13e-4 and 17 CFR 240.13e-101 *et seq.* Such tender offer funds are not required to establish as a fundamental policy that they will make periodic repurchases, as required by Rule 23c-3(b) under the 1940 Act. 17 CFR 270.23c-3(b), 15 U.S.C. 80a. The rule change proposed herein would not exempt tender offer funds from the Corporate Financing Rule. However, NASD Regulation will consider individual requests for exemption under the NASD Rule 9600 series from the requirements of the Corporate Financing Rule for such tender offer funds. See, Exemption granted October 29, 1999 under "Corporate Financing Rule—Rule 2710" at www.nasd.com.

²⁰ 17 CFR 270.23c-3(b).

²¹ 17 CFR 230.415.

²² 15 U.S.C. 77a *et seq.*

²³ An interval fund that has received a "no objections" opinion from the Corporate Financing Department based upon representations that underwriting compensation will not exceed a certain amount will become subject to the Sales Charge Rule upon effectiveness of the proposed amendments, provided that the compensation limit has not already been met or exceeded. Any interval fund that has reached the applicable compensation limit under the Corporate Financing Rule shall remain subject to the requirements of the Rule until the fund files a post-effective amendment with the Commission registering additional securities.

²⁴ 15 U.S.C. 78o-3(b)(6).