

and the Commission continues to believe it is consistent with the Act.<sup>22</sup>

The BSE Letter also expressed concern that the ISE's Facilitation Mechanism contains no prohibition on the cancellation of a facilitation order, which the BSE stated could leave a customer order potentially unexecuted and subject to market risk. The BSE contends that BOX's rules are better because they prohibit cancellation of facilitation orders. The Commission, however, previously found this feature of the ISE's Facilitation Mechanism to be consistent with the Act.<sup>23</sup> Moreover, the Commission notes that Paragraph .01 to Supplementary Material to ISE Rule 716 states, among other things:

It will be a violation of a Member's duty of best execution to its customer if it were to cancel a facilitation order to avoid execution of the order at a better price. The availability of the Facilitation Mechanism does not alter a Member's best execution duty to get the best price for its customer.

The BSE Letter also commented that the ISE's Facilitation Mechanism does not provide for the dissemination to ISE members of information regarding the price and size of the orders competing with the facilitation order, which the BSE believes restricts potential price improvement. Although the ISE's rules are different than those proposed by the BSE and approved by the Commission, the Commission nevertheless believes the ISE's rules in this regard are consistent with the Act.<sup>24</sup>

In addition, the BSE Letter asked why "Public Customer Order" would be replaced by "order" in ISE Rule 716(d)(1). The ISE explains in Amendment No. 3 that the purpose of the deletion of the phrase "Public Customer" is to allow the use of the Facilitation Mechanism for broker-dealer orders as well as Public Customer orders.<sup>25</sup>

The BSE Letter questioned the reference in the Supplementary Material to ISE Rule 716 to "Solicited Order" Mechanism, which at the time the ISE filed its proposal was not part of the ISE's rules. As noted above, Amendment No. 2 addressed this comment by removing the reference to "Solicited Order" Mechanism.<sup>26</sup> Amendment No. 4, however, reinserted this language following the

Commission's approval of the ISE's Solicited Order Mechanism.<sup>27</sup>

The BSE Letter asked why the proposed rule change would delete the phrase "on the Exchange" from ISE Rule 716(d)(3)(i). The ISE represents that the deletion of "on the Exchange," is a technical clarification that will not affect the operation of Rule 716.<sup>28</sup>

The Commission finds good cause for approving Amendment Nos. 2, 3, 4, and 5 to the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**. The Commission believes that accelerated approval of Amendment Nos. 2, 3, 4, and 5 is appropriate because it will immediately allow broker-dealer and public customer orders to be executed at Split Prices. Accordingly, the Commission believes that there is good cause, consistent with Section 19(b) of the Act, to approve Amendment Nos. 2, 3, 4, and 5 to the proposed rule change on an accelerated basis.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment Nos. 2, 3, 4, and 5 are 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-ISE-2003-07 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-ISE-2003-07. 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 the ISE. 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-ISE-2003-07 and should be submitted on or before June 3, 2005.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>29</sup> that the proposed rule change (SR-ISE-2003-07) and Amendment No. 1 thereto are hereby approved and that Amendment Nos. 2, 3, 4, and 5 thereto are hereby approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>30</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. E5-2381 Filed 5-12-05; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-51669; File No. SR-NSCC-2004-09]

### Self-Regulatory Organizations; National Securities Clearing Corporation; Order Approving Proposed Rule Change To Establish a Comprehensive Standard of Care and Limitation of Liability to Its Members

May 9, 2005.

#### I. Introduction

On December 8, 2004, the National Securities Clearing Corporation ("NSCC") filed with the Securities and Exchange Commission ("Commission") proposed rule change SR-NSCC-2004-09 pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act").<sup>1</sup> Notice of the proposal was

<sup>22</sup> See Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (File No. 10-127) (order approving the application of the ISE for registration as a national securities exchange) at 11397.

<sup>23</sup> *Id.* at 11398.

<sup>24</sup> *Id.* at 11397.

<sup>25</sup> See supra note 8.

<sup>26</sup> See supra note 7.

<sup>27</sup> See supra notes 9 and 10.

<sup>28</sup> Telephone conversation between Katherine Simmons, Vice President and Associate General Counsel, ISE, and Theodore R. Lazo, Senior Special Counsel, Division, Commission (March 22, 2004).

<sup>29</sup> 15 U.S.C. 78s(b)(2).

<sup>30</sup> 17 CFR 200.30-3(a)(12).

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

published in the **Federal Register** on April 6, 2005.<sup>2</sup> No comment letters were received. For the reasons discussed below, the Commission is approving the proposed rule change.

## II. Description

NSCC is establishing a comprehensive standard of care and limitation of liability with respect to its members. Historically, the Commission has left to user-governed clearing agencies the question of how to allocate losses associated with, among other things, clearing agency functions.<sup>3</sup> The Commission has reviewed clearing agency services on a case-by-case basis and in determining the appropriate standard of care has balanced the need for a high degree of clearing agency care with the effect the resulting liabilities may have on clearing agency operations, costs, and safekeeping of securities and funds.<sup>4</sup> Because standards of care represent an allocation of rights and liabilities between a clearing agency and its members, which are generally sophisticated financial entities, the Commission has refrained from establishing a unique federal standard of care and generally has allowed clearing agencies and other self-regulatory organizations and their members to establish their own standards of care.<sup>5</sup> In addition, the Commission has recognized that a gross negligence standard of care is appropriate for certain noncustodial functions where a clearing agency, its board of directors, and its members determine to allocate risk to individual service users.<sup>6</sup>

NSCC believes that adopting a uniform rule<sup>7</sup> limiting NSCC's liability

to its members to direct losses caused by NSCC's gross negligence, willful misconduct, or violation of Federal securities laws for which there is a private right of action will: (1) Memorialize an appropriate commercial standard of care that will protect NSCC from undue liability;<sup>8</sup> (2) permit the

insolvency, of any third party, including, without limitation, any depository, custodian, sub-custodian, clearing or settlement system, transfer agent, registrar, data communication service or delivery service ("Third Party"), unless the Corporation was grossly negligent, engaged in willful misconduct, or in violation of Federal securities laws for which there is a private right of action in selecting such Third Party.

(b) Under no circumstances will the Corporation be liable for any indirect, consequential, incidental, special, punitive or exemplary loss or damage (including, but not limited to, loss of business, loss of profits, trading losses, loss of opportunity and loss of use) howsoever suffered or incurred, regardless of whether the Corporation has been advised of the possibility of such damages or whether such damages otherwise could have been foreseen or prevented.

(c) With respect to instructions given to the Corporation by a Special Representative/Index Recipient Agent, the Corporation shall have no responsibility or liability for any errors which may occur in the course of transmissions or recording of any transmissions or which may exist in any magnetic tape, document or other media so delivered to the Corporation.

(d) With respect to the Corporation's distribution facilities, the Corporation assumes no responsibility whatever for the form or content of any tickets, checks, papers, documents or other material (other than items prepared by it) placed in the boxes in its distribution facilities assigned to each Settling Member, Municipal Comparison Only Member, Insurance Carrier Member, TPA Member, Fund Member and Data Services Only Member, or otherwise handled by the Corporation; nor does the Corporation assume any responsibility for any improper or unauthorized removal from such boxes or from the Corporation's facilities of any such tickets, checks, papers, documents or other material, including items prepared by the Corporation.

(e) With respect to Fund/Serv transactions, the Corporation will not be responsible for the completeness or accuracy of any transaction or instruction received from or transmitted to a Settling Member, Data Services Only Member, TPA Member, TPA Settling Entity, Mutual Fund Processor or Fund Member through Fund/Serv, nor for any errors, omissions or delays which may occur in the transmission of a transaction or instruction to or from a Settling Member, Data Services Only Member, TPA Member, TPA Settling Entity, Mutual Fund Processor or Fund Member.

(f) The Corporation will not be responsible for the completeness or accuracy of any IPS Data and Repository Data received from or transmitted to an Insurance Carrier Member, Member or Data Services Only Member through IPS nor for any errors, omissions or delays which may occur in the transmission of such IPS Data and Repository Data to or from an Insurance Carrier Member, or Data Services Only Member.

<sup>8</sup> NSCC has always operated under a gross negligence standard of care and both internal and external counsel have consistently advised members that this is the case. NSCC is seeking to eliminate any confusion due to the absence of a clear standard set forth in its rules and to memorialize its historical practice. In addition, NSCC has in effect a service agreement with the Fixed Income Clearing Corporation ("FICC") pursuant to which FICC provides services for

resources of NSCC to be appropriately utilized for promoting the accurate clearance and settlement of securities; and (3) will be consistent with similar rules adopted by other self-regulatory organizations and approved by the Commission.<sup>9</sup>

## III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. 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 its custody or control.<sup>10</sup> The Commission believes that NSCC's rule change is consistent with this Section because it will permit the resources of NSCC to be appropriately utilized to protect funds and assets.

Although the Act does not specify the standard of care that must be exercised by registered clearing agencies, the Commission has determined that a gross negligence standard of care is acceptable for noncustodial functions where a clearing agency and its participants contractually agree to limit the liability of the clearing agency.<sup>11</sup> NSCC's

NSCC's fixed income products. This service agreement provides for a gross negligence standard of care. In the absence of this new rule, NSCC could be in the position of having to pay for losses caused by FICC that are not recoverable under the agreement.

<sup>9</sup> See, e.g., Securities Exchange Act Release Nos. 37421 (July 11, 1996), 61 FR 37513 [File No. SR-CBOE-96-02]; 37563 (August 14, 1996), 61 FR 43285 [File No. SR-PSE-96-21]; 48201 (July 21, 2003), 68 FR 44128 [File No. SR-GSCC-2002-10]; and 49373 (March 8, 2004), 69 FR 11921 [File No. SR-FICC-2003-09].

<sup>10</sup> 15 U.S.C. 78q-1(b)(3)(F).

<sup>11</sup> In the release setting forth standards that would be used by the Division of Market Regulation in evaluating clearing agency registration applications, the Division of Market Regulation urged clearing agencies to embrace a strict standard of care in safeguarding participants' funds and securities. Securities Exchange Act Release No. 16900 (June 17, 1980), 45 FR 4192. In the release granting permanent registration to The Depository Trust Company, the National Securities Clearing Corporation, and several other clearing agencies, however, the Commission indicated that it did not believe that sufficient justification existed at that time to require a unique Federal standard of care for registered clearing agencies. Securities Exchange Act Release No. 20221 (October 3, 1983), 48 FR 45167. In a subsequent release, the Commission stated that the clearing agency standard of care and the allocation of rights and liabilities between a clearing agency and its participants applicable to clearing agency services generally may be set by the clearing agency and its participants. In the same release, the Commission stated that it should review clearing agency proposed rule changes in this area on a case-by-case basis and balance the need for a

Continued

<sup>2</sup> Securities Exchange Act Release No. 51458 (March 31, 2005), 70 FR 17494.

<sup>3</sup> Securities Exchange Act Release Nos. 20221 (September 23, 1983), 48 FR 45167 and 22940 (February 24, 1986), 51 FR 7169.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Securities Exchange Act Release No. 26154 (October 3, 1988), 53 FR 39556. NSCC's services provided to members are noncustodial in that, other than clearing fund deposits, it does not hold its members funds or securities.

<sup>7</sup> New Section 2 of Rule 58 states:

SEC. 2. Notwithstanding any other provision in the Rules:

(a) The Corporation will not be liable for any action taken, or any delay or failure to take any action, hereunder or otherwise to fulfill the Corporation's obligations to its Members including Settling Members, Settling Bank Only Members, Municipal Comparison Only Members, Insurance Carrier Members, TPA Members, Mutual Fund/Insurance Services Members, Non-Clearing Members, Fund Members and Data Services Only Members, other than for losses caused directly by the Corporation's gross negligence, willful misconduct, or violation of Federal securities laws for which there is a private right of action. Under no circumstances will the Corporation be liable for the acts, delays, omissions, bankruptcy, or

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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**BILLING CODE 8010-01-P**

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

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.

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

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