SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–38506; File No. SR–NASD–95–63]

Self-Regulatory Organizations; Notice of Filing of Amendment No. 4 to Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to Proposed Rule Governing Broker/Dealers Operating on the Premises of Financial Institutions

April 14, 1997.

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 March 25, 1997, NASD Regulation, Inc. (''NASD Regulation'') filed with the Securities and Exchange Commission (''SEC'' or ''Commission'') Amendment No. 4 [1] to the 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 the proposed rule change filed in SR–NASD–95–63. Below is the amended text of the proposed rule change. Proposed new language is in italics; proposed deletions are in brackets.

Conduct Rules

2350. Broker/Dealer Conduct on the Premises of Financial Institutions

(a) Applicability

This section shall apply exclusively to those broker/dealer services conducted by members on the premises of a financial institution where retail deposits are taken. This section does not alter or abrogate members' obligations to comply with other applicable NASD rules, regulations, and requirements, nor those of other regulatory authorities that may govern members operating on the premises of financial institutions.

(b) Definitions

(1) For purposes of this section, the term ''financial institution'' shall mean federal and state-chartered banks, savings and loan associations, savings banks, credit unions, and the service corporations *of such institutions* required by law [of such institutions].

(2) ''Networking arrangement'' and ''brokerage affiliate arrangement'' shall mean a contractual arrangement between a member and a financial institution pursuant to which the member conducts broker/dealer services for customers of the financial institution and the general public on the premises of such financial institution where retail deposits are taken.

(3) ''Affiliate'' shall mean a company [which] *that* controls, is controlled by or is under common control with a member as defined in [Schedule E of the By-Laws] *Rule 2720.*

(4) ''Broker/dealer services'' shall mean the investment banking or securities business as defined in [Paragraph] *paragraph* (1) of Article I of the By-Laws.

[(5) ''Confidential financial information'' shall not include: (A) customers' names, addresses, and telephone numbers, unless a customer specifies otherwise; or (B) information that can be obtained from unaffiliated credit bureaus or similar companies in the ordinary course of business.]

(c) Standards for Member Conduct

No member shall conduct broker/dealer services on the premises of a financial institution *where retail deposits are taken* unless the member complies initially and continuously with the following requirements:

(1) Setting

Wherever [possible] *practical,* the member's broker/dealer services shall be conducted in a physical location distinct from the area [where] *in which* the financial institution's retail deposits are taken. In all situations, members shall identify the member's broker/dealer services in a manner that is clearly distinguished from the financial institution's retail deposit-taking activities. The member's name shall be clearly displayed in the area in which the member conducts its broker/dealer services.

(2) Networking and Brokerage Affiliate Agreements

Networking and brokerage affiliate arrangements between a member and a financial institution must be governed by a written agreement that sets forth the responsibilities of the parties and the compensation arrangements. The member must ensure *that* the agreement stipulates that [: (A)] supervisory personnel of the member and representatives of the Securities and Exchange Commission and the Association will be permitted access to the financial institution's premises where the member conducts broker/dealer services in order to inspect the books and records and other relevant information maintained by the member with respect to its broker/dealer services [;].

[(B) unregistered employees of the financial institution will not receive any compensation, cash or non-cash, that is conditioned or whether a referral of a customer of the financial institution to the member results in a transaction; and

(C) the member will notify the financial institution if any associated person of the member who is employed by the financial institution is terminated for cause by the member.]

[(3) Compensation of Registered/Unregistered Persons

The member shall not provide cash or non-cash compensation to employees of the financial institution who are not registered with an NASD member in connection with, but not limited to, locating, introducing, or referring customers of the financial institution to the member.]

[(4)]*(3)* Customer Disclosure and Written Acknowledgment

[(A) When] *At or prior to the time that* a customer account is open by a [broker/dealer] *member* on the premises of a financial institution where retail deposits are taken, the member shall*:*

(A) disclose, orally and in writing, that the securities products purchased or sold in a transaction with the member:

(i) are not insured by the Federal Deposit Insurance Corporation (''FDIC'') or other [applicable] deposit insurance;

(ii) are not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; and

(iii) are subject to investment risks, including possible loss of the principal invested*; and* [.]

[(B) For all accounts opened by a broker/dealer on the premises of a financial institution where retail deposits are taken, the member shall]

(B) make reasonable efforts to obtain from each customer during the account opening process a written acknowledgment of the disclosures required by [Subsections (c)(4)(i) through (iii)] *paragraph (c)(3)(A).*

[(6)] *(4)* Communications with the Public

(A) All members [communications regarding customers' securities transactions and long and short positions, including] confirmations and account statements[,] must indicate

[1] The Commission previously published a Notice of NASD's proposed rule change in this matter and three amendments thereto. *See* Securities Exchange Act Release No. 36980 (March 15, 1996), 61 FR 11913 (March 22, 1996).

clearly that the broker/dealer services are provided by the member. [Communications that include information regarding nondeposit-insured transactions and positions with the member and deposit-insured transactions and positions or accounts with the]

(B) Advertisements and other promotional and sales material that announce the location of a financial institution [should clearly distinguish between the two. Securities transactions conducted by the member should be introduced with the member's identity and, at a minimum, the member] *where broker/dealer services are provided by the member, or that are distributed by the member on the premises of a financial institution,* must disclose that securities products: are not insured by the FDIC or other applicable deposit insurance; are not deposits or other obligations of the financial institution and are not guaranteed by the financial institution; *and* are subject to investment risks, including possible loss of the principal invested. *The shorter, logo format described in paragraph (c)(4)(C) may be used to provide these disclosures.* [Advertisements, sales literature, and other similar materials issued by the member that related exclusively to its broker/dealer services will be deemed to be the materials of the member and must indicate prominently the identity of the member providing the broker/dealer services. The financial institution may be referenced in a non-prominent manner in advertising or promotional materials for the purposes of identifying the location where broker/dealer services are available and, where appropriate, to disclose a material relationship between the member and the financial institution, for example, where the member is affiliated with a financial institution that serves as investment adviser to an open-end investment company (''mutual fund'').]

(C) The following shorter, logo format disclosures may be used by members in visual media, such as television broadcasts, Automated Teller Machine (''ATM'') screens, billboards, signs, posters, and in written advertisements and promotional materials, such as brochures, to comply with the requirements of paragraph (c)(4)(B), provided that such disclosures are displayed in a conspicuous manner:

- *Not FDIC Insured*
- *No Bank Guarantee*
- *May Lose Value*

[Advertisements, sales literature, and other similar materials jointly issued by the member and a financial institution that discuss services or products offered by both entities must distinguish clearly the products and services offered from those offered by the member. The name of the member must be displayed prominently in the section of the materials that describes the broker/dealer services offered by the member, which section will be deemed materials of the member.]

(D) As long as the omission of the disclosures required by paragraph (c)(4)(B) would not cause the advertisement or sales literature to be misleading in light of the context in which the material is presented, such disclosures are not required with respect to messages contained in:

- *radio broadcasts of 30 seconds or less;*
- *electronic signs, including billboard and similar signs, but excluding messages contained on television, on-line computer services, or ATMs; and*
- *signs, such as banners and posters, when used only as location indicators.*

(5) Notifications of Terminations

The member must promptly notify the financial institution if any associated person of the member who is employed by the financial institution is terminated for cause by the member.

II. Procedures of the Self-Regulatory Organization

The Board of Directors (''Board'') of NASD Regulation approved the revisions to the proposed rule change at its meeting on January 27, 1997 and authorized the filing of the rule change with the SEC. The Nasdaq Stock Market, Inc. has been provided an opportunity to consult with respect to the proposed rule change, pursuant to the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries. The NASD Board of Governors reviewed the proposed rule change at its meeting on January 28, 1997. No other action by the NASD is necessary for the filing of the proposed rule change. Section 1(a)(2) to Article VII of the NASD By-Laws permits the NASD Board of Governors to amend the NASD Conduct Rules without recourse to the membership for approval.

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

(a) Purpose

(i) Background

On December 28, 1995, the NASD filed the original proposed rule change with the SEC. The filing subsequently was amended on January 24, January 29, and March 7, 1996.[2] The Commission received 98 comments in response to the proposed rule change.[3] About one-third of the comment letters expressed support for the proposal. While a few commenters supported the proposal as published, most were generally supportive of the proposal's goals but suggested modifications to the proposed rule. More than half of the commenters opposed some or all of the provisions of the proposal. This amendment responds to public comments received.

(ii) Major Revisions to Proposed rule

The major revisions to the original proposed rule change filed with the SEC include the following:

Setting. The setting provision has been revised to make the rule more consistent with the standards imposed by the Interagency Statement on Retail Sales of Nondeposit Investment Products (''Interagency Statement'') issued by the banking regulators on February 15, 1994.

Confidential Financial Information and Compensation of Unregistered Persons. These provisions have been deleted from the proposed rule, and comment is being separately solicited on proposed rules governing the use and release of confidential financial information and regulating the payment of referral fees that would apply to all members.

Communications with the Public. This provision has been revised to make the rule more consistent with the Interagency Statement and a September 12, 1995 interpretation of the Interagency Statement (''1995 Interpretation'') and to eliminate requirements that duplicated existing NASD rules.

Termination for Cause. The proposed rule as filed with the SEC specified that networking and brokerage affiliate agreements must contain a provision requiring a member to notify a financial institution if a dual employee of the member and the financial institution is terminated for cause by the member. This provision has been made into a separate affirmative requirement.

(iii) Description of Proposed Amendments and Other Responses to Comments

Applicability [Paragraph (a)]. Many of the 17 commenters on this provision have requested clarification of the rule's applicability to brokerage services provided ''on the premises of a financial

[2] *See,* note 1, *supra.*

[3] These comment letters are available for copying and inspection at the Commission's Public Reference Room and at the principal office of the NASD.

institution where retail deposits are taken.'' Commenters believe the rule should not apply to telecommunications with customers when a customer uses a telephone or a computer terminal on the premises of the bank to contact a broker/dealer that is not present on the premises on the ground that, in their view, there is no chance for customer confusion. In response, the staff plans to issue a Notice to Members in a Question and Answer (''Q&A'') format after the rule is approved, clarifying this and other interpretive questions about how the rule will be applied. The Q&A will clarify that the applicability of the proposed rule is limited to situations where the account is opened either in person, over the telephone, or through any other electronic medium on the premises of a financial institution where retail deposits are taken by a broker/dealer that has a physical presence on the premises.

Definitions [Paragraph (b)]. Because the provision governing a member's use of confidential financial information has been deleted (*see* discussion below), the definition of ''confidential financial information'' has been deleted.

Standards for Member Conduct [Paragraph (c)]. Two commenters suggested the addition of language to this paragraph, which contains introductory language to the specific requirements of the proposed rule, to clarify that the rule is applicable to broker/dealer operations conducted on the premises ''where retail deposits are taken.'' This revision has been made.

Setting [Paragraph (c)(1)]. This provision as proposed specifies certain requirements, including physical separation, designed to reduce customer confusion between deposit taking and securities activities. The overwhelming majority of the 41 commenters that addressed this provision, including the American Bankers Association (''ABA''),[4] Association of Financial Services Holding Companies (''AFSHC''),[5] Bank Securities Association (''BSA''),[6] Consumer Bankers Association (''CBA''),[7] and NationsBank,[8] criticized language in the commentary section of the proposed rule that indicated that there may be certain business settings where the member may not be able to comply with the rule and may, therefore, be prevented from conducting business in such a location. These commenters indicated that this position conflicts with the Interagency Statement. They have requested a clarification that this provision would not prohibit members from conducting a brokerage business in one-person branches, in walkup windows, kiosks, or desks in public places such as supermarkets, as long as adequate safeguards are adopted, including adequate disclosure and signage. One of the commenters, The Bankers Roundtable (''BR''),[9] requested that this provision be deleted. Commenters also have requested guidance as to the degree of physical separation that is necessary to comply with this provision, and several, including First Union Corporation (''First Union''),[10] have suggested that ''wherever possible'' should be changed to ''wherever practicable.'' One commenter, the Center for Study of Responsive Law,[11] which favors the provision, believes more specific language should be used, and that broker/dealer and financial institution services should be segregated.

In response, ''wherever possible'' has been changed to ''wherever practical'' to clarify that the proposed rule imposes the same standards on broker/dealers as are imposed on financial institutions by the Interagency Statement and requires only that sales of non-deposit products should be conducted in a physically distinct location *wherever practical.* Where a physically distinct location is not practical because, for example, joint services are provided in a kiosk location, the broker/dealer would not be prohibited from conducting business in this manner. However, the location must be identified in a manner that clearly distinguishes the broker/dealer services from the activities of the financial institution, and the member's name must be clearly displayed in the area in which the member conducts its broker/dealer services.

Networking and Brokerage Affiliate Agreements [Paragraph (c)(2)]. Former paragraph (c)(2)(B) required that networking and brokerage affiliate agreements between a member and a financial institution stipulate that transaction-related cash or non-cash compensation to unregistered financial institution employees for referrals is prohibited. Many of the 11 commenters on this provision maintained this provision would result in exerting NASD jurisdiction over the compensation practices of financial institutions. In response, Paragraph (c)(2)(B) has been deleted (*see* discussion below). In addition, the requirement on the part of members to notify financial institutions of the termination of dual employees has been deleted from Paragraph (c)(2) and added as new paragraph (c)(5), in order to emphasize the importance of this provision.

Compensation of Registered/Unregistered Persons [former Paragraph (c)(3)]. This provision stipulates that members may not provide cash or non-cash compensation to employees of the financial institution in connection with referring customers of the financial institution to the member. Strenuous opposition has been expressed by many of the 65 commenters who addressed this provision, including the ABA, BSA, BR, Office of the Comptroller of the Currency (''OCC''),[12] CBA, Federal Deposit Insurance Corporation (''FDIC''),[13] Independent Bankers Association of America (''IBAA''),[14] and Securities Industry Association (''SIA'').[15]

In particular, these commenters were concerned with language in the rule filing accompanying the proposed rule stating that a NASD member may not do indirectly what it is prohibited from doing directly, i.e., an NASD member may not compensate employees of a financial institution for referrals through payments directed in the first instance to a financial institution. Commenters were particularly concerned that this provision should be clarified to ensure that the NASD is not attempting to regulate a financial institution's compensation practices with respect to its own employees, a practice that is subject to regulation by bank regulators.

Moreover, some commenters, including BSA and the Investment

[4] *See* letter from Sarah A. Miller, American Bankers Association, to Jonathan G. Katz, SEC, dated May 21, 1996.

[5] *See* letter from Patrick A. Forte, Association of Financial Services Holding Companies, to Jonathan G. Katz, SEC, dated May 21, 1996.

[6] *See* letter from Robert M. Kurucza, Bank Securities Association, to Jonathan G. Katz, SEC, dated May 21, 1996.

[7] *See* letter from Marcia Z. Sullivan and Steven I. Zeisel, Consumer Bankers Association, to Jonathan G. Katz, SEC, dated May 21, 1996.

[8] *See* letter from Paul J. Polking, NationsBank, to Jonathan G. Katz, SEC, dated May 20, 1996.

[9] *See* letter from Richard Whiting, The Bankers Roundtable, to Jonathan G. Katz, SEC, dated May 21, 1996.

[10] *See* letter from David A. Hebner, First Union Corporation, to Jonathan G. Katz, SEC, dated May 20, 1996.

[11] *See* letter from Janice C. Shields, Center for Study of Responsive Law, to Jonathan G. Katz, SEC, dated May 15, 1996.

[12] *See* letter from Douglas E. Harris, Comptroller of the Currency, to Jonathan G. Katz, SEC, dated May 21, 1996.

[13] *See* letter from Nicholas J. Ketcha Jr., Federal Deposit Insurance Corporation, to Jonathan G. Katz, SEC, dated July 30, 1996.

[14] *See* letter from Leland M. Stenehjem, Jr., James R. Lauffer, and William W. Reid, Jr., Independent Bankers Association of America, to Jonathan G. Katz, SEC, dated May 21, 1996.

[15] *See* letter from Brewster Ellis, Securities Industry Association, to Jonathan G. Katz, SEC, dated May 22, 1996.

Company Institute (''ICI''),[16] maintain that prohibiting such referral payments would create a competitive disadvantage for broker/dealers operating on the premises of a financial institution because they believe that members operating independent of financial institution premises are entitled to greater flexibility in providing *de minimis* payments to unregistered persons under existing SEC no-action letters. Commenters also have advised that the restriction in the proposed rule on the payment of referral fees is inconsistent with the one-time nominal fee that may be paid to unregistered financial institution employees pursuant to the guidelines set forth in the Interagency Statement and a November 23, 1993 SEC No-Action Letter,[17] provided the fee is not tied to the successful sale of securities. Finally, one commenter, the North American Securities Administration Association (''NASAA''),[18] expressed an opinion that the NASD should prohibit all referral fees.

In response, Paragraph (c)(3) has been deleted, and the NASD Regulation Board has approved the solicitation of comment on a proposed rule governing compensation of unregistered persons that would apply to all members.[19] This proposal would clarify existing policy and would respond to concerns that the policy would otherwise appear to be applied differentially to different classes of members.

Customer Disclosure and Written Acknowledgment [Paragraph (c)(4)]. This provision specifies the disclosures a member must make when a customer opens an account, and also requires members to make reasonable efforts to obtain a written acknowledgment of the required disclosures during the account-opening process. Many of the 17 commenters on this provision have asked the NASD to consider allowing the use of abbreviated disclosures allowed by the federal banking agencies under a September 12, 1995 interpretation of the Interagency Statement (''1995 Interpretation'') under appropriate circumstances. Other commenters have argued that NASD-required disclosure and the disclosure required by banking regulators (as reflected in the Interagency Statement) should be the same. One commenter has argued that the NASD should regulate all members equally and should require all members to provide risk disclosure, while two other commenters believe that further disclosure should be required, including disclosure of any fees and compensation relating to a transaction.

The Interagency Statement requires the longer, written disclosures contained in the proposed rule when an account is opened. Accordingly, this provision has not been revised, since as currently drafted it is consistent with banking regulator requirements. However, in order to ensure that the proposed rule is consistent with the 1995 Interpretation, a new Paragraph (c)(4)(C) has been added to permit the use of abbreviated disclosures under limited circumstances (*see* discussion below). In addition, the NASD Regulation Board has approved the issuance of an interpretive Notice to Members reminding member firms of their risk disclosure obligations in connection with the sale of insured products and uninsured securities products under existing NASD rules and soliciting comment on whether a new rule, prescribing point-of-sale disclosure in specified circumstances, should be adopted.[20]

Use of Confidential Financial Information [former Paragraph (c)(5)]. This provision states that an NASD member shall not use confidential financial information provided by the financial institution regarding its customer unless prior written approval has been granted to the financial institution by the customer to release the information. Most of the 84 commenters who addressed this provision expressed significant objections to the proposed restriction on the use of confidential financial information, stating that this provision should either be deleted or substantially revised. Those opposed to this provision include the ABA, AFSHC, BSA, BR, OCC, CBA, IBAA, ICI, SIA, and the major bank commenters, including Chase Manhattan Bank,[21] Chemical Bank,[22] First Union, and NationsBank. Most of these commenters are of the opinion that, to the extent there are special concerns when a bank provides confidential financial information, the concerns are properly the subject of federal and state banking and privacy laws, and the NASD has no jurisdiction to regulate a financial institution's use of customer information.

The commenters also believe that a member should be able to use such information, provided proper disclosure is made and consent has been obtained in accordance with applicable law, which the commenters state does not require written consent. Commenters believe that, alternatively, a member should be able to rely on a representation by the financial institution that customer consent was obtained. Further, the commenters state that it would be an operational burden to comply with this provision, citing as examples the difficulty of obtaining consent from both existing and future customers, the impracticality of requiring a person employed by both a broker/dealer and a bank to obtain verification of a customer's consent before using confidential financial information inadvertently obtained in the regular course of business, additional record-keeping requirements, and the costs of redesigning database systems that were built in compliance with existing laws and that now aggregate financial information for use by integrated firms. Also, many commenters believe that customers expect and welcome this sharing of information.

As with other provisions of the proposed rule, commenters stated that this provision is discriminatory and anti-competitive, noting that restrictions regarding the use of confidential financial information are not applied similarly to broker/dealers who are not operating on the premises of a financial institution. In this regard, commenters are of the opinion that there is no public policy reason why customer information possessed by affiliates or broker/dealers that are not operating on the premises of a financial institution that include, for example, information regarding real estate holdings, consumer finance loans, insurance, or other financial matters, should be treated differently than customer information provided by a financial institution. Commenters also believe that any rule adopted the NASD to regulate the use of confidential information should apply to all members. Commenters further state that this provision has no relationship to one of the major stated purposes of the proposed rule: the prevention of customer confusion. Further, if the purpose of this provision is to prevent customer abuse of a sales practice nature, they believe that existing NASD suitability, cold-calling, and disclosure rules address this concern.

[16] *See* letter from Paul Schott Stevens, Investment Company Institute, to Jonathan G. Katz, SEC, dated May 21, 1996.

[17] Chubb Securities Corporation, SEC No-Action Letter (November 23, 1993).

[18] *See* letter from Dee Riddell Harris, North American Securities Administrators Association, Inc., to Jonathan G. Katz, SEC, dated May 21, 1996.

[19] *See* NASD Notice to Members 97–11 (March 1997).

[20] This Notice will appear in a future issue of NASD Notices to Members and will also be available on NASD Regulation's Web Site.

[21] *See* letter from Jay No. Soloway, The Chase Manhattan Bank, to Jonathan G. Katz, SEC, dated May 20, 1996.

[22] *See* letter from Jay N. Soloway, Chemical Bank, to Jonathan G. Katz, SEC, dated May 20, 1996.

Finally, because Congress was considering the sharing of customer information between financial institutions and their affiliates and subsidiaries at the time the rule was proposed for comment, some commenters believed that the NASD should refrain from issuing guidelines on privacy until Congress has had an opportunity to develop a federal policy on the issue. Two commenters, NASAA and the Consumer Federation of America,[23] expressed support for this provision.

Since the close of the comment period, some provisions of the legislation discussed by the commenters have been adopted. In particular, the recently-enacted amendments to the Fair Credit Reporting Act (''FCRA''), 15 U.S.C. Section 1681 *et seq.*, address the use and release of confidential financial information. The FCRA regulates the consumer reporting industry by imposing certain restrictions and requirements on consumer reporting agencies. Any entity, including a broker/dealer, that accumulates and disseminates certain consumer information may be subject to the FCRA. In particular, an entity that provides so-called ''non-experience information'' (e.g., information contained in credit applications or reports from credit bureaus, demographic firms, or other third parties) to a non-affiliate could be considered a consumer reporting agency and might be required to comply with FCRA requirements. On the other hand, an entity may share without limitation ''experience information'' (i.e., information derived from transactions or experiences with the consumer) with both affiliates and non-affiliates without becoming subject to the FCRA. In addition, as a result of the recent amendment to the FCRA, members of the same corporate family now may share non-experience consumer information without becoming subject to FCRA requirements. In particular, the amendments allow affiliates to share non-experience information, either directly or through a central database, so long as it is clearly and conspicuously disclosed to the consumer that information may be shared among the affiliates, and the consumer is given the opportunity, before the information is initially communicated, to opt out of the sharing arrangement.

The provision in the proposed rule regarding confidential information was not intended to regulate a financial institution's use of customer information. Rather, the proposal was intended to limit the use NASD members could make of confidential financial information. In addition, NASD Regulation is sensitive to concerns that this provision as proposed could have a differential impact on members with financial institution affiliates and those without such affiliates that is not justified by differences in business practices. Consequently, this provision has been deleted, and the NASD Regulation Board has approved the issuance of a Notice to Members soliciting comment on a rule governing the use and release of confidential financial information that would apply to all members.[24]

The proposed rule discussed in the Notice to Members would apply to the sharing of information pertaining to natural persons. In particular, before a member may share confidential information with parties other than business affiliates, the member would have to (i) provide to the customer notice that the information may be released and (ii) obtain from the customer his or her affirmative written consent. This restriction would not apply to the release of information pursuant to regulatory, self-regulatory, or court process. In addition, before a member may release confidential information to a business affiliate, the member would have to provide to the customer (i) notice that the information may be released and (ii) a reasonable opportunity to object to the sharing of the information before it occurs. Similarly, information that is provided by a business affiliate may not be used unless the member follows this same procedure or determines that the business affiliate has done so.

Communications with the Public [Paragraph (c)(4)]. This provision sets forth requirements for all communications with customers, including account statements, advertisements, and sales literature. Several of the 30 commenters who addressed this provision have asked that the risk disclosure requirement in former Paragraph (c)(6)(A) be modified or deleted based on their belief that disclosure at the time the account is opened or in solicitations is sufficient to achieve the purpose of the provision. Commenters also have asked whether such disclosure may be provided in the abbreviated format allowed by the 1995 Interpretation to the Interagency Statement. Several commenters also stated that the provision in redundant and duplicative of existing NASD rules, and that all members should be subject to the same disclosure rules.

Paragraphs (B) and (C) of former Paragraph (c)(6) have been deleted in response to these comments and to prevent duplication of existing NASD advertising rules. Also, several new provisions have been added to new Paragraph (c)(4), clarifying the circumstances under which abbreviated risk disclosures may be used and when such disclosures are not required.

(b) Statutory Basis

NASD Regulations believes that the amendment to the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[25] which requires, among other things, that the Association's rules must be designed to promote just and equitable principles of trade, prevent fraudulent and manipulative acts and practices, and protect investors and the public interest. The NASD believes that regulating the conduct of broker/dealers conducting business on the premises of financial institutions will alleviate customer confusion in dealing with such entities and provide a regulatory framework for regulating such broker/dealer activities with the result that investors will be able to make more informed investment decisions with a better understanding of the distinctions between the securities industry and other segments of the financial services industry, in furtherance of the requirement.

(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

Written comments were neither solicited nor received regarding Amendment No. 4 to the proposed rule change.

IV. 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

[23] *See* letter from Barbara Roper, Consumer Federation of America; Mary Griffin, Consumers Union; Gerri Detweiler, National Council of Individual Investor; and Edmund Mierzwinski, U.S. Public Interest Research Group to Jonathan G. Katz, SEC, dated August 9, 1996.

[24] *See* NASD Notice to Members 97–12 (March 1997).

[25] 15 U.S.C. 78*o*–3.

publishes its reasons for so finding or (ii) as to which the self-regulatory organization 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.

V. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing. 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 the file number in the caption above and should be submitted by May 12, 1997.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 97–10223 Filed 4–18–97; 8:45 am]

BILLING CODE 8010–01–M

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–38507; File No. SR–PHLX–97–13]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. To Amend the Exchange's Rule Concerning the Pre-Opening Application of the Intermarket Trading System

April 14, 1997.

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 March 19, 1997, the Philadelphia Stock Exchange, Inc. (''PHLX'' or ''Exchange'') 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 by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.[1]

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

The PHLX proposes to amend Phlx Rule 2001, Intermarket Trading System (''ITS''), to enhance the operation of the Pre-Opening Application by effectively including circuit breakers as a trading halt situation that will trigger the Pre-Opening Application. The proposed rule change will also reorganize and update Rule 2001 to make it conform more closely to the Pre-Opening Application rules of other exchanges and to the model Pre-Opening Application Rule attached as Exhibit A to the ITS Plan.[2]

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 PHLX 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 PHLX has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

[1] The Commission notes that the other ITS Participants (the American Stock Exchange, Boston Stock Exchange, Chicago Board Options Exchange, Chicago Stock Exchange, Cincinnati Stock Exchange, National Association of Securities Dealers, New York Stock Exchange, Pacific Stock Exchange) have filed essentially the same proposals to amend each of their rules concerning the Pre-Opening Application. *See* Securities Exchange Act Release Nos. 38285 (February 13, 1997), 62 FR 8065 (February 21, 1997) and 38393 (March 12, 1997), 62 FR 13201 (March 19, 1997).

[2] The Commission notes that PHLX's Rule 2001 is incomplete in that it does not contain all the sections of the Pre-Opening Application that the other exchange's Pre-Opening Application rules and the ITS Plan model Pre-Opening Application rule possess. The PHLX must file to amend Rule 2001 in order to further conform Rule 2001 to the Pre-Opening Application rules of other exchanges and to the ITS Plan model Pre-Opening Application rules to the extent that Rule 2001 does not contain relevant sections.

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

1. Purpose

The purpose of the proposed rule change is to enhance the operation of the Pre-Opening Application under PHLX's Rule 2001. Rule 2001 contains basic definitions pertaining to ITS, prescribes the types of transactions that may be effected through ITS and the pricing of commitments to trade, and specifies the procedures pertaining to the operation of the Pre-Opening Application, whereby an Exchange specialist who wishes to open a market in an ITS stock may obtain any pre-opening interest in that stock by other market-makers registered in that stock in other Participant markets.

PHLX's current Pre-Opening Application prescribes that if an Exchange specialist anticipates that the opening transaction on the Exchange will be at a price that represents a change from the security's previous days' consolidated closing price of more than the ''applicable price change,'' the Exchange specialist shall notify other Participant markets by sending a pre-opening notification through the ITS. The ''applicable price changes'' in current Rule 2001 are:

Consolidated closing price[3]	Applicable price change (more than)
Network A[4]:	
Under $15	⅛ point.
$15 or over	¼ point.
Network B:	
Under $5 or over	⅛ point.
	¼ point.

Thereafter, the Exchange specialist shall not open the market in the security until not less than three minutes after the transmission of the pre-opening notification. Once an Exchange specialist has issued a pre-opening notification, other Participant markets may transmit ''pre-opening responses'' to the Exchange specialist through the ITS that contain ''obligations to trade.''

[3] If the previous day's closing price of an eligible listed security exceeded $100 and the security does not underlie an individual stock option contract listed and currently trading on an exchange, the ''applicable price change'' is one point.

[4] Network A is comprised of New York Stock Exchange (''NYSE'') securities; Network B is comprised of securities admitted on the American Stock Exchange, the Boston Stock Exchange, the Chicago Board Options Exchange, the Chicago Stock Exchange, the Cincinnati Stock Exchange, the Pacific Exchange, the Philadelphia Stock Exchange, or any other exchange, but not also admitted to dealings on the NYSE.