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July 13, 2004

Katherine A. England
Assistant Director
Division of Market Regulation
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-1001

Re: File No. SR-NASD-2004-108
Treatment of Commodity Pool Trail Commissions under Rule 2810

Dear Ms. England:

Pursuant to Rule 19b-4, enclosed please find the above-numbered rule filing. Also enclosed is a 3-1/2" disk containing the rule filing in Microsoft Word 7.0 to facilitate production of the Federal Register release.

If you have any questions, please contact Gary L. Goldsholle, Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8104; e-mail gary.goldsholle@nasd.com. The fax number of the Office of General Counsel is (202) 728-8264.

Very truly yours,

Barbara Z. Sweeney
Senior Vice President
and Corporate Secretary

Enclosures

File No. SR-NASD-2004-108
Consists of 117 Pages
July 13, 2004

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C.

Form 19b-4

Proposed Rule Change

by

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Pursuant to Rule 19b-4 under the
Securities Exchange Act of 1934

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(3) of the Securities Exchange Act of 1934 (“Act”), the National Association of Securities Dealers, Inc. (“NASD”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) Notice to Members 04-50, discussing the treatment of commodity pool trail commissions under Rule 2810 (Direct Participation Programs).

No changes to the text of NASD rules are required by this proposed rule change.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

(a) The proposed rule change was approved by the Board of Directors of NASD Regulation, Inc. at its meeting on January 21, 2004, which authorized the filing of the rule change with the SEC. Counsel for The Nasdaq Stock Market and NASD Dispute Resolution have 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 its Subsidiaries. The NASD Board of Governors had an opportunity to review the proposed rule change at its meeting on January 22, 2004. No other action by NASD is necessary for the filing of the proposed rule change.

NASD will announce the implementation date of the proposed rule change in Notice to Members 04-50 which NASD expects to issue on the same date as the filing of the proposed rule change with the Commission. The implementation date will be the date

of this filing.

(b) Questions regarding this rule filing may be directed to Gary L. Goldsholle, Associate Vice President and Associate General Counsel, Office of General Counsel, Regulatory Policy and Oversight, at (202) 728-8104.

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

(a) Purpose

NASD's Direct Participation Programs Rule governs public offerings of direct participation programs (DPPs), including establishing limits on the level of underwriting compensation. Historically, in reviewing the level of underwriting compensation in commodity pool DPPs, NASD staff has excluded certain trail commissions. In particular, NASD staff excluded trail commissions paid to an associated person of a member if: (1) the member was registered with the Commodity Futures Trading Commission as a Futures Commission Merchant; (2) the associated person receiving the trail commissions had passed the National Commodity Futures Examination (Series 3) or the Futures Managed Funds Examination (Series 31); and (3) the associated person receiving the trail commissions provided ongoing investor relations services to the investors. Notice to Members 04-50, attached as Exhibit 4, serves to advise members that effective immediately, NASD staff will consider all trail commissions paid in connection with commodity pool DPPs in calculating whether the level of underwriting compensation meets the requirements of Rule 2810.

(b) Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of

Section 15A(b)(6) of the Act, which requires, among other things, that NASD'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 believes that the proposed rule change is in the public interest and will benefit investors in commodity pool DPPs by limiting the compensation that can be paid to members for selling commodity pool DPPs, and servicing the accounts that hold such investments, to the same amounts that apply to all other DPP investments.

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

NASD 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.

5. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The proposed rule change was published for comment in NASD Notice to Members 04-07 (February 2004). Twenty-six comment letters addressing the issue of commodity pool DPP trail commissions were received in response to the Notice. A copy of Notice to Members 04-07 is attached as Exhibit 2. Copies of the comment letters received in response to the Notice that address this issue are attached as Exhibit 3. Of the twenty-six comment letters received, two were in favor of the proposed rule change, twenty-three were opposed, and one expressed no opinion. Most of the commenters that opposed the proposed rule change noted generally the differences between commodity pools and other DPPs, and the services generally provided to persons investing in commodity pool DPPs. Many commenters also cited the benefits to investors of

diversification by investing in commodities in general and in commodity pool DPPs in particular, but warned that if the level of underwriting compensation was capped, then they may no longer be in a position to recommend commodity pool DPPs to investors. However, six of the commenters that opposed the proposed rule change acknowledged that establishing compensation limits for selling commodity pool DPPs may be appropriate, but urged limits higher than those currently in place for other DPPs.

As discussed in Notice to Members 04-50, based upon NASD staff's review and analysis, including review of the comments received, NASD staff does not believe the reasons underlying the exclusion of certain trail commissions of commodity pool DPPs continue to apply today. NASD staff has seen no evidence that today's commodity pool DPP investors receive a significantly higher level of service than investors in other DPPs, including real estate, oil and gas, and equipment leasing partnerships. Moreover, commenters failed to adequately explain the differences in service provided by persons who have passed the Series 3 or Series 31 (and thus met the exclusion) and those who have not (and thus remained subject to the compensation limits of the DPP Rule). Finally, NASD staff believes that notwithstanding a limit on the level of underwriting compensation, firms and registered representatives will continue to offer and recommend commodity pool DPPs where there are benefits to investors in terms of diversification and where such products meet investors' financial status and investment objectives.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The proposed rule change is effective upon filing pursuant to Section 19(b)(3)(A) of the Act and paragraph (f)(1) of Rule 19b-4 thereunder, in that the proposed rule change constitutes a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

1. Completed notice of proposed rule change for publication in the Federal Register.
2. NASD Notice to Members 04-07 (February 2004).
3. Comments received in response to NASD Notice to Members 04-07 (February 2004).
4. NASD Notice to Members 04-50 (July 2004).

Pursuant to the requirements of the Securities Exchange Act of 1934, NASD has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

NASD, INC.

BY: _____
Barbara Z. Sweeney, Senior Vice President and
Corporate Secretary

Date: July 13, 2004

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-

; File No. SR-NASD-2004-108)

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by National Association of Securities Dealers, Inc. Relating to the Treatment of Commodity Pool Trail Commissions

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 _____, the National Association of Securities Dealers, Inc. (“NASD”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASD. NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of NASD under Section 19(b)(3)(A)(i) of the Act³ and Rule 19b-4(f)(1) thereunder,⁴ which renders the proposal effective upon receipt of this filing by the Commission. 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 is filing a Notice to Members 04-50, discussing the treatment of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(1).

commodity pool trail commissions under Rule 2810 (Direct Participation Programs).

No changes to the text of NASD rules are required by this proposed rule change.

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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 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 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

NASD's Direct Participation Programs Rule governs public offerings of direct participation programs (DPPs), including establishing limits on the level of underwriting compensation. Historically, in reviewing the level of underwriting compensation in commodity pool DPPs, NASD staff has excluded certain trail commissions. In particular, NASD staff excluded trail commissions paid to an associated person of a member if: (1) the member was registered with the Commodity Futures Trading Commission as a Futures Commission Merchant; (2) the associated person receiving the trail commissions had passed the National Commodity Futures Examination (Series 3) or the Futures Managed Funds Examination (Series 31); and (3) the associated person receiving the trail commissions provided ongoing investor relations services to the investors. Notice to Members 04-50, attached as Exhibit 4, serves to advise members that effective

immediately, NASD staff will consider all trail commissions paid in connection with commodity pool DPPs in calculating whether the level of underwriting compensation meets the requirements of Rule 2810.

2. Statutory Basis

NASD believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, which requires, among other things, that NASD'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 believes that the proposed rule change is in the public interest and will benefit investors in commodity pool DPPs by limiting the compensation that can be paid to members for selling commodity pool DPPs, and servicing the accounts that hold such investments, to the same amounts that apply to all other DPP investments.

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

NASD 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

The proposed rule change was published for comment in NASD Notice to Members 04-07 (February 2004). Twenty-six comment letters addressing the issue of commodity pool DPP trail commissions were received in response to the Notice. A copy of Notice to Members 04-07 is attached as Exhibit 2. Copies of the comment letters received in response to the Notice that address this issue are attached as Exhibit 3. Of the

twenty-six comment letters received, two were in favor of the proposed rule change, twenty-three were opposed, and one expressed no opinion. Most of the commenters that opposed the proposed rule change noted generally the differences between commodity pools and other DPPs, and the services generally provided to persons investing in commodity pool DPPs. Many commenters also cited the benefits to investors of diversification by investing in commodities in general and in commodity pool DPPs in particular, but warned that if the level of underwriting compensation was capped, then they may no longer be in a position to recommend commodity pool DPPs to investors. However, six of the commenters that opposed the proposed rule change acknowledged that establishing compensation limits for selling commodity pool DPPs may be appropriate, but urged limits higher than those currently in place for other DPPs.

As discussed in Notice to Members 04-50, based upon NASD staff's review and analysis, including review of the comments received, NASD staff does not believe the reasons underlying the exclusion of certain trail commissions of commodity pool DPPs continue to apply today. NASD staff has seen no evidence that today's commodity pool DPP investors receive a significantly higher level of service than investors in other DPPs, including real estate, oil and gas, and equipment leasing partnerships. Moreover, commenters failed to adequately explain the differences in service provided by persons who have passed the Series 3 or Series 31 (and thus met the exclusion) and those who have not (and thus remained subject to the compensation limits of the DPP Rule). Finally, NASD staff believes that notwithstanding a limit on the level of underwriting compensation, firms and registered representatives will continue to offer and recommend commodity pool DPPs where there are benefits to investors in terms of diversification

and where such products meet investors' financial status and investment objectives.

III. DATE OF EFFECTIVENESS OF THE PROPOSED RULE CHANGE AND TIMING FOR COMMISSION ACTION

NASD has designated the proposed rule change as constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of NASD under Section 19(b)(3)(A)(i) of the Act⁵ and Rule 19b-4(f)(1) thereunder,⁶ which renders the proposal effective upon receipt of this filing by the Commission.

At any time within 60 days of this filing, the Commission may summarily abrogate this proposal 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, N.W., Washington, D.C. 20549. Comments also may be submitted electronically at the following e-mail address: rule-comments@sec.gov. All comment letters should refer to File No. SR-NASD-2004-108. This file number should be included on the subject line if e-mail is used. To help us process and review comments more efficiently, comments should be

⁵ 15 U.S.C. 78s(b)(3)(A)(i).

⁶ 17 CFR 240.19b-4(f)(1).

sent in hardcopy or by e-mail but not by both methods. 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 NASD. All submissions should refer to the file number in the caption above and should be submitted by [insert date 21 days from the date of publication].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority, 17 CFR 200.30-3(a)(12).

Margaret H. McFarland
Deputy Secretary