To ensure that information on consultant arrangements, once disclosed, remains current, the amendment also requires dealers to (1) promptly notify the issuer, in writing, of any change in the information disclosed; and (2) update issuers, in writing, within one year of the previous disclosure of each consultant's name, company, role and compensation arrangement, even where such information has not changed.[7] Amendment No. 1 clarifies that the annual updating requirement for dealers disclosing information on an issuer-specific basis is triggered by the previous full disclosure of the consultant's name, company, role and compensation arrangement (and not any interim disclosure of changes to such information). However, this annual updating requirement would cease to apply if the dealer is no longer using the consultant, directly or indirectly, to attempt to obtain or retain municipal securities business with a particular issuer.

II. Discussion

The Commission believes the proposed rule change is consistent with the Act and the rules and regulations promulgated thereunder.[8] Specifically, the Commission believes that approval of the proposed rule change is consistent with Section 15B(b)(2)(C)[9] of the Act. The Commission is satisfied that the amendments to Rule G–38(c) provide the necessary relief to dealers from the heretofore stringent application of the rule while still essentially maintaining the rule's original intent and purpose. Prior to this proposed rule change, some dealers had difficulty meeting the ''any dealer'' requirement of the rule, because they had no way of knowing when the lead manager was selected. In cases where it is difficult to determine when a dealer is chosen (*i.e.*, co-manager selection), the amended rule provides an option for the dealer to disclose its consulting relationship before the specific dealer is selected.

The Commission understands that the timing of disclosure requirements had to be changed to make the rule more workable. However, the Commission was concerned that the initial amendment weakened the original goal of the rule (*i.e.*, for dealers to provide complete, timely disclosure concerning their consulting arrangements to issuers so that issuers can evaluate all potential underwriters before making a final decision). Given the rule's goal, the Commission believed that the initial proposal, allowing the dealer to make its disclosures within three days after the consultant had contacted the issuer,[10] would have greatly lessened the effectiveness of the rule. Thus, the Commission requested Amendment No. 1 to close potential compliance loopholes in the dealers' disclosure requirements and align the proposal with the rule's intent. The Commission believes Amendment No. 1 preserves the original intent and purpose of the rule and stymies any potential collusive activity by dealers and their consultants to circumvent Rule G–37.

III. Conclusion

For the above reasons, the Commission believes that the proposed rule change is consistent with the provisions of the Act, and in particular with Section 15B(b)(2)(C).

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[11] that the proposed rule change (SR–MSRB–97–9) is hereby approved.

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

Margaret H. McFarland,

Deputy Secretary.

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communication with the issuer.'' However, the Commission requested that the timing requirement be more stringent. Thus, the Board filed Amendment No. 1, eliminating the dealers' three day disclosure window and replacing it with the current language. *See* note 1, *supra*.

[7] Pursuant to Rule G–8(a)(xviii) on recordkeeping, dealers are required to maintain records of all disclosures made pursuant to Rule G–38(c). This would apply to disclosures made pursuant to the amendment.

[8] The Commission has considered the proposed rule's impact on efficiency, competition and capital formation. As a result of this amendment, municipal securities dealers should experience a decline in the number of disclosures required to be made to issuers regarding their consulting arrangements. A decline in required disclosure should translate to a decline in costs associated with these filings, thus allowing dealers to allocate resources to other areas. The implementation of this amendment should also enhance dealers' efficiency as recordkeeping and compliance become less burdensome. 15 U.S.C. 78c(f).

[9] Section 15B(b)(2)(C) requires the Commission to determine that the Board's rules are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in municipal securities, to remove impediments to and perfect the mechanism of a free and open market in municipal securities, and, in general, to protect investors and the public interest.

[10] *See* note 6, *supra*.

[11] 15 U.S.C. 78s(b)(2).

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–40500; File No. SR–NASD–98–69]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to Mutual Fund Breakpoint Sales

September 29, 1998.

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 September 10, 1998, the National Association of Securities Dealers, Inc. (''NASD''), through its regulatory subsidiary, NASD Regulation, Inc. (''NASD Regulation'') 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 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 NASD Interpretive Memorandum 2830–1 regarding mutual fund breakpoint sales to clarify its application to modern portfolio investment strategies. Below is the text of the proposed rule change. Proposed new language is italicized.

IM–2830–1 ''Breakpoint'' Sales

The sale of investment company shares in dollar amounts just below the point at which the sales charge is reduced on quantity transactions so as to share in the higher sales charges applicable on sales below the breakpoint is contrary to just and equitable principles of trade.

Investment company underwriters and sponsors, as well as dealers, have a definite responsibility in such matters and failure to discourage and to discontinue such practices shall not be countenanced.

For purposes of determining whether a sale in dollar amounts just below a breakpoint was made in order to share in a higher sales charge, the Association will consider the facts and circumstances, including, for example, whether a member has retained records that demonstrate that the trade was executed in accordance with a bona fide

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

asset allocation program that the member offers to its customers:

- *Which is designed to meet their diversification needs and investment goals; and*
- *Under which the member discloses to its customers that they may not qualify for breakpoint reductions that are otherwise available.*

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

In the context of mutual fund sales, a ''breakpoint'' is that point at which the sales charge for quantity purchases of fund shares is reduced. Although funds are not required under SEC or NASD rules to offer breakpoint discounts, many funds use reduced fee schedules as a marketing tool to attract large investors. NASD Rule IM–2830–1 prohibits sales of mutual fund shares in amounts below breakpoints, if such sales are made ''so as to share in higher sales charges.'' The application of this standard depends on the purpose, or intent, of the member recommending the transaction. Accordingly, determining whether a breakpoint sales violation has occurred depends on facts and circumstances that provide evidence of intent.

Recently, NASD Regulation considered the application of IM–2830–1 to modern portfolio investment strategies that utilize many different mutual funds with varying investment objectives. Both the Independent Dealer/Insurance Affiliate Committee and the Investment Companies Committee of NASD Regulation requested that the staff consider amending IM–2830–1 to more precisely identify those facts and circumstances to be considered by the staff when examining whether trades made pursuant to bona fide asset allocation programs that miss breakpoints have violated NASD rules.

NASD Regulation believes that under most circumstances, sales under a breakpoint pursuant to a bona fide asset allocation program would not constitute a breakpoint violation. NASD Regulation also believes that many investors generally may benefit from asset-based investment strategies, and that such strategies should not be discouraged. Based on these factors, as well as a review of the NASD's past positions regarding breakpoint sales, NASD Regulation proposed to amend IM–2830–1 to provide that for purposes of determining whether a sale of investment company shares for a dollar amount below a breakpoint was done for the purpose of sharing in a higher commission, the NASD will consider, among other things, whether the member conducting such sale retained records that demonstrate (a) that the trade was executed in accordance with a bona fide asset allocation program and (b) that the customer was informed that it might not receive breakpoint reductions that otherwise would be available.

2. Statutory Basis

NASD Regulation believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[3] 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, in that the proposed rule change provides explicit guidance to both members of the NASD and the NASD Regulation examination staff regarding the application of the Association's breakpoint selling rules to modern portfolio investment strategies, such as strategies involving bona fide asset allocation programs, that can benefit investors.

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 Regulation has neither solicited nor received comments on 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 reason 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.

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. 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 SR–NASD–98–69 and should be submitted by October 27, 1998.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Margaret H. McFarland,

Deputy Secretary.

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[3] 15 U.S.C. 78*o*–3.

[4] 17 CFR 200.30–3(a)(12).