SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56142; File No. SR-NYSE-2007-22)

July 26, 2007

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to the Harmonization of NYSE and NASD Regulatory Standards, the Updating of Certain NYSE Terminology, and the Reorganization and Clarification of Certain NYSE Rules in Connection with the Harmonization Process

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 February 27, 2007, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Exchange. On July 26, 2007, NYSE filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

The proposed rule change consists of amendments to NYSE rules, organized categorically, that would advance the process of harmonizing the regulatory standards of the Exchange and the National Association of Securities Dealers, Inc. ("NASD"). In addition, the proposed rule change would update certain terminology and otherwise reorganize and clarify current NYSE regulatory standards. The text of the proposed rule change is available on the Exchange's Web site (www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

2 17 CFR 240.19b-4.

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 NYSE 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 NYSE 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange is proposing amendments to certain NYSE Rules pursuant to its SRO Rule Harmonization initiative. In connection with this filing, the Exchange is also separately submitting to the Commission a report that provides an overview of the Exchange's approach in this regard.

Introduction

Relative to the approval of the NYSE/ARCA merger,[3] the Exchange agreed to initiate a comparison of its regulatory requirements (as prescribed by the NYSE Rulebook and associated interpretive materials) to corresponding NASD regulatory provisions. The purpose of the process was to achieve, to the extent practicable,[4] substantive harmonization of the two regulatory schemes. To that end, this filing proposes amendments to an extensive range of NYSE rules which have been divided into four categories. In addition to organizing the rules

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3 See Securities Exchange Act Release No. 53382 (February 27, 2006) 71 FR 11251 (March 6, 2006) (order approving SR-NYSE-2005-77).

4 The review process recognized the appropriateness of differing standards based upon the differences between the markets and membership of NYSE and NASD.

conceptually, this serves to distinguish the review and recommendation process that has been applied to each category, discussed more fully below.

The categories are arranged as follows: Category 1 addresses Member Firm Organization/Structure and Governance; Supervision; Registration, Qualification and Continuing Education; and Sales Practice (collectively, the "Sales Practice Rules"); Category 2 addresses the Financial/Operational Rules; Category 3 addresses the Buy-In Rules; and Category 4 addresses the selective deletion of the term "member" and the complete deletion of the term "allied member" from the NYSE rules ("Member" and "Allied Member" Rules).

Global Amendments

Category 4 includes rules for which the only substantive proposed change is deletion of the terms "member" and/or "allied member." Note, however, that the selective deletion of the term "member" and the complete deletion of the term "allied member" is proposed throughout the other three categories as well.

These amendments are discussed more fully below under Category 4 ("Member" and "Allied Member" Rules). In brief, the Exchange is proposing to delete, where appropriate, the term "member" throughout the NYSE rules to reflect its revised meaning in light of the recent merger/reorganization of the Exchange. While "member" is still recognized as a categorical designation, its current definition[5] is substantively different from its pre-merger definition, rendering its use in many NYSE rules outdated. Thus, many regulatory requirements that once pertained specifically to NYSE members no longer apply at all, or apply to members only in their capacity as member organization employees.

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[5] The term "member" currently refers to an employee of a member organization authorized to effect transactions on the Floor of the Exchange on behalf of such member organization, which holds a license to so trade.

The "allied member" designation is a regulatory category based on a person's "control" over a member organization.[6] It is proposed that the term be simply deleted in rules where a person's control status is not relevant to the rule's application. In contexts where an individual's status as a member organization "control person" has regulatory relevance, the Exchange proposes to substitute the newly defined category of "principal executive" (see proposed Rule 416A amendments, below). Unlike the "allied member" designation, the "principal executive" designation would not require a registration process, but would be used only for regulatory reporting and notification purposes.

Category 1 ("Sales Practice Rules")

Background

In order to initiate the rule harmonization process, the Exchange enlisted, through its Compliance Advisory Group ("CAG"),[7] the assistance of several securities industry regulatory professionals from member organizations who volunteered to participate in various subcommittees in order to conduct an initial review of all relevant materials and to report their findings and recommendations to the Exchange and the NASD (collectively, the "SROs"). The SROs were charged with the responsibility of considering the appropriateness of the committees' recommendations and working together to amend their respective rules accordingly.

The review process formally began in February 2006 when the Exchange's Member Firm Regulation ("MFR") Division, in conjunction with the CAG, organized four

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6 See subsection (b) of NYSE Rule 304 ("Allied Members and Approved Persons").

7 The Exchange's Compliance Advisory Group is a committee consisting of representatives from the Exchange Member Firm Regulation Division as well as legal and compliance personnel from a cross-section of the NYSE member organization community. CAG meets on a periodic basis, generally monthly, to discuss regulatory and compliance matters of interest to the securities industry.

subcommittees and assigned each a group of rules within a specified regulatory category. The following four subcommittees were thus established: (1) Member Firm Organization/Structure and Governance; (2) Supervision; (3) Registration, Qualification and Continuing Education; and (4) Sales Practice. Representatives from the Exchange, the NASD, and the Securities Industry Association ("SIA")[8] participated throughout this review process in a consultative role.[9] The recommendations that resulted from these subcommittees' comparison of NYSE and NASD rules are, in large part, the basis for the Category 1 amendment proposals presented herein.

The subcommittee review process essentially consisted of identifying inconsistencies between the NYSE rules and the NASD rules, determining which SRO standard made more regulatory sense, and then recommending rule changes that would either conform an NYSE standard to its NASD counterpart or vice versa. In some instances, the subcommittees recommended a hybrid approach that included amendments to corresponding rules of both SROs.

Each of the recommendations has been reviewed with the CAG Group and the NASD. These subsequent discussions allowed further exploration of the issues raised by the subcommittees and provided a better sense for which recommendations clearly warrant redress via the formal rule amendment process and which require further consideration.[10]

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8 Note that SIA has since combined with the Bond Market Association to form the Securities Industry and Financial Markets Association ("SIFMA").

9 NASD did not participate in the Member Firm Organization/Structure and Governance Subcommittee.

10 See NYSE Report submitted in conjunction with this filing for a further discussion and enumeration of such rules.

The Exchange has also taken the opportunity, where appropriate, to reorganize and clarify rule text related to the subcommittees' recommendations and to otherwise update, refine and clarify its regulatory standards.

Rule 311 Formation of Member Organizations

NYSE Rule 311 governs the formation and approval of member organizations by the Exchange. The proposed amendments to Rule 311(b) would extend the application of the rule, which currently addresses partnerships and corporations, to include any type of entity (e.g., a limited liability company) applying to the Exchange to become a member organization.

The proposed amendments would delete subsection (b)(7) of Rule 311 which requires every employee who is associated as a member with a member organization to be designated with a title, such as vice president, consistent with such person's responsibilities and the usage of titles within such organization. Additionally, the amendments propose the deletion of subsection (h) which prescribes the number of partners to be named in a member organization in order for it to conduct business. These two provisions are being deleted as they are outdated and no longer necessary in light of the current spectrum of NYSE member organizations business models.

Rule 313 Submission of Partnership Articles-Submission of Corporate Documents

NYSE Rule 313 requires member organizations to submit to the Exchange for approval certain documents which establish a partnership's or corporation's existence. The proposed amendments to Rule 313 add limited liability agreements to the enumeration of documents required to be submitted to and approved by the NYSE in order for an entity to be a member organization. The proposed amendments to Rule 313 also amend .23 of the supplementary material to provide that all corporations, not just those organized under the laws of the State of New York, shall subject themselves to the restrictions set forth in .23.

Rule 322 (Guarantees by, or Flow Through Benefits for Members or Member Organizations)

Rule 322.10 currently requires each member organization to provide written notice to the Exchange prior to: (1) guaranteeing, endorsing or assuming, directly or indirectly, the obligations of another person or (2) receiving flow-through capital benefits. The practice by member organizations of guaranteeing the liabilities of other persons has long been recognized as a matter that gives rise to special risks with respect to the member organization's capital. Accordingly, as a matter of practice, the Exchange has carefully reviewed and vetted such submissions such that the "prior notice" requirement has effectively been treated as a "prior approval" requirement.

The proposed amendments would codify this well-established approach by replacing the present requirement that "notice" of at least 10 business days be given to the Exchange prior to entering into an arrangement prescribed by the rule with an explicit requirement that written Exchange approval be obtained prior to the finalization of any such arrangement.

The NASD does not currently have an analogue to Rule 322. The Member Firm Organization/Structure and Governance Subcommittee recommended that NASD adopt a similar rule and NASD has taken the recommendation under advisement.

Rule 342 (Offices – Approval, Supervision and Control) and its Interpretation

Rule 342.13 - Acceptability of Supervisors

NYSE Rule 342.13(a) currently requires that persons who are to be assigned certain prescribed supervisory responsibilities[11] have a "creditable" three year record as a registered

[11] In this regard, Rule 342.13(a) references Rule 342(d) which requires that "[q]ualified persons acceptable to the Exchange shall be in charge of: (1) any office of a member or member organization, (2) any regional or other group of offices, (3) any sales department or activity."

representative or have three years of "equivalent experience" before functioning as a supervisor.[12]

The Exchange proposes that Rule 342.13(a) be amended to eliminate the prescribed three-year experience requirement for supervisory personnel and conform with the standard outlined in NASD Rule 1014(a)(10)(D) with respect to firms that are submitting an application to become registered as a broker dealer. In addition, as under NASD 1014(a)(10)(D), the proposed amendments would require that supervisory candidates have one year of "direct experience" or two years of "related experience" in the subject area to be supervised.

With respect to existing broker dealers, the Exchange believes that, given a member organizations' first hand knowledge of their supervisory candidates, it is reasonable to provide greater flexibility than Rule 342.13(a) currently allows. Accordingly, the proposed amendments would allow member organizations to make informed determinations, on a case-by-case basis, as to the length and type of experience and training required for each supervisory candidate before he or she is deemed sufficiently prepared to assume particular responsibilities.

In order to ensure regulatory jurisdiction over all principal executives, and to more closely conform with the standard prescribed under subsection (a) of NASD Rule 1021 (Registration Requirements) the Exchange proposes new Rule 342.13(c) which would require each person designated by a member organization as a "principal executive," as that term is defined in Rule 416A, to pass an examination appropriate to the functions to be performed by such person.

Rule 342.19 - Supervision of Producing Manager

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[12] Rule 342.13(a) also requires that persons assigned supervisory responsibility pursuant to Rule 342(d) must pass a qualification examination acceptable to the Exchange that demonstrates competence relevant to assigned responsibilities.

NYSE Rule 342.19 currently requires that a person designated to supervise the business of a Producing Manager (a branch office manager, regional/district sales manager, or a person who performs similar functions and that conducts a public business) must be senior to, or otherwise independent of, such Producing Manager. Currently, a component of determining whether such designated person is "otherwise independent" of a Producing Manager is whether the designated person receives an override or other income derived from the Producing Manager's customer activity that represents more than 10% of the designated person's gross income derived from the member organization over the course of a rolling twelve-month period. If the designated person exceeds the 10% threshold, Rule 342.19 requires that "alternate senior or otherwise independent supervision" of the Producing Manager be established.

Member organizations have indicated that the "10% override" standard is difficult to calculate within the context of certain compensation models (e.g., where an override or other compensation may be tied to a formula applicable to the business of the entire branch office and not distinguishable from the Producing Manager's customer activity).

Consequently, the Exchange proposes to delete the current Rule 342.19 standard and offer the following alternative: If a designated supervisor receives an override or other income from the production of registered persons subject to his or her supervision, and the gross revenues of any Producing Manager under his or her supervision exceed 10% of the total gross revenue of all registered persons subject to his or her supervision, then the producing manager would be "flagged" for either alternate supervision (as currently required by Rule 342.19) or "heightened supervision," which is the standard currently utilized by the NASD 3012(a)(C). The Exchange also proposes amending Rule 342.19(a) to add the NASD Rule 3012(a)(2)(C) definition of "heightened supervision." Thus, proposed Rule 342.19(a) would define "heightened supervision" to mean: "those supervisory procedures that evidence supervisory

activities that are designed to avoid conflicts of interest that serve to undermine complete and effective supervision because of the economic, commercial, or financial interests that the supervisor holds in the associated persons and businesses being supervised."

Rule 342.23 - Internal Controls

The Exchange proposes repositioning text, from Rule 401 to Rule 342.23, which requires internal controls over certain prescribed business activities (e.g., activities pertaining to the transmittal of funds and securities from customer accounts, changes in customer address, and changes in customer investment objectives). Since Rule 401 text currently refers back to requirements outlined in Rule 342.23, it makes sense to integrate the Rule 401 text into Rule 342.23 for purposes of easy reference and comprehension.

Rule 345 (Employees – Registration, Approval, Records) and its Interpretation

Adoption of "Assistant Representative" Registration Category

The Exchange is proposing amendments to Rule 345(a) and its Interpretation to adopt "assistant representative" as a registration category and to recognize the Series 11 as its prerequisite qualification examination.[13] This is being done to establish a registration category that would allow for the performance of functions not permitted to be performed by a non-registered sales assistant without requiring full Series 7 registration. Specifically, as defined in proposed Rule 345.10, a person registered as an "assistant representative" would be a member organization employee who could accept unsolicited orders for execution by the member organization. An assistant representative would not be permitted to solicit transactions or new accounts on behalf of the member organization, render investment advice, make

[13] The Commission notes that NASD currently has a similar rule that governs Assistant Representatives. See NASD Rules 1041 (Registration Requirements for Assistant Representatives) and 1042 (Restrictions for Assistant Representatives).

recommendations to customers regarding the appropriateness of securities transaction, or effect transactions in securities markets on behalf of the member organization.

Further, persons registered in this category may not be registered concurrently in any other category. Member organizations may only compensate assistant representatives on an hourly wage and may not directly or indirectly relate their compensation to the number or size of customer transactions effected. This provision would also prohibit assistant representatives from receiving bonuses or other like compensation related to a member organization's transaction-based activity.

Elimination of Prescribed Training Periods for Certain Registered Persons

NYSE Rule 345 currently prohibits member organization employees from performing the functions of a registered representative unless such employee is registered, qualified and meets a designated four-month training period.[14]

Further, the Interpretation[15] of Rule 345 currently provides that exam-qualified "registered representatives" and "registered options representatives" will not receive Exchange approval to perform functions pursuant to such qualifications without first completing a four-month training period. NASD Rules do not require such training periods.

In order to harmonize Rule 345 with the NASD regulatory structure, and to provide member organizations the flexibility to train their registered personnel in a manner appropriate to the duties they will be assuming, the Exchange is proposing amendments to Rule 345 and its Interpretation to eliminate the prescribed four-month training period for registered representatives and for registered options representatives. The proposed amendments would

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14 See Rule 345(a) and Supplementary Material section .15(b)(2).

15 See Rule 345.15/2 ("Qualifications – Categories of Registration") in the NYSE Interpretation Handbook.

allow member organizations to make informed decisions as to the extent and duration of training for such registered persons before they are permitted to perform functions requiring registration.

Similarly, the Exchange is also proposing the elimination of the currently required two-month training period for "limited registration" candidates.[16]

Rule 345(b)

Rule 345(b) currently prohibits any natural person, other than a member or allied member, to assume the duties of an officer with the power to legally bind such member or member organization unless such member or member organization has filed an application with and received the approval of the Exchange. The Exchange proposes to delete Rule 345(b) in its entirety. Proposed amendments to Rule 416A (see below) would require member organizations to notify the Exchange of all principal executives (defined as the designated principal executive officers of a member organization pursuant to NYSE Rule 311(b)(5) or their functional equivalents). There would no longer be a requirement that the Exchange approve such persons (which is consistent with NASD's regulatory structure). New Rule 345(b) would clarify that no person shall undertake any active duties whose performance requires a qualification examination until such person has satisfactorily met such examination requirement. This is included, in part, to reaffirm the exam qualification requirements applicable to such control persons.[17]

Training Requirement for Members and Substitute Members

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16 Limited registration candidates' activities are limited to the solicitation or handling of the sale or purchase of instruments such as investment company securities and variable contracts, insurance premium finding programs, direct participation programs and municipal securities. (See Rule 345.15 /02 in the NYSE Interpretation Handbook).

17 See, for example, Rule 311 and its Interpretation.

The Exchange is proposing new Rule 345(c) which would prohibit any person from becoming active on the Floor as a member or a substitute thereof unless such person has been sufficiently trained under the guidance of an experienced member for such period of time as may be necessary before being permitted to execute orders without supervision. This requirement is proposed to help ensure that persons who will be performing the duties of a member are sufficiently prepared to do so.

Adoption of "Qualified Investor" Standard

The Interpretation of Rule 345[18] currently allows Floor members and Floor clerks who have successfully completed the Series 7A examination to conduct a public business limited to accepting orders from "professional customers" as that term is defined in the Interpretation. The Exchange is proposing substituting the more generally recognized "qualified investor" standard, as that term is defined under section 3(a)(54)[19] of the Act.

Clarification of Employee Background Check Requirements

The Exchange is also proposing revised language[20] that reorganizes and clarifies member organization requirements with respect to investigating the background of persons they contemplate employing.

Rule 346 (Limitations – Employment and Association with Members and Member Organizations)

Rule 346(b) Inclusion of Rule 407 Materials Related to "Private Securities Transactions"

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18 See Rule 345.15 /02 in the NYSE Interpretation Handbook.

19 15 U.S.C. 78c(a)(54).

20 See Rule 345.11 in the Supplementary Material.

NYSE Rule 407 (Transactions – Employees of Members, Member Organizations and the Exchange) provides, in part, that no employee of a member organization shall establish or maintain a securities or commodities account or enter into a private securities transaction without the prior written consent of his or her member organization. The Exchange is proposing amendments to 346 to more logically reposition current Rule 407 requirements[21] with respect to "private securities transactions" (e.g., interests in oil or gas ventures, real estate syndications, tax shelters, etc.) and to harmonize the standards applicable to such transactions with those of NASD Rule 3040 (Private Securities Transaction of an Associated Person).

Specifically, the Exchange proposes repositioning requirements pertaining to "private securities transactions" from Rule 407 to Rule 346(b) since Rule 346 more directly addresses issues related to the outside activities of registered persons. Further, definitions of the terms "private securities transactions" and "selling compensation" are proposed that are substantially similar to the definitions found in corresponding NASD Rule 3040.[22]

Proposed Deletion of Rule 346(c)

The Exchange proposes deleting Rule 346(c) which currently requires that prompt written notice be given to the Exchange "whenever any member or member organization knows, or in the exercise of reasonable care should know, that any person, other than a member, allied member or employee, directly or indirectly, controls, is controlled by or is under common control with such member or member organization." This provision is redundant in light of the FORM BD requirement, pursuant to its question number 10, that each broker dealer disclose

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21 See Rule 407(b) and section .11 in the Supplementary Material.

22 See Rule proposed Rule 346 Supplementary Material sections .10, .11 and .12, respectively.

such control relationships. The proposed amendment would be consistent with the NASD regulatory structure which has no corresponding requirement.

Proposed Amendments to Rule 346(e), Rule 346(f) and 476A (Imposition of Fines for Minor Violation(s) of Rules)

Rule 346(e) currently requires that persons who are assigned or delegated supervisory authority pursuant to Rule 342 must devote their entire time during business hours to their member organization, unless otherwise permitted by the Exchange. Over the past several years, the Exchange has had extensive experience reviewing and responding to approval requests pursuant to Rule 346(e) and has noted an increasing number of member organizations that have interrelated business arrangements with sister corporations active in various areas of the financial services industry. Also noted has been the corresponding increase in experience member organizations have gained in the allocation of supervisory responsibility when supervisory persons are assigned functions across corporate lines.

Accordingly, the Exchange proposes amendments to Rule 346 that would eliminate the requirement of Exchange approval in order for supervisory persons to devote less than their entire time to the business of their member organization. In lieu thereof, the amended rule would require the prior written approval of the member organization, pursuant to the exercise of appropriate due diligence, for such arrangements. The amendments recognize that member organizations are best positioned to make such determinations.

The proposed amendments[23] would require the identification of any entity for which the supervisory person will be performing services during business hours and a description of such services. The member organization's written approval would be required to set forth the

[23] See proposed Rule 346(c).

approximate amount of time the supervisory person is expected to devote to each entity, with particular attention paid to the approximate time expected for the person, based upon qualifications and experience, to be able to effectively discharge his or her supervisory responsibilities on behalf of the member organization. In addition, the amendments would require documentation that the member organization has made a good faith determination that the arrangement will not compromise the protection of investors or the public interest, compromise the supervisor's duties at the member organization, or give rise to a material conflict of interest. These provisions have been repositioned from Rule 346(e) to Rule 346(c).

The nearest corresponding NASD requirement is found in NASD Rule 3030 (Outside Business Activities of an Associated Person) which generally states that no registered associated person of a member shall be employed by, or accept compensation from, any other person as a result of any other business activity without providing prompt written notice to the member. This standard is similar to that currently outlined in NYSE Rule 346(b) which applies only to non-supervisory member organization employees. While this standard continues to be appropriate for non-supervisory persons, the Exchange believes that, given the responsibilities attendant to persons who have been delegated supervisory duties, a heightened standard of control such as that prescribed by the proposed amendments remains advisable.

It is proposed that the Interpretation of Rule 346(e) be deleted since its application is specific to the regulatory standard being deleted, and would thus be rendered irrelevant upon approval of the proposed amendments to the Rule.

Further, Rule 476A, which lists violations of Exchange rules that are subject to a fine not to exceed $5,000, includes Rule 346(e) as a "failure to obtain Exchange approval" violation. Since the Exchange is proposing the elimination of the Exchange approval requirement under

this provision (and since Rule 346, as amended, no longer contains a subsection (e), it is proposed that the reference to Rule 346(e) within Rule 476A be deleted as well.

Proposed Amendments to Rule 346(f)

Rule 346(f) currently requires that, except as otherwise permitted by the Exchange, "no member, allied member, approved person, employee or any person directly or indirectly controlling, controlled by or under common control with a member or member organization shall have associated with him or it any person who is known, or in the exercise of reasonable care should be known, to be subject to any 'statutory disqualification'."[24] As written, this provision is overly broad in that its prohibitive reach ostensibly extends to persons not subject to the jurisdiction of the Exchange. Thus, amendments are proposed to Rule 346(f) to reasonably clarify that its reach is limited to persons subject to the Exchange's jurisdiction. The amended language has also been repositioned as Rule 346(d). As violations of current Rule 346(f) are subject to Rule 476A, corresponding amendments to that rule that reflect this repositioning are proposed as well.

Rules 351 (Reporting Requirements) and 401A (Customer Complaints)

NYSE Rule 351(d) requires each member organization to report to the Exchange statistical information regarding customer complaints relating to such matters as may be specified by the Exchange.[25] Current Exchange policy requires that all complaints, including oral complaints, be reported pursuant to this provision.[26]

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24 See Section 3(a) (39) of the Act for the definition of statutory disqualification.

25 See NYSE Information Memo Nos. 06-28 (May 4, 2006), 05-29 (April 22, 2005), 04-11 (March 9, 2004), 03-38 (September 19, 2003), 03-36 (August 25, 2003), and 98-16 (April 14, 1998).

26 See NYSE Information Memo No. 03-38 dated September 19, 2003.

Amendments to Rule 351(d) are proposed that would limit reportable complaints to those that are "written," consistent with NASD Rule 3070(c). Furthermore, proposed new NYSE Rule 351.15 limits the definition of the term "customer complaint" to written statements of a customer, or any person acting on behalf of a customer, other than a broker or dealer, alleging a grievance involving the activities of those persons under the control of a member organization.

NYSE Rule 401A currently requires that member organizations acknowledge and respond to all complaints subject to the reporting requirements of Rule 351(d). As noted above, the Exchange is proposing to limit Rule 351(d) reportable complaints to those that are written. However, the Exchange believes that both written and oral complaints should be acknowledged and responded to pursuant to Rule 401A. Thus, it is proposed that the Rule 401A reference to Rule 351(d) be deleted to clarify that verbal complaints remain within the scope of Rule 401A. Note that Rule 401A requires member organizations to maintain written records of such acknowledgements, responses and other prescribed complaint-related follow-up activities, and further requires that such records be retained in accordance with NYSE Rule 440 (Books and Records).

Rule 352 (Guarantees, Sharing in Accounts, and Loan Arrangements)

Rule 352 restricts the extent to which member organization personnel may share in customer account profits or losses. Rule 352(b) generally prohibits member organizations, allied members and registered representatives from sharing profits or losses in any customer account. However, Rule 352(c) permits such sharing in proportion to financial contributions made to a joint account.

Rule 352(c)

The Exchange proposes to amend Rule 352(c) to exempt from the proportional contribution requirement joint accounts with immediate family members held by principal executives or registered representatives of a member organization. This amendment would avoid intrusive regulation into accounts that may naturally entail profit and loss participation on a disproportionate basis, as with joint accounts between husband and wife, while retaining coverage of the rule for other accounts. Similarly, NASD Rule 2330(f)(1)(A) generally permits an NASD member or a person associated with an NASD member to share in profits and losses with a customer, provided such sharing is proportionate to the financial contributions of each account holder while NASD Rule 2330(f)(1)(B) exempts from this proportionality requirement accounts shared between an associated person and a customer who is an immediate family member of such associated person.

The amendments make clear that any sharing arrangement entered into pursuant to Rule 352(c) is subject to the Rule 352(a) provision that no member organization shall guarantee or in any way represent that it will guarantee any customer against loss in any account or on any transaction; and no employee of such member organization shall guarantee or in any way represent that either he or she, or his or her employer, will guarantee any customer against loss in any customer account or on any customer transaction.

The amendments define the term "immediate family" in Rule 352(c) to include parents, mother-in-law or father-in-law, husband or wife, children or any relative to whose support the principal executive or registered representative contributes directly or indirectly. This definition harmonizes with the standard under NASD Rule 2330(f)(1)(B). The existing definition of "immediate family" in Rule 352(g) is retained for other provisions in the Rule, essentially allowing persons acting in the capacity of a registered representative or principal executives to lend to or borrow from a more extensive range of family members. Accordingly,

it is proposed that Rule 352(g) be amended to confirm that its provisions are not applicable to Rule 352(c). The broader Rule 352(g) standard is also consistent with the corresponding NASD standard.[27]

Rule 352(d)

The Exchange is also proposing non-substantive amendments to Rule 352(d) that streamline the reference to the exemption from the rule's general prohibition against sharing in profits. Specifically the revised provision would read that, notwithstanding the general prohibition against sharing in profits under paragraph (b), a person acting as an investment adviser (whether or not registered as such) may receive compensation based on a share of profits or gains in an account if all of the conditions in Rule 205-3 of the Investment Advisers act of 1940 (as may be amended from time to time) are satisfied. The provision retains its notice that all advisory compensation arrangements should be reviewed by member organizations and their counsel in light of applicable State and Federal law (e.g., ERISA).

Rule 353 (Rebates and Compensation)

First proposed in 1978 and adopted in 1979,[28] Rule 353(a) enacted into Exchange regulations anti-rebate provisions which had previously been contained in the Registered Representative Agreement.[29] In pertinent part, the Rule provides:

> "No member, allied member, registered representative or officer shall, directly or indirectly, rebate to any person, firm, or corporation, any part of the compensation he receives for the solicitation of orders for the purchase or sale of securities or other

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27 See subsection (c) of NASD Rule 2370 (Borrowing From or Lending to Customers).

28 See Securities Exchange Act Release No. 15811 (May 11, 1979).

29 See NYSE Information Memo 79-42 (July 16, 1979).

similar instruments for the accounts of customers of his member organization employer…."

The Rule has for some time been consistently interpreted by the Exchange to prohibit rebate arrangements directly between natural persons (without the knowledge or involvement of the broker dealers carrying such persons' registration) but not to prohibit arrangements when payments are made broker dealer to broker dealer and remitted to duly registered individuals. The Exchange has, upon request, provided "good business practice" safeguards regarding how to best structure such arrangements pursuant to Rule 353.

Amendments to the Rule are proposed that would incorporate those safeguards and clarify relevant regulatory requirements applicable to these arrangements. The amendments would also re-title the rule from "Rebates and Compensation" to "Rebates and Commission Sharing Arrangements" to better reflect the focus of the amended text. NASD has no analogue to Rule 353.[30]

Proposed amendments to Rule 353(a) would reaffirm that the rule prohibits rebate arrangements "directly" to natural persons. Specifically, the revised text states that "[n]o employee of any member organization shall, directly remit to or receive from any person, firm, or corporation, any part of the compensation received for effecting transactions in securities or other similar instruments for a customer account, or directly pay or receive such compensation, or any part thereof, as a bonus, commission, fee or other consideration for business sought or procured for the employee or for any member organization of the Exchange."

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[30] NASD Rule 2420 (Dealing with Non-Members) states that no member may deal with a non-member unless at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public. NASD IM-2420-2 (Continuing Commissions Policy) states that continuing commissions are permitted so long as the person receiving them is a registered with the NASD.

Proposed Rule 353(b) would clarify that registered employees of member organizations may participate in the remittance or receipt of such compensation pursuant to an agreement which provides that:

(1) all remittances or payments to or from the registered employee are made pursuant an arrangement between the member organization and another registered broker-dealer;

(2) the terms of the payment arrangement are memorialized in a written agreement signed by authorized officers of both broker dealers;

(3) all such remittances or payments are duly recorded on the respective organizations' books and records; and

(4) affected customers receive prior, specific, plain language written disclosure of the payment arrangement. (Such disclosure must provide payment parameters and methods; mere "boiler plate" disclosure would not satisfy the provisions of this subsection).

These provisions are intended to prevent improper payment arrangements between individuals that are under the broker dealers' "regulatory radar." They are further meant to assure that sharing in commission-based income is limited to registered persons, as well as to assure the transparency of such arrangements not only to the broker dealers but also to affected customers.

Proposed Rule 353.10 distinguishes other permissible arrangements that could be interpreted as types of commission sharing. Specifically noted are payments made pursuant to a carrying agreement under Rule 382, since such agreements: may involve netting of commissions by the carrying firm; are by definition limited to broker-dealers; are made under an arrangement disclosed to the customers; and are in writing. Also included is a reference to

Section 28(e) of the Act which provides a safe harbor that protects money managers from liability for breach of fiduciary duty solely on the basis that they paid more than the lowest commission rate in order to receive brokerage and research services provided by a broker-dealer if a manager determines in good faith that the amount of commissions was reasonable in relation to the brokerage and research services received.

Proposed Rule 353.10 also makes clear that any commission-sharing arrangements established pursuant to Rule 353 must comply with all other applicable SRO rules and federal regulations and may not otherwise compromise services to affected customers (e.g., with respect to "best execution" obligations).

Rule 388 (Prohibition Against Fixed Rates of Commission)

Rule 388 currently states that the Exchange does not require its members to charge fixed or minimum rates of commission, and provides that nothing in the Rules of the Exchange shall be construed as authorizing the charging of fixed rates.

The Exchange adopted Rule 388 on April 3, 1975 in response to Rule 19b-3[31] of the Act and in conjunction with the Securities Acts Amendments of 1975,[32] which moved the securities industry toward fully negotiated commission rates. The Commission rescinded Rule 19b-3 in 1988 upon the enactment of Section 6(e)(1)[33] of the Act which specifically prohibited exchanges from imposing fixed rates of commissions. Since the purpose of Rule 388 has been achieved by Section 6(e)(1), it has been rendered redundant and serves no practical purpose. Accordingly, it is proposed that it be rescinded. The NASD has no comparable rule.

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31 17 CFR 240.19b-3.

32 Elements of the SEC rule were enacted in amendments to the Act at Section 6(e)(1).

33 15 U.S.C. 78f(e)(1).

Rule 401 (Business Conduct)[34]

Rule 401 states, in part, that each member organizations shall at all times adhere to the principles of good business practice in the conduct of its business affairs. The Exchange is proposing to add supplementary material to Rule 401[35] that would codify the understanding that principles of good business conduct extend to compliance with all regulatory provisions to which a member organization is subject (including applicable provisions of federal securities law, the rules and regulations of any SRO of which a member organization is a member, state securities law, ERISA, etc.). This would clarify that the principles of good business practice required by Rule 401 extend, for example, to the product-specific provisions of NASD Rule 2210 (Communications with the Public) and its interpretive material[36] which are not specifically addressed in corresponding NYSE Rule 472 (Communications with the Public) as well as to NASD Rule 2440 (Fair Prices and Commissions) and NASD IM-2440 (Mark-up Policy).

Rule 407 (Transactions – Employees of Members, Member Organizations and the Exchange)

The proposed amendments to Rule 407 are discussed above in the context of the "Rule 346" amendments.

Rule 408 (Discretionary Power in Customers' Accounts)

NYSE Rule 408 provides, in part, that no employee of a member organization shall exercise discretionary power in any customer's account or accept orders for an account other

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34 See also discussion under "Rule 342" above of the repositioning of Rule 401(b) text into Rule 342.23.

35 See proposed Rule 401.10.

36 For example, unlike NYSE Rule 472 and its interpretation, NASD IM-2210-2 addresses "communication with the public" issues specific to Variable Life Insurance and Variable Annuities. Likewise, NASD IM-2210-8 addresses communications issues specific to Collateralized Mortgage Obligations.

than the customer without first obtaining written authorization of the customer. The Exchange is proposing amendments to Rule 408(a) that would require member organizations to obtain the signature of any person or persons authorized to exercise discretion in such accounts, of any substitute so authorized, and the date such discretionary authority was granted. The proposed amendment would conform Rule 408(a) to corresponding requirements in NASD Rule 3110(c) and would promote better member organization controls to ensure that exercise of discretionary power over accounts is properly authorized.

Rule 408(c) prohibits effecting purchases or sales which are excessive in size or frequency in view of the financial resources of such customer. It is proposed that Rule 408(c) be amended to harmonize it with NASD 2510(a) which prohibits transactions that are excessive in size or frequency in light of the "financial resources and character" of the account. Specifically, the Exchange proposes amending Rule 408(c) to take into consideration the "character" of an account by requiring consideration of the customer's "account history, investment objectives and age."

In addition, The Exchange proposes amendments to Rules 408(d) and 408.11 that would delete the term, "institutional account" and replace it with the term, "qualified investors" as the latter is a readily identifiable standard under the federal securities laws.

Rules 409A (SIPC Disclosures) and 436 (Interest on Credit Balances)

The Exchange is proposing the deletion of Rule 436 and its Interpretation and the repositioning of their substance into Rule 409A. The purpose is to both clarify the intent of Rule 436 and place the revised text in a more suitable context.

Rule 409A currently provides, in part, that member organizations must advise each customer in writing, upon the opening of an account and at least annually thereafter, that they may obtain information about the Securities Investor Protection Corporation (SIPC), including

the SIPC Brochure, by contacting SIPC, and shall provide the Web site address and telephone number of SIPC. The proposed amendments to Rule 409A would add that member organization account statements must contain a disclosure to the effect that free credit balances not maintained for purposes of reinvestment in securities will be ineligible for SIPC coverage.

The purpose of consolidating Rule 436 and its Interpretation into Rule 409A is to position all of our provisions relating to SIPC and its consequences for customers in one rule for easier application and more logical placement. During the course of our rule review, we have attempted to align kindred and related rules into a more coherent structure. Rule 436, as it presently exists, was created to implement certain aspects of the Banking Act of 1933 (generally referred to as the Glass Stiegel Act). Specifically, Rule 436 and its Interpretation 436/01 provide that no member organization, unless subject to supervision by State banking authorities, shall pay interest on any credit balance created for the purpose of receiving interest thereon, however, interest may be paid on "free" credit balances left with a member organization for the purpose of reinvestment or temporarily being held awaiting investment. Accordingly, the Interpretation provides that member organizations should devise a method for determining whether the credit balance is left for investment or reinvestment purposes to ensure that such funds are fully protected by SIPC. Rule 436 has been interpreted to mean that free credit balances are to be used for reinvestment purposes, which falls fore square to the proposed change in Rule 409A(2) regarding SIPC not covering balances that are not being used for reinvestment purposes.

Rule 412 (Customer Account Transfer Contracts)

Background

NYSE Rule 412 regulates the process by which member organizations transfer customer accounts through the Automated Customer Account Transfer Service ("ACATS").[37] NYSE Rule 412 generally requires that, in order for a customer's account to be transferred to another firm through ACATS, the customer must formally initiate the transfer process by providing "authorized notice" to the receiving organization. In the context of Rule 412, authorized notice means the customer's signature on a transfer initiation form (i.e., a signed "TIF"). However, in certain circumstances (notably, bulk transfers) obtaining a signed TIF from each and every customer may not be practicable. Thus, Rule 412(f) permits member organizations to seek an exemption from the authorized notice requirement and to effect bulk transfers using "negative consent letter" notice to affected customers in lieu of individually executed TIFs. Currently, such exemptions are granted by the Exchange on a case-by-case basis.

Proposed Amendments

Amendments to NYSE Rule 412(f) are proposed that would allow member organizations to effect a bulk transfer of customer accounts through the use of negative consent letters without first obtaining approval from the NYSE. The standards the Exchange proposes to codify and apply to this process are the same as those currently applied by the Exchange pursuant to its case-by-case review procedures and are essentially consistent with the NASD's regulatory guidance in this area.[38] The Exchange believes that codification of bulk transfer standards will better enable membership to standardize and coordinate their bulk transfer

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37 ACATS is an automated system, administered by the National Securities Clearing Corporation ("NSCC") that standardizes the transfer of customer accounts from one broker dealer to another. See also NYSE Information Memo No. 04-20 (April 8, 2004).

38 See NASD Notice to Members 02-57 (Bulk Transfer of Customer Accounts).

procedures. Exchange staff will, of course, remain available to provide interpretive guidance and practical advice when needed.

In order for a member organization to qualify for the proposed "bulk transfer" exemption, two sets of standards must be met. First, the transfer in question must involve a large enough number of accounts such that it would be impracticable to obtain each customer's authorized notice as otherwise required by NYSE Rule 412(a). In addition, the circumstances necessitating the transfer must be an extraordinary, firm-driven corporate event outside the delivering[39] firm's ordinary course of business (e.g., a merger, the sale of a branch office or business division from one firm to another, an introducing firm moving their business to a new clearing firm, etc.).

Second, the delivering firm would be required to provide affected customers with notice regarding the prospective bulk transfer through the use of a negative consent letter.[40] The proposed amendments set forth the disclosure requirements to be contained in such letters. Specifically, an acceptable negative consent letter would be required to include: a synopsis of the circumstances necessitating the transfer (a merger, the sale of a branch office from one firm to another, an introducing firm moving their business to a new clearing firm, etc.); notification of the customer's right to opt out of the transfer; sufficient notice (generally, a minimum of 30

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39 In the context of Rule 412(f), the term "delivering firm" refers to the broker-dealer with which the customer has a direct business relationship (i.e., the "introducing" or "correspondent" firm if the delivering firm is not self-clearing.) Likewise, in the context of Rule 412(f), the term "receiving firm" refers to the "introducing" or "correspondent" firm (or self-clearing firm) on the receiving end of the transfer.

40 The rationale behind requiring that the negative consent letter be sent by the delivering firm is that it is the organization that the customers "know" (i.e., the firm most prominently featured on the customers' statements and with whose personnel (e.g., their registered representative) they generally interact. The presumption is that customers are more likely to open mail from a firm they know rather than from a firm with which the customer has no business relationship (the "receiving firm"), in which case the mail might be disregarded as an advertisement or solicitation.

calendar days) for customers to opt out of the transfer; disclosure of any previously established fees associated with the transfer; information explaining the manner in which the customer can effect a transfer to another broker-dealer, if the customer so chooses; and a statement regarding the compliance of both the delivering and receiving firm with SEC Regulation S-P.[41]

The proposed amendments would also require that both the delivering and the receiving firms agree in writing to any bulk transfer pursuant to Rule 412(f). This is to ensure that the proposed provisions are not used, for example, by a registered representative who is moving to another firm to take his customers with him via bulk transfer without the knowledge or consent of the delivering firm. Absent the explicit approval of both firms, any transfer of customer accounts under such circumstances must be effected pursuant to each customer's authorized notice and would be fully subject to the provisions of Rule 412. As noted above, only extraordinary, firm-driven corporate events outside the delivering firm's ordinary course of business can serve as the basis for a Rule 412(f) exemption. The proposed amendments would preclude member organizations from transferring customer accounts pursuant to Rule 412(f) at the behest of individual brokers who have been terminated or who have resigned from the firm. Any such customer account transfer would require the affirmative consent of each customer pursuant to a duly executed TIF and would be fully subject to Rule 412 and its Interpretation.[42]

Rule 416A (Member and Member Organization Profile Information Updates And Quarterly Certifications Via The Electronic Filing Platform

Rule 416A requires member organizations to establish and regularly maintain firm profile information via the Exchange's Electronic Filing Platform ("EFP"). It further requires

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41 See Securities Exchange Act Release No. 42974 (June 22, 2000), 65 FR 40334 (June 29, 2000) ("Privacy of Consumer Financial Information").

42 See proposed Rule 412.40.

member organizations to comply with any Exchange request for such information. Information is recorded on an EFP template.

In light of the proposed elimination of the "allied member" designation, the Exchange proposes amending Rule 416A to create a new reporting designation to be known as "principal executives" which would capture each member organization's control persons. The proposed[43] designation would be defined to include persons designated by a member organization as a "principal executive officer," as such terms is defined in subsection (b)(5) of NYSE Rule 311 (Formation and Approval of Member Organizations), or their functional equivalents. Thus, the "principal executives" designation would encompass each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Compliance Officer, Chief Legal Officer, or any person assigned comparable functions or responsibilities (e.g., a person in a Limited Liability Company with principal executive responsibilities but with other than a principal executive title).

The proposed amendments would essentially codify existing Exchange EFP reporting requirements[44] with respect to these key personnel contacts, which are also required to be reported via FORM BD.[45] A key benefit of reporting these key contact persons to the Exchange as well as on FORM BD is that the EFP system has interactive functionalities that allow the Exchange to specifically target one or more contact persons to receive "email blasts" with time-sensitive instructions or regulatory information. The proposed rule would also allow for requiring the designation of other categories of persons as otherwise directed by the Exchange.

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43 See proposed .10 of the rule's "Supplementary Material."

44 See NYSE Information Memo No. 01-11, dated June 19, 2001.

45 See item 2(a) in Schedule A of FORM BD (Direct Owners and Executive Officers).

Unlike the "allied member" designation, there would be no exam qualification requirement particular to the "principal executive" designation per se (see also the deletion of "allied member" examination requirement from Rule 304A) though, of course, each principal executive would be required to take and pass any qualification examinations necessary to perform their assigned functions.

Rule 445 (Anti-Money Laundering Compliance Program)

Background

NYSE Rule 445 requires each member organization to develop and implement an anti-money laundering ("AML") program consistent with ongoing obligations under the Bank Secrecy Act.[46] The prescribed AML program obligations include the development of internal policies, procedures and controls; the designation of a person or persons to implement and monitor the day-to-day operations and internal controls of the program (commonly referred to as the "AML Officer"); ongoing training for appropriate persons; and an independent testing function for overall compliance.

The Exchange is proposing amendments to NYSE Rule 445 to clarify the term "prompt notice" and to harmonize other aspects of its AML program requirements with those prescribed by NASD.[47]

Proposed Amendments

"Prompt Notice"

In addition to requiring that each member organization designate a person or persons to implement and monitor the day-to-day operations and internal controls of its AML compliance program, NYSE Rule 445(4) further requires that "prompt notice" be given to the Exchange

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[46] 31 U.S.C. 5311 et seq.

[47] See NASD Rules 3011, IM-3011-2 and IM-3011-2.

regarding any change in such designation. The Exchange proposes amending NYSE Rule 445(4) to clarify that the term "prompt notice" means not later than 30 days following any change in such information, consistent with the requirements prescribed under NYSE Rule 416A(b).[48] NASD IM-3011-2 ("Review of Anti-Money Laundering Compliance Person Information") requires that the updating of such designation be within "17 business days after the end of each calendar quarter…" The Exchange believes that the more stringent requirement herein proposed is reasonable and will provide more current information regarding AML contact persons.

"Prior Written Approval"

The Exchange proposes deleting the first sentence of NYSE Rule 445(4)(C), which sets forth a "prior written approval requirement" for member organizations in instances where the designated person under Rule 445(4) is employed not by the member organization, but by an affiliate of the member organization.[49] NASD Rules do not have a comparable approval requirement.[50] Similarly, the Exchange proposes deletion of Rule 445.30, as this section, which provides an exemption to the approval requirement, would be rendered irrelevant.

"Independent Testing"

NYSE Rule 445.20 sets forth three categories of persons who are currently deemed insufficiently independent to conduct the required testing requirement pursuant to NYSE Rule

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48 See section (b) of NYSE Rule 416A ("Member and Member Organization Profile Information Updates and Quarterly Certifications Via the Electronic Filing Platform"), which requires member organizations to update their required membership profile information promptly, but in any event not later than thirty days following any change in such information.

49 See NYSE Rule 445(4) (B), which provides that a person may be designated under 445(4) when the person is employed by an entity that directly or indirectly controls, or is controlled by, or is under common control with the member organization.

50 See also NASD IM-3011-2. See also NASD Notice to Members 06-07.

445(3). Specifically, the Rule prohibits such testing from being conducted by (1) a person who performs the functions being tested, or (2) the designated AML compliance officer, or (3) a person who reports to either the person performing the functions being tested or the AML compliance officer.

The Exchange proposes to amend NYSE Rule 445.20 to harmonize it with corresponding NASD IM 3011-1[51] by adding an exception which would allow a person categorized in subsections (1) or (2) to conduct the testing when four conditions are satisfied. First, the member organization must have no other qualified internal personnel to conduct the testing. Second, the member organization must establish written policies and procedures to address conflicts that may arise from allowing the testing to be conducted by a person who reports to the person(s) whose activities are the subject of the testing. Third, the person who conducts the testing must, to the extent possible, report the test results to a person at the member organization who is senior to the person described in Rule subsections (1) and (2). If the person does not report the results consistent with this provision, the member organization must document a reasonable explanation for not doing so. Fourth, the member organization must document its rationale, which is required to be reasonable, for determining that it has no alternative than reliance on these conditions to comply with the testing requirement.

This exception to the general "independent testing" standard is proposed to allow small firms the flexibility to use appropriate internal personnel to conduct the testing required by Rule 445, while requiring that controls be in place to retain the effectiveness of the testing process.

Category 2 ("Financial/Operational Rules")

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51 See also NASD Notice to Members 06-07.

Background

In order to address certain Financial/Operational Rules not encompassed by the CAG subcommittee review process, the Exchange organized an in-house Financial/Operations Rule Committee and enlisted the participation of volunteers from SIFMA's Capital, Operations and Clearing Firms Committees and the NASD.

Proposed Amendments

Rule 325 (Capital Requirements for Member Organizations)

Restructuring of the Rule

NYSE Rule 325 requires member organizations subject to Rule 15c3-1[52] under the Act to comply with the capital requirements prescribed therein and with the additional net capital requirements established by the NYSE. The Exchange is proposing to restructure the text of Rule 325 into two separate sections: General Provisions[53] and Notification Provisions.[54] This non-substantive change will separate the net capital notification requirements contained in current Rule 325(b)(1) and (b)(2) from the other provisions of Rule 325.

Rule 325(c)

NYSE Rule 325(c)(1) currently provides that a long put option or a long call option, which is not an obligation of a clearing agency or has not been endorsed or guaranteed by a member organization, has no net capital value under any provision of Rule 325. The Exchange is proposing to rescind this provision because the substance of this requirement is covered in Rule 15c3-1 under the Act.

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52 17 CFR 240.15c3-1.

53 See proposed Rule 325(a), (b) and (c).

54 See proposed Rule 325(e).

Subsection (c)(2) of current Rule 325 provides for net capital requirements on certain proprietary day trading positions subject to a special margin requirement. The Exchange is proposing to rescind Rule 325(c)(2). This provision is no longer necessary because the SEC's capital rule requires firms to be in compliance on a moment to moment basis.

Additionally, the Exchange is proposing to adopt, as new Rule 325(c), a provision from NASD Rule 3130(e) which will require a member organization to suspend all business operations during any period of time during which the member organization is not in compliance with applicable net capital requirements as set forth in Rule 15c3-1 under the Act.

Rule 326 (Growth Capital Requirement, Business Reduction Capital Requirement, Unsecured Loans and Advances)

NYSE Rule 326(a) currently sets forth the conditions that trigger restrictions on business growth for member organizations. NYSE Rule 326(b) requires reduction of business by member organizations if certain conditions exist, as prescribed by the rule. The Exchange is proposing to expand the application of Rule 326(a) and (b) to apply to all broker-dealers, not just those which carry customer accounts. However, the proposed amendments clarify that non-carrying firms will not be subject to the automatic and self operative Rule 326(a) and (b), unless specifically directed by the Exchange.

The Exchange is also proposing to amend Rule 326(a)(1) and (b)(1). The current provisions require a condition triggering a growth restriction or business reduction to be known to the Exchange for five consecutive business days. The five day period is intended to provide breathing room so that these conditions can be corrected. The proposed amendments to Rule 326(a)(1) and (b)(1) provide that the condition must be known to either the member organization or the Exchange for five consecutive business days. The Exchange is proposing this change so that there is no benefit in not advising the Exchange about these conditions.

NYSE Rule 326(a)(2) provides for restrictions on the growth of a member organization's business at the discretion of the Exchange, much as subsection (b)(2) of Rule 326 allows for the mandated reduction in business at the discretion of the Exchange. Amendments to these provisions are proposed to clarify that the Exchange may exercise its discretion with respect to financial or operational conditions relating to a member organization's business.

Further, the proposed new Rule 326(a)(3) clarifies that "expansion of business" may include: net increase in the number of registered representatives or other producing personnel; exceeding average commitments over the previous three months for market making or block positioning; initiation of market making in new securities or any new firm trading or other commitment in securities or commodities in which a market is not made (other than riskless trades associated with customer orders); exceeding average commitments over the previous three months for underwritings; opening of new branch offices; entering into any new line of business or deliberately promoting or expanding any present lines of business; making unsecured or partially secured loans, advances, drawings, guarantees or other similar receivables; and such other measures as the Exchange deems appropriate under the circumstances in the public interest or for the protection of investors and member organizations.

The Exchange proposes to reposition the provisions in current Rule 326.10 which define "expansion of business" into subsection (a)(3) of Rule 326. In addition, the Exchange is proposing to reposition the provisions of current Rule 326.11, which define "Business Reduction," into subsection (b)(3) of the rule. The Exchange is also proposing to add certain conditions contained in NASD IM-3130(e) into new subsection (b)(3) to harmonize the SROs' examples of business reductions by member organizations. The additions include: promptly paying all free credit balances to customers; promptly effecting delivery to customers of all fully-paid securities in the member's possession or control; accepting no new customer

accounts; restricting the payment of salaries or other sums to partners, officers, directors, shareholders, or associated persons of the member; and accepting unsolicited customer orders only.

Current NYSE Rule 326(c) restricts all member organizations from making unsecured loans or advances to certain individuals or entities associated with the member organization when certain conditions are met. Current Rule 326(d) requires all member organizations to recall unsecured loans or advances when certain business reduction criteria are met. The Exchange is proposing to reposition the requirements in current Rule 326(c) and (d) regarding unsecured loans and advances in subsections (a)(3) and (b)(3), as part of the enumeration of examples of "expansion of business" and "business reduction," and to afford their application to all such loans regardless of counterparties.

Current NYSE Rule 326.12 imposes an automatic restriction on member organizations that introduce accounts on a fully disclosed basis to, or clear on an omnibus basis through, a restricted member organization. The Exchange is proposing to reposition Rule 326.12 into 326.10 in light of other proposed amendments to the rule and to amend this provision so that the restrictions will not flow automatically to the introducing firm when its clearing firm is restricted. The proposed rule provides that the Exchange may apply this requirement at its discretion.

NYSE Rule 326.13 currently allows member organizations to enter into subordination agreements, which are not allowable as good capital under NYSE Rule 325, to increase the member organization's total subordinated liabilities and capital available, and for the protection of customers. The Exchange is proposing to rescind .13 inasmuch as recourse to non-allowable capital has not been utilized.

The Exchange is proposing to add new Rule 326.11 that illustrates conditions under which the Exchange may exercise its discretion to reduce or limit a member organization's business. These conditions are contained in NASD IM-3130(e) and include situations such as non-current and/or inaccurate books and records, lack of full compliance with Rule 15c3-3[55] under the Act and the inability to promptly clear and settle transactions.

Lastly, the Exchange is proposing to change the title of Rule 326 to "Business Growth Restrictions and Business Reduction Requirements" and to make certain changes to the subheadings within the Rule.

Rule 382 (Carrying Agreements)

NYSE Rule 382 governs Exchange requirements for carrying agreements and provides for the contractual allocation of key functions involved in the opening and operation of customer accounts and the settlement and clearance of transactions in such accounts.

The Exchange is proposing to amend subsection (a) to provide that standardized forms of agreements between member organizations and introducing firms that are registered broker-dealers, which have been previously approved by the Exchange, need not be submitted to the Exchange for approval.

Additionally, the Exchange is proposing to amend Rule 382(a) to provide that carrying arrangements previously approved by another SRO with a comparable rule to NYSE Rule 382, e.g., NASD Rule 3230, will not require submission to and approval by the Exchange.

The Exchange is proposing amendments to Rule 382(b) to address third party piggy-back arrangements by requiring that carrying agreements for accounts held on a fully disclosed

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55 17 CFR 240.15c3-3.

basis specifically identify and allocate respective functions and responsibilities of each introducing and carrying organization that is directly or indirectly a party to such agreements.

Amendments to Rule 382(b) are proposed that will clearly delineate which functions and responsibilities must be allocated to the carrying organization and will require that the carrying agreements so state.

Amendments to Rule 382(b) are also proposed to state that the carrying agreement may provide that the opening and approval of accounts in a manner consistent with NYSE Rule 405, the maintenance of books and records in a manner consistent with Rules 17a-3 and 17a-4 under the Act and the transmission of orders to the carrying organization for execution may be allocated to an introducing organization, which is other than a registered broker or dealer. Such amendments would, in recognition of present industry practice, permit entities which are other than registered broker or dealers, as the introducing party which directly interfaces with the customer, to undertake the mechanical aspects of order transmission and the ministerial aspects of bookkeeping and of opening and approving accounts.

The term "opening and approving" is intended to limit the scope of the amended rule to the acceptance of new accounts, but only in circumstances where it has gathered sufficient information to satisfy the Exchange's Rule 405 precept as the standard for recording investment objectives and other basic documentation. By establishing Rule 405 as the norm to follow (even by a person not formally subject to its fiat) and by asserting it as a prerequisite to an acceptable Rule 382 agreement, it is believed that investor protection is reasonably served. Under the proposed amendments, more continuous and stringent regulatory requirements such as "monitoring of accounts" would not be permitted to be allocated to an entity which is not a registered broker or dealer.

The Exchange is proposing to add to current Rule 382(c), which requires written notification to customers whose accounts are held on a fully disclosed basis, that upon the opening of such account, the customer shall be notified in writing by the party designated by the agreement to make such notification of the responsibilities allocated to each respective party, and of any subsequent material change to such allocation or to the relationship of the parties, if any, promptly upon the occurrence of any such change. The proposed amendments to the Rule reposition this provision into new subsection (b)(4).

The Exchange is proposing to add Rule 382(e)(2) which provides that carrying agreements may provide for the receipt of customer funds or securities by the introducing organization and delivery thereof to the carrying organization in a manner consistent with Rules 15c3-1 and 15c3-3 under the Act, provided that the introducing organization maintains appropriate procedures and systems for the receipt and delivery of such funds or securities to ensure compliance with all relevant rules under the Act.

Additionally, amendments are proposed to codify current Exchange practice by adding a new subsection (f) to Rule 382 to require that each carrying organization provide the Exchange with written notice 10 business days prior to its commencement of the carrying the accounts of any new correspondents, identifying such new correspondents and furnishing such additional information as may be requested by the Exchange. Moreover, each such carrying organization must, contemporaneously, represent to the Exchange that it has the financial and operational resources and support staff to take on such additional correspondent activity.

The proposed amendments also codify the principle that, to the extent that a particular function is allocated to one of the parties, the other parties to the agreement shall supply to the responsible organization all data in its possession pertinent to the proper performance and

supervision of that function. The agreement shall include an acknowledgement by each relevant party of this obligation.

Rule 416 (Questionnaires and Reports)

NYSE Rule 416(b) requires that, unless a specific temporary extension of time has been granted, a fee of $500 shall be imposed for each day that such report is not filed in the prescribed time. Requests for such extensions of time must be submitted to the Exchange at least three business days prior to the due date. The Exchange is proposing to amend subsection (b) to clarify that each "day" means each "business day" for purposes of determining whether a report is filed in the prescribed time. The proposed amendments also provide that the fee imposed by the Exchange when reports are not filed on time may be waived by the Exchange, in whole or in part.

The Exchange is proposing to add a new subsection .25 to the Supplementary Material of Rule 416 which will consist of language moved from current NYSE Rule 418.25.[56] This provision requires member organizations, approved to use an alternative method of computing net capital under Appendix E of Rule 15c3-1 under the Act, to file supplemental and alternative reports, as may be prescribed by the Exchange. The NASD does not currently have such a provision but stated that it may propose to adopt a similar requirement.

Rule 418 (Audit)

Under current NYSE Rule 418, the Exchange may require member organizations, at any time, to conduct an audit of its financial statements in accordance with Exchange Rules and Rule 17a-5 under the Act.[57] The Exchange is proposing to amend this provision by removing

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56 See Securities Exchange Act Release No. 52269 (August 16, 2005) 70 FR 49349 (August 23, 2005) (SR-NYSE-2005-19). See also NYSE Information Memo 05-62.

57 17 CFR 240.17a-5.

the reference to Exchange Rules and replacing it with language that allows the Exchange to require an audit or other similar procedure as the Exchange may deem necessary for the protection of investors or in the public interest. The Exchange is also proposing to rescind subsection .10 of Rule 418, which requires member organizations that are subject to this rule to file with the Exchange an agreement covering its annual audit during the following year because the substance of this provision is covered by Rule 17a-5 under the Act.

NYSE Rule 418.12 requires member organizations that fail to file an audited financial and operational report in the time period prescribed by the Exchange to pay a $200 penalty for each day of delayed filing. The Exchange is proposing to amend this provision to clarify that each "day" means each "business day."

In light of proposed amendments to the NYSE Rules to remove the terms "allied member" and "member" (where appropriate) from the rulebook, the Exchange is proposing to amend Rule 418.15 to require that the financial statements be signed by two principal executives of the member organization and that such financial statements be made available to all principal executives of the member organization. NASD has expressed that it may propose to adopt a similar provision to NYSE Rule 418.15.

The Exchange is proposing to rescind Rule 418.20 which requires, in part, that all pertinent audit working papers and underlying documentation be retained for at least three years and that it be available for review by a representative of the Exchange at the office of the respondent or at the office of the independent public accountant. This provision is not required under Act rules and the NASD does not have a similar provision in their rules. Further, this provision has not been exercised during the time that this rule has been in effect. As noted above, Rule 418.25 has been repositioned into .25 of Rule 416.

Rule 420 (Reports on Borrowing and Subordinated Loans for Capital Purposes)

Currently, the NYSE and the NASD use subordinated loan forms which reflect the requirements of Appendix D to Rule 15c3-1 under the Act but differ in minor provisions and in certain procedural ways. The Exchange is proposing to unify the procedures of NYSE and NASD in this area. Specifically, the Exchange is proposing to consolidate paragraphs (a) and (b) of Rule 420 to combine the subordination agreement requirements for the lending of both cash and notes collateralized by securities. The proposed amendments also add that loans of cash or collateralized notes made to a member organization are subject to the requirements of Rule 420(a). In addition, Rule 420(a)(2), which calls for an opinion of counsel as required by NYSE Rule 313(d), will be modified to provide that an opinion will no longer be required when the loan is made by a holding company or principal executive of a member organization or by a bank, as defined in Section (3)(a)(6)[58] of the Act, unless so directed by the Exchange.

NYSE Rule 420(c) requires a general partner of a member organization to promptly report to the NYSE any borrowings of cash or securities, the proceeds of which will be contributed to the net capital of the member organization. The rule further imposes certain standards for the documents evidencing such borrowings as the Exchange deems appropriate and requires that such documents be submitted to and approved by the Exchange before the cash or securities involved may qualify as net capital. The Exchange is proposing to codify current Exchange practice by amending this provision to apply to borrowings of participants in LLC's. The NASD does not have a similar rule to NYSE Rule 420 but has indicated it may propose to adopt similar requirements for carrying firms only.

Rule 422 (Loans of and to Directors, etc.)

58 15 U.S.C. 78c(3)(a)(6).

NYSE Rule 422 prohibits unsecured loans between members of the Board or of employees of the NYSE and member organizations, absent the prior consent of the NYSE board of directors. This provision was amended post-merger to include subsidiaries of NYSE Group. The Exchange is proposing to rescind Rule 422 in its entirety because the substance of this provision is contained in the supplementary guidelines to NYSE's internal ethics code.

Rule 431 (Margin Requirements)

Staff is proposing to amend Rule 431(e)(8)(C)(ii) to clarify that, for purposes of this subsection, amounts agreed to be extended by a member organization shall be deducted in determining capital under Rule 326 if the loan commitment is irrevocable; amounts agreed to be extended shall be presumed irrevocable commitments, unless a broker-dealer can evidence otherwise.

Rule 440 (Books and Records)

NYSE Rule 440 requires member organizations to make and preserve books and records as the Exchange may prescribe, and as prescribed by Rule 17a-3[59] under the Act. The recordkeeping format, medium and retention period is to comply with Rule 17a-4 under the Act.[60] The Exchange is proposing to rescind Rule 440.10(2), which requires member organizations, at a minimum of once per month, to account for all U.S. government bearer instruments by physical examination and comparison with its books and records. This provision is outdated, as there are few, if any, U.S. government instruments in bearer form and the requirement to account for any physical instruments is included in Rule 17a-13[61] under the Act and is generally referenced in subsection .10 of the rule.

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59 17 CFR 240.17a-3.

60 17 CFR 240.17a-4.

61 17 CFR 240.17a-13.

Category 3 ("Buy-In Rules")

Background

In order to address the operational "Buy-In Rules" not encompassed by the CAG subcommittee review process, the Exchange organized an in-house committee and enlisted the participation of the NASD and the Ad Hoc Buy-in Subcommittee of the SIFMA Securities Operations Division. The SIFMA subcommittee, which predates the SRO Rule Harmonization Initiative, was established to identify and standardize various Buy-in rules and procedures in conjunction with Street Side contracts including Stock Loans.[62] The proposed amendments discussed below result from the combined recommendations of these participants.

The NYSE Buy-In Rules apply to transactions in Exchange-listed securities that are not subject to the rules of a Qualified Clearing Agency such as the Depository Trust Clearing Corporation ("DTCC")[63] or the National Securities Clearing Corporation ("NSCC"),[64] including the Continuous Net Settlement ("CNS")[65] transactions that settle through them.

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62 The Exchange previously worked with this committee to amend and harmonize its rules with those of other SROs. See Securities Exchange Release No. 52842 (November 28, 2005), 70 FR 72321 (December 2, 2005) (SR-NYSE-2005-50). See also NYSE Information Memo 05-100.

63 The Depository Trust Clearing Corporation is a member of the U.S. Federal Reserve System, a limited-purpose trust company under New York State banking law and a registered clearing agency with the SEC.

64 NSCC, is a central counterparty that provides centralized clearance, settlement and information services for broker-to-broker equity, corporate bond and municipal bond, exchange-traded funds and unit investment trust trades in the United States. NSCC provides clearing and settlement, risk management, central counterparty services and a guarantee of completion for trades. NSCC also nets trades and payments among its participants, reducing the volume of securities and payments that need to be exchanged each day.

65 CNS is an automated accounting system that centralizes the settlement of compared security transactions and maintains an orderly flow of security and money balances. CNS nets daily transactions, including open positions to create a single long or short position for each participant, minimizing security movements and associated costs.

In an effort to promote harmonization of the SRO Operational, Clearing and Settlement Rules (collectively referred to as the "Buy-In Rules) the Exchange is proposing amendments to NYSE Rules 140 (Members Closing Contracts—Conditions), 282 (Buy-in Procedures); 283 (Members Closing Contracts—Procedure); 285 (Notice of Intention to Successive Parties); 286 (Closing Portion of Contract); 287 (Liability of Succeeding Parties); 288 (Notice of Closing to Successive Parties); 289 (Must Receive Delivery); and 290 (Defaulting Party May Deliver After 'Buy-in' Notice).

Proposed Amendments

The Exchange proposes to reposition Rules 140, 283, 285, 286, 287, 288, 289, and 290 into Rule 282 so that Rule 282 will serve as a complete repository for all requirements and procedures related to buy-ins.[66] The substance of the repositioned rules is not being altered. In addition to making these requirements more readily accessible, the amendments will bring the rule closer to the format of its NASD Rule 11810 (Buying-In) and IM-11810 (Sample Buy-In Forms).

In addition to this consolidation, the following amendments to Rule 282 are proposed in order to clarify certain technical requirements with respect to buy-in processes:

Rule 282(1)(b) requires that the defaulting member organization receiving a buy-in notice must send a signed, written response to the initiating organization stating its position with respect to the resolution of the item no later than 5:00 p.m. ET on the date of issuance of the buy-in notice. The Exchange proposes the addition of Supplementary Material section .15 that would clarify that "[f]or purposes of Rule 282(b), e-mail and electronic systems shall be acceptable as the functional equivalent of a writing, in lieu of paper form, provided that it is

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66 See proposed Rules 282.25, .30, .35, .40, .45, .50, and .55.

retainable and susceptible of acknowledgement to the same degree and extent as the written response."[67]

NYSE Rule 282(c) states that if the "buy-in" notice has not been returned by 5:00 p.m. ET on the "buy-in" notice date, or the "buy-in" notice is returned as "DK'd," or the "buy-in" notice is returned with the indication that the contract is known but that delivery cannot be made, a "buy-in" shall be executed on the "effective date" by the initiating member organization by purchasing all or part of the securities necessary to satisfy the amount requested in the "buy-in" notice. Proposed amendments to Rule 282(c) would clarify that if a notice of buy-in is not acknowledged by the failing party by 5:00 p.m. ET on the day of issuance, the notice will be deemed accepted. However, prior to the proposed execution date, the seller has a right to request proof of fail obligation in order to prove otherwise. This conforms with the NASD's current requirement.

Rule 282(1)(h) requires that the initiating member organization executing the buy-in shall immediately upon execution, but no later than 5:00 p.m. ET, notify the defaulting member organization as to the quantity purchased and the price paid. The Exchange is proposing to amend Rule 282(1)(h) to clarify that if there is a system outage at the Clearing Firm or the Depository, then notification by the initiating member organization executing a buy-in must take place prior to the opening on the next business day.

The Exchange proposes the addition of provision Rule 282(2) to clarify that fails that are subject to the rules of a Qualified Clearing Agency must comply with the procedures or requirements of the Qualified Clearing Agency."

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[67] See Rules 17a-3 and 17a-4 under the Act and NYSE Rules 440 (Books and Records).

It is also proposed that Rule 282 be amended to adopt certain provisions of NASD IM 11810 (Sample Buy-In Forms) because these provisions are applicable to both NYSE and NASD membership. Specifically, the Exchange proposes adding section (f) (Securities in Transit) as new Rule 282.60; section (h) ('Close-Out' Under Committee or Exchange Rulings) as new Rule 282.65; section (i) (Failure to Deliver and Liability Notice Procedures) as new Rule 282.70; section (j) (Contracts Made for Cash) as new Rule 282.75; section (l) (Buy-In' Desk Required) as new Rule 282.80; and section (m) (Buy-In of Accrued Securities) as new Rule 282.85.

Background/Reference Rule Synopses

Rule 140 ("Members Closing Contracts—Conditions")

Rule 140 states that a member organization may close a contract as provided in Rule 283 in the event that the other party to the contract does not recognize the contract or the other party to the contract neglects or refuses to exchange written contracts pursuant to Rule 137.

Rule 283 ("Members Closing Contracts—Procedure")

Rule 283 refers to the procedure for closing contracts. According to Rule 283, oral or written notice must be provided to the other party at least thirty minutes prior to closing.

Rule 285 ("Notice of Intention to Successive Parties")

According to Rule 285, a member organization that receives notice that a contract is to be closed for its account for non-delivery shall immediately re-transmit notice to any other member organization from whom the securities involved are due.

Rule 286 ("Closing Portion of Contract")

According to Rule 286, when notice of intention to close a contract, or re-transmitted notice thereof, is given for less than the full amount due, it shall be for not less than one trading unit.

Rule 287 ("Liability of Succeeding Parties")

According to Rule 287, the closing of a contract must be for the account and liability of each succeeding party in interest, and, if notice of such contract being closed is transmitted, then such closing shall automatically close all contracts with respect to which such re-transmitted notice shall have been delivered prior to the closing.

Rule 288 ("Notice of Closing to Successive Parties")

Under Rule 288, if a contract, other than a contract the close-out of which is governed by the rules of a Qualified Clearing Agency, has been closed, the member organization who closed, or gave order to close, the contract shall notify the member organization for whose account the contract was closed. In addition, the rule requires the member organization receiving such a notification, or receiving such notice that a contract has been closed pursuant to the rules of a Qualified Clearing Agency, shall immediately notify each succeeding party in interest and other member organizations to which re-transmitted notice pursuant to Rule 285 has been sent. The rule also requires any statements of resulting money differences to be rendered immediately.

Rules 289 ("Must Receive Delivery") and 290 ("Defaulting Party May Deliver After 'Buy-in' Notice")

Rules 289 and 290 clarify the requirements and timeframes upon which a defaulting member organization may deliver against a "buy-in" notice. Rule 289 requires an initiating member organization to accept physical delivery of some or all of the securities that are the subject of a buy-in, thereby halting the buy-in execution for those securities if those securities are tendered prior to the buy-in. Rule 290 permits a defaulting member organization to deliver securities subject to a notice of buy-in until 3:00 p.m. Eastern Time on the day of the execution of the buy-in.

Rule 282 ("Buy-in Procedures")

Rule 282 describes procedures to be followed when a securities contract, except a contract where its close-out is governed by the rules of a Qualified Clearing Agency (such as DTC and NSCC), which has not been completed by the seller in accordance with its terms, may be closed-out by the buyer (i.e., the initiating member organization). According to the Rule, the close-out may not be sooner than three business days after the due date for delivery. Rule 282 allows the member organization failing to receive the securities to execute the buy-in.

The Supplementary Material of Rule 282 is intended to ensure that member organizations comply with the closeout requirements of Regulation SHO.[68] Specifically, member organizations are obligated to comply with the marking, locate, and delivery requirements of Regulation SHO for sales of equity securities under the Act. Member organizations are required to have policies and procedures in place to comply with these rules, including closeout procedures.[69]

Rule 430 (Partial Delivery of Securities to Customers on C.O.D Purchases)

Rule 430 prescribes that no member organization "may accept for a customer a purchase order for any security, other than obligations of the United States Government, unless it has first ascertained that the customer placing the order or its agent will receive against payment securities in an amount equal to any execution confirmed to the customer, even though such an execution may represent the purchase of only a part of a larger order."

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68 17 CFR 242.200 through 242.203.

69 At the same time the changes noted above were being developed, the SEC implemented Regulation SHO – Regulation of Short Sales, which shares a similar purpose with the buy-in rules – the reduction of fails to deliver. Rule 203 to Regulation SHO imposes locate and borrowing/delivery requirements on broker-dealers that sell equity securities, including closeout requirements on certain open fail to deliver positions.

The Exchange proposes deleting Rule 430 in its entirety as the substance of the rule is incorporated in NYSE Rule 387(a)(4).

Rule 387(a)(4) prohibits a member organization from accepting an order from a customer pursuant to an arrangement whereby payment for securities purchased or delivery of securities sold is to be made to or by an agent of the customer unless the member organization "has obtained an agreement from the customer that the customer will furnish his agent instructions with respect to the receipt or delivery of the securities involved in the transaction promptly upon receipt by the customer of each confirmation, or the relevant data as to each execution, relating to such order (even though such execution represents the purchase or sale of only a part of the order)" and that in any event the customer will assure that such instructions are delivered to his agent no later than as prescribed by Rule 387(a)(4).

Category 4 ("Member" and "Allied Member" Rules)

As noted above, amendments are proposed throughout this filing that update terminology in light of the Exchange's current organizational structure. Of particular significance is the proposed deletion, where appropriate, of the term "member" and the elimination of the term "allied member" as a regulatory category.[70] The selective deletion of the term "member" reflects the fact that it has been redefined in the context of the NYSE/ARCA business model.[71] The term "allied member," which is a regulatory category based on a person's "control" over a member organization is being eliminated because it, has

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70 Note that there are pending amendments to certain NYSE Rules which propose deletion of the terms "allied member" and/or "member" and thus, are not included in this filing (SR-NYSE-2006-50 deletes term "member" from NYSE Rules 726 and 791; SR-NYSE-2006-111 deletes the terms "allied member" and "member" from NYSE Rule 421; and SR-NYSE-2007-06 deletes the terms "allied member" and "member" from NYSE Rule 440A

71 For additional information, see Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (Order Approving SR-NYSE-2005-77).

likewise been rendered outdated. Category 4 includes those rules for which the only proposed substantive change is the deletion of either or both of these terms.

"Member"

NYSE Rule 2(a) provides that the term "member," when used to denote a natural person approved by the Exchange, means a natural person associated with a member organization who has been approved by the Exchange and designated by such member organization to effect transactions on the Floor of the Exchange or any facility thereof.

This definition reflects the fact that, since the creation of NYSE Group, Inc. in 2006, "members" are not, by virtue of their membership, equity owners of NYSE Group or any of its subsidiaries. Thus, the term "member" no longer has the same regulatory meaning in the context of the NYSE/ARCA business model.

Background

Following the NYSE/ARCA merger, NYSE Market issued Trading Licenses that entitled their holders to have physical and electronic access to the trading facilities of NYSE Market, subject to the limitations and requirements specified in the rules of the Exchange. An organization may acquire and hold a Trading License only if and for so long as such organization is qualified and approved to be a member organization of the Exchange. Organizations that obtain licenses to trade on NYSE Market ("Trading Licenses") are member organizations. In addition, broker-dealers that submit to the jurisdiction and rules of the Exchange, without obtaining a Trading License and thus without having rights to directly access the trading facilities of NYSE Market, will be member organizations.[72]

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[72] See Footnote 71, supra.

A member organization holding a Trading License may designate a natural person, known as a member, to effect transactions on its behalf on the floor of NYSE Market, subject to such qualification and approvals as may be required in the rules of the Exchange.

Proposed Amendments

The Exchange is proposing, where applicable, to delete references to the term "member" as a category of Exchange association except to the extent its usage distinguishes, from a regulatory perspective, a natural person who is licensed to trade on the Floor of the Exchange on behalf of a member organization. All other references to members will be deleted. If necessary, the term "employee" is added to rules where the current text does not otherwise capture persons acting as members.

"Allied Member"

Background

In 1939, the Exchange created the category of "allied member" to make a non-member general partner of a member organization directly responsible to the Exchange and directly subject to Exchange control and discipline. The allied member designation identifies an individual who is a "control" person, including but not limited to, a principal executive officer of the member organization. Allied membership status was intended to remedy situations where disciplinary action was taken by the Exchange against member organizations because of actions of their non-member general partners for which the member organization was not entirely responsible, and over which they could not have exercised full control.

NYSE Rule 2(c) currently defines the term "allied member" as a natural person who is a general partner of a member organization or other employee of a member organization who

controls,[73] or is a principal executive officer of, such member organization and who has been approved by the Exchange as an allied member.[74] There currently are approximately 1,393 allied members of the Exchange. Allied membership, especially as presently administered, has no direct analogue at the NASD.

Proposed Amendments

The Exchange is proposing that the term "allied member" be deleted from both the NYSE rulebook and as a category of Exchange association as it has become outdated within the context of the new NYSE corporate structure. The Exchange is proposing to replace the term in the NYSE rulebook with the term "principal executive" to retain a means of identifying each member organization's control "persons." The proposed designation would be defined to include persons designated by a member organization as a "principal executive officer," as such terms is defined in subsection (b)(5) of NYSE Rule 311 (Formation and Approval of Member Organizations) or their functional equivalents. [75]

Rule 311(b)(5) currently states that a member organization may not be approved by the NYSE Board of Directors unless, among other things, the Board of Directors of such member

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73 See NYSE Rule 2(f). The term "control" means the power to direct or cause the direction of the management or policies of a person whether through ownership of securities, by contract or otherwise. A person shall be presumed to control another person if such person, directly or indirectly: (i) has the right to vote 25 percent or more of the voting securities; (ii) is entitled to receive 25 percent or more of the net profits; or (iii) is a director, general partner or principal executive officer (or person occupying a similar status or performing similar functions) of the other person. Any person who does not so own voting securities, participate in profits or function as a director, general partner or principal executive officer of another person shall be presumed not to control such other person. Any presumption may be rebutted by evidence, but shall continue until a determination to the contrary has been made by the Exchange.

74 NYSE Rule 304 sets forth the eligibility requirements for allied membership. NYSE Rule 304A sets forth the examination/registration requirements for allied membership.

75 See also proposed new Rule 416A.10 which defines the term "principal executive."

organization designates its principal executive officers who shall be members or allied members and shall exercise senior principal executive responsibility over the various areas of business of such corporation in such areas that the rules of the Exchange shall prescribe, including: operations, compliance with rules and regulations of regulatory bodies, finances and credit, sales, underwriting, research and administration.

The Exchange is proposing to modify the Rule 311(b)(5) definition of principal executive officer by deleting the requirement that a principal executive officer be a member or allied member of the Exchange.

Generally, throughout this filing, in instances where the provisions of a rule apply to an allied member in his or her capacity as a principal executive officer (or functional equivalent, e.g., "senior officer" or "partner") of the member organization, it is proposed that the term "principal executive" be substituted. In instances where the provisions of a rule apply to an allied member in his or her capacity as an employee of a member organization, it is proposed that the rule text be amended accordingly.

The Exchange is aware that the elimination of the allied member designation raises certain issues with respect to Exchange registration requirements as well as its jurisdiction over certain member organization personnel. Specifically, once the allied member category is eliminated, the Chief Financial Officer (CFO) and Chief Operations Officer (COO), designations which require qualification pursuant to the Series 27 (Financial and Operations Principal) or Series 28 (Broker/Dealer Financial and Operations Principal) examinations, may not be registered with the Exchange because the Exchange does not have a registration category

for the Series 27 or Series 28.[76] In order to address this concern, the Exchange is proposing to recognize the NASD's requirement to use the Financial and Operations Principal CRD registration categories, Series 27/28,[77] for such exam-qualified individuals.

Further, Chief Executive Officers (CEO) are not required by Exchange rules to pass an examination; their only current qualification requirement is that they be members or become allied members. As noted above, in order to ensure regulatory jurisdiction over all principal executives, and to conform with the standard prescribed under NASD Rule 1021(a), the Exchange has proposed amendments to Rule 342 that would require each person designated by a member organization as a "principal executive," as that term is defined in Rule 416A, to pass an examination appropriate to the functions to be performed by such person.[78]

Forms U4 and U5 (among other forms) will require updating in order to delete allied member registrations and to replace it with another classification for principal executive officers (or persons occupying similar status or having similar functions), voting stockholders, and employee directors.

The deletion of the "allied member" category of Exchange association will not hinder the Exchange's enforcement and disciplinary efforts with respect to individuals who fall into this category. Specifically, the NYSE Division of Enforcement can assert jurisdiction absent allied member status under NYSE Rule 476 and may bring disciplinary matters based on a predicate violation pursuant to the individual's supervisory position within the member

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76 Rule 345(b) requires natural persons other than members or allied members who assume the duties of an officer with the power to bind the member or member organization to file Form U4 and receive approval of the Exchange.

77 See Rule 311(b) (5) interpretation in the NYSE Interpretation Handbook which delineates the requirements for CFO/COO of Introducing and Clearing Firms.

78 See proposed new Rule 342.13(c).

organization. An employee's status as an allied member has not been and will not be the sole or preferred route to enforcement or disciplinary actions against these individuals.

Additionally, NYSE Market Surveillance, in conducting its investigations, looks at the supervision of the member organizations, its supervisory procedures and the capacity in which the individual is employed (i.e., supervisory position), not necessarily the employee's status as an allied member of the Exchange.

2. Statutory Basis

The Exchange believes the statutory basis for proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, with the requirements of Section 6(b)(5)[79] of the Act. Section 6(b)(5) requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system, and in general, to protect investors and the public interest. The proposed changes will provide greater harmonization between Exchange and NASD rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for dual-member organizations. Where proposed amendments do not entirely conform to existing NASD rules, the Exchange believes the standards they would establish otherwise further the objectives of Section 6(b)(5) by providing greater regulatory clarity and practicality.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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[79] 15 U.S.C. 78f(b)(5).

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

The Exchange has neither solicited nor received written 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 reasons for so finding or (ii) as to which the NYSE 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. 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. Please include File Number SR-NYSE-2007-22 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2007-22. 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 Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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-NYSE-2007-22 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[80]

Florence E. Harmon
Deputy Secretary

[80] 17 CFR 200.30-3(a)(12).