



DIVISION OF
MARKET REGULATION

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

August 1, 2006

Mr. Michael Rufino
Senior Vice President, Member Firm Regulation
NYSE Regulation, Inc.
20 Broad St.
New York, NY 10005

Dear Mr. Rufino:

In your letter dated July 26, 2006, on behalf of NYSE Regulation, Inc. ("NYSE"), you seek interpretive guidance with regard to the definition of statutory disqualification, as contained in Section 3(a)(39) of the Securities Exchange Act of 1934 ("Exchange Act") (which incorporates by reference Sections 15(b)(4)(D), (E), and (H), among others). You also seek interpretive guidance in connection with Exchange Act Rule 19h-1(a). In addition, you seek assurance that the staff of the Division of Market Regulation ("Staff") would not recommend enforcement action to the Commission under Exchange Act Section 6(c)(2) or Rule 19h-1(a) if the NYSE does not file a notice with the Commission for any person subject to a statutory disqualification under Section 3(a)(39) ("subject person") whom the NYSE is proposing to admit to or continue in membership or association with a member organization,¹ under the circumstances described more fully below.

A. Interpretive Advice

1. Time-limited Bars or License Revocations

You have requested guidance on whether a person subject to a bar or license revocation, for example, as described in Section 3(a)(39)(A) or Section 3(a)(39)(F) (through incorporation by reference to Section 15(b)(4)(H)(i)), that is time-limited and that does not require application for reentry or have a continuing effect after application for reentry has been granted, would be subject to a statutory disqualification under Section 3(a)(39) for the duration of the bar or license revocation, or for a longer period of time. It is the Staff's view

¹ A person subject to a statutory disqualification as defined in Section 3(a)(39) is not necessarily precluded from participating in the securities industry. However, when such a person seeks admission to or continuance in membership or association with a member of a self-regulatory organization ("SRO"), the Commission and the SROs have the opportunity to give special review to such person and to restrict or prevent entry into, or continuance in, the business where appropriate in the public interest and for the protection of investors. See Senate Comm. on Banking, Housing, and Urban Affairs, The Securities Acts Amendments of 1989, S. Rep. No. 101-155, at 39 (1989); Exchange Act Rel. No. 13726 (Jul. 8, 1977) (adopting Rule 19h-1).

that a person is no longer subject to a statutory disqualification when the time limitation of a bar or license revocation has expired, provided that (i) application for reentry is not required or has been granted, (ii) the bar or revocation has no continuing effect, and (iii) the bar was not issued in connection with a final order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct, as described in Exchange Act Section 15(b)(4)(H)(ii).²

2. State Bars or Suspensions Based on Disciplinary Action Taken by an SRO

You have requested guidance on whether a person subject to a bar or suspension by a State securities commission that is based solely upon a disciplinary action taken by an SRO (a “follow-on” action) would be subject to a statutory disqualification under Section 3(a)(39)(F) (through incorporation by reference to Section 15(b)(4)(H)(i)). The Staff would not consider a person to be subject to a statutory disqualification under Section 3(a)(39) if the person were subject to a bar or suspension by a State securities commission that is based solely upon a disciplinary action taken by an SRO. In other words, if the SRO action alone does not result in a statutory disqualification, a State bar or suspension based solely upon the SRO action also would not result in a statutory disqualification. Follow-on actions based on disciplinary actions of other entities, or in other circumstances, would require analysis on a case-by-case basis.

3. Willful Violations of the MSRB rules

You have requested guidance regarding the application of the notice filing requirement under Rule 19h-1(a) to subject persons who are subject to a statutory disqualification solely due to a finding of a willful violation of the rules of the Municipal Securities Rulemaking Board (“MSRB rules”), provided that the related sanctions are no longer in effect. Exchange Act Rule 19h-1(a)(3)(iii)(B) provides an exception from the notice filing requirement for subject persons who are subject to a statutory disqualification solely due to a finding of a willful violation of the federal securities laws or a rule or regulation thereunder, if the sanctions are no longer in effect. Section 15B(c)(1) provides, “No broker, dealer, or municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in contravention of any rule of the [MSRB].” Consequently, a violation of the MSRB rules also would constitute a violation of

² As an example, a person subject to a statutory disqualification based on a three-month bar (or three-year bar) that ends automatically and has no continuing effect would no longer be subject to a statutory disqualification at the end of the three months (or three years) under Section 3(a)(39)(F) (through incorporation by reference to Exchange Act Section 15(b)(4)(H)(i)), unless the bar was issued in connection with a final order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct, as described in Exchange Act Section 15(b)(4)(H)(ii).

Section 15B(c)(1), and therefore, of the Exchange Act. In our view, the exception contained in Rule 19h-1(a)(3)(iii)(B) would include findings of willful violations of the MSRB rules, if the sanctions are no longer in effect.

4. Aiding and Abetting

You have requested guidance regarding the application of the notice filing requirement under Rule 19h-1(a) to subject persons who are subject to a statutory disqualification solely due to findings of willfully aiding, abetting, counseling, commanding, inducing, or procuring (collectively, "aiding and abetting") a violation by any other person of the federal securities laws or a rule or regulation thereunder. As suggested in your letter, the Rule 19h-1(a)(3)(iii)(B) exception discussed above is not explicitly applicable to such findings. However, the Staff would view Rule 19h-1(a)(3)(iii)(B) to encompass willfully aiding and abetting a violation. Therefore, no notice would be required to be filed with the Commission pursuant to the exception under Rule 19h-1(a)(3)(iii)(B) for willfully aiding and abetting a violation of the provisions of the federal securities laws or the rules or regulations thereunder (including the MSRB rules), if no notice would be required for a direct violation of those provisions, provided that the related sanctions are no longer in effect.

These interpretive positions are based solely on your representations and the facts presented and are strictly limited to the application of Exchange Act Section 3(a)(39) and Rule 19h-1. [These positions do not represent a legal interpretation or conclusion with respect to the applicability of any other statutory or regulatory provisions of the federal securities laws, including Sections 15(b)(4) or 15(b)(6) of the Exchange Act.] Any different facts or circumstances may require a different response.

B. No-Action Relief

1. Findings of Willful Violations or Failure to Supervise in the Context of New Admissions, Readmissions, or Continuances

Based on the facts and representations set forth in your letter and discussions with the Staff, the Staff will not recommend enforcement action to the Commission under Section 6(c)(2) of the Exchange Act or Rule 19h-1(a) thereunder if the NYSE does not file a notice with the Commission when proposing to admit to or continue in membership or association with a member organization any subject person if:

- (a) the subject person is subject to a statutory disqualification solely due to a finding of a willful violation (including willfully aiding and abetting a

violation) of the CEA or the rules or regulations thereunder, provided that the sanctions are no longer in effect;³ or

- (b) the subject person is subject to a statutory disqualification solely due to a finding that the subject person failed reasonably to supervise, with a view to preventing violations of the federal securities laws or the rules or regulations thereunder (including the MSRB rules), or of the CEA or the rules or regulations thereunder, another person who committed a violation, provided that the sanctions related to the finding are no longer in effect with respect to the subject person.

2. Statutory Disqualifications Arising from Sarbanes-Oxley Amendments

Based on the facts and representations set forth in your letter and discussions with the Staff, the Staff will not recommend enforcement action to the Commission under Section 6(c)(2) of the Exchange Act or Rule 19h-1(a) if the NYSE does not file a notice with the Commission for any subject person who, as of the date of this letter, already is a member, member organization, or associated person of a member or member organization of the NYSE or another self-regulatory organization,⁴ if that subject person, as of the date of this letter, is subject to:

- (a) a bar, as described in Exchange Act Section 15(b)(4)(H)(i), and:
 - (i) the bar is no longer in effect (and is not related to fraudulent, manipulative, or deceptive conduct), or
 - (ii) the bar is still in effect, unless there is a change in employer or the employer makes an application for the registration of the person in a supervisory capacity; or

³ In your letter you also request relief from the notice filing requirement for subject persons subject to a statutory disqualification due to a finding of a willful violation (including willfully aiding and abetting a violation) of the MSRB Rules. These requests are addressed in Sections A.3 and A.4, above.

⁴ For purposes of this letter, an associated person would include a person that was associated with a member or member organization within 45 days prior to the date of this letter, provided that the person is associated with another member or member organization within 45 days after the date of this letter.

(b) a final order based on violations of laws or regulations prohibiting fraudulent, manipulative, or deceptive conduct, as described in Exchange Act Section 15(b)(4)(H)(ii),⁵ and:

(i) the sanctions do not involve licensing or registration revocation or suspension (or analogous sanctions), and the sanctions are no longer in effect;

(ii) the sanctions do not involve licensing or registration revocation or suspension (or analogous sanctions), and the sanctions are still in effect, unless there is a change in employer or the employer makes an application for the registration of the person in a supervisory capacity; or

(iii) the sanctions do involve licensing or registration revocation or suspension (or analogous sanctions), and

(A) the sanctions are no longer in effect, and

(1) the order was entered 10 or more years ago, or

(2) the order was entered within the prior 10 years, unless there is a change in employer or the employer makes an application for the registration of the person in a supervisory capacity; or

(B) the sanctions are still in effect, unless there is a change in employer or the employer makes an application for the registration of the person in a supervisory capacity.

The Staff notes in particular that Section 604 of the Sarbanes-Oxley Act overlays the existing framework of Section 3(a)(39) of the Exchange Act by including additional circumstances which would result in a statutory disqualification. Consistent with the existing exceptions from the notice filing requirement in Rule 19h-1(a)(3)(iii), these Staff positions should allow the NYSE to integrate filings mandated by the Sarbanes-Oxley Act into established programs that monitor subject persons as they reenter the securities business, move from one firm to another, or take on supervisory responsibilities.

These Staff positions concern enforcement actions only and do not represent a legal conclusion with respect to the applicability of the statutory or regulatory provisions of the federal securities laws. These positions are based on the facts you have presented and the

⁵ This would include a finding of aiding and abetting a violation of such laws.

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representations you have made, and any different facts or conditions may require a different response. Moreover, these positions are subject to modification or revocation if at any time the Commission or the Staff determines that such action is necessary or appropriate.

Sincerely,

A handwritten signature in black ink, appearing to read "Cath McGuire". The signature is fluid and cursive, with the first name "Cath" and last name "McGuire" clearly distinguishable.

Catherine McGuire
Chief Counsel

Michael G. Rufino
Senior Vice President
Member Firm Regulation

NYSE Regulation

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July 26, 2006

Catherine McGuire, Esq.
Associate Director and Chief Counsel
Division of Market Regulation
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Definition of "Statutory Disqualification" – Sarbanes-Oxley Act

Dear Ms. McGuire:

NYSE Regulation, Inc. ("NYSE" or "Exchange") is writing to seek assurance that the staff of the Division of Market Regulation ("Staff") will not recommend enforcement action to the Commission under Section 6(c)(2) of the Securities Exchange Act of 1934 ("Exchange Act") or Rule 19h-1(a) thereunder if the NYSE does not file notices with the Commission for persons the NYSE is proposing to admit to or continue in membership or association with a member organization, notwithstanding certain statutory disqualifications. As discussed in more detail below, we believe that the relief we seek will better enable the Exchange, and the Commission, to focus resources on filings that raise important investor protection concerns.

Background

Under the regulatory scheme established by Section 6(c)(2) and Rule 19h-1, the NYSE generally is required to file a notice with the Commission for any person subject to a statutory disqualification ("subject person") that the Exchange is proposing to admit to or continue in membership or association with a member organization. The definition of "statutory disqualification" is contained in Section 3(a)(39) of the Exchange Act, which incorporates segments of Section 15(b)(4). Among other things, a person is subject to a statutory disqualification if such person: (1) "is enjoined from any action, conduct, or practice specified in [Section 15(b)(4)(C) of the Exchange Act]"; (2) is subject to a finding of a willful violation of the Exchange Act, the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, or a rule or regulation thereunder; or (3) is subject to a finding of a "fail[ure] reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, or regulations, another person who commits such a violation, if such other person is subject to his supervision."

Rule 19h-1 currently does not require SROs, including the NYSE, to file notices in certain circumstances.¹

¹ See Exchange Act Rel. No. 18278 (Nov. 20, 1981), 46 FR 58654 (Dec. 3, 1981) (adopting amendments to Rule 19h-1).

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In pertinent part, Rule 19h-1(a)(3)(iii)(A) waives the notice-filing requirement for statutory disqualifications that consist of injunctions specified in Exchange Act Section 15(b)(4)(C), provided that the "injunction was entered 10 or more years prior to the proposed admission or continuance." Rule 19h-1(a)(3)(iii)(B) provides similar relief for statutory disqualifications that consist of findings of a willful violation of the federal securities laws or a rule or regulation thereunder by the Commission or an SRO "and the sanction for such violation is no longer in effect."

Rule 19h-1 does not, however, provide relief from the notice-filing requirement for statutory disqualifications that consist of a finding of a failure reasonably to supervise, even if the sanctions related to the finding are no longer in effect.²

Sarbanes-Oxley Act of 2002

Section 604 of Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley Act" or "Act"), which was enacted on July 30, 2002, expanded the definition of statutory disqualification in Section 3(a)(39) by incorporating (the new) paragraph 15(b)(4)(H) so as to include persons:

subject to any final order of a State securities commission (or any agency or officer performing like functions), State authority that supervises or examines banks, savings associations, or credit unions, State insurance commission (or any agency or office performing like functions), an appropriate Federal banking agency (as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813(q))), or the National Credit Union Administration, that—

(i) bars such person from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or

(ii) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct.³

Consequently, absent similar relief, SROs, including the NYSE, are required under Exchange Act Rule 19h-1(a) to file a notice for any person who becomes a subject person as a result of the expanded definition, and whom the SRO is proposing to admit to or continue in membership or association with a member organization, notwithstanding a statutory disqualification based on a final order specified in the expanded definition whose sanction is no longer in effect.

² Recently, however, the Staff provided no-action relief to the Exchange for certain persons subject to a statutory disqualification solely because of a finding by a foreign financial regulatory authority of a failure to supervise. See Letter re: The New York Stock Exchange, Inc. (Feb. 11, 2005).

³ Pub. L. No. 107-204, 116 Stat. 745 (2002), Sec. 604. Section 604 amended Exchange Act Section 3(a)(39)(F) to add a cross-reference to Exchange Act Section 15(b)(4)(H), which also was added by the Sarbanes-Oxley Act.

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Request for No-Action Relief

The Exchange is seeking assurance that the Staff will not recommend enforcement action to the Commission under Section 6(c)(2) of the Exchange Act or Rule 19h-1(a) thereunder if the NYSE does not file a notice with the Commission when proposing to admit to or continue in membership or association with a member organization any subject person subject to a statutory disqualification as a result of the following findings.

- A. *Willful violations of the Commodity Exchange Act, or the rules of the Municipal Securities Rulemaking Board, provided that the sanctions are no longer in effect (will be treated like violations specified in Rule 19h-1(a)(3)(iii)(B)), or*
- B. *Willful aiding, abetting, counseling, commanding, inducing, or procuring the violation by any other person of any provision under the federal securities laws, or the Commodity Exchange Act, or the rules of the Municipal Securities Rulemaking Board, provided that the sanctions are no longer in effect, and Failure to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, provided that the sanctions are no longer in effect (will be treated like violations specified in Rule 19h-1(a)(3)(iii)(B)).*

The Exchange is also seeking assurance that the Staff will not recommend enforcement action to the Commission under Section 6(c)(2) of the Exchange Act or Rule 19h-1(a) thereunder if the NYSE does not file a notice with the Commission when proposing to continue in membership or association with a member organization any subject person who, as of the date of your response to this letter, is subject to a statutory disqualification pursuant to Section 15(b)(4)(H) under the following conditions:

- A. For *continuances*,⁴ in connection with *bars*, as described in *Exchange Act Section 15(b)(4)(H)(i)*:
 1. If the bar *is no longer in effect* (and is not related to *fraudulent, manipulative, or deceptive conduct*), or
 2. If the bar *is still in effect*, unless there is a change in employer, or if employer makes an application for the registration of the person in a supervisory capacity.

⁴ A continuance is a subject person who is, as of the date of your response to this letter, a member organization, or associated person of a member organization of NYSE LLC or another self-regulatory organization. For purposes of this letter, an associated person would include a person that was associated with a member organization within 45 days prior to the date of your response to this letter, provided that the person is associated with another member organization within 45 days after the date of your response to this letter.

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- B. For *continuances*, in connection with *final orders* based on violations of laws or regulations prohibiting *fraudulent, manipulative, or deceptive conduct*, as described in *Exchange Act Section 15(b)(4)(E)(ii)*:⁵
1. If the sanctions *do not* involve *licensing or registration revocation or suspension* (or analogous sanctions), and the sanctions *are no longer in effect*.
 2. If the sanctions *do not* involve *licensing or registration revocation or suspension* (or analogous sanctions), and the sanctions *are still in effect*, unless there is a change in employer, or if employer makes an application for the registration of the person in a supervisory capacity.
 3. If the sanctions *do* involve *licensing or registration revocation or suspension* (or analogous sanctions), and
 - a) If the sanctions *are no longer in effect*, and
 - (i) the order was entered *10 or more years ago*, or
 - (ii) the order was entered *within the prior 10 years*, unless there is a change in employer, or if employer makes an application for the registration of the person in a supervisory capacity; or
 - b) If the sanctions *are still in effect*, unless there is a change in employer, or if employer makes an application for the registration of the person in a supervisory capacity.

Our understanding of Section 604 of the Sarbanes-Oxley Act is that it overlays the existing framework of Section 3(a)(39) of the Exchange Act by including additional circumstances which would result in a statutory disqualification. Consistent with the existing exceptions from the notice filing requirement in Rule 19h-1(a)(3)(iii), these Staff positions should allow the NYSE to integrate filings mandated by the Sarbanes-Oxley Act into established programs that monitor subject persons as they reenter the securities business, move from one firm to another, or take on supervisory responsibilities.⁶

⁵ This would include a finding of aiding and abetting a violation of such laws.

⁶ As with those exceptions, we believe that the proposed relief would allow both the Exchange and the Commission to focus resources on filings that raise important investor protection concerns. In fact, the requested relief from the notice filing requirement is substantially narrower than the exceptions contained in Rule 19h-1(a)(3)(iii). Specifically, the requested relief applies only to persons already in the securities industry, whereas the exceptions in Rule 19h-1(a)(3)(iii) apply to both new entrants and persons already in the securities industry.

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Request for Interpretive Guidance

The Exchange is also seeking interpretive guidance regarding whether a person would be subject to a statutory disqualification, as defined in Section 3(a)(39), in the circumstances described below.

- A. **Time-Limited Bar or License Revocation** – It is the Exchange’s understanding that if a person is subject to a bar or license revocation that is time-limited, and that does not require reapplication for reentry or have a continuing effect after application for reentry has been granted, the person would be subject to a statutory disqualification that lasts for the same amount of time as that bar or license revocation. As an example, a person subject to a statutory disqualification based on a three-month bar (or three-year bar) that ends automatically and has no continuing effect would no longer be subject to a statutory disqualification at the end of the three months (or three years) under Section 15(b)(4)(H)(i), unless the bar was issued in connection with a *final order* based on violations of laws or regulations prohibiting *fraudulent, manipulative, or deceptive conduct*, as described in Section 15(b)(4)(H)(ii).
- B. **Bars or Suspensions Based on Disciplinary Action Taken by an SRO** – It is the Exchange’s understanding that a person would not be subject to a statutory disqualification if the person is subject to a bar or suspension by a State securities commission that is based solely upon a disciplinary action taken by a self-regulatory organization.

Upon receipt of the Commission’s response to this request for relief, the Exchange intends to publish an Information Memorandum reminding its member organizations of the Sarbanes-Oxley amendments to the definition of a statutory disqualification.

The staff of the NYSE would be happy to further discuss these issues with you. Any questions should be directed to myself or Peggy Germino at (212) 656-8450.

Sincerely,

Michael Rufino

c: Brian A. Bussey, Assistant Chief Counsel
Gena Lai, Staff Attorney
Joseph Sheirer, NYSE
William Jannace, NYSE
Susan Light, NYSE
Peggy Germino, NYSE