



DEPARTMENT OF THE TREASURY
FINANCIAL CRIMES ENFORCEMENT NETWORK

Via Electronic Mail to rule-comments@sec.gov

August 22, 2007

Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: *File Number SR-NYSE-2007-22 – Notice of Filing of Proposed Rulemaking and Amendment No. 1 Thereto Relating to the Harmonization of NYSE and NASD Regulatory Standards and Clarification of Certain NYSE Rules in Connection with the Harmonization Process*

Dear Ms. Morris:

As administrator of the Bank Secrecy Act,¹ the Financial Crimes Enforcement Network (“FinCEN”) thanks the Securities and Exchange Commission (“the Commission”) and the New York Stock Exchange LLC (“the Exchange”) for their efforts in ensuring that U.S. broker-dealers comply with the Bank Secrecy Act and its implementing regulations, which safeguards the U.S. financial system from the abuses of financial crime, including terrorist financing, money laundering, and other illicit activity. FinCEN understands that the Commission is currently considering the proposed change by the Exchange of NYSE Rule 445, requiring each Exchange member to develop and implement an anti-money laundering program that is consistent with the provisions of the Bank Secrecy Act. Although we have been informed by the Commission that the status of the proposal is in question as a result of the recent approval of the consolidation of NASD and the member regulation, enforcement, and arbitration functions of the Exchange, we are writing to express our concern about the independent testing exception proposed by the Exchange, particularly in light of our goal to ensure consistency on this issue across industries.

Rule 445 currently requires a member to conduct periodic independent testing of its anti-money laundering program. Rule 445 permits testing to be conducted either by the member, the member’s personnel, or by a qualified outside party. The rule currently prohibits testing of an anti-money laundering program by (1) a person who performs the

¹ 12 U.S.C. 1829b, 12 U.S.C. 1951-1959, and 31 U.S.C. 5311-5314 and 5316-5332.

anti-money laundering program function being tested, (2) the member's designated anti-money laundering compliance officer, or (3) a person who reports to either of the other prohibited persons, because such persons cannot be sufficiently independent. In its current state, the rule is consistent with FinCEN policy and guidance on this issue.

The Exchange has proposed to amend Rule 445 by adding an exception that would permit currently prohibited persons to conduct testing of a member's anti-money laundering program if (1) the member has no other qualified internal personnel to conduct the testing, (2) the member establishes written policies and procedures that address conflicts that may arise from the conduct of testing by the prohibited persons, (3) the otherwise prohibited person who conducts the testing, to the extent possible, reports the results to a person at the member who is senior to the prohibited person; and (4) the member documents its rationale, which must be reasonable, for determining that it has no alternative other than reliance on the independent testing exception. As it has been explained, the Exchange proposes to add this exception to harmonize its rules with the independent testing exception contained in NASD IM-3011-1. NASD adopted IM-3011-1 in January 2006 as relief for small broker-dealers.²

FinCEN is committed to implementing the Bank Secrecy Act efficiently, effectively, and consistently across the industries subject to our regulations. In this regard, we consistently have interpreted the independent audit provision of the Bank Secrecy Act to preclude anti-money laundering program testing by personnel with an interest in the outcome of the testing.³ We have not been persuaded in any context that certain mitigating steps – including anti-retaliation measures, for example – sufficiently address the potential for conflict that arises when prohibited persons conduct independent testing.⁴ Lack of independence unacceptably increases the risk that a financial institution

² Order Approving Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to NASD Rule 3011 and the Adoption of New Related Interpretive Material, 71 Fed. Reg. 632, 633 (January 5, 2006).

³ The Bank Secrecy Act requires financial institutions to establish anti-money laundering programs including, at a minimum: (1) the development of internal policies, procedures, and internal controls to guard against money laundering, (2) the designation of an anti-money laundering compliance officer, (3) an ongoing employee training program, and (4) an independent audit function to test programs). 31 U.S.C. 5318(h)(1). We have implemented regulations requiring anti-money laundering programs, *inter alia*, for banks, broker-dealers, futures commission merchants, insurance companies, money services businesses, and dealers in precious metals, stones, and jewels.

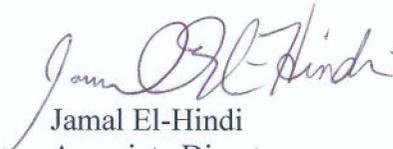
⁴ *See, e.g.*, 31 C.F.R. § 103.125(d)(4) (money services businesses required to provide for independent review of their anti-money laundering programs, but such review may not be conducted by the anti-money laundering compliance officer) and 31 C.F.R. § 103.140(d) (independent testing of the anti-money laundering program of a dealer in precious metals, stones, and jewels may not be conducted by the anti-money laundering compliance officer or a person involved in the operation of the program). *See also Anti-Money Laundering Programs for Mutual Funds*, 67 Fed. Reg. 21117, 21120 (April 29, 2002) (“testing may be accomplished either by employees of the fund, its affiliates, or unaffiliated service providers so long as those same employees are not involved in the operation and oversight of the program”) and *Conducting Reviews of Money Services Business Anti-Money Laundering Programs*, FIN-2006-G012 (September 22,

will become a conduit for terrorist financing, money laundering, and other illicit activity. Our position, which we previously articulated to Commission staff with respect to NASD IM-3011-1, has been consistent regardless of the size of the entity required to comply with our regulations.⁵

Because of the importance of consistency in this regard, we strongly urge the Commission and the Exchange to reconsider the proposed amendment to the independent testing provision of Rule 445, as it is inconsistent with the independent audit requirements of the Bank Secrecy Act and our interpretive guidance. In the alternative, we would propose harmonizing NYSE and NASD rules by removing the provisions of NASD IM-3011-1 that permit testing by persons prohibited under Rule 445.

We thank the Commission and the Exchange for consideration of our comments respecting the importance of consistency in the administration of the Bank Secrecy Act and the implementation of its minimum requirements. We appreciate the challenges and opportunities the Commission faces with the consolidation of NASD and the member regulation, enforcement, and arbitration functions of the Exchange. If in the post - consolidation phase the Commission is considering regulatory changes related to this issue, we welcome the opportunity to consult further. If you have any questions or concerns or would like further information about the independent testing policies we have implemented across the industries subject to our regulations, please contact me at (202) 354-6400.

Sincerely,



Jamal El-Hindi
Associate Director
Regulatory Policy & Programs Division

2006) (independent review may be conducted by "an officer, employee, or group of employees, so long as the reviewer is not the designated compliance officer and does not report directly to the compliance officer").

⁵ Although we communicated to the Commission our support for the concept of helping to ensure that smaller businesses are not compelled to hire expensive outside auditors to conduct the testing, we noted our concern about the dilution of the "independent" aspect of the testing requirement and suggested that the concept of independence be retained.