

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-53848; File No. SR-NYSE-2005-78)

May 19, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc. (n/k/a New York Stock Exchange LLC); Order Approving a Proposed Rule Change Relating to Amendments to New York Stock Exchange Rules 35 (“Floor Employees to be Registered”) and 301 (“Proposed Transfer or Lease of Membership”)

I. Introduction

On December 13, 2005, the New York Stock Exchange, Inc. (n/k/a New York Stock Exchange LLC) (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change seeking to amend NYSE Rules 35 (“Floor Employees to be Registered”) and 301 (“Proposed Transfer or Lease of Membership”) which would limit access to the Exchange Floor until fingerprint reports have been properly processed and approved, require an alternative background check for persons whose fingerprints are deemed illegible, and clarify that the Exchange would no longer process fingerprint cards.

The proposed rule change was noticed for comment in the Federal Register on December 29, 2005.<sup>3</sup> The Commission received no comments on the proposed rule change.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 53018 (December 14, 2005), 70 FR 77230 (December 29, 2005).

On March 20, 2006, the Exchange filed Amendment No. 1.<sup>4</sup> On May 4, 2006, the Exchange filed Amendment No. 2 to the proposed rule change. On May 10, 2006, the Exchange withdrew Amendment No. 2 and filed Amendment No. 3 to the proposed rule change.<sup>5</sup> This order approves the proposed rule change.

## II. Description

NYSE Rule 35 governs the issuance of Floor tickets (i.e., Regular Tickets and Special Tickets) to Floor employees, which enables them to enter upon the trading Floor. NYSE Rule 35.70 requires the fingerprinting of prospective employees of members and member organizations. Similarly, NYSE Rule 301(c) requires that prospective members be fingerprinted.

Due to security concerns, the Exchange is proposing to tighten these rules by: (1) denying access to the Floor for persons fingerprinted for the first time until the fingerprinting results have properly been processed and accepted; and (2) subjecting persons whose fingerprints cannot be read (i.e., are illegible) to an alternative background check acceptable to the Exchange that would cover the same criminal convictions included by a fingerprint background check. NYSE's proposed amendments also reflect that the Exchange no longer accepts fingerprint cards, but rather requires members and applicants for membership to be fingerprinted through an agent acceptable to the Exchange.

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<sup>4</sup> In Amendment No. 1, the Exchange deleted Footnote 1 from the original filing and clarified that upon the cessation of the sale of memberships at the end of 2005, the Exchange would no longer provide fingerprinting services to any of its members. This amendment did not affect the substance of the proposed rule change; therefore, the Commission is not noticing this Amendment for public comment.

<sup>5</sup> In Amendment No. 3, the Exchange made technical changes to reflect modifications made to the format of NYSE Rule 301 that were approved as part of SR-NYSE-2005-77. See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006). Due to the purely technical nature of Amendment No. 3, the Commission is not noticing this Amendment for public comment.

A. Background

Rule 17f-2 under the Exchange Act<sup>6</sup> sets out the requirements for the fingerprinting of persons employed in the securities industry. The Exchange has adopted procedures to comply with the regulations in order to assure that appropriate persons are fingerprinted and the results of the fingerprinting are reviewed.<sup>7</sup> Specifically, prior to providing member firm employees with Floor ticket access to the Trading Floor and Exchange facilities, and pursuant to NYSE Rules 35 and 345.11 (“Employees – Registration, Approval, Records”),<sup>8</sup> a member firm must electronically submit a Form U4<sup>9</sup> via the Central Registration Depository system (“CRD”).<sup>10</sup> The hiring member firm and the employee are responsible for confirming the accuracy of the information included on the Form U4.<sup>11</sup>

Members and member organizations currently have up to 30 days from the date of the electronic filing of the Form U4 application in Web CRD for the fingerprints to be submitted. The Exchange has represented that applicants and member organizations sometimes wait until

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<sup>6</sup> 17 CFR 240.17f-2.

<sup>7</sup> See NYSE Information Memos 76-30 dated June 25, 1976 and 76-53, dated December 31, 1976, announcing, respectively, the adoption of Exchange Act Rule 17f-2 and SEC approval of the Exchange’s plan for the processing of fingerprints. See also Securities Exchange Act Release No. 13105 (December 23, 1976), 42 FR 753 (January 4, 1977).

<sup>8</sup> NYSE Rule 345.11 requires, among other things, member firms to thoroughly investigate the previous record of persons whom they contemplate employing.

<sup>9</sup> Form U4 includes information such as an individual’s ten-year employment history, five-year residential history, education, disciplinary actions, disclosure information, and the SRO of registration.

<sup>10</sup> The CRD is a registration and licensing system for the U.S. securities industry, state and federal regulators, and SROs. The National Association of Securities Dealers, Inc. (“NASD”) operates the CRD pursuant to policies developed jointly with the North American Securities Administrators Association, Inc.

<sup>11</sup> Firms can use CRD to verify the accuracy of the disclosure portion (e.g., criminal disclosures, regulatory action disclosures) of Form U4 against previously submitted filings and fingerprint results.

the end of the 30-day period to submit fingerprints, although results from the Federal Bureau of Investigation (“FBI”) can be reported within 24-48 hours.

B. NYSE’s Proposed Rule Change

1. Access to Exchange Floor

NYSE is proposing that prospective Floor employees not be admitted to the Floor until the results of the applicant’s fingerprinting have been posted to the CRD, reviewed and approved. NYSE, however, would grant conditional approval to an applicant who had been fingerprinted previously in connection with employment by another member or registered broker-dealer, pending review of the fingerprint results submitted by the current employer, if the prior employment was within ninety days of the application.

2. Illegible Fingerprints – Alternative Background Checks

The Exchange also is proposing to address its concern about applicants that submit fingerprints which cannot be read (*i.e.*, illegible fingerprints). Under Exchange Act Rule 17f-2(a)(1)(iv),<sup>12</sup> when fingerprints are rejected three times as “illegible” by the FBI, the individual is exempt from further fingerprinting.<sup>13</sup> Exchange Act Rule 17f-2 does not require an alternate means of conducting a background check. To address this possible gap in the background check, NYSE is proposing to require that members and member organizations conduct an alternative background check acceptable to the Exchange when an individual’s fingerprints are deemed illegible.

In order to be acceptable to the Exchange, any such background check would have to cover the same criminal convictions included by fingerprint type on a fifty state basis and, if the applicant is foreign, an Interpol or other multi-national database check.

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<sup>12</sup> 17 CFR 240.17f-2(a)(1)(iv).

<sup>13</sup> In this instance, CRD also conducts a “name check.”

Conditional approval would be available to persons previously the subject of a background check, provided employment with a member or registered broker-dealer terminated within ninety days of the application.

### 3. Acceptance of Fingerprint Cards

Lastly, the Exchange is proposing revisions to NYSE Rules 35.70 and 301(c) to reflect the fact that the Exchange no longer receives fingerprint cards directly but does so through agents of the Exchange.<sup>14</sup> However, the Exchange's Membership Services Department will process the fingerprints of member applicants not associated with broker-dealers (not required to be registered on CRD).

### III. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>15</sup> In particular, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act<sup>16</sup> which 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 to protect investors and the public interest.

The Commission believes that the proposed rule change should strengthen the security of the Exchange Floor by not permitting new Floor employees to be admitted to the Floor

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<sup>14</sup> NYSE Rule 345.18 ("Employees – Registration, Approval, Records") provides that any filing or submission to be made with the Exchange under that rule, where appropriate, may be made with a properly authorized agent acting on behalf of the Exchange and shall be deemed to be a filing with the Exchange.

<sup>15</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>16</sup> 15 U.S.C. 78f(b)(5).

until the results of their fingerprint checks have been posted to the CRD, reviewed and approved. The Exchange, however, would grant conditional approval to persons previously fingerprinted, or subject to a background check with a member or registered broker-dealer, where such prior employment was within ninety days of the application. The Commission believes that permitting conditional approval under those conditions is acceptable given that any such applicant would be under a duty to disclose to the Exchange any reportable events during such employment to a supervising broker-dealer who was charged with a duty to report statutory disqualifications. In addition, the applicant would, of course, have a duty to disclose any reportable events during the intervening period in his or her application.

The Commission also believes that requiring an alternative background check in the event that an applicant's fingerprints are deemed illegible and therefore, a fingerprint check is not performed on an applicant, should strengthen the security of the NYSE Floor. The Commission notes that in order for an alternative background check to be acceptable to the Exchange, the background check would, at a minimum, have to disclose the same arrest records as a fingerprint check would for all fifty states and, where the applicant is foreign, through the records of Interpol. Member organizations would be expected to use appropriate diligence in the selection of investigative agencies for such background checks, assuring their ability to satisfactorily research all pertinent databases. The Commission believes that these standards should ensure that an adequate background check is performed on all applicants.

Finally, the Commission believes that it is acceptable for the Exchange to no longer accept fingerprint cards, and for NYSE Rules 35 and 301 to provide that any individual who is required to submit to a fingerprint-based background check, have such a

check performed by an agent acceptable to the Exchange. The Exchange has represented that it believes that the NASD or another self-regulatory organization should be able to provide these services to any member or applicant that requires fingerprinting.<sup>17</sup>

Therefore, the Commission believes that individuals who need to obtain access to fingerprinting services in order to gain access to the Exchange floor should not be adversely affected by the proposed rule change.

#### IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-NYSE-2005-78) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>19</sup>

Nancy M. Morris  
Secretary

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<sup>17</sup> Telephone conference among Jennifer Colihan, Special Counsel, Division of Market Regulation (“Division”), Commission, Kristie Diemer, Attorney, Division, Commission, and Gregory Taylor, Senior Special Counsel, Exchange, on March 22, 2006.

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).