

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-54012; File No. SR-NYSE-2006-05)

June 16, 2006

Self-Regulatory Organizations; New York Stock Exchange, Inc. (n/k/a New York Stock Exchange LLC); Order Approving Proposed Rule Change as Amended by Amendments No. 1 and 2 Amending an Interpretation of NYSE Rule 345 (Employees – Registration, Approval, Records)

I. Introduction

On February 17, 2006, 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”), 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 proposal to amend the filing requirements in connection with the establishment of an “independent contractor” relationship between a natural person, who is required to be registered pursuant to NYSE Rule 345, and a member organization. On May 3, 2006, NYSE filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the Federal Register on May 17, 2006.<sup>3</sup> On June 14, 2006, NYSE filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission received no comments regarding the proposal. This order approves the proposed rule change, as amended.

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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. 53789 (May 11, 2006), 71 FR 28735.

<sup>4</sup> In Amendment No. 2, the Exchange makes minor, non-substantive changes to the rule text contained in Exhibit 5 of the proposed rule change. This is a technical amendment and is not subject to notice and comment.

## II. Description of the Proposal

The NYSE proposes to amend Interpretation (a)/02 (“Independent Contractors”) of NYSE Rule 345 (“Employees – Registration, Approval, Records”). NYSE Rule 345(a) requires that natural persons performing certain prescribed duties on behalf of a member organization be registered with and qualified by the Exchange.<sup>5</sup> The Interpretation of NYSE Rule 345(a)<sup>6</sup> permits a registered representative to assert the status of “independent contractor” provided that any registered representative associated with a member organization who is so designated be considered an employee of that member organization for purposes of the rules of the Exchange.

Currently, the Interpretation subjects all independent contractor arrangements to prior Exchange approval pursuant to the following four conditions: (1) the member organization must provide written assurances to the Exchange that it will supervise and control all activities of the independent contractor effected on its behalf to the same degree and extent that it supervises and controls the activities of all other registered representatives and in a manner consistent with NYSE Rule 342; (2) a copy of the written agreement between the independent contractor and the member organization must be submitted to the Exchange which provides that the independent contractor will engage in securities-related activities solely on behalf of the member organization (except as otherwise explicitly permitted by the member organization in writing); that such securities-related activities will be subject to the direct, detailed supervision, control and

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<sup>5</sup> NYSE Rule 345(a) states that “[n]o...member organization shall permit any natural person to perform regularly the duties customarily performed by (i) a registered representative, (ii) a securities lending representative, (iii) a securities trader or (iv) a direct supervisor of (i), (ii) or (iii) above, unless such person shall have been registered with, qualified by and is acceptable to the Exchange.”

<sup>6</sup> See NYSE Interpretation Handbook, Rule 345(a)/02.

discipline of the member organization; that the person is not subject to a “statutory disqualification” as defined in Section 3(a)(39) of the Act<sup>7</sup> and that nothing therein will negate any of the foregoing; (3) the prospective independent contractor must submit an undertaking subjecting himself to the jurisdiction of the Exchange; and (4) the member organization must provide the Exchange assurances that the prospective independent contractor is covered by the organization’s fidelity insurance and that the independent contractor is in compliance with applicable state Blue Sky provisions.

The NYSE is eliminating the requirement that member organizations submit separate written representations to the Exchange for approval of proposed independent contractor arrangements. The amended Interpretation retains current requirements with respect to regulatory expectations regarding the arrangements. Accordingly, the proposed amendments would continue to specifically require compliance with the following regulatory requirements:

The member organization must directly supervise and control all activities effected on its behalf by independent contractors to the same degree and extent that it is required to regulate the activities of all other persons registered with the member organization consistent with NYSE Rule 342 and all other applicable Exchange rules.<sup>8</sup> For example: (a) the member organization must ensure that any permitted dual employment arrangement involving an independent contractor be in compliance with NYSE Rule 346 (“Limitations- Employment and Association with Members and Member

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<sup>7</sup> See 15 U.S.C. 78c(a)(39).

<sup>8</sup> The Exchange notes that this would explicitly confirm that the standard of supervision for registered independent contractors is identical to that of registered employees, since the supervisory requirements of NYSE Rule 342 apply to member organizations and their employees.

Organizations”); (b) the member organization must ensure that independent contractors are covered by the organization’s fidelity insurance bond, determine whether such persons are subject to a “statutory disqualification” and ensure that independent contractors are in compliance with applicable state Blue Sky provisions; and (c) the member organization must ensure that the initiation and cessation of independent contractor status and other required amendments be appropriately and timely evidenced via Form U4 (“Uniform Application for Securities Industry Registration or Transfer”) or U5 (“Uniform Termination for Securities Industry Registration”), as applicable.<sup>9</sup> Independent contractor status must be indicated on Form U4 at the time of initial registration. If the status is discontinued, either by termination of the relationship or by the independent contractor becoming an employee, Form U4 must be amended promptly.

Further, the proposed amendments would require member organizations to obtain the written attestation of each individual seeking to assert independent contractor status that he will be subject to the direct, detailed supervision, control and discipline of the member organization; will be bound by the relevant rules, standards and guidelines of the member organization; and will be deemed an employee of the member organization and, as such, will be fully subject to the jurisdiction of the Exchange. The proposed

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<sup>9</sup> Form U4 is the uniform form used to register personnel in the securities industry. Form U4 is filed with Web CRD, the system developed jointly by the National Association of Securities Dealers and the North American Securities Administrators Association to register associated persons. Form U4, among other things, requires an associated person to state whether he is an independent contractor. By signing Form U4, an associated person acknowledges that he is subject to the rules of the self-regulatory organization (“SRO”) with which he is registering as well as to the securities laws.

amendments retain an updated<sup>10</sup> version of a “Consent to Jurisdiction” form that would be required for this purpose. Though member organizations will no longer need to submit executed Consent to Jurisdiction forms to the Exchange for approval, member organizations would be required to retain them along with the corresponding independent contractor agreement and timely provide them to the Exchange upon request.

The current Interpretation limits the application of independent contractor status to persons without supervisory responsibilities.<sup>11</sup> The proposed amendments would remove the prohibition against supervisory persons asserting the status of independent contractor, except for those persons designated as principal executive officers (e.g., Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, etc.) who must remain direct employees of the member organization given their unique senior principal executive responsibilities over the various areas of their associated member organization.<sup>12</sup>

### III. Discussion

After careful consideration, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations

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<sup>10</sup> The amendments to “Consent to Jurisdiction” consist of the deletion of dated references (such as the “Constitution” of the Exchange); replacing the term “registered representative” with the term “registered person” to reflect the proposed amendment that would eliminate the prohibition against supervisory persons asserting independent contractor status; and non-substantive changes that improve it stylistically.

<sup>11</sup> That prohibition has been relaxed as to registered representatives “in charge” of an office under NYSE Rule 342.15. See Securities Exchange Act Release No. 48762 (November 7, 2003), 68 FR 64942 (November 17, 2003) (SR-NYSE-2003-26).

<sup>12</sup> See NYSE Rule 311(b)(5) and its Interpretation.

thereunder applicable to a national securities exchange<sup>13</sup> and, in particular, the requirements of Section 6 of the Act.<sup>14</sup> Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>15</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change should reduce unnecessary administrative burdens on the NYSE as well as member organizations. Persons who assert independent contractor status are subject to the member organizations' internal policies and procedures and the jurisdictional reach of the Exchange to the same extent as any other registered person. The Exchange would still receive notice of independent contractor arrangements. The Rule helps ensure that member organizations are aware of their responsibility to supervise independent contractors.

Specifically, the revised Form U4: (1) obviates the need to submit duplicative notice because the Form U4 provides the Exchange prompt notice and an up-to-date

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<sup>13</sup> In approving this proposed rule change, as amended, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>14</sup> 15 U.S.C. 78f.

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

record of such persons<sup>16</sup> by requiring the identification by registered persons of independent contractor status; and (2) establishes jurisdictional reach by requiring registered persons who seek to become associated with a member organization to “submit to the authority of the jurisdictions and SROs and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and SROs as they are or may be adopted, or amended from time to time.”<sup>17</sup>

The Exchange believes that permitting supervisors to assert independent contractor status should not affect the individual’s ability to supervise, nor would it reduce accountability for failure to fulfill their supervisory, regulatory, and other professional obligations. The Commission notes that regardless of whether an individual is deemed an independent contractor, he will be required to have the same qualifications and act in the same capacity as any other person similarly charged with supervisory responsibilities.

Finally, the Commission reiterates its longstanding position that the designation of an independent contractor has no relevance for purposes of the securities laws.<sup>18</sup> In this regard, the Commission notes that member organizations may not avoid their

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<sup>16</sup> NYSE Rule 345.12 provides, in part, that an application for a natural person required to be registered with the Exchange shall be submitted on Form U4 and that information on Form U4 must be kept current and shall be updated by filing with the Exchange an amendment to that filing.

<sup>17</sup> See Form U4, Subsection 2 of Section 15A (Individual/Applicant’s Acknowledgement and Consent).

<sup>18</sup> See letter to Gordon S. Macklin, President, NASD, Charles J. Henry, Chicago Board Options Exchange, Robert J. Birnbaum, American Stock Exchange and John J. Phelan, NYSE from Douglas Scarff, Director, Division of Market Regulation, dated June 18, 1982.

obligation to control and supervise the activities of their registered persons by designating them as independent contractors.<sup>19</sup>

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>20</sup> that the proposed rule change (File No. SR-NYSE-2006-05), as amended, is hereby approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>21</sup>

Nancy M. Morris  
Secretary

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<sup>19</sup> See Section 15(b)(4)(E) of the Act, 15 U.S.C. 78o(b)(4)(E).

<sup>20</sup> 15 U.S.C. 78s(b)(2).

<sup>21</sup> 17 CFR 200.30-3(a)(12).