

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-52181; File No. SR-NYSE-2005-04)

August 1, 2005

Self-Regulatory Organizations; New York Stock Exchange, Inc.; Notice of Filing of Proposed Rule Change, Amending Interpretation of NYSE Rule 311 (“Formation and Approval of Member Organizations”) to Codify Certain Qualification Requirements for and Criteria for Dual- or Multi-Designation of Principal Executive Officers.

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> notice is hereby given that on January 6, 2005, the New York Stock Exchange, Inc. (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. On July 25, 2005, the NYSE amended the proposed rule change (“Amendment No.1”).<sup>3</sup> 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 Exchange proposes amendments to the Interpretation of NYSE Rule 311 (“Formation and Approval of Member Organizations”) to codify: (i) qualification requirements for Chief Operations Officers (“COOs”) and Chief Financial Officers (“CFOs”); (ii) criteria for the dual-designation of introducing firm COOs and CFOs; (iii) criteria for the other dual-designation and multi-designation of principal executive officer

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

<sup>2</sup> 17 C.F.R. 240.19b-4

<sup>3</sup> In Amendment No. 1, the Exchange deleted the provision codifying Chief Operations Officer exemptions for certain introducing firms, proposed an amendment codifying limitations on the employment of principal executive officers, and made technical corrections to the purpose section and the rule text.

functions; (iv) criteria for co-designation of such functions; and (v) limitations on the employment of principal executive officers. The text of the proposed rule change is available on the NYSE Web site (<http://www.nyse.com>), at the NYSE's Office of the Secretary and at the Commission's Public Reference Room.

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 Exchange 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 Exchange 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

NYSE Rule 311(b)(5) requires the designation of "principal executive officers" exercising senior principal executive responsibility over various prescribed areas of each member organization's business.<sup>4</sup> The Interpretation of NYSE Rule 311(b)(5)<sup>5</sup> further specifies that persons so designated, such as CFOs or COOs must be either members or allied members, must satisfy an examination requirement that is acceptable to the Exchange and must also have work experience and background commensurate with their

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<sup>4</sup> The rule lists certain areas of responsibility that are applicable to all member organizations, such as operations, compliance with the rules and regulations of regulatory bodies, finance and credit, and those areas which may or may not be present in a member organization, such as sales, underwriting, and research.

<sup>5</sup> See Interpretation Handbook at NYSE Rule 311(b)(5)/01.

responsibilities. The Exchange is proposing amendments to the Interpretation of NYSE Rule 311 in order to codify and clarify the following:

- The qualification requirements for CFOs and COOs;
- That member organizations with limited operational activities may dually designate a single person to act as both CFO and COO, where circumstances permit;
- That the Exchange's approval is required for dual-designations other than CFO/COO and for all principal executive officer multi-designations;
- That the Exchange's approval is required for the co-designation of functions requiring a principal executive officer; and
- That the prior written approval of the Exchange, pursuant to NYSE Rule 346 (e), is required for arrangements involving the dual-employment of principal executive officers.

Proposed Amendments to the Interpretation of NYSE Rule 311(b)(5)

CFO/COO Qualification – Clearing Firms

The Financial and Operations Principal Qualification Examination (Series 27) addresses Exchange and Federal regulatory requirements relating to a broad range of broker-dealer functions, including:

- Maintenance of Books and Records<sup>6</sup>
- Net Capital Requirements<sup>7</sup>;

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<sup>6</sup> 17 CFR 240.17a-3; 17 CFR 240.17a-4.

<sup>7</sup> 17 CFR 240.15c3-1.

- Customer Protection Rule<sup>8</sup>;
- Financial Reporting<sup>9</sup>;
- Processing of Funds and Securities; and
- Federal Reserve Board Regulations.<sup>10</sup>

The material covered by the Series 27 Examination, in large part, reflects the functions and responsibilities associated with a clearing firm. Accordingly, since rescinding the Allied Member Examination (Series 41) in January 1986,<sup>11</sup> the Exchange has required that the CFO and COO at a clearing firm be Series 27-qualified. The proposed amendments to the Interpretation of NYSE Rule 311(b)(5) (see proposed new Section /02) would codify this requirement.

#### CFO/COO Qualification – Introducing Firm

The scope of financial and operational responsibilities is generally more limited in an introducing firm than in a clearing firm. This is because introducing firms enter into contractual arrangements with clearing firms, pursuant to NYSE Rule 382, in which responsibility for many “back office” (e.g., operational and financial) broker-dealer functions are allocated to the clearing firm. Typically, the clearing firm would accept

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<sup>8</sup> 17 CFR 240.15c3-3.

<sup>9</sup> 17 CFR 240.17a-5; 17 CFR 240.17a-11.

<sup>10</sup> 15 U.S.C. 78g; 15 U.S.C. 78h.

<sup>11</sup> See NYSE Information Memo Number 86-3 dated January 29, 1986.

responsibility for: (i) extending credit to customers (pursuant to margin account agreements); (ii) delivery of confirms and statements to customers; (iii) receiving and delivering funds and securities to customers; (iv) maintaining books and records; (v) safeguarding customer funds and securities; and (vi) clearing and settling transactions. Therefore, CFOs and COOs at introducing firms need not demonstrate as broad a range of expertise as that required of persons acting on behalf of clearing firms. The Introducing Broker/Dealer Financial and Operations Principal Qualification Examination (Series 28) is specifically designed to address the regulatory responsibilities associated with supervision over those more limited functions that typically remain the responsibility of the introducing firm.

The proposed amendments to the Interpretation of NYSE Rule 311(b)(5) (see proposed new Section /02 ) would codify that a person can qualify to function as the CFO or COO of an introducing firm by passing either the Series 27 Examination or the Series 28 Examination.

#### CFO/COO Dual-Designations

The current Interpretation of NYSE Rule 311 is not explicit as to whether the duties of CFOs and COOs must be exercised by different persons or whether a single person may be dually designated. The proposed amendments are intended to clarify the Exchange's position on the matter.

Given that that the level of operational and financial responsibility at many introducing firms may be such that a single qualified person could (and, in fact, does) adequately function as both the designated CFO and COO, it is proposed that allowance for such dual-designations be codified (see proposed new Section /03). An introducing

firm's dually designated CFO/COO could be either Series 27 or 28 qualified. The determination of whether one person could effectively function as both CFO and COO would be made by the member organization, based upon the nature and extent of their operational and financial activities. The proposed amendments require that the member organization use due diligence to assess the adequacy of the arrangement in light of the prescribed supervisory requirements of NYSE Rule 342 ("Offices – Approval, Supervision and Control"). The proposed amendments would also require that the Exchange be promptly notified of all such dual-designations.

#### Other Dual- or Multi-Designations

Given that the Series 27 is the qualifying examination for both CFOs and COOs, the pairing of CFO/COO functions is the most common dual-designation. The Exchange believes that the dual-designation of other principal executive officer functions, as well as the multi-designation of such functions, may also be appropriate under certain circumstances. However, given the diversity of responsibilities that may be involved with such arrangements, the Exchange also believes that a greater measure of regulatory control should be maintained over them. Accordingly, amendments to the Interpretation of NYSE Rule 311(b)(5) are proposed (see proposed new Section /04) to codify that any assignment of principal executive officer dual-designation status other than a CFO/COO arrangement, or any multi-designation of principal executive officer titles, would require the prior written approval of the Exchange.

#### Co-Designation of Principal Executive Officers

The practice of designating co-CEOs at member organizations has been permitted in the past, subject to Exchange approval. The Exchange proposes amendments to codify

the approval process, as well as to address the matter of whether a member organization may co-designate other principal executive officers. While the Exchange believes that this practice could lead to confusion as to which designee is ultimately responsible and accountable for assigned functions, there may be instances where such arrangements are supported by valid business reasons, such as when each co-designee has special expertise in critical areas within the purview of the principal executive officer job description. Accordingly, the proposed amendments would permit such co-designations, pursuant to a written request and subject to the prior written approval of the Exchange (see proposed new Section /05).

Written requests to the Exchange must set forth the reason for the co-designation and explain how the arrangement is structured. Further, since such co-designations raise issues regarding which person has ultimate authority and accountability, the request must make clear that each co-designee has joint and several responsibility for discharging the duties of that principal executive officer designation and that no understanding or agreement purporting to apportion or limit such responsibility will be recognized by the Exchange.

#### Limitations on the Employment of Principal Executive Officers

Proposed amendments to the Interpretation reaffirm that, pursuant to NYSE Rule 346(e), a principal executive officer may, with the prior written approval of the Exchange, be a part-time employee (see proposed new Section /06). Approval will depend upon the degree of control, if applicable, between the member organization and such other business; the nature of the principal executive officer's duties and responsibilities at the member organization; the approximate time required to perform

such duties and responsibilities effectively, and; the nature of the outside employment. This reference to Rule 346(e) is intended to clarify that such requests will be considered on a case-by-case basis, and are not subject to restrictions regarding Financial and Operational Principals' part-time employment at more than two members or member organizations outlined in NYSE Information Memo No. 91-25, dated July 8, 1991. This aspect of the proposed rule change will be discussed in the Information Memo released in conjunction with the approval of the proposed rule change.

### Miscellaneous

It is proposed that current Section /03 be deleted. This Section, which addresses the use of "vice-presidential titles" and includes an unnecessary reference to "Rule 345(b)" and a dated reference to "Question 11 of the U-4 application" is outmoded and serves no current purpose. Also, the reference to Rule 304(b)/04 has been corrected to Rule 304(b) and moved from current Section /02 to proposed Section /01.

### 2. Statutory Basis

The Exchange believes that the statutory basis for this proposed rule change is Section 6(c)(3)(B) of the Act.<sup>12</sup> Under that section, it is the Exchange's responsibility to prescribe standards of training, experience and competence for persons associated with Exchange members and member organizations. In addition, under Section 6(c)(3)(B) of the Act, the Exchange may bar a natural person from becoming a member or person associated with a member, if such natural person does not meet such standards of training, experience and competence as are prescribed by the rules of the Exchange. The

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<sup>12</sup> 15 U.S.C. 78f(c)(3)(B).

Exchange believes that the proposed amendments are consistent with the Act in that they codify qualification and examination requirements for certain prescribed individuals.

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

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

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

Written comments were neither solicited nor received.

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 Exchange 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2005-04 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number SR-NYSE-2005-04. 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. Copies of such filing will also 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-2005-04 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to the delegated authority.<sup>13</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).