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October 31, 2005

Ms. Catherine McGuire
Division of Market Regulation
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: File No. SR-NYSE-2004-64 Relating to Annual Report and Annual Certification - Response to Comment Letters

Dear Ms. McGuire:

The New York Stock Exchange ("NYSE" or "the Exchange") filed amendments to NYSE Rule 342 ("Offices – Approval, Supervision and Control") with the Securities and Exchange Commission ("SEC" or "the Commission') on November 1, 2004. This letter will respond to comments reflected in the letters of September 14 from the Self-Regulation and Supervisory Practices Committee of the Securities Industry Association ("SIA") (the "SIA Letter") and Lehman Brothers Inc. (the "Lehman letter").

Background

On November 1, 2004, the Exchange filed SR-NYSE-2004-64, which proposed amending NYSE 342.30 to: require members and member organizations to file with the Exchange the Annual Reports currently required to be given to each member organization's chief executive officer ("CEO"); require that these Annual Reports include a discussion of compliance efforts regarding anti-money laundering; require each member organization to designate a principal officer or general partner as Chief Compliance Officer; and require each member, and the CEO of each member organization, to file a yearly statement confirming the adequacy of their compliance processes and procedures.

On July 11, 2005, the Exchange filed a partial amendment (Amendment No. 1), proposing to add to its Interpretive Handbook Interpretations 342.30(d)/01 and 342.30(e)/01 for purposes of clarifying issues related to the designation of a Chief

Compliance Officer and the Annual Certification, respectively. On August 12, 2005, the Exchange filed another partial amendment (Amendment No. 2), adding language to Rule 342.30(e)/01, modifying paragraph 4, adding a new paragraph 5 to clarify the obligations of member organizations in the preparation of annual certifications, and renumbering the former paragraph 5 as paragraph 6.[1]

Comments

"Adequacy" of Member Organization Processes

Both comment letters raised concerns as to whether the Exchange was requiring chief executive officers ("CEOs") to certify that their policies and procedures were "adequate" or otherwise attest to their effectiveness at a specific point in time.

To clarify the intent of the Exchange, the words "the adequacy of" are being deleted from proposed Rule 342.30 in Amendment 3.

It would not, however, be reasonable to assert (nor are we suggesting that the commenters are asserting) that a CEO has no obligation to believe that the processes to which he or she is attesting are reasonably capable of achieving the ends described in the rule. Rather, the CEO is required, before signing the attestation, to meet with the chief compliance officer ("CCO") and such other officers as he or she may wish to review the points described in Rule 342.30(e)(ii), to review the report evidencing the processes as set out in (e)(iii) and submit it to the member organization's board of directors. The CEO is encouraged to consult with officers responsible for their business areas, the CCO, outside consultants, lawyers and accountants, as they deem appropriate, before making the attestation. The over-arching purpose of this process is to give the CEO an informed basis for the certification. To further clarify the obligations of the CEO in this context, the words "and review" are being added to proposed Rule 342(e)(i)(A) in Amendment 3.

Role of Chief Compliance Officer

Both letters expressed concern that wording in the Exchange's description of the rule might have the effect of casting CCOs as having business line responsibility.

In proposing that each member organization designate a general partner or principal executive officer as CCO, the Exchange was seeking to recognize the importance of the compliance function at member organizations. The requirement has the effect of making the CCO an allied member of the Exchange, as befits this critical function. The Exchange is sensitive to the concerns expressed as to vesting the CCO with business-line

[1] See Securities Exchange Act Release No. 52259 (August 15, 2005), 70 FR 48997 (August 22, 2005).

authority, but nothing in the rule as written or intended would change present policies in that regard.

Rule 311(b)(5) speaks not of "business areas" but of "areas of the business."[2] This is a crucial difference. In using the former phrase descriptively and informally the Exchange had no intention of addressing the relationship of a CCO to such "areas of the business." In addition, as noted below, Rule 311(b)(5) already includes compliance functions among the covered "areas of the business" without in any way contributing to the concerns expressed by the commenters.

The proposed rule effects no change in whether or not a compliance manager is a business line supervisor. This remains, as it has been, a fact specific determination, and one to be determined with care. Absent traditional indicia of control, a compliance officer would not be deemed as being in the line of supervision. Nothing in the proposed rule or in the filing should be read as attempting to alter such existing standards.[3]

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[2] Rule 311(b)(5) The Board of Directors [of each member organization shall designate] its "principal executive officers" who shall be members or allied members and shall exercise senior principal executive responsibility over the various areas of the business of such corporation in such areas as the rules of the Exchange may prescribe, including: operations, compliance with rules and regulations of regulatory bodies, finances and credit, sales, underwriting, research and administration…(emphasis added).

[3] Some of the concerns in the SIA letter, as exemplified by footnote 6, may have arisen from a misreading of the copy in the Federal Register. The language quoted in the letter relates not to the meeting between the CCO and CEO, but rather to the CEO certification. It is found not in a footnote, but in the body copy. The section in its entirety reads:

> CEO Certification
> The proposed amendment's CEO certification requirement reflects the Exchange's belief that member organizations' senior executives, particularly CEOs, should focus the highest degree of attention and resources on the compliance function. While subordinates with supervisory responsibility for specific business lines remain accountable for the discharge of compliance policies and written supervisory procedures, the Exchange considers CEOs to be ultimately accountable for the compliance and supervision of their member organizations. *In keeping with these principles, the CEO certification requirement is intended to promote and expand dialogue between member organization CEOs and their officers who are responsible for compliance with federal laws and Exchange regulations.* (Footnotes omitted, emphasis added.)

The utility of a filing requirement

The Lehman letter questioned why the Exchange proposed rule diverges from that of the NASD with respect to the need to file. By this, we take it to mean the divergence from the requirement that the first NASD certification be made (but not filed) no later than November 30 and annually thereafter, while the Exchange's rule must be submitted no later than April 1 of each year. We see less divergence in this difference than might at first appear. The Annual Certification was added to existing Rule 342.30, which previously required members and member organizations to prepare an annual report addressing critical compliance issues arising *during the preceding year*. The April 1 date gives such members and member organizations three months from the close of the year to prepare the report. The proposed changes in the rule will require that the report now be submitted to the Exchange on that same date. The timely submission of that report, including the Annual Certification, provides the Exchange with information which is of use in the examination of members and member organizations. Having the Annual Certification submitted to the Exchange (rather than retained by the member or member organization until reviewed in the next examination) assures timely completion and highlights immediately any problem which may prevent the CEO from completing the Certification.

With regard to the comments regarding the timing, as between the NASD and NYSE dates, it is our understanding that NASD will permit members of both self-regulatory organizations to satisfy their requirements with a filing no later than April 1. This should fully address the issue.

We very much hope that this discussion has clarified the Exchange's position in this matter. Please feel free to contact Gregory Taylor at 212-656-2920 or William Jannace at 212-656-2744 should you have any questions concerning the above.

Very truly yours,

Assistant Secretary

cc: Elizabeth MacDonald
Lourdes Gonzalez