

LEHMAN BROTHERS

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September 14, 2005

VIA EMAIL

Secretary
U.S. Securities and Exchange Commission
100 F Street, N.W.
Washington, D.C. 20549

Re: File No. SR-NYSE-2004-64; Proposed Changes to Exchange Rule 342
Requiring Chief Executive Officer Certification

To whom it may concern:

Lehman Brothers, Inc., (“Lehman”) appreciates the opportunity to provide comments in response to the referenced rule filing, which seeks input on proposed amendments and related interpretive material to New York Stock Exchange (“NYSE”) Rule 342. The amendments would require annual certification by the Chief Executive Officer (“CEO”) of the firm to the firm’s compliance processes and procedures.

Lehman applauds the work of the NYSE in promoting compliance efforts at member firms. Lehman supports CEO certification requirements, generally, as appropriate to creating a firm-wide culture of compliance. Combined with the related requirements to hold meetings between the CEO and Chief Compliance Officer (“CCO”), and to prepare a written report discussing compliance processes, the certification effectively promotes interaction of compliance and senior management and regular documented reviews of firm-wide compliance programs. Lehman previously supported a substantially similar certification requirement that was proposed by the National Association of Securities Dealers (“NASD”), and subsequently approved by the Securities and Exchange Commission (“SEC”).¹ In addition, senior Lehman executives provided substantial technical assistance to the NASD during the course of the NASD rulemaking process. Because the NYSE proposal seeks to achieve the same goals as the existing NASD rule, Lehman believes the two rules ought to be consistent to the greatest

¹ Securities Exchange Act Release No. 50347 (September 10, 2004), 69 FR 56107 (September 17, 2004) (SR-NASD-2003-176).

degree possible. In order to achieve this result, Lehman offers the following suggestions:

1. **Eliminate language in the rule that requires the CEO to certify to the “adequacy” of the firm’s compliance policies and procedures.**

The inclusion of an adequacy standard in the CEO’s certification is a significant difference from the NASD rule language, which requires the CEO to certify to having processes in place. The laudable goal of making compliance efforts a recurring focus of the CEO’s attention could quickly become the CEO’s sole pre-occupation if the CEO were further required to become sufficiently expert in the area of regulation and compliance to be able to offer an opinion as to adequacy.

Moreover, Lehman has difficulty understanding why the NYSE would depart from the NASD’s already implemented approach, given the importance of SRO cooperation and efficient regulation to the stability of financial markets. After all, the issue of including just such a standard was widely and publicly debated in two separate comment periods when the NASD proposed its version of CEO certification in 2004. Ultimately, the NASD opted not to include an adequacy standard in the rule submitted for SEC approval, in recognition of “the difficulty in certifying to absolute compliance at any given moment in the face of dynamic regulatory and business environments.”² Given the existing record of public comment and NASD deliberations on the question of adequacy standards, we question what new or additional motives would now compel the NYSE to propose (and the SEC to approve) a significantly more burdensome version of the same rule. Some experience with and opportunity for reflection on the NASD approach, as approved, should occur before regulators determine that improvements are necessary.

2. **Clarify language that confuses common understanding of the role of Compliance officers.**

The NYSE proposal includes language which suggests that Compliance officers are responsible for compliance with laws and regulations and that the Compliance Department is a “business area” of the firm. For example, the proposal states that by requiring a senior officer to be named as the CCO, the rule recognizes the increased importance of the compliance function and that this provision is fully consistent with NYSE Rule 311(b)(5), which mandates that the principal executive officer “exercise responsibility over each of the prescribed *business areas* of the Member

² 68 FR 75707

Organization (e.g. compliance).”³ The proposal also states that it “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.*”⁴

Much effort on the part of regulators, industry trade associations and individual firms has gone into carefully defining the role of Compliance officers and responsibility for actual compliance with rules and policies. We are concerned that the statements of the NYSE in this release might blur the common understanding of these roles that has been evolving. In general, compliance officers advise business managers with respect to regulations and the development of compliance policies and procedures. However, responsibility for following the rules and firm policies regarding those rules, as well as executing supervisory responsibilities to ensure compliance with same, remain the responsibility of business line supervisors.

To avoid any potential for misunderstanding, Lehman recommends that the NYSE make clear its understanding that Compliance is not a ‘business’ area and that business line supervisors are responsible for compliance with rules and regulations.

3. **Determine whether a filing requirement is necessary**

While the requirement to file the certification with the NYSE would not impose significant new burdens, Lehman questions why the NYSE proposal should diverge from that of the NASD with respect to the need to file. As a matter of regulatory efficiency and consistency in SRO rulemaking, Lehman believes the two rules ought to be identical so firms do not have to establish separate processes for proper disposition of the certification. The firm would prefer to see the regulators gain some experience with the already approved NASD CEO certification rule before considering further improvements. If and when such improvements are deemed necessary, they should be adopted by both SROs.

³ 70 FR 48999

⁴ Id.

We thank you for the opportunity to provide comments on this proposal. If you have any comments or questions in response, please feel free to contact the undersigned at 212-320-6732.

Very truly yours,

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