

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 Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NSCC. All submissions should refer to the File No. SR-NSCC-2002-04 and should be submitted by September 10, 2002.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.<sup>7</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-46344; File No. SR-NYSE-2001-44]

### Self-Regulatory Organizations; Order Approving a Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment No. 2 of the Proposed Rule Change by the New York Stock Exchange, Inc. Relating to NYSE Rule 407 ("Transactions—Employees of Members, Member Organizations and the Exchange")

August 13, 2002.

On October 22, 2001, the New York Stock Exchange, Inc. ("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> the proposed rule change to incorporate and amend an existing written interpretation of NYSE Rule 407 to require that associated persons obtain their employers' written approval before entering into private securities transactions, and define the terms "securities or commodities account," "private securities transactions," and "other financial institution." The

proposed rule change was published in the **Federal Register** on December 4, 2001.<sup>3</sup> The Commission received three comments on the proposed rule change.<sup>4</sup> On December 12, 2001, the Exchange submitted Amendment No. 1 to the proposed rule change.<sup>5</sup> On April 16, 2002, the NYSE filed a response to the comment letters.<sup>6</sup> On July 3, 2002, the NYSE submitted Amendment No. 2 to the proposed rule change.<sup>7</sup> This order approves the proposed rule change, as amended, and approves Amendment No. 2 on an accelerated basis.

### I. Description of the Proposed Rule Change

NYSE Rule 407(b) requires that members, allied members and employees obtain prior written consent from their employers in order to open and maintain a securities or commodities account at another broker-dealer, investment adviser, bank or other financial institution. Employers of such associated persons must receive duplicate confirmations and statements of such accounts.

The Exchange proposes to amend NYSE Rule 407, and incorporate and amend an existing interpretation of NYSE Rule 407 in the *NYSE Interpretation Handbook*, to require that

associated persons of members or member organizations obtain their employers' written approval (rather than notification) before entering into private securities transactions. The Exchange also proposes that associated persons effecting private securities transactions shall arrange for duplicate confirmations and statements (or their equivalents) to be sent to another person designated by their member or member organization under NYSE Rule 342(b)(1) ("Offices—Approval, Supervision and Control") to periodically review such transactions.

The Exchange proposes to define the terms "securities or commodities account," "private securities transactions" and "other financial institution." The Exchange also proposes to amend NYSE Rule 407 to provide the Exchange with the general authority to waive any of the requirements of the rule upon written request of a member or member organization that has the obligation to approve the account and where good cause is shown.

### II. Summary of Comments

The Commission received three comment letters on the proposal.<sup>8</sup> The commenters generally supported the NYSE's proposal to require member firms to conduct a transactional-based review of private securities transactions.<sup>9</sup> However, the commenters recommended certain technical changes to the proposed rule language to reflect the purpose of the proposed rule change.<sup>10</sup> Further, one commenter stated that, although the proposal requires that associated persons effecting private securities transactions arrange for duplicate confirmations and statements (or their equivalents), there may be instances in which confirmations and statements would not be available.<sup>11</sup> Therefore, the commenter believed that in absence of confirmations and statements, a private placement memorandum, offering circular, or subscription agreement may be more appropriate to review.

Regarding the commenters' concerns about clarifying the proposed rule language, the NYSE believed it was not necessary to clarify the text of the proposed rule change.<sup>12</sup> In response to the commenter's suggestions of other

<sup>3</sup> See Securities Exchange Act Release No. 45097 (November 21, 2001), 66 FR 63084.

<sup>4</sup> See letters to Jonathan G. Katz, Secretary, Commission, from Michael Dardis, Vice President, Compliance Manager, Wells Fargo Investments, dated January 11, 2002 ("Wells Fargo Letter"); and Les Klein, Managing Director, Solomon Smith Barney, dated January 11, 2002 ("SSB Letter"). See also letter from Brian C. Underwood, Senior Vice President, Director of Compliance, A.G. Edwards & Sons, Inc., to Katherine England, Assistant Director, Division of Market Regulation ("Division"), Commission, dated January 24, 2002 ("A.G. Edwards Letter").

<sup>5</sup> See letter from James E. Buck, Senior Vice President and Secretary, NYSE, to Nancy Sanow, Assistant Director, Division, Commission, dated December 11, 2001 ("Amendment No. 1"). Amendment No. 1 modifies the proposed definition of a "securities or commodities account," by adding a non-inclusive phrase to be consistent with the proposed definitions of other terms in the proposed rule text. This was a technical amendment and is not subject to notice and comment.

<sup>6</sup> See letter from Richard P. Bernard, Executive Vice President and General Counsel, NYSE, to Nancy Sanow, Assistant Director, Division, Commission, dated April 15, 2002 ("NYSE Response Letter").

<sup>7</sup> See letter from Darla C. Stuckey, Corporate Secretary, NYSE, to Katherine A. England, Assistant Director, Division, Commission, dated July 5, 2002 ("Amendment No. 2"). Amendment No. 2 clarifies that the proposed rule text shall apply to associated persons of members or member organizations that either establish or maintain a securities or commodities account, or a private securities transaction. In addition, Amendment No. 2 modifies the proposed rule text to require members and member organizations to develop and maintain written procedures for reviewing any securities or commodities accounts, or private securities transactions.

<sup>8</sup> See note 4, *supra*.

<sup>9</sup> See Wells Fargo Letter; SSB Letter; A.G. Edwards Letter.

<sup>10</sup> *Id.*

<sup>11</sup> See A.G. Edwards Letter.

<sup>12</sup> See NYSE Response Letter (stating that the NYSE would clarify the requirements of the rule in an Information Memo upon approval of the proposal by the Commission).

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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

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

documents that NYSE members and member organizations review in the absence of confirmations and statements on private securities transactions, the NYSE stated that the proposed rule language currently addresses this concern by providing for the review of confirmations, statements, "or their equivalents."<sup>13</sup> The NYSE also stated that it expects members and member organizations to monitor individual transactions based on the information available to them.<sup>14</sup> Further, the NYSE stated that where confirmations and statements were not available from the issuers, members and member organizations would be required to develop and implement policies, which among other things, provide for periodic updates and attestations from employees as to their existing, and any additional, private securities transactions.<sup>15</sup>

### III. Discussion

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>16</sup> In particular, the Commission finds that the proposal, as amended, is consistent with Section 6(b)(5) of the Act,<sup>17</sup> which requires, among other things, that the rules of the Exchange be designed to prevent fraudulent and manipulative acts and practices and promote just and equitable principles of trade.

The Commission believes that requiring associated persons of members or member organizations to obtain their employers' written approval before entering into private securities transactions will provide member organizations another tool to assist in carrying out their supervisory responsibilities. In addition, it will make for more consistent regulation across the industry.<sup>18</sup> After careful consideration of the commenters' concerns about the proposed rule language and its requirements, the Commission believes that the proposal sufficiently addresses the types of information that would be necessary to be reviewed by a designated Exchange member or member organization. The Commission believes that the proposed rule change should assist the Exchange

and its members and member organizations in monitoring employee transactions for possible conflicts of interest or violations of self-regulatory organization or SEC requirements.

### IV. Amendment No. 2 of the Proposed Rule Change

The Commission finds good cause for approving Amendment No. 2 of the proposed rule change prior to the thirtieth day after notice of publication in the **Federal Register**. Amendment No. 2 clarifies that the proposal applies to associated persons of members or member organizations that either establish or maintain a securities or commodities account, or a private securities transaction. In addition, Amendment No. 2 modifies the proposed rule text to require members and member organizations to develop and maintain written procedures for reviewing any securities or commodities accounts, or private securities transactions. The Commission believes that it is not necessary to separately solicit comment on Amendment No. 2 before approving this proposal because Amendment No. 2 makes changes to clarify the responsibilities of Exchange members, member organizations, and their employees, pursuant to this rule. The Commission therefore finds that the approval of Amendment No. 2 on an accelerated basis is appropriate.

### V. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 2, including whether the amendment is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. 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 Exchange. All submissions should refer to File No. SR-NYSE-2001-44 and should be submitted by September 10, 2002.

### VI. Conclusion

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-NYSE-2001-44), as amended, is approved.

For the Commission, by the Division of Market Regulation, pursuant to the delegated authority.<sup>20</sup>

**Margaret H. McFarland,**

*Deputy Secretary.*

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## SMALL BUSINESS ADMINISTRATION

### Public Federal Regulatory Enforcement Fairness Hearing; Region I Regulatory Fairness Board

The Small Business Administration Region I Regulatory Fairness Board and the SBA Office of the National Ombudsman will hold a Public Hearing on Tuesday, September 17, 2002 at 9 a.m. at the Thomas P. O'Neil Federal Building, Auditorium—First Floor, 10 Causeway Street, Boston, MA 02222, to receive comments and testimony from small business owners, small government entities, and small non-profit organizations concerning regulatory enforcement and compliance actions taken by Federal agencies.

Anyone wishing to attend or to make a presentation must contact David Polatin in writing or by fax, in order to be put on the agenda. David Polatin, U.S. Small Business Administration, Massachusetts District Office, 10 Causeway Street, Suite 812, Boston, MA 02222, phone (617) 565-5562, fax (617) 565-5597, e-mail [david.polatin@sba.gov](mailto:david.polatin@sba.gov).

For more information, see our Web site at <http://www.sba.gov/ombudsman>.

Dated: August 13, 2002.

**Michael L. Barrera,**

*National Ombudsman.*

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> In approving this proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> See NASD Rule 3040.

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).