

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48762; File No. SR-NYSE-2003-26]

### Self-Regulatory Organizations; Order Granting Approval of Proposed Rule Change by the New York Stock Exchange, Inc., To Amend an Interpretation of NYSE Rule 345 To Provide for the Elimination of "Registered Representative-in-Charge" as a Category Precluded From Being an Independent Contractor

November 7, 2003.

On September 3, 2003, the New York Stock Exchange, Inc. ("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 proposed rule change to amend an Interpretation of NYSE Rule 345 in order to permit independent contractors to serve as "Registered Representatives-In-Charge." Notice of the proposed rule change was published for comment in the **Federal Register** on October 7, 2003.<sup>3</sup> No comments were received on the proposed rule change.

NYSE Rule 342.15 provides that a small office (one with three or fewer registered representatives) may be in the charge of a non-resident qualified principal or manager. However, pursuant to Interpretation /02 to the same Rule, in such a case, a resident registered representative must be designated as "in charge." Currently, Interpretation /02 to Rule 345(a) prohibits a natural person registered representative who is an independent contractor from serving as a "registered representative-in-charge."

The Exchange has represented that small offices with independent contractors typically have a limited securities sales business, and that "members and member organizations generally assign administrative as opposed to supervisory functions to persons they designate as registered representatives-in-charge."<sup>4</sup> According to the Exchange, NYSE member organizations believe that prohibiting registered representatives in charge of small offices from being independent contractors creates an unnecessary burden. To address this position, the Exchange proposes to allow registered representatives-in-charge to associate

with members and member organizations as independent contractors, provided that the member or member organization does not assign or delegate supervisory responsibilities to such persons, and submits a written statement to that effect.

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>5</sup> Specifically, the Commission finds that the proposal is consistent with section 6(b)(5) of the Act,<sup>6</sup> which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change should reduce the regulatory burdens of NYSE members and member organizations and allow them an appropriate degree of flexibility in their management of personnel in small offices.

At the same time, the Commission notes that the proposed rule change does not alter in any way the obligation of NYSE members or member organizations to oversee the operation of their businesses and supervise the performance of their associated persons in a manner that assures compliance with the Act and rules and regulations thereunder, as well as applicable rules of the NYSE. The Commission therefore believes that the proposal is consistent with its longstanding position that regardless of their designation, independent contractor registered representatives are considered "associated persons" of a broker-dealer under the Act if their activities are subject to control by the broker-dealer, such as when there is a principal and agent relationship.<sup>7</sup>

To this end, the Commission notes that other NYSE rules governing the supervision of personnel that relate to independent contractors and small offices will remain unchanged. Thus, NYSE Interpretation /02 to Rule 345(a)

<sup>5</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78(c)(f).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> See Letter to Gordon S. Macklin, President, National Association of Securities Dealers, Inc. from Douglas Scarff, Director, Division of Market Regulation, Commission (June 18, 1982) (on file with the Commission). See also *Privacy of Consumer Financial Information (Regulation S-P)*, Rel. No. 34-42974 (June 22, 2000), 65 FR 40334 (June 29, 2000); *Matter of Crute*, 53 S.E.C. 1112 (December 21, 1998).

will continue to provide that status as an "independent contractor" does not preclude characterization and treatment as an employee for purposes of the NYSE Constitution and Rules. Moreover, NYSE rules will continue to require that qualified supervisors perform all supervisory functions, such as approval of accounts and review of account activity.<sup>8</sup> Indeed, NYSE will require that where a registered representative-in-charge is an independent contractor, the employing member or member organization submit a written statement confirming that it has not assigned or delegated supervisory responsibilities to the registered representative-in-charge. This written statement will be in addition to documents already required to be submitted by the member or member organization in seeking approval of independent contractor status, such as written assurances that the member or member organization will supervise and control all activities of the independent contractor the same as it regulates the activities of all other registered representatives.<sup>9</sup>

It is therefore ordered, pursuant to section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (File No. SR-NYSE-2003-26) be, and it hereby is, approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

Margaret H. McFarland,  
Deputy Secretary.

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## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Proposed Advisory Circular; Instructions for Continued Airworthiness; Maintenance Tasks for High Intensity Radio Frequency (HIRF)/ Electromagnetic Interference (EMI)/ Lightning Protection Features

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Notice of availability of proposed advisory circular and request for comments.

**SUMMARY:** The Federal Aviation Administration (FAA) announces the availability of proposed advisory circular (AC) number 33.4-3,

<sup>8</sup> See NYSE Rules 342, 345.

<sup>9</sup> See NYSE Rule 345(a), Interpretation /02.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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.

<sup>3</sup> See Release No. 34-48579 (October 1, 2003), 68 FR 57947 ("Notice").

<sup>4</sup> Notice, 68 FR at 57948.