



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

February 1, 2007

DIVISION OF
MARKET REGULATION

Mary Yeager
Assistant Secretary
New York Stock Exchange LLC
11 Wall Street
New York, NY 10005

Re: NYSE Request for Exemptions from Certain Provisions of the Intermarket Trading System ("ITS") Plan

Dear Ms. Yeager:

In your letter, dated January 26, 2007,¹ you requested, on behalf of the New York Stock Exchange LLC ("NYSE" or the "Exchange") that the Commission grant exemptions pursuant to Rule 608(e) under the Securities Exchange Act of 1934 ("Act")² from certain provisions of the ITS Plan, in connection with implementation of Phase IV of the Exchange's Hybrid MarketSM rollout. Specifically, you requested the exemptions from Section 8(d)(i) (Trade-Throughs; Locked Markets), and Exhibit B, Section (b)(1) of the ITS Plan, with respect to the use of intermarket sweep orders ("ISOs"),³ execution of which by NYSE could violate the ITS Plan. You also requested an exemption for trade-throughs that occur when the market is crossed, and when a quote affirmatively is marked as "slow" or "non-firm."

Since October 1, 2006, the effective date of the "Plan for the Purpose of Creating and Operating an Intermarket Communications Linkage Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934" ("Linkage Plan"), connectivity between markets is provided pursuant to the Linkage Plan.⁴ The purpose of the ITS Plan and the Linkage Plan is to enable their

¹ See Letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy M. Morris, Secretary, Securities and Exchange Commission ("Commission"), dated January 26, 2007 ("NYSE Exemption Request").

² 17 C.F.R. § 242.608(e). Rule 608(c) requires each participant in a national market system plan to comply, and enforce compliance with, the plan by its members and their associated persons. Rule 608(e) establishes the Commission's authority to exempt any self-regulatory organization ("SRO") or SRO member from the requirements of the Rule.

³ Intermarket Sweep Orders are defined in Rule 600(b)(30) of Regulation NMS. 17 C.F.R. § 242.600(b)(39). As noted in footnote 9, *infra*, the NYSE will require all members that route ISOs to the Exchange prior to the Trading Phase Date of Regulation NMS to protect any better-priced quotation of any other ITS participant.

⁴ See Securities Exchange Act Release No. 54551 (September 29, 2006), FR 59148 (October 6, 2006) (approving the Linkage Plan).

participants to act jointly in planning, developing, operating, and regulating the System⁵ that electronically links the participant markets to one another, as described in the ITS Plan and the Linkage Plan. The Linkage Plan, together with the ITS Plan, governs the operation of the System until the termination of the ITS Plan, which is expected to take place on the Trading Phase Date.⁶ After the Trading Phase Date and until the termination of the Linkage Plan, the operation of the System would be governed by the Linkage Plan. Therefore, until the Trading Phase Date, when the ITS Plan is expected to terminate, NYSE remains subject to the ITS Plan.⁷

On September 18, 2006, to permit the Linkage Plan participants to commence trading pursuant to the Linkage Plan, the ITS Plan participants, including NYSE, requested exemptions from certain provisions of the ITS Plan.⁸ However, Section 8(d)(i) and Exhibit B, Section (b)(1) regarding the avoidance of trade-throughs continue to apply to the ITS Plan participants, including NYSE.

Phase IV of the Hybrid rollout is designed to complete the NYSE's compliance with Regulation NMS, including the acceptance of ISOs. This new software release also allows trading through all better-priced quotes when the market is crossed and trading through top-of-book quotes that are marked as "slow" or "non-firm." Once the Phase IV software is put into operation for a particular security, the NYSE would trade through those quotations which another market affirmatively designates as "slow" or "non-firm" by use of the CTA-approved indicators. In the absence of such indicator, the NYSE would automatically route to better-priced top of book quotations when executing a trade at a price inferior to those quotations.

⁵ The current ITS technology is used to effectuate both the ITS and the Linkage plans. Therefore, the term "System" applies to the technology used to effectuate both the ITS Plan and the Linkage Plan.

⁶ Trading Phase Date is the required date for full operation of Regulation NMS-compliant trading systems of all automated trading centers that intend to qualify their quotations for trade-through protection under Rule 611. On January 24, 2007, the Commission extended the Trading Phase Date until March 5, 2007. See Securities Exchange Act Release No. 55160 (January 24, 2007), 72 FR 4202 (January 30, 2007).

⁷ Because the Linkage Plan does not contain trade-through and locked market prohibitions, the ITS Plan was preserved for the period before the Trading Phase Date. The ITS Plan participants include the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the Chicago Stock Exchange, Inc., the Nasdaq Stock Market LLC, the National Association of Securities Dealers, Inc., the National Stock Exchange, Inc., the NYSE, NYSE Arca, Inc., and the Philadelphia Stock Exchange, Inc.

⁸ The ITS Plan participants asked for these exemptions because certain provisions of the ITS Plan conflict with the operation of the Linkage Plan, whereas other provisions of the ITS Plan are no longer relevant. The Commission granted the requested exemptions, including the exemption from Section 8(d)(ii) (Adoption of Trade-Through Rules), on September 29, 2006. See Letter from David Shillman, Associate Director, Division of Market Regulation, Commission, to Robert Hill, Chairman, ITS Operating Committee, dated September 29, 2006 ("ITS Exemption Letter").

Generally, Section 8(d)(i) and Exhibit B, Section (b)(1) of the ITS Plan, which governs trading in non-Nasdaq securities, requires that participants avoid trading through any bid or offer from an ITS participating market center. Therefore, NYSE requires, subject to the conditions described herein, an exemption from Section 8(d)(i) and Exhibit B, Section (b)(1) of the ITS Plan to trade through ITS protected quotations before the Trading Phase Date in connection with: (1) the acceptance and execution of ISOs;⁹ (2) crossed markets (i.e., where an ITS protected bid is higher than an ITS protected offer);¹⁰ and (3) quotes affirmatively marked "slow" or "non-firm" by use of the CTA-approved indicators.

Based on the aforementioned factors and conditions, the Commission finds that the exemptions from Section 8(d)(i) and Exhibit B of the ITS Plan, described above, are consistent with the requirements of Rule 608 (e) under the Act in that they are consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and the perfection of the mechanisms of, a national market system. Specifically, the Commission believes that the NYSE proposal is reasonably designed to allow NYSE and its market participants the opportunity to gain experience with the NYSE's Regulation NMS-compliant trading system and ISOs before the Trading Phase Date.

Accordingly, based on the NYSE's representations and the facts presented, the Commission hereby grants the exemptions described above to the NYSE, effective February 1, 2007 up to the Trading Phase Date of Regulation NMS. These exemptions are subject to modification or revocation at any time, however, if the Commission determines that such action is necessary or appropriate to further the purposes of the Act.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹¹



David Shillman
Associate Director

⁹ On January 26, 2007, the Exchange filed an immediately effective rule change proposing new Rule 15B(T), which requires member organizations that route ISOs to the Exchange during this interim period to simultaneously send ISOs (or comparable orders) to execute against the full displayed size of every other ITS participant displaying a better-priced quotation. See Securities Exchange Act Release No. 55210 (January 31, 2007) (SR-NYSE-2007-08). The Exchange represented that it will conduct surveillance to assure that its members are in compliance with the Exchange's rules governing the use of ISOs.

¹⁰ There is a similar exemption for crossed markets in Rule 611(b)(4) of Regulation NMS that is scheduled to become operative on the Trading Phase Date.

¹¹ See 17 CFR § 200.30-3(a)(27).



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Mary Yeager
Assistant Secretary
New York Stock Exchange LLC
11 Wall Street
New York, NY 10005

Dear Ms. Yeager:

In your letter, dated January 26, 2007,¹ you requested, on behalf of the New York Stock Exchange LLC ("NYSE" or the "Exchange"), that the Commission grant exemptions from certain trade-through provisions of the Intermarket Trading System ("ITS") Plan, in connection with implementation of Phase IV of the Exchange's Hybrid Marketsm rollout, with respect to the use of intermarket sweep orders ("ISOs"), trade-throughs that occur when the market is crossed, and trade-throughs when a quote affirmatively is marked as "slow" or "non-firm." In addition, you requested relief on behalf of the Exchange from the requirement that NYSE enforce compliance by its members with NYSE Rule 15A, adopted pursuant to Section 8(d) of the ITS Plan, with respect only to the corresponding exemptions.

In light of the fact that today the Commission granted the exemptions² pursuant to Rule 608(e) under the Securities Exchange Act of 1934 ("Act"), and based on the facts and representations set forth in the NYSE Exemption Request, the staff of the Division of Market Regulation will not recommend enforcement action to the Commission under Section 19(g)(1) of the Act, if the Exchange does not enforce compliance with NYSE Rule 15A with respect to trade-throughs in connection with ISOs, crossed markets, and quotes marked as "slow" or "non-firm," to the extent permitted by the exemptions.

This staff position is limited to enforcement action under Section 19(g)(1) of the Act and does not purport to express any legal conclusions with respect to the applicability of the statutory or regulatory provisions of the federal securities laws. Moreover, this response is based upon the representations you have made in the NYSE Exemption Request, and any different facts or

¹ See Letter from Mary Yeager, Assistant Secretary, NYSE, to Nancy M. Morris, Secretary, Securities and Exchange Commission ("Commission"), dated January 26, 2007 ("NYSE Exemption Request").

² See Letter from David Shillman, Associate Director, Division, Commission, to Mary Yeager, Assistant Secretary, NYSE, dated February 1, 2007 ("NYSE Exemption Letter").

Mary Yeager
NYSE No-Action Letter
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conditions may require a different response. The Staff's position is subject to modification or revocation at any time if the Commission or the Staff determines that such action is necessary or appropriate, in furtherance of the purposes of the Act.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Shillman". The signature is fluid and cursive, with a prominent initial "D" and a long, sweeping tail.

David Shillman
Associate Director