SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-52382)

September 6, 2005

Order Pursuant to Section 11A of the Securities Exchange Act of 1934 and Rule 608(e) Thereunder Extending a De Minimis Exemption for Transactions in Certain Exchange-Traded Funds from the Trade-Through Provisions of the Intermarket Trading System

This order extends, through June 28, 2006, a de minimis exemption to the provisions of the Intermarket Trading System Plan ("ITS Plan"),[1] a national market system plan,[2] governing intermarket trade-throughs that expired on September 4, 2005. The de minimis exemption was originally issued by the Commission on August 28, 2002[3] and extended on May 30, 2003,[4] on March 3, 2004,[5] and on December 3, 2004.[6]

Specifically, this order continues the de minimis exemption from compliance with Section 8(d)(i) of the ITS Plan with respect to two specific exchange-traded funds ("ETFs"), the

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1 The self-regulatory organizations ("SROs") participating in the ITS Plan include the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the Chicago Stock Exchange, Inc., the National Stock Exchange, Inc. (formerly the Cincinnati Stock Exchange, Inc.), the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc. (collectively, the "participants"). See Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983).

2 Securities Exchange Act of 1934 ("Act") Rule 11Aa3-2(d), 17 CFR 240.11Aa3-2(d), promulgated under Section 11A, 15 U.S.C. 78k-1, of the Act requires each SRO to comply with, and enforce compliance by its members and their associated persons with, the terms of any effective national market system plan of which it is a sponsor or participant. Rule 608(e) (formerly Rule 11Aa3-2(f)), 17 CFR 242.608(e), under the Act authorizes the Commission to exempt, either unconditionally or on specified terms and conditions, any SRO, member of an SRO, or specified security from the requirement of the rule if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

3 See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) (the "August 2002 Order"). The August 2002 Order granted relief through June 4, 2003.

4 See Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003) (the "May 2003 Order"). The May 2003 Order granted relief through March 4, 2004.

5 See Securities Exchange Act Release No. 49356 (March 3, 2004), 69 FR 11057 (March 9, 2004) (the "March 2004 Order"). The March 2004 Order granted relief through December 4, 2004.

6 See Securities Exchange Act Release No. 50795 (December 3, 2004), 69 FR 71445 (December 9, 2004) (the "December 2004 Order"). The December 2004 Order granted relief through September 4, 2005.

Dow Jones Industrial Average ETF ("DIA") and the Standard & Poor's 500 Index ETF ("SPY").[7] By its terms, the December 2004 Order continued the exemption from the trade-through provisions of the ITS Plan of any transactions in the two ETFs that are effected at prices at or within three cents away from the best bid and offer quoted in the Consolidated Quote System ("CQS") for a period of nine months, which ended on September 4, 2005.

Our August 2002, May 2003, March 2004, and December 2004 orders discussed our basis for determining that issuing and extending the de minimis exemption was consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system. The December 2004 Order further noted that:

> In March 2004 and in May 2003, the Commission extended the three cent de minimis exemption for additional nine-month periods, in order to assess trading data associated with the de minimis exemption and to consider whether to adopt the de minimis exemption on a permanent basis, to adopt some other alternative solution, or to allow the exemption to expire. As a result of its review of trading data associated with the de minimis exemption, the Commission has proposed, as part of its market structure initiatives, Regulation NMS under the Act, which would include a new rule relating to trade-throughs.

On April 6, 2005, the Commission approved Regulation NMS under the Act.[8] In Regulation NMS, the Commission adopted an approach that, among other things, protects only automated quotations and excludes manual quotations from trade-through protection, and renders the de minimis exemption unnecessary. However, until Regulation NMS is implemented in this

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7 The Commission limited the de minimis exemption to these two securities because they share certain characteristics that may make immediate execution of their shares highly desirable to certain investors. In particular, trading in the two ETFs is highly liquid and market participants may value an immediate execution at a displayed price more than the opportunity to obtain a slightly better price. Unlike prior orders, the December 2004 extension of the de minimis exemption applied only to the DIA and the SPY, and not the QQQ, because, on December 1, 2004, trading of the QQQ transferred from the American Stock Exchange to Nasdaq, and thus trades in the QQQ ceased to be subject to the trade-through provisions of the ITS Plan. Accordingly, an exemption for the QQQ was no longer necessary. See December 2004 Order.

8 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

regard, the reasons for maintaining the de minimis exemption in effect continue to be valid.

Therefore, to maintain the status quo and avoid requiring market participants to make short-term trading or programming changes pending such implementation, it is appropriate to extend the de minimis exemption through June 28, 2006, the day before the first scheduled date of that implementation under Regulation NMS. The Commission will consider whether to extend the de minimis exemption further if the DIA or the SPY are not chosen to be included in the NMS compliance phase that begins on June 29, 2006. The Commission emphasizes, as it did in the December 2004 Order, the March 2004 Order, the May 2003 Order, and the August 2002 Order, that the de minimis exemption does not relieve brokers and dealers of their best execution obligations under the federal securities laws and SRO rules.

Accordingly, IT IS ORDERED, pursuant to Section 11A of the Act and Rule 608(e) thereunder,[9] that participants of the ITS Plan and their members are hereby exempt from Section 8(d) of the ITS Plan during the period covered by this Order with respect to transactions in DIAs and SPYs that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS. This Order extends the de minimis exemption from September 4, 2005 through June 28, 2006.

By the Commission.

Jonathan G. Katz
Secretary

[9] 17 CFR 242.608(e).