

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-53856)

May 24, 2006

Order Granting Exemption to NYSE Market, Inc. and NYSE Arca, L.L.C. from Requirement to Register as a Securities Information Processor

I. Introduction

In a letter dated April 4, 2006,¹ NYSE Market, Inc. (“NYSE Market”) and NYSE Arca, L.L.C. requested that the Securities and Exchange Commission (“Commission”) grant each of them a permanent exemption from the requirement under Section 11A(b) of the Securities Exchange Act of 1934 (“Exchange Act”) that a securities information processor acting as an exclusive processor register with the Commission.² For the reasons discussed below, the Commission grants each of NYSE Market and NYSE Arca, L.L.C. an exemption from the requirement to register pursuant to Section 11A(b) of the Exchange Act, subject to the conditions specified in this order.

II. Background

The New York Stock Exchange, Inc. (“NYSE”) and Archipelago Holdings, Inc. (“Archipelago”) merged on March 7, 2006. The merger combined the businesses of the NYSE and Archipelago under a single, publicly traded holding company called NYSE Group, Inc. (“NYSE Group”). New York Stock Exchange LLC (“NYSE LLC”), a wholly owned subsidiary of NYSE Group, succeeded to the registration of the NYSE as a national securities exchange. NYSE LLC has delegated performance of its market functions to NYSE Market, a wholly owned subsidiary of NYSE LLC. These market functions include the authority to act as a securities information processor for quotation and transaction information related to securities traded on NYSE Market and other trading facilities operated by NYSE Market. Archipelago, now also a wholly owned subsidiary of NYSE Group, continues to be the sole owner of NYSE Arca, Inc. (“NYSE Arca”), a registered national securities exchange formerly known as the Pacific Exchange, Inc. In addition, NYSE Arca, L.L.C. (formerly known as Archipelago Exchange, L.L.C.), a wholly-owned subsidiary of Archipelago, continues to operate the equity market functions of NYSE Arca.

¹ See letter from James F. Duffy, Assistant Secretary, NYSE Market, Inc., and Janet Angstadt, Deputy General Counsel, NYSE Arca, L.L.C., to Robert L.D. Colby, Acting Director, Division of Market Regulation, Securities and Exchange Commission, dated April 4, 2006 (“April 4 Letter”).

² 15 U.S.C. 78k-1(b). Rule 609 under the Exchange Act, 17 CFR 242.609, requires that the registration of a securities information processor be on Form SIP, 17 CFR 249.1001.

In connection with the merger, the Commission approved a proposed rule change filed by the NYSE pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. In the approval order, the Commission stated that, because NYSE Market would be engaging, on an exclusive basis on behalf of NYSE LLC, in collecting, processing, or preparing for distribution or publication information with respect to transactions or quotations on, or effected or made by means of, a facility of NYSE LLC, it would be an exclusive processor that would be required to register pursuant to Section 11A(b) of Act.³ Similarly, the Commission stated, in an order approving a proposed rule change filed by the Pacific Exchange in connection with the merger, its belief that NYSE Arca, L.L.C. is acting as an exclusive processor for NYSE Arca and is therefore also subject to the registration requirement in Section 11A(b) of the Exchange Act.⁴

The Commission granted each of NYSE Market and NYSE Arca, L.L.C. a temporary exemption from registration under Section 11A(b)(1) of the Exchange Act and Rule 609 thereunder for a period of thirty days from the closing of the merger while an application for registration or an application for an exemption from registration is prepared.⁵ The Commission also granted a conditional continuation of the 30-day exemption for an additional 90 days, provided that each of NYSE Market and NYSE Arca, L.L.C. filed an application for registration or exemption within the initial 30-day period.⁶

On April 4, 2006, NYSE Market and NYSE Arca, L.L.C. filed with the Commission a joint request to grant each a permanent exemption from the registration requirement in Section 11A(b) of the Act.⁷ NYSE Market and NYSE Arca, L.L.C. believe that the purposes of Section 11A(b) of the Exchange Act are not served by requiring them to register as exclusive processors under Section 11A(b) of the Exchange Act because Section 11A(b) subjects registered securities information processors to a regulatory regime to which they are already subject in all material respects as facilities of registered national securities exchanges.⁸

³ See Securities Exchange Act Release No. 34-53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (order approving SR-NYSE-2005-77, as amended).

⁴ See Securities Exchange Act Release No. 34-53383 (February 27, 2006), 71 FR 11271 (March 6, 2006) (order approving SR-PCX-2005-134, as amended).

⁵ See Securities Exchange Act Release Nos. 53382, supra note 3, at 11271 and 53383, supra note 4, at 11277. This 30-day period expired on April 6, 2006.

⁶ Id.

⁷ See April 4 Letter, supra note 1.

⁸ Id.

III. Discussion

Sections 11A(b)(1) and (2) of the Exchange Act and Rule 609 thereunder (formerly Rule 11Ab2-1) provide that a securities information processor⁹ that is acting as an exclusive processor¹⁰ register with the Commission by filing an application for registration on Form SIP. Section 11A(b)(1) of the Exchange Act and Rule 609(c) thereunder allow the Commission, by rule or order, to conditionally or unconditionally exempt any securities information processor from any provision of Section 11A(b) of the Exchange Act or the rules or regulations thereunder, if the Commission finds that such exemption is consistent with the public interest, the protection of investors, and the purposes of Section 11A(b).¹¹

In its release adopting Rule 609, the Commission provides a framework for the consideration of exemption requests pursuant to Section 11A(b)(1) of the Exchange Act.¹² Specifically, the Commission indicates that the need for registration of an exclusive processor should be considered in respect of Sections 11A(b)(1), (b)(3) and (b)(5) and Sections 17(a) and (b) of the Exchange Act, insofar as they provide a framework for the surveillance and regulation of registered securities information processors. The Commission stated that any application for an exemption from registration should show not only how such exemption would be consistent with the statutory purposes discussed in the release, but also should demonstrate why, by virtue of

⁹ Section 3(a)(22) of the Exchange Act, 15 U.S.C. 78c(a)(22)(A), defines the term securities information processor to mean any person engaged in the business of (i) collecting, processing, or preparing for distribution or publication, or assisting, participating in, or coordinating the distribution or publication of, information with respect to transactions in or quotations for any security (other than an exempted security) or (ii) distributing or publishing (whether by means of a ticker tape, a communications network, a terminal display device, or otherwise) on a current and continuing basis, information with respect to such transactions or quotations.

¹⁰ Under Section 3(a)(22)(B) of the Exchange Act, 15 U.S.C. 78c(a)(22)(B), an exclusive processor is defined as any securities information processor or self-regulatory organization which, directly or indirectly, engages on an exclusive basis on behalf of any national securities exchange or registered securities association, or any national securities exchange or registered securities association which engages on an exclusive basis on its own behalf, in collecting, processing, or preparing for distribution or publication any information with respect to (i) transactions or quotations on or effected or made by means of any facility of such exchange or (ii) quotations distributed or published by means of any electronic system operated or controlled by such association.

¹¹ See 15 U.S.C. 78k-1(b)(1) and 17 CFR 242.609(c).

¹² See Securities Exchange Act Release No. 11673 (September 23, 1975), 40 FR 45422 (October 2, 1975) (adopting Commission Rule 11Ab2-1, which has been redesignated as Rule 609).

the applicant's organization, operation or other characteristics, the applicant should be exempted from registration, the requirements of Section 11A(b) and the Commission's authority under Sections 17(a) and 17(b) of the Exchange Act.¹³

As noted above, the Commission believes that NYSE Market and NYSE Arca LLC are acting as exclusive processors as defined in Section 3(a)(22)(B) of the Exchange Act because they are engaging on an exclusive basis on behalf of NYSE LLC and NYSE Arca, respectively, in collecting, processing, or preparing for distribution or publication information with respect to transactions or quotations on, or effected or made by means of, a facility of NYSE LLC or NYSE Arca, as applicable. Further, NYSE Market, in carrying out the market functions of NYSE LLC, operates (and is regulated) as a facility of NYSE LLC, which is a national securities exchange registered under Section 6 of the Exchange Act and the rules and regulations thereunder.¹⁴ Likewise, NYSE Arca, L.L.C., in operating the equity market functions of NYSE Arca, operates and is regulated as a facility of NYSE Arca and its subsidiary, NYSE Arca Equities, Inc. In the April 4 Letter, each of NYSE Market and NYSE Arca, L.L.C. represent that it does not perform any exclusive processor functions other than in its capacity as a facility for NYSE LLC and NYSE Arca, respectively.¹⁵

As discussed below, with respect to operations as facilities of registered national securities exchanges, each of NYSE Market and NYSE Arca, L.L.C. already is subject to regulation and Commission oversight under the Exchange Act to the same extent as registered exchanges.¹⁶ Oversight and regulation of registered exchanges encompass and exceed the oversight and regulation to which NYSE Market and NYSE Arca, L.L.C. would be subject pursuant to registration under Section 11A(b)(1) of the Exchange Act and the rules and regulations thereunder. Accordingly, the Commission believes that registration of NYSE Market and NYSE Arca, L.L.C. as exclusive processors under Section 11A(b)(1) of the Exchange Act with respect to those functions that they carry out

¹³ Id. at 45423.

¹⁴ Section 3(a)(2) of the Exchange Act, 15 U.S.C. 78c(a)(2), defines the term facility, with respect to an exchange, to include its premises, tangible or intangible property whether on the premises or not, any right to use such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.

¹⁵ April 4 Letter, supra note 1, at 2.

¹⁶ The definition of an exchange under the Exchange Act includes “the market facilities maintained by such exchange.” See Section 3(a)(1) of the Exchange Act, 15 U.S.C. 78c(a)(1). The functions and operation of a national securities exchange encompass the collection, processing, and dissemination of information related to securities trading.

as facilities of NYSE LLC and NYSE Arca, respectively, would not further the purposes of the Exchange Act.

A. Denial of Access to Services Provided by a Securities Information Processor or a National Securities Exchange

Section 11A(b)(5)(A) of the Exchange Act (1) requires a registered securities information processor to promptly file notice with the Commission if the processor prohibits or limits any person in respect of access to services offered, directly or indirectly, by the processor, and (2) provides that any such prohibition or limitation will be subject to Commission review, on its own motion or upon application by any person aggrieved.¹⁷ If the prohibition or limitation is reviewed, the Commission shall dismiss the proceeding if it finds (after notice and opportunity a hearing) that such prohibition or limitation is consistent with the provisions of the Exchange Act and the rules and regulations thereunder and that such person has not been discriminated against unfairly. If the Commission does not make such a finding, or if it finds that such prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act, the Commission shall set aside the prohibition or limitation and require the securities information processor to permit such person access to services offered by the processor.¹⁸

NYSE Market and NYSE Arca, L.L.C., however, already are subject to similar Commission regulation and oversight pursuant to Sections 6(b)(7), 6(d), 19(d), and 19(f) of the Exchange Act with respect to their activities as facilities of exchanges.¹⁹ Section 19(d)(1) requires, in part, that an exchange promptly file notice with the Commission if the exchange prohibits or limits any person in respect to access to services offered by such exchange or member thereof.²⁰ Any such action for which the exchange must file notice is subject to Commission review.²¹

In addition, Section 6(b)(7) of the Exchange Act provides that the rules of an exchange, among other things, must provide a fair procedure for the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.²²

¹⁷ See 15 U.S.C. 78k-1(b)(5)(A).

¹⁸ See Section 11A(b)(5)(B) under the Exchange Act, 15 U.S.C. 78k-1(b)(5)(B).

¹⁹ 15 U.S.C. 78f(b)(7) and (d) and 78s(d) and (f).

²⁰ 15 U.S.C. 78s(d)(1).

²¹ 15 U.S.C. 78s(d)(2). See also Section 19(f) of the Exchange Act, 15 U.S.C. 78s(f).

²² 15 U.S.C. 78f(b)(7). Section 6(d)(2), 15 U.S.C. 78f(d)(2), provides procedural requirements for any such proceeding by an exchange.

The Commission therefore believes that regulation of NYSE LLC and NYSE Arca as national securities exchanges provides for equivalent regulation and Commission oversight of actions that NYSE Market or NYSE Arca, L.L.C. may take in their capacity as facilities to deny access to services as would be the case were each to register as an exclusive processor under Section 11A(b) of the Exchange Act.

B. Limitation on Activities of a Securities Information Processor or a National Securities Exchange

Section 11A(b)(6) of the Exchange Act grants the Commission authority to censure or place limitations on the activities, functions, or operations of any registered securities information processor or suspend for a period not exceeding twelve months or revoke the registration of any such processor.²³ Likewise, Section 19(h)(1) of the Exchange Act grants the Commission authority to suspend for a period not exceeding twelve months or revoke the registration of an exchange, or to censure or impose limitations upon the activities, functions, and operations of an exchange.²⁴ The Commission therefore has the authority to place limitations on the activities of NYSE Market and NYSE Arca, L.L.C., with respect to their activities as a facility of a registered national securities exchange.

C. Access to Books and Records of a Securities Information Processor or a National Securities Exchange

Section 17(a)(1) of the Exchange Act requires that national securities exchanges and registered securities information processors make and keep for prescribed periods such records, furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Exchange Act.²⁵ Section 17(b) of the Exchange Act requires that such records be subject at any

²³ 15 U.S.C. 78k-1(b)(6).

²⁴ 15 U.S.C. 78s(h)(1). See also Sections 19(h)(2), (h)(3), and (h)(4) of the Exchange Act, 15 U.S.C. 78f(h)(2), (h)(3), and (h)(4).

²⁵ 15 U.S.C. 78q(a). The Commission has promulgated rules pursuant to Section 17(a) of the Exchange Act that apply to national securities exchanges, but not registered securities information processors. See, e.g., Rule 17a-1 under the Exchange Act, 17 CFR 240.17a-1 (requiring in part a national securities exchange to preserve, for a period of not less than five years, the first two in an easily accessible place, at least one copy of all documents that are made or received by it in the course of its business as such and in the conduct of its self-regulatory activity, and to furnish copies of such records to any representative of the Commission upon request). Form SIP, the application for registration of a securities information processor, does require that a securities information processor provide the Commission with certain information relating to its business organization, financial information, operational capability, and access to services. 17 CFR 249.1001.

time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission and the appropriate regulatory agency for such persons.²⁶

The record retention and production requirements set out in Sections 17(a) and (b) of the Exchange Act therefore already are applicable to NYSE Market and NYSE Arca, L.L.C. with respect to their activities as facilities of NYSE LLC and NYSE Arca, respectively. Thus, requiring NYSE Market and NYSE Arca, L.L.C. to register as exclusive processors with respect to their activities as facilities of registered exchanges would serve no additional regulatory purpose in this instance.

IV. Conclusion

On the basis of the foregoing, the Commission finds that, with respect to their activities as facilities of NYSE LLC and NYSE Arca, granting exemptions to NYSE Market and NYSE Arca, L.L.C. from the requirement to register as securities information processors pursuant to Section 11A(b) of the Exchange Act is consistent with the public interest, the protection of investors, and the purposes of Section 11A(b) of the Exchange Act, including maintenance of fair and orderly markets in securities and the removal of impediments to, and perfection of the mechanism of, a national market system. This exemption is limited only to the exclusive processor activities that NYSE Market performs as a facility of NYSE LLC, and to activities that NYSE Arca, L.L.C. performs as a facility of NYSE Arca.

IT IS HEREBY ORDERED, pursuant to Section 11A(b) of the Exchange Act,²⁷ that NYSE Market and NYSE Arca, L.L.C. shall be exempt from registering as a securities information processor, subject to the conditions specified in this order.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.²⁸

Nancy M. Morris
Secretary

²⁶ 15 U.S.C. 78q(b).

²⁷ 15 U.S.C. 78k-1(b).

²⁸ 17 CFR 200.30-3(49).