

SECURITIES AND EXCHANGE COMMISSION

[RELEASE NO. 34-54766; File No. S7-06-05]

November 16, 2006

Order Granting the New York Stock Exchange Inc.'s (n/k/a the New York Stock Exchange LLC) Application for an Exemption Pursuant to Section 36 of the Securities Exchange Act of 1934

I. Introduction

On May 26, 2005, the Securities and Exchange Commission (the "Commission") received an application from the New York Stock Exchange, Inc. (n/k/a the New York Stock Exchange LLC) ("NYSE" or "Exchange")¹ for an exemption pursuant to Section 36² of the Securities Exchange Act of 1934 (the "Exchange Act"),³ in accordance with the procedures set forth in Exchange Act Rule 0-12.⁴ The NYSE has requested exemptive relief from Section 12(a) of the Exchange Act⁵ to permit its members and brokers or dealers to trade certain unregistered debt securities on its facilities.⁶ On July 8, 2005, the Commission approved publication of a notice of the application submitted by the NYSE, a proposed exemption order,⁷

¹ On October 17, 2006, the NYSE submitted an updated application to the Commission.

² 15 U.S.C. 78mm. Section 36 of the Exchange Act gives the Commission the authority to exempt any person, security or transaction from any Exchange Act provision by rule, regulation or order, to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors.

³ 15 U.S.C. 78a *et seq.*

⁴ 17 CFR 240.0-12. Exchange Act Rule 0-12 sets forth procedures for filing applications for orders for exemptive relief pursuant to Section 36.

⁵ 15 U.S.C. 78l(a).

⁶ The NYSE made its exemption request with regard to the Automated Bond System ("ABS"), an existing bond trading facility. Subsequently, the NYSE filed a proposed rule change, SR-NYSE-2006-37 (the "NYSE Bonds Proposal"), to establish a new trading facility, NYSE Bonds, which would replace ABS. Accordingly, the Commission is granting the exemption described herein for use in conjunction with ABS and any successor bond trading facility, which would include NYSE Bonds, in the event that the NYSE Bonds Proposal is approved.

⁷ See Release No. 34-51998 (July 8, 2005), 70 FR 40748 (July 15, 2005).

and a proposed rule change by the NYSE that would incorporate the terms of the proposed exemption into the NYSE's rules.⁸ We received 19 comment letters on the proposed exemption order.⁹ The responses are discussed more fully below. This order grants the NYSE's application for an exemption, subject to the conditions set forth below.

In connection with NYSE's request for an exemption, it has also proposed a rule change, SR-NYSE-2004-69, to establish rules for the trading of unlisted debt securities on the Exchange. The Commission, via authority delegated to the Division of Market Regulation, today is also approving that rule change,¹⁰ as well as a rule change relating to trade reporting for transactions in unregistered debt securities proposed by the National Association of Securities Dealers, Inc. ("NASD").¹¹

II. Order Granting the New York Stock Exchange's Application for an Exemption Pursuant to Section 36 of the Securities Exchange Act of 1934

Section 12(a) of the Exchange Act provides in relevant part that "[i]t shall be unlawful for any "member, broker or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for such exchange." Section 12(b) of the Exchange Act¹² dictates how the registration referred to in Section 12(a) must be accomplished. Accordingly, all equity and debt securities that are not "exempted securities" or are not otherwise exempt from Exchange Act registration

⁸ See Release No. 34-51999 (July 8, 2005), 70 FR 41067 (July 15, 2005) (SR-NYSE-2004-69).

⁹ The commenters are as follows: Bond Market Association; Representative Michael Castle; Mr. William Dolan; Mr. Donald Dueweke; Mr. Howard Friedman; Ms. Robyn Greene; Mr. Denis Kelleher; Mr. Ron Klein; Mr. Dennis J. Lehr; Multiple Markets, Inc.; the National Association of Securities Dealers, Inc.; NASDAQ Stock Market LLC; New York Stock Exchange LLC; Mr. Joseph Riveiro; Mr. David Russell Jr.; and Mr. Fred Siesel.

¹⁰ See Release No. 34-54767 (November 16, 2006) (SR-NYSE-2004-69).

¹¹ See Release No. 34-54768 (November 16, 2006) (SR-NASD-2006-110).

¹² 15 U.S.C. 78l(b).

must be registered by the issuer under the Exchange Act before a member, broker or dealer may trade that class of securities on a national securities exchange.

Contrarily, brokers or dealers who trade debt securities otherwise than on a national securities exchange may trade debt securities regardless of whether the issuer registered that class of debt under the Exchange Act. This is so because Exchange Act registration for securities traded other than on a national securities exchange is required only for certain equity securities. In particular, Section 12(g) of the Exchange Act,¹³ the only Exchange Act provision other than Section 12(a) to impose an affirmative Exchange Act registration requirement, requires the registration of equity securities exclusively.

As the Commission has stated in the past, we believe that this disparate regulatory treatment may have negatively and unnecessarily affected the structure and development of the debt markets.¹⁴ In 1994, to reduce existing regulatory distinctions between exchange-traded debt securities and unlisted debt securities that trade in the “over-the-counter” (“OTC”) market, we adopted Exchange Act Rule 3a12-11.¹⁵ Rule 3a12-11 provides for the automatic effectiveness of Form 8-A registration statements for exchange-traded debt securities, exempts exchange-traded debt from the borrowing restrictions under Section 8(a) of the Exchange Act,¹⁶ and exempts exchange-traded debt from certain proxy and information statement requirements under Sections

¹³ 15 U.S.C. 78l(g). Section 12(g)(1) of the Exchange Act and Rule 12g-1 [17 CFR 240.12g-1] promulgated thereunder require an issuer to register a class of equity securities if the issuer of the securities, at the end of its fiscal year, has more than \$10,000,000 in total assets and a class of equity securities held by 500 or more recordholders.

¹⁴ See Release Nos. 34-34922 (November 1, 1994), 59 FR 55342 (November 7, 2004), and 34-34139 (June 1, 1994), 59 FR 29398 (June 7, 1994).

¹⁵ 17 CFR 240.3a12-11.

¹⁶ 15 U.S.C. 78h(a).

14(a), (b) and (c) of the Exchange Act.¹⁷ Despite these efforts, the vast majority of secondary trading of debt securities continues to occur in the OTC market, which suggests that there still may be regulatory impediments that need to be addressed.¹⁸

In addition, we have sought to increase the level of transparency in the public debt markets. We have long believed that price transparency in the U.S. capital markets is fundamental to promoting the fairness and efficiency of our markets.¹⁹ In 1998, the Commission's staff conducted a review of the public debt markets and found that in the area of corporate debt securities, price transparency was deficient.²⁰ Following the staff's 1998 review, the NASD was encouraged to develop systems to receive and redistribute prices of transactions in corporate debt securities on an immediate basis.²¹

We view the exemptive relief requested by the NYSE as another step to improve the public debt markets. The Commission believes that granting the NYSE's application will serve the public interest by minimizing unnecessary regulatory disparity and promoting competition. Currently, unlike on a national securities exchange, broker-dealers may trade debt securities in the OTC market regardless of whether the issuer registered that class of debt under the Exchange Act. The exemption is designed to minimize that disparate regulatory treatment and promote

¹⁷ 15 U.S.C. 78n(a), (b) and (c).

¹⁸ The NYSE estimates that there are over 22,000 publicly offered corporate bond issues having a par value in excess of \$3 trillion but only 8% of the \$3 trillion par value is registered under the Exchange Act and so may be traded on the NYSE. See NYSE's request for exemptive relief. Letter to Jonathan G. Katz, Secretary, Commission, from Mary Yeager, NYSE, dated May 26, 2005. See Release No. 34-51998.

¹⁹ See Testimony of Chairman Arthur Levitt Before the House Subcommittee on Finance and Hazardous Materials, Committee on Commerce, Concerning Transparency in the United States Debt Market and Mutual Fund Fees and Expenses (September 29, 1998).

²⁰ Id.

²¹ Id.

competition between the corporate debt security markets. Moreover, the exemption may improve the existing level of transparency on the current OTC market.

At the same time, the conditions of the exemption serve to protect investors by minimizing any reduction in information available as a result of the exemption. Further, the conditions are designed to ensure that investors continue to have access to comprehensive public information about an issuer, including the issuer's detailed disclosure in a registration statement filed under the Securities Act of 1933 and accompanying trust indenture qualified under the Trust Indenture Act of 1939, and substantially all of the public information that would be available if the debt securities were registered under Section 12 of the Exchange Act.

We received 19 comment letters on the proposed exemption order. The commenters generally supported the proposed exemption. We have, however, added an additional condition to the exemption based on a response from the Bond Market Association ("BMA"). The BMA expressed concern that debt securities of an issuer that does not have equity securities listed on a national securities exchange, such as a wholly-owned subsidiary of an issuer of equity securities, would lose the exemption from state law regulation provided by Section 18 of the Securities Act²² for "covered securities" if the NYSE unilaterally delisted debt securities eligible for trading under this exemption order. To address this concern, we have added a new condition to the order stating that the NYSE will delist a class of debt securities only if the issuer of the class of debt security does not object to the delisting. As the potential loss of covered security status under

²² 15 U.S.C. 77r. Section 18 of the Securities Act preempts state regulation that would require the registration or qualification of covered securities, or registration or qualification of securities transactions that involve covered securities. Under Section 18, a security is a "covered security" if it is: (1) listed, or authorized for listing, on the NYSE or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities); (2) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described above; or (3) is a security of the same issuer that is equal in seniority or that is a senior security to a security described in the two preceding paragraphs.

Section 18 of the Securities Act would be an unintended consequence of this exemption, this additional condition would allow an issuer with listed debt securities to maintain covered security status with respect to its securities at its option.

Another commenter, the NASDAQ Stock Market LLC, argued that limiting the bonds eligible to trade pursuant to this exemption exclusively to companies with equity listed on the NYSE, or their wholly-owned subsidiaries, would potentially be anti-competitive to other national securities exchanges. We do not believe this exemption will provide the NYSE with an unfair competitive advantage over other exchanges. Although the unlisted bonds that will trade on the ABS, and any successor bond trading facility pursuant to this exemption will not be eligible to trade on other exchanges pursuant to the unlisted trading privileges of Section 12(f) of the Exchange Act,²³ another exchange may petition the Commission for similar relief that would permit that exchange's members to trade unregistered debt securities on its facilities subject to the conditions imposed by the Commission in this order.

In granting this relief, we expect that the NYSE will design and implement all rules related to the relief in a manner that protects investors and the public interest and does not unfairly discriminate between customers, issuers, brokers or dealers. We view the exemptive relief requested by the NYSE as another step to improve the public markets and believe that granting the NYSE's application will minimize unnecessary regulatory disparity, promote competition and transparency in the public debt markets and is necessary and appropriate in the public interest and consistent with the protection of investors.

Accordingly, IT IS ORDERED pursuant to Section 36 of the Exchange Act that, under the terms and conditions set forth below, an NYSE member, broker or dealer may effect a

²³ 15 U.S.C. 78l(f). Section 12(f) of the Exchange Act permits a national securities exchange to extend unlisted trading privileges to any security that is listed and registered on a national securities exchange.

transaction on the ABS, and any successor bond trading facility, in a debt security that has not been registered under Section 12(b) of the Exchange Act without violating Section 12(a) of the Exchange Act.²⁴ This exemption does not extend to any other section or provision of the Exchange Act.

For purposes of this order, a “debt security” is:

Any security that, if the class of securities were listed on the NYSE, would be listed under Sections 102.03 or 103.05 of the NYSE’s Listed Company Manual. A debt security does not include any security that, if the class of securities were listed on the NYSE, would be listed under Sections 703.19 or 703.21 of the NYSE’s Listed Company Manual. Provided, however, under no circumstances does a debt security include any security that is defined as an “equity security” under Section 3(a)(11) of the Exchange Act.

References to Sections 102.03, 103.05, 703.19, and 703.21 of the NYSE’s Listed Company Manual are to those sections as in effect on January 31, 2005.

For purposes of this order, the following conditions must be satisfied:

- (1) The issuer of the debt security has registered the offer and sale of such security under the Securities Act of 1933;²⁵
- (2) The issuer of the debt security, or the issuer’s parent company if the issuer is a wholly-owned subsidiary,²⁶ has at least one class of common or preferred equity securities registered under Section 12(b) of the Exchange Act and listed on the NYSE;
- (3) The transfer agent of the debt security is registered under Section 17A of the Exchange Act;²⁷

²⁴ As noted previously, NYSE members will be able to effect transactions on the NYSE in accordance with the terms of this exemption without violating NYSE rules only after SR-NYSE-2004-69 becomes effective.

²⁵ 15 U.S.C. 77a *et seq.*

²⁶ The terms “parent” and “wholly-owned” have the same meanings as defined in Rule 1-02 of Regulation S-X [17 CFR 210.1-02].

²⁷ 15 U.S.C. 78q-1.

- (4) The trust indenture for the debt security is qualified under the Trust Indenture Act of 1939;²⁸
- (5) The NYSE has complied with the undertakings set forth in its exemptive application to distinguish between debt securities registered under Section 12(b) of the Exchange Act and listed on the NYSE and debt securities trading pursuant to this order; and
- (6) The NYSE will delist a class of debt securities that are listed on the NYSE as of the date of this order only if the issuer of that class of debt security does not object to the delisting of those securities.

By the Commission.

Nancy M. Morris
Secretary

²⁸ 15 U.S.C. 77aaa - 77bbbb.