**UNITED STATES OF AMERICA**
**Before the**
**SECURITIES AND EXCHANGE COMMISSION**

**SECURITIES EXCHANGE ACT OF 1934**
**Release No. 72065 / May 1, 2014**

**ADMINISTRATIVE PROCEEDING**
**File No. 3-15860**

| In the Matter of | ORDER INSTITUTING ADMINISTRATIVE AND CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTIONS 19(h)(1) AND 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING REMEDIAL SANCTIONS AND A CEASE-AND-DESIST ORDER |
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| New York Stock Exchange LLC, NYSE Arca, Inc., NYSE MKT LLC f/k/a NYSE Amex LLC, and Archipelago Securities, L.L.C., | |
| Respondents. | |

## I.

The Securities and Exchange Commission ("Commission") deems it appropriate and in the public interest that public administrative and cease-and-desist proceedings be, and hereby are, instituted pursuant to Sections 19(h)(1) and 21C of the Securities Exchange Act of 1934 ("Exchange Act") against New York Stock Exchange LLC, NYSE Arca, Inc., NYSE MKT LLC f/k/a NYSE Amex LLC, and Archipelago Securities, L.L.C. (collectively, "Respondents" or "NYSE Entities").

## II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") that the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, Respondents consent to the entry of this Order Instituting Administrative and Cease-and-Desist Proceedings Pursuant to Sections 19(h)(1) and 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order ("Order"), as set forth below.

## III.

On the basis of this Order and Respondents' Offers, the Commission finds that:

## Introduction

Congress has subjected national securities exchanges to significant regulatory compliance obligations because of their critical role in the national market system. The Exchange Act requires self-regulatory organizations, including national securities exchanges, to comply with their own rules and the federal securities laws. As part of that process, the Exchange Act requires exchanges to file with the Commission rule proposals or rule changes, and states that no proposed rule change shall take effect unless it is approved by the Commission or otherwise is permitted to become effective and operative as provided by the Exchange Act and the rules thereunder.

The obligation of national securities exchanges such as New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("Arca"), and NYSE MKT LLC f/k/a NYSE Amex LLC ("Amex") (collectively, the "Respondent Exchanges") to operate in compliance with their own rules is fundamental. It enables the exchange's members and all participants in the trading that occurs on each exchange, as well as all persons seeking access to the facilities of the exchanges, to understand on what terms and conditions trading will be conducted on that exchange, thereby fostering a fair, orderly, and free and open market. The Exchange Act requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and in general, protect investors and the public interest.[1] Additionally, the rules of an exchange may not be designed, among other things, to permit unfair discrimination between customers, issuers, brokers, or dealers.[2]

1 *See* Exchange Act Section 6(b)(5).

2 *Id.*

This matter primarily involves a number of episodes in which the Respondent Exchanges engaged in business practices without having effective exchange rules in place,[3] or operated in a manner that did not comply with the exchange rules then in effect or the federal securities laws. In addition, Archipelago Securities L.L.C. ("ArcaSec"), the wholly-owned routing broker for the Respondent Exchanges, failed to establish, maintain, and enforce policies and procedures in connection with error account trading that were reasonably designed to prevent the misuse of material, nonpublic information by the broker or any person associated with the broker. ArcaSec also violated the Exchange Act and rules thereunder by effecting transactions in securities without sufficient net capital and failing to provide timely notice of the net capital deficiency to the Commission.

The Respondent Exchanges devoted insufficient attention to ensuring that the business operations of the exchanges and of their affiliated broker-dealer were conducted in accordance with effective exchange rules and the federal securities laws. In particular, during the relevant periods, the Respondent Exchanges lacked comprehensive and consistently-applied policies and procedures for determining whether new business practices required an exchange rule or rule change and evaluating whether business operations were being conducted fully in accordance with existing exchange rules and the federal securities laws. Further, the exchanges lacked adequate policies and procedures for ensuring that proposed rules and rule changes that were filed with the Commission accurately reflected the manner in which a particular business operation or practice actually would function. Moreover, in certain of the scenarios described below, the Respondent Exchanges continued to operate without effective exchange rules or in violation of an existing rule for extended periods of time because they failed to promptly file appropriate rule proposals for already ongoing exchange operations that required a rule or filed rule proposals despite having been informed informally by the Commission's staff that a particular proposal was likely not consistent with the Exchange Act.

As a result of this conduct, NYSE, Arca, and Amex each violated Sections 19(b) and 19(g) of the Exchange Act. Arca also violated Rule 612(a) of Regulation NMS. ArcaSec violated Sections 15(c)(3), 15(g), and 17(a)(1) of the Exchange Act, and Rules 15c3-1 and 17a-11(b)(1) thereunder.

## Respondents

**New York Stock Exchange LLC** is a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act. NYSE currently is a New York limited liability company and an indirect, wholly-owned subsidiary of IntercontinentalExchange, Inc. ("ICE"). NYSE's parent, NYSE Euronext, merged with ICE on November 13, 2013.

[3] As used in this Order, "effective exchange rule" means an exchange rule that has been approved by the Commission, either directly or pursuant to delegated authority to the Commission staff; or has become effective through operation of law. *See* Exchange Act Section 19(b) and Rule 19b-4 thereunder.

The Commission previously has brought three enforcement actions against NYSE. In 1999, the Commission found that NYSE had failed to detect and halt unlawful proprietary trading by independent floor brokers. *In the Matter of New York Stock Exchange, Inc.*, Exchange Act Release No. 41574, 1999 WL 430863 (June 29, 1999). In 2005, the Commission found that NYSE had failed to detect, investigate, and discipline widespread unlawful proprietary trading by specialists on the floor of the exchange. *In the Matter of New York Stock Exchange, Inc.*, Exchange Act Release No. 51524, 2005 WL 840452 (April 12, 2005). In 2012, the Commission found that NYSE violated Regulation NMS Rule 603 by failing to distribute market data information to market participants on terms that were "fair and reasonable" and "not unreasonably discriminatory." *In the Matter of New York Stock Exchange LLC and NYSE Euronext*, Exchange Act Release No. 67857, 2012 WL 4044880 (Sept. 14, 2012).

**NYSE Arca, Inc.** is a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act. Arca is a Delaware corporation and an indirect, wholly-owned subsidiary of ICE. In 2000, the Commission found that Arca's predecessor, Pacific Exchange, Inc., failed to discharge its duties as a self-regulatory organization by enforcing compliance with a number of the exchange's options trading rules. *In the Matter of Certain Activities of Options Exchanges*, Exchange Act Release No. 43268, 2000 WL 1277616 (Sept. 11, 2000).

**NYSE MKT LLC f/k/a NYSE Amex LLC** is a national securities exchange registered with the Commission pursuant to Section 6 of the Exchange Act. Amex currently is a Delaware limited liability company and an indirect, wholly-owned subsidiary of ICE.

The Commission previously brought two enforcement actions against Amex prior to its merger with NYSE Euronext in 2008. In 2000, the Commission found that Amex did not discharge its duties as a self-regulatory organization by failing to enforce compliance with a number of the exchange's options trading rules. *In the Matter of Certain Activities of Options Exchanges*, Exchange Act Release No. 43268, 2000 WL 1277616 (Sept. 11, 2000). In 2007, the Commission found that Amex failed to enforce certain order handling rules and recordkeeping obligations. *In the Matter of American Stock Exchange LLC*, Exchange Act Release No. 55507, 2007 WL 2744640 (March 27, 2007).

**Archipelago Securities, L.L.C.** is a broker-dealer registered pursuant to Section 15 of the Exchange Act and is a member of each of the Respondent Exchanges, the Financial Industry Regulatory Authority, Inc. ("FINRA"), and several other national securities exchanges. ArcaSec currently is a Delaware limited liability company and an indirect, wholly-owned subsidiary of ICE. ArcaSec operates as a facility of each of the Respondent Exchanges that provides outbound routing between each exchange and other market centers, and among the Respondent Exchanges, subject to certain conditions. The operation of ArcaSec as a facility of the Respondent Exchanges is subject to oversight by those exchanges and the Commission, and also by FINRA, its designated examining authority as a broker-dealer. Each exchange is required to file proposed rule changes with the Commission in accordance with Section 19(b) of the Exchange Act and Rule 19b-4 thereunder relating to the functions to be performed by ArcaSec in its role as an exchange facility.

## Facts

In each of the instances described below, one or more of the Respondent Exchanges either conducted a new or modified business practice for which an exchange rule was required, but without having one in place, or conducted such business practice in a manner that was inconsistent with the exchange rule then in effect, or the federal securities laws. Similarly, ArcaSec did not have an adequate written policy to prevent a potential misuse of material, nonpublic information, failed to maintain adequate net capital, and did not timely notify the Commission of a net capital deficiency that occurred in January 2010.

### A. NYSE, Arca, and Amex Conducted Error Account Trading Through ArcaSec Without Effective Exchange Rules

ArcaSec has functioned as a routing broker for Arca since 2005,[4] for NYSE since 2007[5], and for Amex since 2008.[6] From its inception as a routing broker for Arca, ArcaSec's functions have been strictly limited and it is "not [to] engage in any business other than its Outbound Router function . . . and other activities approved by the Commission."[7]

In 2005, Arca established an "error account" at ArcaSec. Arca (and later NYSE and Amex) used the ArcaSec error account to trade out of securities positions that the Respondent Exchanges assumed from time to time in the course of their operations as a result of, among other things, computer system malfunctions or outages, unmatched orders, errors from routing to other exchanges, or accommodations. However, in 2005, Arca did not file a proposed rule seeking Commission approval to maintain and use the ArcaSec error account to liquidate securities positions caused by Arca's operations.

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[4] In connection with the merger between PCX Holdings, Inc. and Archipelago Holdings LLC, the Commission in 2005 approved ArcaSec's functioning as the routing broker for the resulting Archipelago Exchange. *See* Exchange Act Release No. 52249 (Aug. 12, 2005), 70 Fed. Reg. 48611 (Aug. 18, 2005); Exchange Act Release No. 52497 (Sept. 22, 2005), 70 Fed. Reg. 56949 (Sept. 29, 2005). When Archipelago Holdings LLC merged with NYSE Group, Inc. in 2006, ArcaSec continued to function as the routing broker for Arca pursuant to the prior Commission orders. A rule confirming ArcaSec as the routing broker for Arca became effective in 2011. *See* Exchange Act Release No. 64730 (June 23, 2011), 76 Fed. Reg. 38235 (June 29, 2011) (approving Arca Equities Rule 7.41 (now Rule 7.45)); Exchange Act Release No. 55590, fn. 10 (April 5, 2007), 72 Fed. Reg. 18707 (April 13, 2007).

[5] ArcaSec's permitted function as the routing broker for NYSE is set forth in NYSE Rule 17, which became effective in April 2007. *See* Exchange Act Release No. 55590.

[6] ArcaSec's permitted function as the routing broker for Amex is set forth in Amex Equities Rule 17, which became effective in November 2008. *See* Exchange Act Release No. 59009 (Nov. 24, 2008), 73 Fed. Reg. 73363 (Dec. 2, 2008).

[7] *See* Exchange Act Release No. 52497 (Sept. 22, 2005), 70 Fed. Reg. at 56953 (Sept. 29, 2005).

Similarly, when exchange rules became effective for ArcaSec to act as a routing broker for NYSE, in April 2007, and for Amex, in November 2008, respectively, those rules did not provide for the existence and use of an error account at ArcaSec to liquidate securities positions resulting from the exchanges' operations.[8] Over the years, error account trading was conducted on numerous occasions on behalf of each of the Respondent Exchanges when each exchange lacked an effective exchange rule that permitted trading through an error account.

On January 11, 2010, a trading systems testing error occurred at Arca that caused ArcaSec to acquire erroneous long and short positions in twelve securities with a total value in excess of $4 billion, composed of approximately $2 billion in long positions and $2 billion in short positions on both sides of the twelve securities. As a result, ArcaSec held net long positions of approximately $232 million in three securities and net short positions of approximately $271 million in nine other securities. On that day, an Arca information technology employee, in the course of conducting a system test, mistakenly connected an automated testing tool to Arca's live trading environment, rather than to a testing environment where the testing was to have been performed. Over the course of approximately fifteen minutes, the testing tool generated more than 18,000 purchase and sale orders that resulted in executions of buy and sell orders totaling over 28 million shares. The erroneously-acquired positions were placed into ArcaSec's error account.

Prior to any notice being provided to the Commission by ArcaSec that the incident had occurred, Arca employees on the Arca Trade Operations Desk ("TOD"),[9] acting under the direction of a senior Arca official and with the knowledge of NYSE senior management, and in their dual capacities as registered representatives associated with ArcaSec, traded out of the positions in the ArcaSec error account during the after-hours market on January 11 and during market hours the morning of January 12. The trading resulted in ArcaSec sustaining a net loss of $1,175,274.

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[8] ArcaSec's approved functions as the routing broker for the Respondent Exchanges were limited to the following, in pertinent part:

> 1. The Routing Broker(s) will receive routing instructions from the Exchange, to route orders to other market centers and report such executions back to the Exchange. The Routing Broker(s) cannot change the terms of the order or the routing instructions, nor does the Routing Broker(s) have any discretion about where to route an order.
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> 2. The broker-dealer affiliate of the Exchange that acts as a Routing Broker will not engage in any other business other than (a) its outbound router function and (b) any other activities it may engage in as approved by the Commission.

NYSE Rule 17; Amex Equities Rule 17; Arca Equities Rule 7.41.

[9] ArcaSec did not employ traders. Rather, certain employees who worked on Arca's Trade Operations Desk, who also were registered representatives associated with ArcaSec, were assigned by Arca management to conduct error account trading on behalf of all of the Respondent Exchanges.

Arca provided notice of the testing error and error account trading to the Commission staff on January 13, 2010. The Commission's Office of Compliance Inspections and Examinations ("OCIE") conducted an examination following the January 2010 trading incident. In late February 2010, the Commission staff told Arca senior management that error account trading at ArcaSec on behalf of Arca and the other affiliated exchanges should be described in an effective exchange rule.

Nevertheless, Arca and NYSE continued to trade in the ArcaSec error account on at least thirty-one additional occasions through the end of 2010 even though neither exchange had an effective rule permitting such trading. In January 2011, NYSE submitted to the Commission's staff an initial draft rule proposal that, consistent with prior practice, provided for error account trading to be conducted by Arca TOD personnel.[10]

In February 2011, NYSE Euronext compliance officials instructed Arca and ArcaSec management to discontinue using the ArcaSec error account until there were effective exchange rules allowing the Respondent Exchanges to do so. Notwithstanding the express direction from NYSE Euronext compliance officials prohibiting the use of the error account, on several additional occasions in 2011 Arca and NYSE used the ArcaSec error account to trade out of positions, twice by TOD personnel and, beginning in June 2011, six times by an unaffiliated, third party broker. In those instances, Arca management notified NYSE Euronext legal staff and Commission staff prior to trading. However, the Respondent Exchanges conducted the error account trading without having an effective exchange rule in place and the Commission never approved or authorized the trading.

In March 2012, Arca filed a rule proposal seeking approval for its practice of using a third-party broker for trading out of positions in the ArcaSec error account. That rule became effective in May 2012.[11] In October 2012, NYSE and Amex filed substantially identical rule proposals that became effective later that same month.[12]

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10 Although the draft rule proposal was submitted by NYSE, it was intended to be a model for subsequent error account rule proposals from Arca and Amex. The Commission's staff provided comments on the draft and on subsequent draft rule proposals submitted by the Respondent Exchanges over the course of the following twenty months. Throughout this informal comment process, the Commission's staff consistently informed the Respondent Exchanges of concern regarding the consistency with the Exchange Act of any rule proposal that provided for trading in the ArcaSec error account by Arca TOD personnel. Specifically, staff highlighted concerns that TOD staff potentially could access certain material nonpublic information when trading in the error account, as described below.

11 Exchange Act Release No. 66963, 77 Fed. Reg. 28919 (May 16, 2012) (Arca Equities Rule 7.45).

12 Exchange Act Release No. 68066, 77 Fed. Reg. 65030 (Oct. 24, 2012) (Amex Rule 17-Equities); Exchange Act Release No. 68067, 77 Fed. Reg. 65040 (Oct. 24, 2012) (NYSE Rule 17).

### B. ArcaSec Violated Exchange Act Section 15(g) With Regard to Error Account Trading

Section 15(g) of the Exchange Act requires registered brokers and dealers to "establish, maintain, and enforce written policies and procedures reasonably designed, in light of the nature of the broker's or dealer's business, to prevent the misuse . . . of material nonpublic information" by the broker or dealer or any associated person.[13] From 2005 until October 2010, the Arca TOD employees who conducted error account trading on behalf of the Respondent Exchanges did so from their computer workstations on the TOD. Arca TOD personnel could open and run a number of programs on their monitors at each workstation. In addition to a program that allowed the Arca TOD personnel to conduct trading, those employees simultaneously could access and run a separate program (the Global Trade Manager or "GTM") that showed the Respondent Exchanges' entire depth of book,[14] including non-displayed liquidity,[15] for securities listed on NYSE and Arca. The information supplied by the GTM included material, nonpublic information, as it allowed Arca TOD personnel to view all non-displayed buy and sell orders for each listed security, which could have enabled them to anticipate possible shifts in a security's price from pending non-displayed orders. This information was intended solely for use by the Arca TOD personnel in tracking orders, facilitating efficient trading on the exchanges, and ensuring orderly markets in listed securities.

At all times prior to October 2010, ArcaSec lacked policies, procedures, and systems reasonably designed to prevent Arca TOD personnel who, in their capacity as ArcaSec registered representatives, were conducting error account trades on behalf of the Respondent Exchanges from accessing the non-displayed liquidity data at their TOD workstations while conducting such trading. Although NYSE Euronext had policies and procedures prohibiting misuse of material, nonpublic information by employees conducting personal trading, those policies and procedures did not address the possible misuse of such information, including use of non-displayed liquidity information, during error account trading. Arca TOD personnel were not trained by Arca or ArcaSec on whether they were allowed to use the non-displayed liquidity information when trading in the error account. ArcaSec had no electronic systems or barriers that prevented Arca TOD personnel from accessing the non-displayed liquidity when conducting error trading.

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[13] There is no requirement under Section 15(g) that there be an underlying insider trading violation or any other violation of the Exchange Act or the rules thereunder. *See In the Matter of Certain Market Making Activities on NASDAQ,* Exchange Act Release No. 40910, 1999 WL 6176, at *6 fn. 3 (Jan. 11, 1999); *In the Matter of Gabelli & Co., Inc., et al.*, Exchange Act Release No. 35057, 1994 WL 684627 (Dec. 8, 1994).

[14] An exchange's "depth of book" reflects the amount of open buy and sell orders on that exchange for a security at different prices. The depth of book provides an indication of the liquidity and investor interest in a security on that exchange.

[15] "Non-displayed liquidity" means information that is not available to the public regarding pending buy or sell orders for a security.

ArcaSec also failed to conduct any surveillance to monitor whether Arca TOD personnel accessed this confidential information while conducting error account trading.

The Commission's staff notified ArcaSec management of this deficiency in February 2010, but ArcaSec did not restrict access to the desktop trading platform for Arca TOD personnel or adopt any policy or procedure reasonably designed to prevent the potential misuse of such information in connection with error account trading until October 2010. At that time, ArcaSec instituted a new procedure that required error account trading to be conducted exclusively at a workstation that did not provide access to the non-displayed liquidity information. During the period from February 2010 until the new procedure was established in October 2010, trading in the ArcaSec error account was conducted without restrictions on the Arca TOD personnel's access to the depth of book and non-displayed liquidity information for stocks on the NYSE and Arca order books.

### C. ArcaSec Violated the Net Capital Rule and Failed to Provide Timely Notice of the Violation to the Commission

As a result of the January 2010 trading incident, ArcaSec incurred a net capital deficiency of approximately $99 million over the course of two days during the incident, which violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder. Moreover, ArcaSec failed to provide written notice of this net capital deficiency to the Commission on the days of these events, as is required by Section 17(a)(1) of the Exchange Act and Rule 17a-11(b)(1) thereunder. ArcaSec did not provide the requisite written notice to the Commission until eleven days after the deficiency had occurred.

### D. NYSE Provided Co-location Services Without An Effective Exchange Rule

"Co-location" is a service offered by some securities exchanges that enables market participants to transmit orders to, and receive information from, exchanges with reduced delay (or "latency").[16] Typically, market participants that receive co-location services enter orders through the same gateway as those who do not co-locate, but co-location reduces physical distance and enables their orders to reach the exchange's matching engine more quickly, and therefore interact with the matching engine sooner, than the orders sent at the same time by non-co-locating

16 The Commission has used the following definition of co-location:

> Co-location is a service offered by trading centers that operate their own data centers and by third parties that host the matching engines of trading centers. The trading center or third party rents rack space to market participants that enables them to place their servers in close physical proximity to a trading center's matching engine. Co-location helps minimize network and other types of latencies between the matching engine of trading centers and the servers of market participants.

Concept Release on Equity Market Structure, Exchange Act Release No. 61358 (Jan. 14, 2010), 75 Fed. Reg. 3594 (Jan. 21, 2010).

participants. The provision of co-location services is a material aspect of the operation of the facilities of a national securities exchange.

From at least 2006 until September 2010, NYSE – through a number of affiliates[17]– offered co-location services to customers at data centers located in Brooklyn and in Manhattan (the "Legacy Data Centers"). Prior to offering co-location services, NYSE did not file a proposed rule with the Commission relating to co-location, nor did any rule of the exchange in effect at that time provide for or permit the operation of the co-location business. Initially, co-location was not offered as a stand-alone product, but was bundled together with other technological services. By 2008, however, NYSE had begun contracting with customers to provide co-location at the Legacy Data Centers as a stand-alone service. The fees that were charged for co-location at the Legacy Data Centers were not transparent or made publicly available. In addition, the fees that NYSE charged for co-location services at the Legacy Data Centers were not uniform for all customers, and were the product of discrete negotiations with each customer, such that each customer negotiated its own fees. As a result, not all Legacy Data Center customers paid the same fees for the same types of services. In mid-2009, NYSE began standardizing the fees for new co-location customers, but it allowed pre-existing Legacy Data Center customers to continue paying the fees for which they previously had contracted.

In February 2009, following an inspection of Arca's regulation of access to its market, OCIE staff recommended that Arca (which, at that time, was offering co-location services at a data center in Weehawken, New Jersey) propose appropriate rules specifying the fees and practice of co-location access. Shortly thereafter, NYSE Euronext legal staff discussed with Commission staff potential rule filings by the Respondent Exchanges regarding co-location services. In June 2009, a senior official in the Division of Trading and Markets informed NYSE Euronext senior management that the fees charged for co-location services were required to be filed as a proposed rule change, which would allow the Commission to review whether the fees were equitably apportioned, not unfairly discriminatory, and not a burden on competition. In August 2009, NYSE provided an informal draft rule to Trading and Markets staff for review and comment.

In September 2009, in response to the NYSE draft rule proposal, the staff told NYSE Euronext legal personnel that NYSE's practice of individually negotiating fees for co-location services created concerns as to whether fees were being equitably allocated among members and other persons using the exchange's facilities, and indicated that a rule filing that failed to address NYSE's legacy co-location contracts would be subject to the same concerns. Notwithstanding this concern, in March 2010, NYSE filed a proposed rule relating to co-location services at the Legacy Data Centers that provided standard fees for new co-location customers, but retained the previously negotiated disparate fees for pre-existing co-location customers, noting that such fees would not be offered to any co-location customer after September 1, 2010, in connection with the opening of a new data center.

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17 The contracting entities were NYSE TransactTools, Inc. and NYSE Technologies.

Shortly after the March 2010 rule filing, Commission staff put NYSE's rule filing on hold for additional review because it incorporated the non-standard individually negotiated fees and thus would require additional analysis and consultation within the Commission. NYSE did not submit a revised rule proposal and, in July 2010, withdrew the pending rule filing and continued to provide co-location services at the Legacy Data Centers without an effective exchange rule until September 2010, when all co-location customers were re-located to a data center in Mahwah, New Jersey, and the co-location fees were standardized pursuant to a subsequent rule filing.[18]

### E. NYSE Failed to Operate the New York Block Exchange In Accordance With the Effective Exchange Rule

The New York Block Exchange ("NYBX") was a trading facility that was developed and operated by a joint venture of NYSE and another, unaffiliated, entity in order to provide an all-electronic facility to handle trading in large blocks of securities. In November 2008, NYSE filed a proposed rule change with the Commission that described the intended functions and operations of NYBX. The rule filing became effective on January 22, 2009 and NYBX began operations on January 29, 2009.[19] NYSE Rule 1600 specifically indicated that when processing orders the NYBX facility would have access to NYSE's order book, known as Display Book ("DBK"), including information about non-displayed liquidity that was available on DBK.[20] However, NYBX did not operate in the manner described in the exchange rule.

During the development of NYBX, NYSE's Market Data group was responsible for ensuring that a new data feed providing the DBK's non-displayed liquidity information (the "hidden feed") would be operational before NYBX began executing trades. However, the hidden feed had not yet been installed when NYBX began operations on January 29, 2009. As a result, certain orders sent to the NYBX facility, which would only execute if the NYBX facility determined there was sufficient contraside non-displayed liquidity in the DBK to satisfy the order, failed to execute because the lack of the hidden feed meant that the NYBX facility was unable to "see" any non-displayed liquidity in the DBK.

The inability of the NYBX system to operate from inception in the manner described in the exchange rule resulted from failures by the NYSE rule writing group and the software design and operations staff to communicate and coordinate their functions effectively. The design and creation of the NYBX system software was carried out by Arca operations staff in Chicago, but the rule for the facility was drafted and filed by NYSE legal staff in New York. The Arca operations staff noted as early as July 2008 that the hidden feed functionality might not be operational at

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[18] *See* Exchange Act Release No. 62960 (Sept. 21, 2010), 75 Fed. Reg. 59310 (Sept. 27, 2010).

[19] NYSE Rule 1600 provided all of the operative provisions relating to the NYBX facility's operations. *See* Exchange Act Release No. 59282 (Jan. 22, 2009), 74 Fed. Reg. 5009 (Jan. 28, 2009).

[20] NYSE Equities Rule 1600(a), (b)(2)(E), (c)(3)(B)(iii), and (d)(1)(B)(i), provide that information about all non-displayed liquidity in NYSE's DBK would be available to the NYBX facility during its operation.

NYBX's inception and understood that the NYBX rule proposal that would be filed with the Commission would need to reflect that unavailability.

However, no one from the Arca operations staff informed the rule writing staff at NYSE before the proposed rule was filed with the Commission on November 13, 2008, that the hidden feed was not in place and might not be in place at the time the NYBX facility began operations. Consequently, the NYBX rule proposal that was filed described the NYBX system as having the hidden feed functionality. Similarly, after the NYBX rule became effective on January 22, 2009, and was circulated to senior management at Arca who were aware that the hidden feed was not operational, no one notified the NYSE's legal or compliance staff that NYBX's functionality did not conform to the effective exchange rule. NYBX was implemented and began operating on January 29, 2009, without the hidden feed functionality, which was inconsistent with the exchange rule then in effect.

On or about February 3, 2009, NYSE's partner in the NYBX venture discovered the defect and brought it to the attention of NYSE management. However, no corrective action was taken at that time. On February 5, 2009, NYSE notified Commission staff about the inconsistency between the rule and NYBX's functionality and NYBX customers were informed by the partner entity that the hidden feed was not available. A public announcement disclosing the problem was made by NYSE on February 12, 2009. Commission staff advised NYSE to file a proposed rule change to amend the rule to accurately describe NYBX's functionalities. NYSE submitted a draft proposed rule to reflect the lack of hidden data feed information on March 5, 2009. The hidden feed functionality became operational on April 3, 2009, rendering the then-pending draft rule change moot.[21]

### F. <u>NYSE Distributed Closing Order Imbalance Information in Violation of the Effective Exchange Rule</u>

In May 2008, NYSE filed for immediate effectiveness an amendment to NYSE Rule 123C to permit NYSE to provide, on a subscription basis, a continuous electronic feed of closing order imbalance information to floor brokers' handheld devices starting at 3:40 p.m. on each trading day.[22] The rule change became effective on May 16, 2008. Under the rule, floor brokers were automatically subscribed to receive this information for stocks in which they had open orders. To obtain this information for other stocks, floor brokers could make a subscription request using their handheld devices.

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[21] In February 2013, NYBX ceased operating. *See* Exchange Act Release No. 68861 (Feb. 7, 2013), 78 Fed. Reg. 10226 (Feb. 13, 2013).

[22] "Closing order imbalance" information is the amount of, and any imbalance between, Market "At-The Close" ("MOC") interest and marketable Limit "At-The-Close" ("LOC") interest to buy and MOC interest and marketable LOC interest to sell in a particular security. *See* Exchange Act Release No. 57862 (May 23, 2008), 73 Fed. Reg. 31174 (May 30, 2008).

In December 2008, NYSE reconfigured its systems to begin providing an automated feed of closing order imbalance information to its operations staff at 2:00 p.m. As a result of this system change, the closing order imbalance information feed inadvertently also was made available to all floor brokers at 2:00 p.m. Shortly thereafter, senior NYSE operational personnel became aware that floor brokers also were receiving an automated feed of closing order imbalance information at 2:00 p.m. NYSE, however, continued disseminating the feed to floor brokers at 2 p.m. without filing a proposed rule change with the Commission.

In October 2009, after learning of NYSE's practice, Commission staff informed NYSE personnel that distributing the automated feed of closing order imbalance information to floor brokers at 2:00 p.m. was inconsistent with NYSE Rule 123C and reminded NYSE of its obligation to file a proposed rule change if it wished to continue the practice. NYSE informed Commission staff that it intended to file a proposed rule change, but it did not discontinue the 2:00 p.m. feed in the interim period. In the early months of 2010, NYSE submitted and discussed several draft rules with Commission staff. In March 2010, Commission staff reiterated its view that NYSE was not in compliance with its rule as long as it continued to distribute the 2:00 p.m. feed without an effective exchange rule that permitted such earlier distribution. Despite these express warnings from the Commission staff that NYSE was acting inconsistently with its rule, NYSE continued to distribute the 2:00 p.m. feed to its floor brokers until May 17, 2010, when it discontinued the feed. Following further discussions with the staff, on June 9, 2010, NYSE filed a proposed rule change with the Commission, which became effective on September 15, 2010.[23]

NYSE's distribution of the 2:00 p.m. feed to floor brokers from December 2008 through May 17, 2010, did not comply with then-existing NYSE Rule 123C, which specifically stated that such a feed would first be distributed to floor brokers at 3:40 p.m. NYSE's non-compliance with its rule both prior to and during the eight months after NYSE personnel were told by the Commission's staff that NYSE was in violation of its rule afforded NYSE's floor brokers an informational advantage of which other market participants and the public were not aware.

### G. <u>Arca Failed to Execute Mid-Point Passive Liquidity Orders in Accordance With the Effective Exchange Rule</u>

In July 2007, Arca Equities Rule 7.31(h)(5), which added Mid-Point Passive Liquidity Orders ("MPLO"),[24] became effective as an order option for securities trades. That rule stated, in pertinent part, that: "If the market is locked, the eligible MPL order will trade at the locked price."[25] In the fall of 2009, Arca decided to modify the manner in which MPLOs were executed, to prevent execution when markets were locked. On or about November 12, 2009, Arca operations

[23] *See* Exchange Act Release No. 62923 (Sept. 15, 2010), 75 Fed. Reg. 57541 (Sept. 21, 2010).

[24] Midpoint passive liquidity orders are undisplayed limit orders that are priced at the midpoint of the Protected Best Bid and Offer ("PBBO").

[25] A "locked" market is one in which the bid price equals the ask price.

received internal approval to change the software regarding MPLOs to ensure that orders would no longer execute in locked markets, but would wait until the bid and offer were no longer locked or crossed[26] before executing. The software changes for the modification were completed and were ready to be implemented into the live trading environment by mid-March 2010.

During the week of March 22, 2010, Arca implemented the MPLO change, which went into effect on March 29, 2010. However, this change was not reflected in an effective Arca exchange rule. On April 7, 2010, an Arca Operations employee noticed that the change in MPLO execution had become operational despite the lack of an effective exchange rule for the new procedure and notified a member of Arca's legal staff. However, Arca did not stop the practice at that time.

On April 9, 2010, Arca filed a proposed rule change for immediate effectiveness that reflected the change to MPLO executions in locked markets. The Commission staff rejected Arca's filing because it deemed that the filing did not comply with the advance notice requirements for immediately effective filings. Arca corrected the deficiency and refiled the rule proposal on April 21, 2010, and the rule change became effective on May 21, 2010.[27]

### H. Arca Accepted Mid-Point Passive Liquidity Orders with Sub-Penny Limits in Violation of Regulation NMS

Rule 612(a) of Regulation NMS prohibits an exchange from, among other things, displaying, ranking, or accepting any order in any NMS stock priced in an increment smaller than $.01 if the order is priced equal to or greater than $1.00 per share. As the Commission has discussed, Rule 612(a) addresses the practice of "stepping ahead" of displayed limit orders by trivial amounts, and encourages the display of limit orders that improve the depth and liquidity of trading in NMS stocks.[28]

On November 28, 2008, Arca implemented a change to its trading system permitting the execution of certain orders in sub-penny increments. The purpose of the system change was to allow for the quotation and execution of orders in sub-penny increments for equities that were trading at less than $1.00 per share, while continuing to prevent the quotation and execution of orders in sub-penny increments for equities priced above $1.00. The system change also permitted MPLOs to execute in sub-penny increments at all price ranges, including for equities priced at greater than $1.00, which was consistent with Arca Rule 7.31(h)(5).[29]

26 A "crossed" market is one in which the bid price exceeds the ask price.

27 *See* Exchange Act Release No. 62004 (Apr. 21, 2010), 75 Fed. Reg. 25013 (May 6, 2010).

28 *See* Exchange Act Release No. 51808, at 29 (June 9, 2005), 70 Fed. Reg. 37496 (June 29, 2005).

29 *See* Exchange Act Release No. 56072 (July 13, 2007), 72 Fed. Reg. 39867 (July 20, 2007).

The system change that was implemented by Arca in November 2008, however, also improperly allowed the Arca trading system to accept MPLOs with limit prices in sub-penny increments for NMS stocks priced equal to or greater than $1.00, which was not permitted by Arca Rule 7.31(h)(5) and violated Rule 612(a) of Regulation NMS. As a result, Arca's trading system became capable of accepting MPLOs with sub-penny limits on November 28, 2008, and accepted such orders in violation of Rule 612(a) from January 2, 2009, until October 18, 2010, when Arca re-programmed its trading system to prevent the entry of MPLOs with sub-penny limits.

Arca's improper acceptance of MPLOs with sub-penny limits was attributable to several factors. Arca did not have sufficient testing protocols to review systems changes for compliance with the provisions of Regulation NMS, and did not have adequate procedures to check that the functionality of the systems changes was consistent with Arca's rules and Regulation NMS. In addition, Arca did not have effective procedures to detect that the Arca trading system was accepting orders in non-permitted increments, only becoming aware of the problem after Arca was contacted by a customer on October 7, 2010.

Arca's failure to detect the problem is all the more problematic given that in October 2009 the OCIE staff recommended that Arca develop and implement procedures to monitor periodically its trading system to ensure that it rejected incoming quotations, orders, or indications of interest priced less than the minimum increment. In November 2009, Arca informed OCIE staff that Arca's trading system was designed to systematically enforce compliance with that requirement, and that Arca's quality assurance process was effective in helping to assure that Arca rejects orders priced less than the minimum increment. At the time Arca issued this response, its systems had been improperly accepting MPLOs with sub-penny limits for nearly a year, and continued to do so for another eleven months.

## IV.

## Legal Analysis

### A. Section 19(b)(1) of the Exchange Act

Section 19(b)(1) of the Exchange Act requires every exchange to file any proposed rule change with the Commission and for the Commission to publish notice of the proposed rule change and to give interested persons an opportunity to submit written data, views, and arguments concerning the proposed rule change. Section 19(b)(1) further provides that "[n]o proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection." The "rules of an exchange" include the exchange's constitution, articles of incorporation, bylaws, and rules, but also such "stated policies, practices, and interpretations" of an exchange "as the Commission, by rule, may determine to be necessary or appropriate in the public interest or for the protection of investors." Exchange Act Section 3(a)(27). A "stated practice, policy, or interpretation" means any material aspect of the operation of the facilities of a self-regulatory organization ("SRO") or any statement made generally available to, among others, the membership of, to all participants in, or to persons having or seeking access to the facilities of the SRO that establishes or changes any standard, limit, or guideline with respect to the rights, obligations or privileges of specified persons or the meaning, administration, or enforcement of an existing rule. Exchange Act Rule 19b-4(a)(6). A "stated policy, practice, or interpretation" of an SRO shall be deemed to be a proposed rule change unless it is reasonably and fairly implied by an existing rule of the SRO, or is concerned solely with the administration of the SRO and is not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO. Exchange Act Rule 19b-4(c).

As a result of the conduct discussed above:

1. NYSE, Arca, and Amex violated Section 19(b)(1) by using the ArcaSec error account to assume and trade out of stock positions, including but not limited to those positions arising from the systems incident on January 11, 2010, without an effective exchange rule in place.

2. NYSE violated Section 19(b)(1) by offering co-location services without an effective exchange rule in place.

### B. Section 19(g)(1) of the Exchange Act

Among other things, Section 19(g)(1) of the Exchange Act requires every exchange to comply with the provisions of the Exchange Act, the rules and regulations thereunder, and its own rules. 15 U.S.C. § 78s(g)(1); *see In the Matter of National Stock Exchange, et al.*, Exchange Act Release No. 51714, 2005 WL 1185531, at *5 (May 19, 2005). The Commission has previously found exchanges to be in violation of Section 19(g)(1) where they acted in a manner inconsistent with their own rules. *See In the Matter of EDGX Exchange, Inc.*, Exchange Act Release No. 65556, 2011 WL 4860052 (Oct. 13, 2011); *In the Matter of National Stock Exchange,* Exchange Act Release No. 51714, 2005 WL 1185531 (May 19, 2005).

As a result of their conduct described above:

1. NYSE, Arca, and Amex violated Section 19(g)(1) of the Exchange Act by permitting ArcaSec to assume and trade out of securities positions in a manner inconsistent with their rules, which limited ArcaSec's activity to outbound and inbound routing of orders on behalf of those Exchanges.

2. NYSE violated Section 19(g)(1) by operating the NYBX in a manner inconsistent with its rules.

3. NYSE violated Section 19(g)(1) by distributing an automated feed of closing order imbalance information to its floor brokers in a manner inconsistent with its rules.

4. Arca violated Section 19(g)(1) by executing Mid-Point Passive Liquidity Orders in a manner inconsistent with its rules.

### C. <u>Section 15(g) of the Exchange Act</u>

Section 15(g) of the Exchange Act requires broker-dealers to establish, maintain and enforce written policies and procedures, reasonably designed, taking into consideration the nature of the broker's or dealer's business, to prevent the misuse, in violation of the Exchange Act or the rules and regulations thereunder, of material nonpublic information by such broker or dealer or any person associated with such broker or dealer. The Commission has consistently made clear that broker-dealers must take seriously their responsibilities to design and enforce sufficiently robust policies and procedures to prevent the misuse of material nonpublic information. *See, e.g.*, *In the Matter of Goldman, Sachs & Co.*, Exchange Act Release No. 66791, 2012 WL 1242363 (April 12, 2012); *In the Matter of Merrill Lynch, Pierce, Fenner & Smith Inc.*, Exchange Act Release No. 63760, 2011 WL 231575 (Jan. 25, 2011). The mere establishment of policies and procedures alone is not sufficient to prevent the misuse of material nonpublic information. It also is necessary to implement measures to monitor compliance with and enforcement of those policies and procedures. *See, e.g., In the Matter of Morgan Stanley & Co. Inc.*, *et al.*, Exchange Act Release No. 54047, 2006 WL 1749842 (June 27, 2006) (finding Section 15(f) violation where Morgan Stanley failed to enforce existing policies and procedures concerning surveillance over a four-year period). These obligations are important even if no questionable trading has occurred.

ArcaSec violated Section 15(g) by failing to establish and enforce policies and procedures reasonably designed to prevent the misuse of material nonpublic information by TOD personnel that were conducting error account trading through ArcaSec's error account on behalf of NYSE Arca, NYSE, and NYSE Amex. Until October 2010, ArcaSec had no written policies or procedures specifically addressing the access to non-displayed liquidity information by TOD personnel liquidating securities positions in the ArcaSec error account. ArcaSec also lacked any systems that would have prevented TOD personnel from accessing such information while they were conducting such trading. ArcaSec also lacked any policy or procedure for surveilling whether the TOD personnel acting on its behalf were accessing material nonpublic information while trading in the error account.

### D. <u>Violations Relating to Net Capital Rule</u>

A broker-dealer violates Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder when it uses the mails, or any means or instrumentality of interstate commerce, to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than exempt securities) while not maintaining its required minimum net capital. ArcaSec computes its minimum required net capital under the "alternative standard" prescribed by Rule 15c3-1(a)(1)(ii), which requires it not to permit its net capital to be less than the greater of $250,000 or 2 percent of aggregate debit items computed in accordance with the Formula for Determination of Reserve Requirements for Brokers and Dealers in Appendix A to Exchange Act Rule 15c3-3(a). As a result of the January 2010 trading incident, ArcaSec violated Section 15(c)(3) and Rule 15c3-1 thereunder by allowing its net capital to decline below the minimum amount of net capital required under the net capital rule by over $99 million on January 11, 2010 and January 12, 2010.

Section 17(a) of the Exchange Act and Rule 17a-11(b)(1) thereunder further requires every broker-dealer whose net capital declines below the minimum amount required pursuant to Rule 15c3-1 to give notice of the deficiency to the principal office of the Commission in Washington, D.C., the regional office of the Commission for the region in which the broker-dealer has its principal place of business, and the broker-dealer's designated examining authority of which such broker-dealer is a member, on the same day of the deficiency. ArcaSec's net capital declined below the minimum required by the net capital rule on January 11, 2010 and continued through the following day. ArcaSec, however, did not provide the requisite written notice of the deficiency to the Division of Trading and Markets and the Chicago Regional Office until January 23, 2010, in violation of Section 17(a) and Rule 17a-11(b)(1) thereunder.

### E. Violations of Rule 612(a) of Regulation NMS

Rule 612(a) of Regulation NMS prohibits an exchange from displaying, ranking, or accepting any order in a sub-penny amount for NMS stocks trading at a price greater than $1.00 per share. Between January 2, 2009, and October 7, 2010, Arca repeatedly violated Rule 612(a) by accepting mid-point passive liquidity orders with sub-penny limits.

## V.

## Undertakings

The Respondent Exchanges have undertaken to do the following:

A. The Respondent Exchanges shall within four (4) months of the issuance of this Order review and, as appropriate, begin implementing changes to, their existing policies, procedures, internal controls, and training for determining whether:

> (1) a new or change to an existing business practice requires the filing of a proposed rule or rule change pursuant to Section 19(b)(1) of the Exchange Act; and
>
> (2) business practices that require an exchange rule are conducted pursuant to and in accordance with an effective exchange rule.

(hereinafter, the "Rule Compliance Programs").

B. The Respondent Exchanges shall no later than four (4) months after the issuance of this Order retain at their expense a qualified independent consultant (the "Consultant") not unacceptable to the staff of the Commission to conduct a comprehensive review of the Respondent Exchanges' Rule Compliance Programs. The Respondent Exchanges shall require the Consultant to assess whether the Rule Compliance Programs are reasonably designed and implemented to ensure compliance by the Respondent Exchanges with Section 19 of the Exchange Act and the rules and regulations thereunder and Respondent Exchanges' own rules. The Respondent Exchanges shall provide a copy of the engagement letter detailing the Consultant's responsibilities to Commission staff. The Respondent Exchanges may in the course of the Consultant's engagement provide the Consultant with the views of the Respondent Exchanges and the management and board of directors of the IntercontinentalExchange Group, Inc. ("ICE") with regard to the review and assessment of the Rule Compliance Programs, and shall permit the Consultant to solicit the views of others, as the Consultant deems appropriate.

C. The Respondent Exchanges shall require the Consultant, within six (6) months of the Consultant's engagement, to submit a report of his/her findings and recommendations (the "Initial Report") simultaneously to the respective Boards of Directors of each of the Respondent Exchanges and ICE and to the Commission's Divisions of Enforcement and Trading and Markets and Office of Compliance Inspections and Examinations ("OCIE"), that:

(1) sets forth the Consultant's findings about the adequacy of each Respondent Exchange's Rule Compliance Program; and

(2) if necessary, makes recommendations regarding how each Respondent Exchange should modify or supplement its Rule Compliance Program.

D. The Respondent Exchanges shall adopt and implement all recommendations made by the Consultant, subject to Section E, below.

E. If the Respondent Exchanges, in consultation with ICE, determine that any of the Consultant's recommendations in the Initial Report are unduly burdensome or impractical, or if they determine that the objectives of the recommendations can be more effectively achieved through another means, the Respondent Exchanges, or any of them, may propose that a recommendation not be implemented or propose an alternative reasonably designed to accomplish the same objectives, and shall notify the Consultant of any such proposals within thirty (30) days of receipt of the Initial Report. If, upon evaluating a Respondent Exchange's proposal(s), the Consultant determines that a recommendation should not be implemented or that a suggested alternative is reasonably designed to accomplish the same objectives as the recommendation in question, then the Consultant may withdraw the recommendation and/or accept the proposed alternative and notify in writing the Commission's Divisions of Enforcement and Trading and Markets and OCIE of any such withdrawn recommendations and/or accepted alternatives, and the Respondent Exchange(s) shall adopt and implement the accepted alternative(s). If, upon evaluating the Respondent Exchange's proposals, the Consultant concludes that the Consultant's recommendation should be implemented, the Consultant shall notify the Respondent Exchange within thirty (30) days of receipt of the alternative proposal and the Respondent Exchange and the Consultant shall, within fourteen (14) days of the Consultant's notification, jointly confer with the staff of the Division of Trading and Markets and OCIE to resolve the matter. In the event that, after conferring with the Commission staff, the Respondent Exchange and the Consultant are unable to agree on an alternative proposal, the Respondent Exchange shall adopt and implement the Consultant's recommendation.

F. Within six (6) months from the Respondent Exchanges' and ICE's receipt of the Initial Report, the Respondent Exchanges shall complete implementation of all of the Consultant's recommendations and/or accepted alternatives.

G. No sooner than six (6) months from the Respondent Exchanges' and ICE's receipt of the Initial Report, the Respondent Exchanges shall require the Consultant to conduct a review of the Respondent Exchanges' implementation of the Consultant's recommendations discussed above and, within twelve (12) months from the Respondent Exchanges' and ICE's receipt of the Initial Report, submit a written final report ("Final Report") to the Boards of the Respondent Exchanges and ICE and the Commission's Divisions of Enforcement and Trading and Markets and OCIE. The Final Report shall describe the review made of the Respondent Exchanges' implementation of the Consultant's recommendations and describe how the Respondent Exchanges have implemented and are complying with the Consultant's recommendations.

H. Within two (2) months from the Respondent Exchanges' and ICE's receipt of the Final Report, a senior executive officer of each of the Respondent Exchanges shall certify in writing to the Director of the Commission's Division of Enforcement that, to the best of his/her knowledge based on reasonable inquiry, all of the Consultant's recommendations and any alternatives approved by the Consultant have been adopted and implemented by that Respondent Exchange.

I. The Respondent Exchanges shall cooperate fully with the Consultant, including providing the Consultant with access to the files, books, records, and personnel of the Respondent Exchanges (and the Respondent Exchanges' relevant affiliated entities, including subsidiaries) as reasonably requested for the above-mentioned review, and obtaining the cooperation of employees or other persons under the Respondent Exchanges' control. Nothing in the foregoing shall be deemed to require the Respondent Exchanges to waive their attorney-client privileges or other privileges with respect to privileged documents.

J. The Respondent Exchanges shall require the Consultant to report to Commission staff on his/her activities as the staff may reasonably request.

K. To ensure the independence of the Consultant, the Respondent Exchanges shall not have the authority to terminate the Consultant without prior written approval of Commission staff and shall compensate the Consultant and persons engaged to assist the Consultant for services rendered pursuant to this Order at their reasonable and customary rates.

L. The Respondent Exchanges shall expend sufficient funds to permit the Consultant to discharge all of his/her duties. The Respondent Exchanges shall permit the Consultant to engage such assistance, clerical, legal or expert, as necessary and at a reasonable cost, to carry out his/her activities, and the cost, if any, of such assistance shall be borne exclusively by the Respondent Exchanges.

M. The Respondent Exchanges shall bear the full expense of carrying out these undertakings, including the costs of retaining the Consultant and implementing the Consultant's recommendations.

N. The Respondent Exchanges shall require the Consultant to enter into an agreement that provides that for the period of engagement and for a period of two (2) years from completion of the engagement, the Consultant shall not enter into any employment, consultant, attorney-client, auditing or other professional relationship with ICE, NYSE Regulation, Inc., NYSE Euronext, or the Respondents, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such. The agreement will also provide that the Consultant will require that any firm with which he/she is affiliated or of which he/she is a member, and any person engaged to assist the Consultant in performance of his/her duties under this Order shall not, without prior written consent of Commission staff, enter into any employment, consultant, attorney-client, auditing or other professional relationship with ICE, NYSE Regulation, NYSE Euronext, or the Respondents, or any of its present or former affiliates, directors, officers, employees, or agents acting in their capacity as such for the period of the engagement and for a period of two (2) years after the engagement. The agreement will also provide that the Consultant shall maintain the confidentiality of any confidential information of the Respondent Exchanges and/or their affiliates.

O. The Respondent Exchanges may apply to the Division of Enforcement for an extension of the deadlines described above before their expiration and, upon a showing of good cause by the Respondent Exchanges, the Division of Enforcement may, in its sole discretion, grant such extensions for whatever time period it deems appropriate.

## VI.

In view of the foregoing, the Commission deems it appropriate and in the public interest to impose the sanctions agreed to in Respondents' Offers.

Accordingly, pursuant to Sections 19(h)(1) and 21C of the Exchange Act, it is hereby ORDERED that:

A. Pursuant to Section 21C of the Exchange Act, Respondents NYSE, Arca, and Amex cease and desist from committing or causing any violations and any future violations of Sections 19(b) and 19(g) of the Exchange Act, and Arca cease and desist from committing or causing any violations and any future violations of Rule 612(a) of Regulation NMS.

B. Pursuant to Section 21C of the Exchange Act, Respondent ArcaSec cease and desist from committing or causing any violations and any future violations of Sections 15(c)(3), 15(g) and 17(a)(1) of the Exchange Act and Rules 15c3-1 and 17a-11(b)(1) thereunder.

C. Pursuant to Section 19(h)(1) of the Exchange Act, Respondents NYSE, Arca and Amex are censured.

D. Pursuant to Section 21B(a)(2) of the Exchange Act, Respondents NYSE, Arca, Amex, and ArcaSec shall pay, jointly and severally, a civil money penalty in the amount of $4,500,000 to the United States Treasury within ten (10) days of the entry of this Order. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717. Such payment must be made in one of the following ways: (1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request; (2) Respondents may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or (3) Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying NYSE, Arca, Amex and ArcaSec as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Antonia Chion, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, N.E., Washington, DC 20549.

E. The Respondent Exchanges shall comply with the undertakings enumerated above.

By the Commission.

Lynn M. Powalski
Deputy Secretary