

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58536; File No. 4-566)

September 12, 2008

Program for Allocation of Regulatory Responsibilities Pursuant to Rule 17d-2; Order Approving and Declaring Effective a Plan for the Allocation of Regulatory Responsibilities Among the American Stock Exchange LLC, Boston Stock Exchange, Inc., CBOE Stock Exchange, LLC, Chicago Stock Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange, LLC, NYSE Arca Inc., NYSE Regulation, Inc., and Philadelphia Stock Exchange, Inc.

On August 12, 2008, the American Stock Exchange LLC (“Amex”), Boston Stock Exchange, Inc. (“BSE”), CBOE Stock Exchange, LLC (“CBOE”), Chicago Stock Exchange, Inc. (“CHX”), Financial Industry Regulatory Authority, Inc. (“FINRA”), International Securities Exchange, LLC (“ISE”), The NASDAQ Stock Market, LLC (“NASDAQ”), National Stock Exchange, Inc. (“NSX”), New York Stock Exchange LLC (“NYSE”), NYSE Arca Inc. (“NYSE Arca”), NYSE Regulation, Inc. (acting under authority delegated to it by NYSE) (“NYSE Regulation”), and Philadelphia Stock Exchange, Inc. (“Phlx”) (collectively, “Participating Organizations” or “Parties”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 17(d) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 17d-2 thereunder,<sup>2</sup> a proposed plan for the allocation of regulatory responsibilities (“Plan”). The Plan was published for comment on August 18, 2008.<sup>3</sup> The Commission received no comments on the Plan. This order approves and declares effective the Plan.

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<sup>1</sup> 15 U.S.C. 78q(d).

<sup>2</sup> 17 CFR 240.17d-2.

<sup>3</sup> See Securities Exchange Act Release No. 58350 (August 13, 2008), 73 FR 48248 (File No. 4-566) (“Notice”).

I. Introduction

Section 19(g)(1) of the Act,<sup>4</sup> among other things, requires every self-regulatory organization (“SRO”) registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO’s own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)<sup>5</sup> or Section 19(g)(2)<sup>6</sup> of the Act.

Section 17(d)(1) of the Act<sup>7</sup> was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication for those broker-dealers that maintain memberships in more than one SRO (“common members”).<sup>8</sup> With respect to a common member, Section 17(d)(1) authorizes the Commission, by rule or order, to relieve an SRO of the responsibility to receive regulatory reports, to examine for and enforce compliance with applicable statutes, rules, and regulations, or to perform other specified regulatory functions.

To implement Section 17(d)(1), the Commission adopted two rules: Rule 17d-1 and Rule 17d-2 under the Act.<sup>9</sup> Rule 17d-1 authorizes the Commission to name a single SRO as the designated examining authority (“DEA”) to examine common members for compliance with the

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<sup>4</sup> 15 U.S.C. 78s(g)(1).

<sup>5</sup> 15 U.S.C. 78q(d).

<sup>6</sup> 15 U.S.C. 78s(g)(2).

<sup>7</sup> 15 U.S.C. 78q(d)(1).

<sup>8</sup> See Securities Act Amendments of 1975, Report of the Senate Committee on Banking, Housing, and Urban Affairs to Accompany S. 249, S. Rep. No. 94-75, 94th Cong., 1st Session 32 (1975).

<sup>9</sup> 17 CFR 240.17d-1 and 17 CFR 240.17d-2, respectively.

financial responsibility requirements imposed by the Act, or by Commission or SRO rules.<sup>10</sup>

When an SRO has been named as a common member's DEA, all other SROs to which the common member belongs are relieved of the responsibility to examine the firm for compliance with the applicable financial responsibility rules. On its face, Rule 17d-1 deals only with an SRO's obligations to enforce broker dealers' compliance with financial responsibility requirements. Rule 17d-1 does not relieve an SRO from its obligation to examine a common member for compliance with its own rules and provisions of the federal securities laws governing matters other than financial responsibility, including sales practices and trading activities and practices.

To address regulatory duplication in these and other areas, the Commission adopted Rule 17d-2 under the Act.<sup>11</sup> Rule 17d-2 permits SROs to propose joint plans for the allocation of regulatory responsibilities with respect to their common members. Under paragraph (c) of Rule 17d-2, the Commission may declare such a plan effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act. Commission approval of a plan filed pursuant to Rule 17d-2 relieves an SRO of those regulatory responsibilities allocated by the plan to another SRO.

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<sup>10</sup> See Securities Exchange Act Release No. 12352 (April 20, 1976), 41 FR 18808 (May 7, 1976).

<sup>11</sup> See Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

## II. The Plan

The proposed Plan is designed to eliminate regulatory duplication by allocating regulatory responsibility over Common NYSE Members<sup>12</sup> or Common FINRA Members,<sup>13</sup> as applicable, (collectively, “Common Members”) for the surveillance, investigation, and enforcement of common insider trading rules (“Common Rules”).<sup>14</sup> The Plan assigns regulatory responsibility over Common NYSE Members to NYSE Regulation for surveillance, investigation, and enforcement of insider trading by broker-dealers, and their associated persons, with respect to NYSE-listed stocks and NYSE Arca-listed stocks, irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur. The Plan assigns regulatory responsibility over Common FINRA Members to FINRA for surveillance, investigation, and enforcement of insider trading by broker-dealers, and their associated persons, with respect to NASDAQ-listed stocks and Amex-listed stocks, as well as any CHX solely-listed stock, irrespective of the marketplace(s) maintained by the Participating Organizations on which the relevant trading may occur. The full text of the Plan and Exhibits A, B, and C thereto can be found in the Notice.

In addition to the Plan, the Participating Organizations have entered into two regulatory services agreements that address investigation and enforcement in situations that involve trading in equity securities by non-Common Members, as Rule 17d-2 covers only situations involving Common Members. The first agreement is between NYSE Regulation (acting as the regulatory

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<sup>12</sup> Common NYSE Members include members of the NYSE and at least one of the Participating Organizations.

<sup>13</sup> Common FINRA Members are members of FINRA and at least one of the Participating Organizations.

<sup>14</sup> Common Rules are defined as: (i) federal securities laws and rules promulgated by the Commission pertaining to insider trading, and (ii) the rules of the Participating Organizations that are related to insider trading. See Exhibit A to the Plan.

services provider), FINRA, and each of the exchanges (“NYSE Regulation Agreement”). The second agreement is between FINRA (acting as the regulatory services provider), NYSE Regulation, and each of the exchanges (“FINRA Agreement”). The agreements provide for the investigation and enforcement of suspected insider trading against broker-dealers and their associated persons that (i) are not Common Members of NYSE in the case of insider trading in NYSE-listed stocks and NYSE-Arca listed stocks; or (ii) are not Common Members of FINRA in the case of insider trading in NASDAQ-listed stocks, Amex-listed stocks, and any CHX solely-listed stock.

Under the agreements, NYSE Regulation and FINRA, respectively, will provide to the exchanges “Core Services” related and limited to the investigation and enforcement activities for non-Common Members where these activities relate to insider trading of equity securities listed on the NYSE or NYSE Arca in the case of the NYSE Regulation Agreement, and to the insider trading of equity securities listed on the Nasdaq or Amex, and any CHX solely listed security in the case of the FINRA Agreement. The Core Services provided under the agreements are rendered (a) only upon completion of a surveillance review under the 17d-2 Plan, and (b) at the request of the relevant exchange. Pursuant to the Plan, NYSE Regulation and FINRA will conduct surveillance, investigation, and enforcement for insider trading for Common NYSE Members and Common FINRA Members, respectively. Surveillance for non-Common Members is excluded from the Plan and remains the responsibility of the SROs in which such non-Common Members maintain membership. However, due the nature of insider trading surveillance technology and processes, the surveillance conducted by NYSE Regulation and FINRA will encompass non-Common Members as the surveillance function does not differentiate between Common and non-Common Members. Accordingly, the investigation and

enforcement services performed under the agreements will arise from surveillance undertaken by NYSE Regulation and FINRA.

### III. Discussion

The Commission finds that the proposed Plan is consistent with the factors set forth in Section 17(d) of the Act<sup>15</sup> and Rule 17d-2 thereunder<sup>16</sup> in that the proposed Plan is necessary or appropriate in the public interest and for the protection of investors, fosters cooperation and coordination among SROs, and removes impediments to and fosters the development of the national market system. In particular, the Commission believes that the proposed Plan should reduce unnecessary regulatory duplication by allocating regulatory responsibility for the surveillance, investigation, and enforcement of Common Rules over Common NYSE Members, with respect to NYSE-listed stocks and NYSE Arca-listed stocks, to NYSE and over Common FINRA Members, with respect to NASDAQ-listed stocks, Amex-listed stocks, and any CHX solely-listed stock, to FINRA. Accordingly, the proposed Plan promotes efficiency by consolidating these regulatory functions in a single SRO based on the listing market for a stock, with regard to Common NYSE Members and Common FINRA Members.

In addition, the Commission notes that the Plan provides that the costs for insider trading surveillance would be shared among the Participating Organizations based on their relative trade volume, subject to certain minimum payment amounts for smaller markets. Modifications to the fees assessed the Participating Organizations pursuant to the cost allocation methodologies established in the Plan do not require an amendment to the Plan, however, any modifications to the cost allocation methodologies would require approval by the Commission. The Commission

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<sup>15</sup> 15 U.S.C. 78q(d).

<sup>16</sup> 17 CFR 240.17d-2.

believes that the Plan provides a reasonable method to allocate among the Parties expenses reasonably incurred by the SRO having regulatory responsibilities under the Plan.<sup>17</sup>

The Commission also notes that because under Rule 17d-2 regulatory responsibility may be allocated from one SRO to another SRO only for Common Members, the Participating Organizations have entered into two regulatory services agreements with NYSE Regulation and FINRA, respectively, to address investigation and enforcement of suspected insider trading involving members who are neither Common NYSE Members nor Common FINRA Members.<sup>18</sup> The Commission is neither approving nor disapproving the terms of the regulatory services agreements. However, the Commission does note that under these regulatory services agreements the ultimate responsibility and primary liability for self-regulatory obligations would remain with each exchange and association, rather than the SRO retained to perform such functions.

#### IV. Conclusion

This Order gives effect to the Plan filed with the Commission in File No. 4-566. The Parties shall notify all members affected by the Plan of their rights and obligations under the Plan.

IT IS THEREFORE ORDERED, pursuant to Section 17(d) of the Act,<sup>19</sup> that the Plan in File No. 4-566 by and among Amex, BSE, CBOE, CHX, FINRA, ISE, NASDAQ, NSX, NYSE, NYSE Arca, NYSE Regulation, and Phlx filed pursuant to Rule 17d-2 is hereby approved and declared effective.

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<sup>17</sup> 17 CFR 240.17d-2(b).

<sup>18</sup> Members only of the NYSE would be the responsibility of NYSE; members only of FINRA would be the responsibility of FINRA.

<sup>19</sup> 15 U.S.C. 78q(d).

IT IS FURTHER ORDERED that the Participating Organizations are relieved of those regulatory responsibilities allocated to NYSE and FINRA under the Plan in File No. 4-566.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Florence E. Harmon  
Acting Secretary

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<sup>17</sup> 17 CFR 200.30-3(a)(34).