

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69011)

Topaz Exchange, LLC; Order Granting Application for a Conditional Exemption Pursuant to Section 36(a) of the Exchange Act from Certain Requirements of Rules 6a-1 and 6a-2 under the Exchange Act

March 1, 2013

I. Introduction

On July 3, 2012, Topaz Exchange, LLC (“Applicant”) submitted to the Securities and Exchange Commission (“Commission”) an application on Form 1 under the Securities Exchange Act of 1934 (“Exchange Act”), to register as a national securities exchange.¹ In addition, the Applicant, pursuant to Rule 0-12² under the Exchange Act, has requested an exemption under Section 36(a)(1) of the Exchange Act³ from certain requirements of Rules 6a-1(a) and 6a-2 under

¹ On December 19, 2012, the Applicant submitted Amendment No. 1 to its Form 1 application. Amendment No. 1, among other things, includes changes to the Limited Liability Company Agreement and the Constitution of Topaz Exchange concerning board composition and size, the initial director election process, and the use of regulatory funds. Amendment No. 1 also includes revisions to proposed rules of Topaz Exchange to remove rules relating to complex orders; to respond to comments on the Form 1 application from Commission staff; and to reflect recent changes to comparable rules of International Securities Exchange, LLC (“ISE”). Amendment No. 1 further provides additional descriptions in the Form 1 application regarding proposed allocation procedures, auction mechanisms, execution of qualified contingent crosses, and the initial director election process, and removes references to complex orders. On December 31, 2012, the Applicant submitted Amendment No. 2 to its Form 1 application. Amendment No. 2, among other things, provides updated information regarding the board of directors of ISE and the Corporate Governance Committee of ISE and includes information regarding Longitude S.A., a newly incorporated affiliate of Topaz Exchange, which information includes the Articles of Incorporation of Longitude S.A. Amendment No. 2 also provides financial information for Longitude S.A. Finally, Amendment No. 2 provides an updated organizational chart that reflects the affiliates of Topaz Exchange.

² 17 CFR 240.0-12.

³ 15 U.S.C. 78mm(a)(1).

the Exchange Act (“Exemption Request”).⁴ This order grants the Applicant’s request for exemptive relief, subject to the satisfaction of certain conditions, which are outlined below.

II. Application for Conditional Exemption from Certain Requirements of Exchange Act Rules 6a-1 and 6a-2

A. Filing Requirements under Exchange Act Rule 6a-1(a)

Exchange Act Rule 6a-1(a) requires an applicant for registration as a national securities exchange to file an application with the Commission on Form 1. Exhibit C to Form 1 requires the applicant to provide certain information with respect to each of its subsidiaries and affiliates.⁵ For purposes of Form 1, an “affiliate” is “[a]ny person that, directly or indirectly, controls, is under common control with, or is controlled by, the national securities exchange . . . including any employees.”⁶ Form 1 defines “control” as “[t]he power, directly or indirectly, to direct the management or policies of a company, whether through ownership of securities, by contract, or otherwise”⁷ Form 1 provides, further, that any person that directly or indirectly has the

⁴ 17 CFR 240.6a-1(a) and 6a-2. See letter from Michael Simon, General Counsel, Secretary and Chief Regulatory Officer, Topaz Exchange, LLC, to Elizabeth Murphy, Secretary, Commission, dated December 14, 2012.

⁵ Specifically, Exhibit C requires the applicant to provide, for each subsidiary or affiliate, and for any entity that operates an electronic trading system used to effect transactions on the exchange: (1) the name and address of the organization; (2) the form of organization; (3) the name of the state and statute citation under which it is organized, and the date of its incorporation in its present form; (4) a brief description of the nature and extent of the affiliation; (5) a brief description of the organization’s business or function; (6) a copy of the organization’s constitution; (7) a copy of the organization’s articles of incorporation or association, including all amendments; (8) a copy of the organization’s by-laws or corresponding rules or instruments; (9) the name and title of the organization’s present officers, governors, members of all standing committees, or persons performing similar functions; and (10) an indication of whether the business or organization ceased to be associated with the applicant during the previous year, and a brief statement of the reasons for termination of the association.

⁶ Form 1 Instructions, Explanation of Terms, 17 CFR 249.1.

⁷ Id.

right to vote 25% or more of a class of voting securities, or has the power to sell or direct the sale of 25% or more of a class of voting securities, is presumed to control the entity.⁸

Exhibit D to Form 1 requires an applicant for exchange registration to provide unconsolidated financial statements for the latest fiscal year for each subsidiary or affiliate. Exhibit D requires the financial statements to include, at a minimum, a balance sheet and an income statement with such footnotes and other disclosures as are necessary to avoid rendering the financial statements misleading. Exhibit D provides, in addition, that if any affiliate or subsidiary of the applicant is required by another Commission rule to submit annual financial statements, a statement to that effect, with a citation to the other Commission rule, may be provided in lieu of the financial statements required in Exhibit D.

A Form 1 application is not considered filed until all necessary information, including financial statements and other required documents, have been furnished in the proper form.⁹

B. Filing Requirements under Exchange Act Rule 6a-2

Exchange Act Rule 6a-2(a)(2) requires a national securities exchange to update the information provided in Exhibit C within 10 days of any action that causes the information provided in Exhibit C to become inaccurate or incomplete. In addition, Exchange Act Rule 6a-2(b)(1) requires a national securities exchange to file Exhibit D on or before June 30 of each year, and Exchange Act Rule 6a-2(c) requires a national securities exchange to file Exhibit C every three years.

⁸ Id.

⁹ 17 CFR 202.3(b)(2). See also 17 CFR 240.0-3(a). Defective Form 1 applications “may be returned with a request for correction or held until corrected before being accepted as a filing.” See 17 CFR 202.3(b)(2). See also Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844, 70881 (Dec. 22, 1998) (“Regulation ATS Adopting Release”) at note 329 and accompanying text.

C. Exemption Request

On December 14, 2012, the Applicant requested that the Commission grant an exemption under Section 36 of the Exchange Act, subject to the conditions set forth below, from the requirement under Exchange Act Rule 6a-1 to file the information requested in Exhibits C and D to Form 1 for the “Foreign Indirect Affiliates,” as defined below, of the Applicant.¹⁰ In addition, the Applicant requested an exemption, subject to certain conditions, with respect to the Foreign Indirect Affiliates from the requirements under: (1) Exchange Act Rule 6a-2(a)(2) to amend Exhibit C within 10 days if the information in Exhibit C becomes inaccurate or incomplete; and (2) Exchange Act Rules 6a-2(b)(1) and (c) to file periodic updates to Exhibits C and D.

The Applicant is a wholly-owned subsidiary of International Securities Exchange Holdings, Inc. (“ISE Holdings”).¹¹ ISE Holdings is a wholly-owned subsidiary of U.S. Exchange Holdings, Inc., which is wholly-owned by a German stock corporation, Eurex Frankfurt AG (“Eurex Frankfurt”). Eurex Frankfurt is wholly-owned by a Swiss stock corporation, Eurex Zurich AG (“Eurex Zurich”), which, in turn, is fifty percent (50%) owned by Deutsche Börse AG (“Deutsche Börse”) and fifty percent (50%) owned by Eurex Global Derivatives AG (“EGD”). Deutsche Börse has one hundred percent (100%) direct ownership interest in EGD. According to the Applicant, the parent ownership structure of U.S. Exchange Holdings, Inc. is comprised entirely of foreign entities, Eurex Frankfurt, Eurex Zurich, Deutsche Börse and EGD (collectively, the “Foreign Direct Affiliates”), which in turn hold ownership interests, either directly or indirectly, in excess of 25 percent (25%) in a large number of other foreign entities, some of which also own interests in other entities in excess of 25 percent (25%)

¹⁰ See Exemption Request, supra note 4.

¹¹ See Exemption Request, supra note 4, at 2.

as well (such Foreign Direct Affiliate-owned entities are referred to, collectively, as the “Foreign Indirect Affiliates”).¹²

Because of the limited and indirect nature of its connection to the Foreign Indirect Affiliates, the Applicant believes that the corporate and financial information of the Foreign Indirect Affiliates required by Exhibits C and D of Form 1 would have little relevance to the Commission’s review of the Applicant’s Form 1 application or to the Commission’s ongoing oversight of the Applicant as a national securities exchange if the Commission were to approve the Applicant’s Form 1 application, as amended.¹³ In this regard, the Exemption Request states that the Foreign Indirect Affiliates have no ability to influence the management, policies, or finances of the Applicant and no obligation to provide funding to, or ability to materially affect the funding of, the Applicant.¹⁴ The Exemption Request also states that: (1) the Foreign Indirect Affiliates have no ownership interest in the Applicant or in any of the controlling shareholders of the Applicant; and (2) there are no commercial dealings between the Applicant and the Foreign Indirect Affiliates.¹⁵ Further, the Exemption Request states that obtaining detailed corporate and financial information with respect to the Foreign Indirect Affiliates (1) is unnecessary for the protection of investors and the public interest and (2) would be unduly burdensome and inefficient because these affiliates are located in foreign jurisdictions and the disclosure of such information could implicate foreign information sharing restrictions in such jurisdictions.¹⁶

¹² See id.

¹³ See id.

¹⁴ See Exemption Request, supra note 4, at 2-3.

¹⁵ See Exemption Request, supra note 4, at 3.

¹⁶ See id. The Applicant also believes that providing the information required by Exhibits C and D with respect to the Foreign Indirect Affiliates could raise confidentiality concerns because many of the Foreign Indirect Affiliates are not public companies. Id.

As a condition to the granting of exemptive relief, the Applicant has agreed to provide: (i) a listing of the names of the Foreign Indirect Affiliates; (ii) an organizational chart setting forth the affiliation of the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant; and (iii) in Exhibit C of the Applicant's Form 1 application, a description of the nature of the Foreign Indirect Affiliates' affiliation with the Foreign Direct Affiliates and the Applicant. In addition, as a condition to the granting of exemptive relief from the requirements of Exchange Act Rule 6a-2(a)(2), 6a-2(b)(1), and 6a-2(c), as described above, the Applicant has agreed to provide amendments to the information required under conditions (i) through (iii) above on or before June 30th of each year. Further, the Applicant notes that it will provide the information required by Exhibits C and D for all of its affiliates other than the Foreign Indirect Affiliates, including the Foreign Direct Affiliates.¹⁷

III. Order Granting Conditional Section 36 Exemption

Section 6 of the Exchange Act¹⁸ sets forth a procedure for an exchange to register as a national securities exchange.¹⁹ Exchange Act Rule 6a-1(a)²⁰ requires an application for registration as a national securities exchange to be filed on Form 1 in accordance with the instructions in Form 1. A Form 1 application is not considered filed until all necessary information, including financial statements and other required documents, has been furnished in

¹⁷ See Exemption Request, supra note 4, at 3.

¹⁸ 15 U.S.C. 78f.

¹⁹ Specifically, Section 6(a) of the Exchange Act states that “[a]n exchange may be registered as a national securities exchange . . . by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.” Section 6 of the Exchange Act also sets forth various requirements to which a national securities exchange is subject.

²⁰ 17 CFR 240.6a-1(a).

the proper form.²¹ Exchange Act Rule 6a-2 establishes ongoing requirements to file certain amendments to Form 1.

Section 36(a)(1) of the Exchange Act provides that “the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”²²

For the reasons discussed below, the Commission believes that it is appropriate in the public interest and consistent with the protection of investors to exempt the Applicant from the requirement under Exchange Act Rule 6a-1 to provide the information required in Exhibits C and D to Form 1 with respect to the Foreign Indirect Affiliates, subject to the following conditions:

- (1) the Applicant must provide a list of the names of the Foreign Indirect Affiliates;
- (2) the Applicant must provide an organizational chart setting forth the affiliation of the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant; and
- (3) as part of Exhibit C to the Applicant’s Form 1 Application, the Applicant must provide a description of the nature of the affiliation between the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant.

The Commission believes, further, that it is appropriate in the public interest and consistent with the protection of investors to exempt the Applicant, with respect to the Foreign Indirect Affiliates, from the requirements under: (a) Exchange Act Rule 6a-2(a)(2) to amend

²¹ 17 CFR 202.3(b)(2). See also *supra* note 9.

²² 15 U.S.C. 78mm(a)(1).

Exhibit C within 10 days of any action that renders the information in Exhibit C inaccurate or incomplete; (b) Exchange Act Rules 6a-2(c) to provide periodic updates of Exhibit C; and (c) Exchange Act Rules 6a-2(b)(1) to provide periodic updates of Exhibit D, subject to the condition that the Applicant provide amendments to the information required under conditions (1) through (3) above on or before June 30th of each year.

As part of an application for exchange registration, the information included in Exhibits C and D is designed to help the Commission make the determinations required under Sections 6(b) and 19(a) of the Exchange Act²³ with respect to the application. The updated Exhibit C and D information required under Exchange Act Rule 6a-2 is designed to help the Commission exercise its oversight responsibilities with respect to national securities exchanges.

Specifically, Exhibit D is designed to provide the Commission with information concerning the financial status of an exchange and its affiliates and subsidiaries,²⁴ and Exhibit C provides the Commission with the names and organizational documents of these affiliates and subsidiaries.²⁵ Such information is designed to help the Commission determine whether an applicant for exchange registration would have the ability to carry out its obligations under the Exchange Act, and whether a national securities exchange continues to have the ability to carry out its obligations under the Exchange Act.

Since the most recent amendments to Form 1 in 1998,²⁶ many national securities exchanges that previously were member-owned organizations with few affiliated entities have

²³ 15 U.S.C. 78f(b) and 78s(a).

²⁴ See Securities Exchange Act Release No. 18843 (June 25, 1982), 47 FR 29259 (July 6, 1982) (proposing amendments to Form 1); see also Form 1, 17 CFR 249.1, and supra Section II.A.

²⁵ Form 1, 17 CFR 249.1. See also supra note 5.

²⁶ See Regulation ATS Adopting Release, supra note 9.

demutualized. Some of these demutualized exchanges have been consolidated under holding companies with numerous affiliates that, in some cases, have only a limited and indirect connection to the national securities exchange, with no ability to influence the management or policies of the registered exchange and no obligation to fund, or to materially affect the funding of, the registered exchange. The Commission believes that, for these affiliated entities, the information required under Exhibits C and D would have limited relevance to the Commission's review of an application for exchange registration or to its oversight of a registered exchange.

Based on the Applicant's representations, the indirect nature of the relationship between the Applicant and the Foreign Indirect Affiliates, and the information that the Applicant will provide with respect to the Foreign Direct Affiliates and the Foreign Indirect Affiliates, the Commission believes that it will have sufficient information to review the Applicant's Form 1 application and to make the determinations required under Sections 6(b) and 19(a) of the Exchange Act with respect to its application for registration as a national securities exchange.²⁷ The Commission believes, further, that it will have the information necessary to oversee the Applicant's activities as a national securities exchange if the Commission were to approve the Applicant's Form 1 application. In particular, the Commission notes that the Applicant has represented that it would have no direct connection to the Foreign Indirect Affiliates, that the Foreign Indirect Affiliates would have no ability to influence the management or policies of the Applicant, and that the Foreign Indirect Affiliates would have no obligation to fund, or ability to materially affect the funding of, the Applicant. In addition, the Commission notes that the

²⁷ 15 U.S.C. 78f(b) and 78s(a). Section 6(b) of the Exchange Act enumerates certain determinations that the Commission must make with respect to an exchange before granting the registration of the exchange as a national securities exchange. The Commission will not grant an exchange registration as a national securities exchange unless the Commission determines that the exchange meets these requirements. See Regulation ATS Adopting Release, supra note 9, at IV.B.

Applicant represented that: (1) the Foreign Indirect Affiliates have no ownership interest in the Applicant or in any of the controlling equity holders of the Applicant; and (2) there are no commercial dealings between the Applicant and the Foreign Indirect Affiliates.²⁸

Given the limited and indirect relationship between the Applicant and the Foreign Indirect Affiliates, as described above, the Commission believes that the detailed corporate and financial information required in Exhibits C and D with respect to the Foreign Indirect Affiliates is unnecessary for the Commission's review of the Applicant's Form 1 application and would be unnecessary for the Commission's oversight of the Applicant as a registered national securities exchange following any Commission approval of its Form 1 application.

For the reasons discussed above, the Commission finds that the conditional exemptive relief requested by the Applicant is appropriate in the public interest and is consistent with the protection of investors.

IT IS ORDERED, pursuant to Section 36 of the Exchange Act,²⁹ that the Applicant is exempt from the requirements to: (1) include in its Form 1 application the information required in Exhibits C and D to Form 1 with respect to the Foreign Indirect Affiliates; and (2) with respect to the Foreign Indirect Affiliates, update the information in Exhibits C and D to Form 1 as required by Exchange Act Rules 6a-2(a)(2), 6a-2(b)(1), and 6a-2(c) subject to the following conditions:

- (i) the Applicant must provide a list of the names of the Foreign Indirect Affiliates;
 - (ii) the Applicant must provide an organizational chart setting forth the affiliation of the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant;
- and

²⁸ See Exemption Request, supra note 4, at 3.

²⁹ 15 U.S.C. 78mm.

(iii) as part of Exhibit C to the Applicant's Form 1 Application, the Applicant must provide a description of the nature of the affiliation between the Foreign Indirect Affiliates and the Foreign Direct Affiliates and the Applicant.

In addition, the Applicant must provide amendments to the information required under conditions (i) through (iii) above on or before June 30th of each year.

By the Commission.

Kevin M. O'Neill
Deputy Secretary