

## SECURITIES AND EXCHANGE COMMISSION

[RELEASE NO. 34-51998; File No. S7-06-05]

July 8, 2005

### Notice of an Application of the New York Stock Exchange, Inc. for an Exemption Pursuant to Section 36 of the Securities Exchange Act of 1934 and Request for Comment

On May 26, 2005, the Securities and Exchange Commission received an application from the New York Stock Exchange, Inc. (“NYSE”) for an exemption pursuant to Section 36<sup>1</sup> of the Securities Exchange Act of 1934,<sup>2</sup> in accordance with the procedures set forth in Exchange Act Rule 0-12.<sup>3</sup> The NYSE requests exemptive relief from Section 12(a)<sup>4</sup> of the Exchange Act to permit its members, brokers and dealers to trade certain unregistered debt securities on the NYSE’s Automated Bond System.<sup>5</sup> We are publishing this notice and a proposed exemptive order to provide interested persons with an opportunity to comment.<sup>6</sup>

#### I. Background

Section 12(a) of the Exchange Act provides in relevant part that it “shall be unlawful for any member, broker or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for

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<sup>1</sup> 15 U.S.C. 78mm. Section 36 of the Exchange Act gives the Commission the authority to exempt any person, security or transaction from any Exchange Act provision by rule, regulation or order, to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors.

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 17 CFR 240.0-12. Exchange Act Rule 0-12 sets forth the procedures for filing applications for orders for exemptive relief pursuant to Section 36.

<sup>4</sup> 15 U.S.C. 78l(a).

<sup>5</sup> The NYSE’s application for exemptive relief is included as Appendix A.

<sup>6</sup> The Commission’s proposed exemptive order is included as Appendix B.

such exchange.” Section 12(b)<sup>7</sup> of the Exchange Act dictates how the registration referred to in Section 12(a) must be accomplished. Accordingly, all equity and debt securities that are not “exempted securities”<sup>8</sup> or are not otherwise exempt from Exchange Act registration must be registered by the issuer under the Exchange Act before a member, broker or dealer may trade that class of securities on a national securities exchange.

Contrarily, brokers or dealers who trade debt securities otherwise than on a national securities exchange may trade debt securities regardless of whether the issuer registered that class of debt under the Exchange Act. This is so because Exchange Act registration for securities traded other than on a national securities exchange is required only for certain equity securities. In particular, Section 12(g)<sup>9</sup> of the Exchange Act, the only Exchange Act provision other than Section 12(a) to impose an affirmative Exchange Act registration requirement, requires the registration of equity securities only.<sup>10</sup>

As the Commission has stated in the past, we believe that this disparate regulatory treatment may have negatively and unnecessarily affected the structure and development of the debt markets.<sup>11</sup> In 1994, to reduce existing regulatory distinctions between exchange-traded debt

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<sup>7</sup> 15 U.S.C. 781(b).

<sup>8</sup> An exempted security may be traded on a national securities exchange absent Exchange Act registration. Section 3(a)(12) of the Exchange Act [15 U.S.C. 78c(a)(12)] defines exempted security to include securities such as government securities, municipal securities, various trust fund interests, pooled income fund interests and church plan interests.

<sup>9</sup> 15 U.S.C. 781(g).

<sup>10</sup> Section 12(g)(1) of the Exchange Act and Rule 12g-1 [17 CFR 240.12g-1] promulgated thereunder require an issuer to register a class of equity securities if the issuer of the securities, at the end of its fiscal year, has more than \$10,000,000 in total assets and a class of equity securities held by 500 or more recordholders. When Congress amended the Exchange Act in 1964 to add Section 12(g), it extended the registration requirement to specified equity securities that are not exchange-traded. No comparable provision was provided for debt securities that are not exchange-traded.

<sup>11</sup> See Release Nos. 34-34922 (November 1, 1994) [59 FR 55342], and 34-34139 (June 1, 1994) [59 FR 29398].

securities and debt securities that trade in the “over-the-counter” (“OTC”) market, we adopted Exchange Act Rule 3a12-11.<sup>12</sup> Rule 3a12-11 provides for the automatic effectiveness of Form 8-A<sup>13</sup> registration statements for exchange-traded debt securities, exempts exchange-traded debt from the borrowing restrictions under Section 8(a)<sup>14</sup> of the Exchange Act, and exempts exchange-traded debt from most of the proxy and information statement requirements under Sections 14(a), (b) and (c) of the Exchange Act.<sup>15</sup> Despite these efforts, the vast majority of secondary trading of debt securities continues to occur in the OTC market, which suggests that there still may be regulatory impediments that need to be addressed.<sup>16</sup>

In addition, we have sought to increase the level of transparency in the public debt markets. We have long believed that price transparency in the U.S. capital markets is fundamental to promoting the fairness and efficiency of our markets.<sup>17</sup> In 1998, the Commission’s staff conducted a review of the public debt markets and found that in the area of corporate debt securities, price transparency was deficient.<sup>18</sup> Following the staff’s 1998 review, the Commission requested the National Association of Securities Dealers, Inc. (“NASD”) to

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<sup>12</sup> 17 CFR 240.3a12-11. Release No. 34-34922 (November 1, 1994) [59 FR 55342].

<sup>13</sup> 17 CFR 249.208a.

<sup>14</sup> 15 U.S.C. 78h(a).

<sup>15</sup> 15 U.S.C. 78n(a), (b) and (c). Rule 3a12-11 states that Rules 14a-1, 14a-2(a), 14a-9, 14a-13, 14b-1, 14b-2, 14c-1, 14c-6 and 14c-7 continue to apply to the exchange-traded debt securities for which Rule 3a12-11 provides exemptive relief [17 CFR 240.14a-1, 14a-2(a), 14a-9, 14a-13, 14b-1, 14b-2, 14c-1, 14c-6 and 14c-7].

<sup>16</sup> The NYSE estimates that there are over 22,000 publicly offered corporate bond issues having a par value in excess of \$3 trillion but only 8% of the \$3 trillion par value is registered under the Exchange Act and so may be traded on the NYSE’s Automated Bond System. See the NYSE’s application for exemptive relief.

<sup>17</sup> See Testimony of Chairman Arthur Levitt Before the House Subcommittee on Finance and Hazardous Materials, Committee on Commerce, Concerning Transparency in the United States Debt Market and Mutual Fund Fees and Expenses (September 29, 1998).

<sup>18</sup> Id.

adopt rules requiring dealers to report transactions in corporate debt securities and preferred stock to the NASD and to develop a real-time price quotation system.<sup>19</sup>

## **II. Summary of the Application**

The NYSE requests us to permit its members, brokers and dealers to trade certain classes of debt securities not registered under Section 12(b) of the Exchange Act on the NYSE's Automated Bond System.<sup>20</sup> The NYSE asserts that the statutory distinctions referred to above put the NYSE at a competitive disadvantage vis-à-vis the OTC market with respect to the trading of debt.<sup>21</sup> Further, the NYSE asserts that investors are adversely impacted by this distinction. The NYSE believes that the adverse impact on investors is twofold.<sup>22</sup> First, the NYSE asserts that investors are deprived of the advantage of competing markets. Second, the NYSE asserts that the Automated Bond System is generally more transparent than the OTC market.<sup>23</sup> The NYSE states that, in contrast to OTC bond trading, the Automated Bond System reports bid and ask quotations and last sale prices, exclusive of any mark-ups, mark-downs or other charges. In addition, the NYSE states that all Automated Bond System trades are reported instantaneously.

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<sup>19</sup> *Id.* The NASD was asked to undertake this initiative for two reasons. First, the vast majority of debt securities are traded on the OTC market. Second, the Commission believed that the NASD possessed the required infrastructure to undertake the initiative and this would obviate the need to “reinvent the wheel.” See Testimony of Chairman Arthur Levitt Before the House Subcommittee on Finance and Hazardous Materials, Committee on Commerce, Concerning Hedge Fund Activities in the U.S. Financial Markets (March 18, 1999).

<sup>20</sup> For purposes of the requested exemption, the term “debt security” would be defined as any security that, if the class of securities were listed on the NYSE, would be listed under Sections 102.03 or 103.05 of the NYSE's Listed Company Manual. A debt security would not include any security that, if the class of securities were listed on the NYSE, would be listed under Sections 703.19 or 703.21 of the NYSE's Listed Company Manual. Provided, however, under no circumstances would a debt security include any security that is defined as an “equity security” under Section 3(a)(11) of the Exchange Act [15 U.S.C. 78c(a)(11)].

<sup>21</sup> See the NYSE's application for exemptive relief.

<sup>22</sup> See the NYSE's application for exemptive relief.

<sup>23</sup> The Automated Bond System is an automated trading and information system that allows member firms to enter directly into the system and execute debt security orders through remote terminals that match them on a price and time priority basis.

The NYSE further asserts that it is not aware of any comparable level of transparency that exists currently.

Notwithstanding any competitive disadvantage to the NYSE that may have resulted from existing statutory distinctions or the potential benefits to investors of increased competition and enhanced transparency,<sup>24</sup> we believe that we must still balance these benefits against any loss of Exchange Act protections that could result if we determine to grant the requested exemptive relief. Further, as explained below, we believe that any proposed relief only should be granted in a way that mitigates any lost Exchange Act protections.

We view the potential loss of the comprehensive public information that an issuer must provide under Section 13(a) of the Exchange Act as perhaps the most significant factor weighing against relief.<sup>25</sup> To address this concern, the NYSE proposes that any exemption be conditioned on two important protections designed to prevent the loss of Exchange Act disclosure. First, relief would be limited to a class of debt securities whose offer and sale was registered under the Securities Act of 1933.<sup>26</sup> This limitation is designed to ensure that investors would have access to the detailed disclosure in the Securities Act registration statement for the debt securities, including a trust indenture qualified under the Trust Indenture Act of 1939.<sup>27</sup>

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<sup>24</sup> A May 2004 study entitled “Transparency of Corporate Bond Markets” by the Technical Committee of the International Organization of Securities Commissions found that transparency supports market efficiency, fosters investor confidence and strengthens investor protection. A similar study of U.S. corporate debt markets found that greater transparency reduces transaction costs of corporate bond trading. See “Corporate Bond Market Transparency and Transaction Costs” by Amy K. Edwards, Lawrence E. Harris and Michael S. Piwowar (March 2005). See [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=593823](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=593823).

<sup>25</sup> 15 U.S.C. 78m(a). Section 13(a) provides the Exchange Act’s comprehensive disclosure standards that require an issuer of securities registered under the Exchange Act to file annual, quarterly and current reports with the Commission.

<sup>26</sup> 15 U.S.C. 77a *et seq.*

<sup>27</sup> 15 U.S.C. 77aaa-77bbbb.

Second, relief would be limited to issuers of debt securities with at least one class of equity securities registered under Section 12(b) and listed on the NYSE.<sup>28</sup> This condition is designed to guarantee that substantially all of the public information that would be available if the debt securities were registered under Section 12(b) would remain available with respect to the issuer of the debt securities covered by the exemption. The only significant Exchange Act disclosure for debt registered under Section 12 that would not continue to be provided under the proposed exemptive relief would be:

- the extremely limited information contained in the Form 8-A required for Exchange Act registration;<sup>29</sup>
- the listing of the class of debt on the annual report's cover page;
- the disclosure of material modifications to instruments defining the rights of debt holders and material limitations or qualifications to the rights of debt holders required by Item 3.03 of Form 8-K; and
- certain exhibits to an issuer's annual and quarterly reports defining the rights of debt holders as provided in Item 601(b)(4) of Regulation S-K, although most of

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<sup>28</sup> The debt securities of a wholly-owned subsidiary of a company with at least one class of equity securities registered under Section 12(b) of the Exchange Act and listed on the NYSE also would be covered by the proposed relief. In addition to the Exchange Act disclosure obligations mentioned below that would no longer apply to a parent debt issuer whose debt could be traded under the exemption, all other Exchange Act disclosure obligations also would not apply to a wholly-owned subsidiary of that company, assuming that the wholly-owned subsidiary had no other class of securities registered or reporting under the Exchange Act. The NYSE asserts that the Exchange Act disclosures and other public information available with respect to the wholly-owned debt issuer's parent, the consolidation of a wholly-owned subsidiary's financial information into its parent's financial statements, as well as the information regarding the wholly-owned subsidiary's debt securities available under the trust indenture and otherwise, are designed to ensure that all interested parties receive necessary information regarding the debt securities.

<sup>29</sup> Form 8-A is the short-form registration statement used by companies to register a class of securities under the Exchange Act. The form requires a description of the registrant's securities pursuant to Item 202 of Regulation S-K or S-B, and in certain circumstances, the filing of all constituent instruments, including any contracts or other documents, that define, limit or qualify the rights of the holders of the class of securities. The disclosures required by the form may be furnished by incorporation by reference to other filings with the Commission.

the exhibits required by Item 601 are filed as exhibits to the Securities Act registration statement for the debt securities.

We preliminarily believe that the loss of this information is outweighed by the proposed relief's benefits to all interested parties, but will consider any public comment to the contrary. We also further note that this information is not required to be disclosed for debt traded in the OTC market. Further, the condition of the proposed exemptive order requiring the issuer of the debt security to have at least one class of common or preferred equity securities registered under Section 12(b) of the Exchange Act and listed on the NYSE is designed to assure that the issuer of debt securities has a significant and continuous listing (and oversight) relationship with the NYSE.<sup>30</sup> This relationship will allow the NYSE to better monitor issuers whose debt is traded on the Automated Bond System and will ensure that the issuers of traded debt satisfy the NYSE's comprehensive listing standards for equity securities.

In addition to the Exchange Act disclosure obligations that would no longer apply, holders of debt securities traded in reliance on the proposed relief would not be protected by the antifraud proscriptions of Exchange Act Rules 14a-9 and 14c-6 or the shareholder communications provisions in Exchange Act Rules 14a-13, 14b-1, 14b-2 and 14c-7, which govern the transmission of proxy and information statements to beneficial owners of securities. Although solicitations of debt holders are infrequent,<sup>31</sup> in its 1994 rulemaking, the Commission determined that the exemptive relief afforded by Exchange Act Rule 3a12-11 should not

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<sup>30</sup> In the case of an issuer that is a wholly-owned subsidiary, the issuer's parent would need to have at least one class of common or preferred equity securities registered under Section 12(b) of the Exchange Act and listed on the NYSE.

<sup>31</sup> According to the NYSE, only six solicitations of debt holders of NYSE-listed debt securities occurred during 2004.

encompass these antifraud and shareholder communications provisions.<sup>32</sup> We believe that other requirements, the contractual terms of the trust indenture, and economic motivations for intermediaries to serve the needs of their customers would help to mitigate the loss of these protections. Specifically, the antifraud protection afforded by Exchange Act Rule 10b-5<sup>33</sup> would continue to apply to soliciting materials sent to holders of debt traded in reliance on the proposed exemption. In addition, NYSE Rule 451<sup>34</sup> requires NYSE member firms to transmit copies of all proxy and consent solicitation materials to beneficial owners.<sup>35</sup> Furthermore, we note that none of these provisions applies to debt securities traded in the OTC market.

We also acknowledge that, if we grant the requested relief, the NYSE's listing standards generally would no longer apply to any debt traded, but not listed, on the Automated Bond System. This would include all debt currently listed on the system that qualifies for trading under the requested exemption because the NYSE intends to formally delist all debt securities that qualify for the exemption, if we approve its application.<sup>36</sup> Without a listing requirement,

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<sup>32</sup> In Release No. 34-34922, the Commission noted that the proxy rules relating to the transmission of materials to beneficial owners not only provide protection to investors, but also benefit issuers by facilitating their ability to communicate directly with their debtholders. Exchange Act Rules 14a-13, 14b-1 and 14b-2 establish procedures by which companies can request a list of their non-objecting beneficial owners from banks, brokers and similar intermediaries holding shares on behalf of such owners.

<sup>33</sup> 17 CFR 240.10b-5.

<sup>34</sup> Paragraph 2451 of the NYSE Guide.

<sup>35</sup> Although banks and other intermediaries that are not NYSE member firms would not be subject to NYSE Rule 451, many of these intermediaries owe fiduciary obligations to their beneficial owner customers that would cause them to continue transmitting soliciting materials to their customers even in the absence of an explicit Commission requirement.

<sup>36</sup> As noted, debt that trades on the NYSE that does not qualify for the exemptive relief would continue to be "listed" on the NYSE. To distinguish between "listed" debt and "traded" debt, the NYSE would: provide definitions of, and distinguish between, listed debt securities and traded debt securities on the Automated Bond System log-on screen and on the NYSE's web site; directly provide each NYSE member and each NYSE listed company with notification clarifying the distinction between listed and traded debt, as well as notification that eligible listed debt will be delisted and, instead, traded on the Automated Bond System; and issue a press release explaining the Section 36 relief.

issuers of debt securities would no longer be required to notify the NYSE about various corporate actions related to the issuer's debt. However, the following actions by the NYSE should alleviate concerns in this regard:

- The NYSE would engage a third party data vendor to provide the NYSE and its members with a customized on-line reference for corporate actions relevant to debt securities trading on the Automated Bond System.<sup>37</sup> This information is similar to, although less comprehensive than, the information that the NYSE currently receives pursuant to its rules for the continued listing of debt securities.<sup>38</sup> Unlike some of the information that the NYSE currently receives pursuant to its rules for the continued listing of debt, the information provided by the third party data vendor would be available only to the NYSE and its members. While the NYSE has undertaken to hire a third party data vendor, the vendor's engagement and availability of the contemplated information would not be a formal condition to the proposed relief; and
- The NYSE has filed proposed rule changes (SR-NYSE-2004-69) on Exchange Act Form 19b-4 that would specify the exchange's initial and continued requirements for trading unregistered debt securities on the Automated Bond System. In particular, the amended rules would state that trading on the NYSE's Automated Bond System could only commence for debt securities with an outstanding market value or principal amount of at

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<sup>37</sup> The NYSE intends to engage Xcitek, LLC as its third party data vendor.

<sup>38</sup> According to the NYSE, Xcitek, LLC's tracking service will provide notification of calls (redemptions), notice of defaults in the payment of interest, notice of consent solicitations and other corporate actions related to public debt including tender offers, issuer name changes and CUSIP number changes. The tracking service will not provide notification of changes in transfer agent or trustee, changes in the collateral deposited under a trust indenture, changes or unusual conditions related to the payment of interest, the issuance or authentication of duplicate bonds, all of which must be provided for listed debt securities. The NYSE asserts that the loss of certain information currently provided under the NYSE Listed Company Manual for listed debt securities is outweighed by the proposed relief's benefits to all parties with an interest.

least \$10 million and trading would be suspended if the outstanding market value or principal amount fell below \$1 million. In addition, the proposed rule would allow the NYSE to suspend trading in a debt security if, among other things, the issuer's assets were substantially reduced, the issuer declared bankruptcy, or the NYSE determined that the issuer engaged in operations that are contrary to the public interest. The Commission is publishing for comment the NYSE's proposed rule changes concurrently with our publication of this notice.<sup>39</sup>

In addition to the previously noted actions that the NYSE intends to take, and conditions to the exemption, the proposed exemptive relief would be available only for debt securities of an issuer whose transfer agent for the debt security is registered under Section 17A of the Exchange Act and for classes of debt securities whose indenture is qualified under the Trust Indenture Act. The first condition is designed to ensure that the transfer agents providing services to issuers of debt securities trading pursuant to the exemption would be subject to Section 17A of the Exchange Act and the rules thereunder and to the Commission's oversight. The second condition is designed to ensure that specific protections afforded to debt holders under the Trust Indenture Act are included in the debt securities' trust indenture.

### **III. Request for Comment**

We request and encourage any interested person to submit comments regarding the NYSE's application as well as the terms of our proposed exemptive order, including whether the request should be granted.<sup>40</sup> In particular, we solicit comment on the following questions:

- Is the scope of the requested exemption appropriate?
- Would the requested exemption increase competition in the public debt markets?

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<sup>39</sup> See Release No. 34-51999 (July 8, 2005).

<sup>40</sup> The Commission's proposed exemptive order is included as Appendix B.

- Would the requested exemption increase the transparency of the public debt markets?
- Would an issuer's Exchange Act reports for its equity securities and all other public information related to the issuer's class of debt adequately inform investors about the debt securities covered by the requested exemption?
- Should the requested exemption relieve issuers of debt securities and other applicable parties from the antifraud proscriptions of Exchange Act Rules 14a-9 and 14c-6 and/or from Exchange Act Rules 14a-13, 14b-1, 14b-2 and 14c-7, which govern the transmission to beneficial owners of proxy and consent materials and information statements, as proposed? Does Exchange Act Rule 10b-5 provide adequate antifraud protection against misstatements or material omissions in proxy or information statements and related materials? Is there any significant concern that banks, brokers and similar intermediaries would refuse or fail to transmit proxy materials to beneficial owners if Rules 14b-1 and 14b-2 no longer expressly applied?
- Should the requested exemption apply to a wholly-owned subsidiary of a company with at least one class of equity securities registered under Section 12(b) and listed on the NYSE, if the wholly-owned subsidiary independently does not satisfy the conditions for relief? Should the wholly-owned subsidiary's parent have to guarantee the subsidiary's debt securities for the requested exemption to apply?
- Are there any other differences between exchange-traded debt and debt traded in the OTC market that warrant a more restrictive regulatory treatment for exchange-traded debt?

- Are there any implications or concerns that may arise because NYSE members would be able to trade a debt security without the NYSE entering into a formal listing arrangement with the issuer of the debt security?
- Should we condition the proposed exemption on any additional NYSE listing standards?
- Are the conditions sufficiently designed so that investors are appropriately protected?
- Are the bases triggering suspension of trading (e.g., bankruptcy, substantial reduction in assets, or NYSE determination that the issuer engaged in operations contrary to the public interest) appropriate? Should any be removed? Are there any others that should be added?
- Is the use of a third party data vendor adequate to provide the NYSE and its members with sufficient information regarding corporate actions relevant to debt securities traded on the Automated Bond System? If not, what additional information or measures would be appropriate? Should any such information or measures be required as an additional condition of the exemption?
- Is the information to be provided by Xcitek, LLC to the NYSE and its members significant enough to justify its inclusion in the proposed exemptive order as a formal condition to relief?

Comments should be received on or before [insert date 30 days after publication in the Federal Register]. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/other.shtml>); or

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number S7-06-05 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-9303.

All submissions should refer to File Number S7-06-05. This file number should be included on the subject line if e-mail is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/other.shtml>). Comments are also available for public inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

For further information, you may contact Sean Harrison, Special Counsel, Office of Rulemaking, at (202) 551-3430, or Robert T. Plesnarski, Deputy Chief Counsel, Office of Chief Counsel, at 202-551-3832 in the Division of Corporation Finance or Timothy Fox, Attorney, or Michael Gaw, Senior Special Counsel, Office of Market Supervision, at (202) 551-5643 and (202) 551-5602, respectively, in the Division of Market Regulation, at the U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

By the Commission.

J. Lynn Taylor  
Assistant Secretary

## **Appendices**

- A The New York Stock Exchange's application for an exemption pursuant to Section 36 of the Exchange Act**
- B Proposed order granting the New York Stock Exchange's application for an exemption pursuant to Section 36 of the Exchange Act**

May 26, 2005

Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street N.W.  
Washington, D.C. 20549-0609

Dear Mr. Katz:

The New York Stock Exchange, Inc. (the “Exchange”) requests that the Securities and Exchange Commission (the “Commission”) provide relief pursuant to Section 36<sup>1</sup> of the Securities Exchange Act of 1934 (the “Exchange Act”)<sup>2</sup> to provide an exemption from the provisions of Section 12(a)<sup>3</sup> of the Exchange Act to permit NYSE members and member organizations to trade certain debt securities that are not registered under Section 12(b)<sup>4</sup> of the Exchange Act.

**Conditions Applicable to the Exemptive Relief Requested**

The Exchange requests that the Commission provide exemptive relief with respect to Section 12(a), which provides in relevant part that it shall be unlawful for any “member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national

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<sup>1</sup> 15 U.S.C. 78mm.

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 15 U.S.C. 78l(a).

<sup>4</sup> 15 U.S.C. 78l(b).

securities exchange unless a registration is effective as to such security for such exchange.”<sup>5</sup> The Exchange further asks that this exemption be granted to allow NYSE members and member organizations to trade debt securities that satisfy the following conditions:

1. The issuer of the debt securities registered the offer and sale of that class of debt securities under the Securities Act of 1933, as amended (the “1933 Act”),<sup>6</sup>
2. The issuer of the debt securities or the issuer’s parent, if the issuer is a wholly-owned subsidiary, has at least one class of common or preferred equity securities registered under Section 12(b)<sup>7</sup> of the Exchange Act and listed on the New York Stock Exchange, and
3. The transfer agent for the debt securities is registered under Section 17A<sup>8</sup> of the Exchange Act.

In connection with this exemptive request, the NYSE undertakes that it will take or has taken the following steps:

- (a) The NYSE will provide definitions of “listed” debt securities and “traded” debt securities on the Automated Bond System® (the “ABS®”) log-on screen and on the NYSE’s website,
- (b) The NYSE will distinguish between “listed” debt securities and “traded” debt securities on the ABS® and on the NYSE website’s bond issue directory,<sup>9</sup>

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<sup>5</sup> If the Commission grants exemptive relief from Section 12(a), members, brokers and dealers would be able to trade on the NYSE eligible debt securities that had not been registered under Section 12(b), which prescribes the procedures for an issuer’s registration of a security and the information required to be submitted. Similarly, the Exchange would no longer need to comply with the provisions of Section 12(d) regarding the certification of listing and registration of debt securities.

<sup>6</sup> 15 U.S.C. 77a.

<sup>7</sup> 15 U.S.C. 78l(b).

<sup>8</sup> 15 U.S.C. 78q-1.

- (c) The NYSE will directly provide each member organization and each listed company notification via letter and/or email prior to the date that trading of the debt securities commences on the ABS<sup>®</sup> to clarify the distinction between “listed” debt securities and “traded” debt securities and to provide notification that eligible listed debt securities will be delisted and, instead, traded on the ABS<sup>®</sup>,
- (d) The NYSE will issue a press release upon launch of this initiative stating that “listed” debt securities trade along side “traded” debt securities on the ABS<sup>®</sup>, and
- (e) The NYSE has contracted with Xcitek, LLC, (“Xcitek”), a third-party bond issue tracking service, for the provision of information prior to the date that this exemption is granted by the SEC.

Xcitek’s tracking service provides the NYSE a customized on-line reference for corporate actions relevant to bonds. The tracking system provides information and data electronically to the NYSE, and provides:

- Notification of calls (redemptions) of traded bonds,
- Notification of tender offers for traded bonds,
- Notice of defaults in payment of interest on traded bonds,
- Notice of consent solicitations for traded bonds, and
- Notice of corporate actions for traded bonds (includes tender offers, issuer name changes, cusip number changes).

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<sup>9</sup> The NYSE will distinguish debt securities "listed" on the ABS<sup>®</sup> from those "traded" on the ABS<sup>®</sup> on the three different screens used to view the market and through which orders may be entered: (1) the book showing all the orders in a particular security; (2) the summary book showing aggregate interest at each price in a particular security; and (3) the display of the best bid/offer, price range, and calculated accrued interest in a particular security. As will be clearly noted on the ABS<sup>®</sup> log-on screen, “listed” debt securities will be identified by a letter or symbol, “traded” debt securities will be identifiable due to the absence of such letter or symbol. The location of the indicator will be the same on all three screens.

The tracking system does not provide notification of changes in trustees, obligors or transfer agents with respect to traded debt securities. The NYSE has entered into a one-year contract with Xcitek to provide this information electronically on a daily basis. Xcitek independently obtains, researches and organizes the information. The NYSE does not itself verify the information provided by Xcitek. To the extent that in the future, Xcitek is no longer willing or able to provide this information, the NYSE will contract with another third party for the provision of similar information.

The NYSE has separately filed SR-NYSE-2004-69 (December 3, 2004) and Amendment No. 1 to 2004-69 (March 15, 2005) on Exchange Act Form 19b-4 to propose NYSE Rules 1400 and 1401 that set forth the requirements for trading unlisted debt securities on the ABS®.

Proposed Rule 1400 provides that, for purposes of this exemption:

“The term Debt Securities includes only securities that, if they were to be listed on the New York Stock Exchange, would be listed under Sections 102.03 or 103.05 of the New York Stock Exchange’s Listed Company Manual; provided, however, that such securities shall not include any security that is defined as an "equity security" under Section 3(a)(11) of the Exchange Act.

For the avoidance of doubt, note that the term “Debt Securities” does not include a security that, if listed on the New York Stock Exchange, would have been listed under Sections 703.19 or 703.21 of the New York Stock Exchange’s Listed Company Manual. The references to Sections 102.03, 103.05, 703.19, and 703.21 of the NYSE’s Listed Company Manual are to those sections as in effect on January 31, 2005.”

Proposed Rule 1401 specifies that only Debt Securities with an outstanding market value or principal amount of at least \$10 million will be permitted to be traded by NYSE members and member organizations on the ABS®. Proposed Rule 1401 also specifies that trading in Debt Securities will be suspended if:

- the outstanding aggregate market value or principal amount of the Debt Securities has fallen to less than \$1,000,000, or

- the Debt Securities may no longer be traded by NYSE members or member organizations on an unregistered basis pursuant to this exemptive request.

In order to ensure that debt securities have at least \$10,000,000 in aggregate market value or principal amount at the time trading commences, the NYSE will review two existing corporate bond issue data bases that provide issue size information for the preponderance of corporate bonds.

To monitor the \$1,000,000 suspension threshold, the NYSE will generally utilize the third party tracking system to monitor partial redemptions and tender offers. The most prevalent reason for outstanding principal amounts to fall below \$1 million is when the price of the bond declines because of a default or potential bankruptcy. Prices of bonds in these situations will be monitored. We will also monitor the media for warnings of possible difficulties, in addition to ratings downgrades.

With respect to debt securities that are currently listed on the NYSE, the Exchange intends to apply to delist debt securities that satisfy the NYSE's requirements for traded debt and, instead, to trade those debt securities on the ABS<sup>®</sup> on an unlisted basis. As described above, the NYSE will be contacting listed companies to provide notification that eligible listed debt securities will be delisted and, instead, traded on the ABS<sup>®</sup>.

The NYSE will also inform listed companies of the NYSE's intention to identify currently outstanding or newly issued unlisted debt securities that are eligible to be traded by NYSE members and member organizations on the ABS<sup>®</sup>. The NYSE's Fixed Income Markets Division will review a variety of sources, including SEC Securities Act filings and bond offerings posted daily in financial publications in order to identify additional unlisted debt securities that have been issued by a NYSE equity-listed company or wholly-owned subsidiary

and that satisfy the requirements of proposed Rules 1400 and 1401. The NYSE intends to provide an opportunity for NYSE members and member organizations to trade all eligible debt securities. Once unlisted debt securities are identified and verified as satisfying the requirements of proposed Rule 1400 and 1401, the NYSE will notify NYSE members and member organizations that such unlisted debt securities are eligible to be traded on the ABS® through ticker notices and postings on the ABS® website.

Debt securities that do not satisfy the proposed requirements of Exchange Rules 1400 and 1401 may continue to be listed on the NYSE. Debt securities that would not satisfy the proposed requirements for trading include convertible debt securities, debt securities that were listed under Sections 703.19 and 21 of the NYSE's Listed Company Manual, debt issued by listed company subsidiaries that are not wholly owned, foreign government debt and debt issued by an issuer that does not have equity securities listed on the NYSE.

## **Background**

In 1992, the Exchange wrote to the Commission requesting that it grant a similar exemption pursuant to Section 3(a)(12) of the Exchange Act.<sup>10</sup> The Exchange pointed out that, while debt securities traded on a national securities exchange must be registered under Section 12(b) of the Exchange Act,<sup>11</sup> debt securities traded “over-the-counter” (“OTC”) were not subject to the same requirement. In fact, debt securities traded OTC need not even be issued by reporting companies. The Exchange argued that these statutory distinctions put it at a competitive disadvantage with respect to the OTC market. In an effort to be responsive, in

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<sup>10</sup> 15 U.S.C. 78c(a)(12). See Letter from Donald J. Solodar, Executive Vice President, New York Stock Exchange, to William H. Heyman, Director, Division of Market Regulation, Securities and Exchange Commission, and Linda C. Quinn, Director, Division of Corporation Finance, Securities and Exchange Commission, dated April 7, 1992.

<sup>11</sup> See footnote 4 *supra*.

November 1994, the Commission amended certain Exchange Act rules to “reduce regulatory distinctions between exchange-traded debt securities required to be registered under Section 12 of the Exchange Act and bonds traded over-the-counter for which such registration is not required.”<sup>12</sup> In doing so, the Commission acknowledged that “regulatory distinctions may have unnecessarily and unintentionally affected the structure and development of the debt markets.”<sup>13</sup>

### **The Exchange Act Bond Registration Requirement**

In the Exchange’s view, the Exchange Act registration requirement for corporate bonds to be traded on exchanges continues to have an anti-competitive impact on exchange bond markets. Under Section 12(g) of the Exchange Act,<sup>14</sup> only equity securities are required to be registered to be traded in the OTC market. In contrast, corporate bond issues may trade on a national securities exchange only if those bonds are registered under the Exchange Act.

The Exchange estimates that, in 1992, 90% of the par value of outstanding corporate debt (excluding private placements) was issued by reporting companies, but only 35% of that debt was registered under the Exchange Act. Currently, the Exchange estimates that 95% of the par value of outstanding corporate debt (excluding private placements) is issued by reporting companies, but only 8% of that debt is registered under the Exchange Act.<sup>15</sup> As a result, the Exchange’s bond market remains small and has declined over the last decade. In 1991,

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<sup>12</sup> See Securities Exchange Act Release No. 34-34922 (November 1, 1994), 59 FR 55342 (Nov. 7, 1994). The Commission, among other things, exempted debt securities listed on a national securities exchange from Sections 14(a), 14(b) and 14(c) of the Exchange Act.

<sup>13</sup> See footnote 9 *supra*.

<sup>14</sup> 15 U.S.C. 78l(g).

<sup>15</sup> While there are no definitive numbers as to the size of the corporate bond market, based upon issues rated by the Nationally Recognized Securities Rating Organizations (“NRSRO”), the Exchange estimates that there are over 22,000 publicly offered corporate bond issues, having a par value in excess of \$3 trillion. These numbers do not include asset-backed securities, medium-term note offerings, or commercial paper. Telephone conversation between Fred Siesel, Consultant to the New York Stock Exchange and Dan Wyzocki, President, First Data Services (November 8, 2004).

approximately 1,800 corporate bond issues having a par value of \$287 billion were traded on the Exchange, representing 675 issuers. At the end of 2004, the Exchange had some 500 corporate bond issues trading (having a par value of \$230 billion), representing 220 issuers. In comparison, the Exchange estimates that there are over 22,000 publicly offered corporate bond issues, with a combined par value in excess of \$2.8 trillion, trading in the OTC secondary markets in the United States without being registered under Section 12(b) of the Exchange Act. Thus, while there are over 22,000 corporate bond issues that can be traded on the OTC market, only about 500 of these issues may be traded on exchanges. Clearly, despite the reforms undertaken by the Commission in 1994, the Exchange believes that fewer companies are deciding to register their debt securities under the Exchange Act, and the number of debt securities eligible for trading on national securities exchanges continues to diminish.

The consequences of the continued disparity in regulatory treatment of exchange and OTC debt securities are not limited to the competitive constraints on the Exchange. The Exchange believes that investors in corporate bonds are adversely impacted. In contrast to OTC bond trading, the Exchange's bond market has long disseminated both last sale prices as they occur on the Exchange exclusive of any mark-ups, mark-downs, or other charges, and bid and ask quotations. Continuous last sale price disclosure has existed since 1867, when the stock and bond ticker first went into operation. In 1919, the stock and bond tickers commenced separate operations, and in 1977, the bond high-speed quote line began the dissemination of last sale prices and quotations to market data providers, such as Bloomberg, Reuters, ILX and others. Today, this market data is available through some 400,000 market data displays providing subscribers – primarily securities firms and financial institutions – with direct instantaneous access to this information, throughout each trading day. Instantaneous means within one to two

seconds of the actual trade. The Exchange is not aware of any comparable level of transparency – trade prices, quotations, and speed of availability for corporate bond prices – that exists currently elsewhere or will exist in the foreseeable future. The Exchange believes that all of this transparency is lost when a bond delists from, or is not traded on, the Exchange.<sup>16</sup>

Exchange bond trading is conducted through the ABS<sup>®</sup>, which began operations in 1977. The ABS<sup>®</sup> is a web-based trading system for fixed income securities to which Exchange member firms subscribe and through which they enter and match customer bond orders on a strict price and time priority basis. The system provides member subscribers with access to screens that display the order “book” in each bond in best price order and in the time sequence received. Completed, locked-in trades are submitted to the clearing corporation (i.e., Depository Trust Clearing Corporation) with calculated accrued interest. ABS<sup>®</sup> centralizes bond trading and facilitates the high-speed dissemination of last sale prices and quotations to market data providers via the Exchange’s dedicated bond quote line. ABS<sup>®</sup> primarily serves the “small-lot” corporate bond market. Small-lot bond buyers and sellers are primarily individuals, bank trust accounts, and small institutions. In addition, bond dealers will use ABS<sup>®</sup> to offset so-called “tail-end” bond positions acquired in the course of large-lot trading. As noted above, ABS<sup>®</sup> is the only system, known to us, providing the public with real-time disclosure of quotations and trade prices, exclusive of mark-ups/mark-downs, commissions, or other charges.

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<sup>16</sup> One instance in which this transparency may be lost is when a company with both listed equity and debt is merged or reorganizes with another company. The successor may list its stock on the Exchange but leave its debt in a now wholly owned subsidiary, which may seek to delist its debt to avoid separate Section 13 reporting requirements. Once delisted from the Exchange, the debt is traded only OTC, and the Exchange believes that investors lose the benefit of the transparency provided by the real time reporting of quotations and trades on the Exchange.

Examples of such delisting, include Southwestern Bell debt (Securities Exchange Act Release No. 34-42141 (Nov. 16, 1999), 64 FR 63833 (Nov. 22, 1999)) and Pacific Bell debt (Securities Exchange Act Release No. 34-42142 (Nov. 16, 1999) 64 FR 63833 (Nov. 22, 1999)). Other examples have involved the debt of Mobil Corporation, Outdoor Systems, ITT Corporation, Chrysler Auburn Hills, Texaco, Ralston-Purina, Time-Warner Entertainment, New England Telephone and New York Telephone.

## **Bond Issue Information**

Because information that is disclosed in connection with the registration of bonds under the Exchange Act is generally also available through other Commission filings and other means, the Exchange believes that permitting a broker or dealer to effect a transaction in a debt security without requiring Exchange Act registration of eligible debt securities will not result in any significant loss of bond or issuer information to investors. First, the Exchange is only requesting exemptive relief with respect to the trading by NYSE members and member organizations of debt securities issued by eligible listed companies and their wholly owned subsidiaries. In order for debt securities to be traded by NYSE members and member organizations, the listed company must have equity securities listed on the NYSE and, thus, already be subject to the requirements of Section 13 of the Exchange Act. Information about the listed company will remain available to investors even in the absence of an Exchange Act registration requirement for bonds of these issuers or their wholly owned subsidiaries.

Second, only debt securities that are registered under the 1933 Act would be eligible to be traded by NYSE members and member organizations on the ABS<sup>®</sup>. Additionally, under Section 15(d) of the Exchange Act, issuers not required to register their debt securities under Section 12 of the Exchange Act are subject to Section 13 reporting requirements for the fiscal year following the effective date of a registration statement filed under the 1933 Act.<sup>17</sup> Issuers must continue to file such reports so long as they have a class of securities with at least 300 “holders of record” as defined under Exchange Act Rule 12g5-1.<sup>18</sup> Therefore, with respect to eligible debt securities that have been issued by the wholly owned subsidiary of a listed company, that wholly

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<sup>17</sup> 15 U.S.C. 78o(d).

<sup>18</sup> 17 C.F.R. 240.12g5-1.

owned subsidiary may or may not itself be currently subject to the requirements of Section 15(d) or Section 13 of the Exchange Act.

The 1933 Act registration statements themselves supply much of the relevant information needed by the bond markets and investors. Indeed, for the most part, the Exchange Act registration Form 8-A simply incorporates by reference the information found in the 1933 Act registration statement. The 1933 Act registration statement also contains a much more detailed and relevant description of the debt issue than is required by Rule 12b-3 of the Exchange Act.<sup>19</sup> The description contained in the term sheet of the registration statement provides the information necessary to trade that issue – whether on an exchange or OTC. The issue description contained in the Form 8-A registration statement does not provide the information needed to trade bonds.

Most of the other disclosure items required in connection with debt securities arise with respect to Forms 8-K, 10-Q and 10-K. These forms would continue to be filed by eligible listed companies and, where required by Sections 15(d) or 13 under the Exchange Act, by eligible wholly owned subsidiaries, regardless of whether the debt securities are registered under the Exchange Act. Item 2.04 of Form 8-K requires disclosure of any triggering event, such as a default, that accelerates or increases a direct financial obligation. Item 3.03 of Form 8-K requires disclosure of any material modification to the rights of security holders. Item 601(b)(4) of Regulation S-K (required to be included in 10-Ks and 10-Qs) discusses the definition of the rights of debt holders. Part II - Item 3(a) of Form 10-Q requires that, to the extent that the registrant has not previously disclosed such information on Form 8-K, the registrant must provide information regarding defaults in the payment of principal, interest, sinking fund, etc.,

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<sup>19</sup> 17 C.F.R. 240.12b-3. Rule 12b-3 requires that wherever the title of securities is required to be stated one shall also indicate “the type and general character of the securities....” For funded debt, issuers are required to state the following: the rate of interest, the maturity date (or dates for serial issues), an indication if the payment of principal or interest is contingent, a brief indication of the priority of the issue, and, if the issue is convertible, a statement to that effect.

“with respect to any indebtedness of the registrant or any of its significant subsidiaries exceeding 5 percent of the total assets of the registrant and its consolidated subsidiaries...” (emphasis added). Thus, the Form 10-Q requires disclosure of defaults in the payment of principal, interest, sinking fund, etc. for any bonds of the registrant, irrespective of whether such bonds are exchange-listed or not.

If, as described above, a wholly owned subsidiary ceases to provide Exchange Act reports itself, much of the information that had been provided by the wholly owned subsidiary will be provided instead by the wholly owned subsidiary’s listed parent company in its own Exchange Act reports. The listed parent company, however, will not be required to list and describe the debt securities issued by the wholly owned subsidiary on the cover page of its own annual report on Form 10-K or to include as an exhibit to its own Forms 10-K or 10-Q the exhibits that would have been required to be filed by the wholly owned subsidiary pursuant to Item 601(b)(4) of Regulation S-K (relating to creation of a new class of securities or indebtedness or the modification of existing rights of security holders).

There are also a variety of databases providing bond information, including information regarding the listing and/or trading location of a bond. A few examples of these database services include: Standard & Poor’s Bond Guide, the Mergent Bond Record, First Data Services’ BORAS, Bloomberg and the Commission’s EDGAR internet service, among other services. In addition, the Exchange’s own bond issue directory is available on the Exchange’s web site and carries the description of each listed bond issue, including bonds currently exempt from Exchange Act registration requirements, such as Tennessee Valley Authority and the International Bank for Reconstruction and Development (World Bank) bonds.

Most notably, of course, OTC bond trading functions without the information obtained as a result of Exchange Act registration. OTC bond trading relies on the information disclosed in the 1933 Act registration statement and the indentures filed under the Trust Indenture Act, including amendments to the indenture affecting the rights of bondholders.

Debt securities traded by NYSE members and member organizations on the ABS® will not be subject to the provisions of the NYSE's Listed Company Manual that relate to debt securities that are listed on the NYSE. While both traded and listed debt securities are subject to the same quantitative thresholds for initial trading/listing and continued trading/listing, listed debt securities are also subject to other requirements, including:

- Issuers of listed debt securities are required to provide immediate notice to the NYSE and the public of defaults or other unusual circumstances relating to the payment of interest;
- Issuers of listed debt securities are required to provide immediate notice to the NYSE and the public of any corporate action it (or third parties) may take towards the redemption, retirement or cancellation of the security;
- Issuers of listed debt securities are subject to requirements for transfer agents; and
- Issuers of listed debt securities are required to submit a listing application in order to list the securities.

As noted above, in the case of traded debt securities, the NYSE will obtain notice regarding defaults and redemptions through the third-party tracking system.

### **No Justification for Disparate Treatment**

In summary, the disparate regulation between exchanges and the OTC markets has occurred without deliberate design. In 1934, Congress determined to regulate all listed issuers,

and did not distinguish between listed equity and listed debt. Of course, at the time, the only place a company could be “listed” was on an exchange. In 1964, Congress properly determined to extend Exchange Act registration requirements to issuers having a substantial number of public shareholders and to require them to file periodic reports with the Commission, even if they were not listed on an exchange. The focus, however, was on those companies with public stockholders, so Section 12(g) of the Exchange Act was made applicable only to issuers of equity held by the requisite number of holders. As a result, publicly held debt that is not listed does not trigger the registration requirement.<sup>20</sup>

We believe that this exemptive relief is consistent with the Commission’s interest in greater bond market transparency. We also believe that removing unnecessary anti-competitive barriers to exchange trading of debt of reporting companies and their consolidated subsidiaries will go a long way towards providing bond investors with the transparency that we all agree is so important. We urge the Commission to use its exemptive power to remove the requirement that bonds of NYSE-listed equity issuers and their consolidated subsidiaries must be registered under the Exchange Act in order to be traded on an exchange. This dichotomy between exchange and OTC bond markets has existed too long and should be ended.

Sincerely yours,

/s/ Mary Yeager

cc: Alan L. Beller  
Annette L. Nazareth

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<sup>20</sup> Also at that time, Section 15(d) was amended to replace the asset-size standard with a holder-of-record standard. See Securities Exchange Act Release No. 34-7492 (January 5, 1965), 30 FR 483 (1965). Because of the widespread use of street name holding, however, the vast majority of bonds issued by bond-only companies fall outside the reporting requirement of Section 15(d). Thus Section 15(d), though it applies to both equity and debt, does not fill the gap left by Section 12(g), and does not achieve Exchange Act ongoing reporting for the bonds of most bond-only companies.

David Shillman  
Paula Dubberly  
Robert Plesnarski  
Sean Harrison  
Michael Gaw  
Timothy C. Fox

**Proposed Order Granting the New York Stock Exchange’s Application for an Exemption Pursuant to Section 36 of the Securities Exchange Act of 1934**

This is a proposed order regarding the exemptive application of the New York Stock Exchange, Inc. (“NYSE”). Before issuing any final order, the Commission will consider public comments received on the NYSE’s exemptive application and proposed order.

**I. Introduction**

On May 26, 2005, the Commission received an application from the NYSE for an exemption pursuant to Section 36<sup>1</sup> of the Securities Exchange Act of 1934 (the “Exchange Act”),<sup>2</sup> in accordance with the procedures set forth in Exchange Act Rule 0-12.<sup>3</sup> The NYSE has requested exemptive relief from Section 12(a)<sup>4</sup> of the Exchange Act to permit its members and brokers or dealers to trade certain unregistered debt securities on the NYSE’s Automated Bond System. This order grants the NYSE’s application for an exemption.

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

Section 12(a) of the Exchange Act provides in relevant part that it shall be unlawful for any “member, broker or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective as to such security for

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<sup>1</sup> 15 U.S.C. 78mm. Section 36 of the Exchange Act gives the Commission the authority to exempt any person, security or transaction from any Exchange Act provision by rule, regulation or order, to the extent that the exemption is necessary or appropriate in the public interest and consistent with the protection of investors.

<sup>2</sup> 15 U.S.C. 78a *et seq.*

<sup>3</sup> 17 CFR 240.0-12. Exchange Act Rule 0-12 sets forth procedures for filing applications for orders for exemptive relief pursuant to Section 36.

<sup>4</sup> 15 U.S.C. 78l(a).

such exchange.” Section 12(b)<sup>5</sup> of the Exchange Act dictates how the registration referred to in Section 12(a) must be accomplished. Accordingly, all equity and debt securities that are not “exempted securities” or are not otherwise exempt from Exchange Act registration must be registered by the issuer under the Exchange Act before a member, broker or dealer may trade that class of securities on a national securities exchange.

Contrarily, brokers or dealers who trade debt securities otherwise than on a national securities exchange may trade debt securities regardless of whether the issuer registered that class of debt under the Exchange Act. This is so because Exchange Act registration for securities traded other than on a national securities exchange is required only for certain equity securities. In particular, Section 12(g)<sup>6</sup> of the Exchange Act, the only Exchange Act provision other than Section 12(a) to impose an affirmative Exchange Act registration requirement, requires the registration of equity securities only.<sup>7</sup>

As the Commission has stated in the past, we believe that this disparate regulatory treatment may have negatively and unnecessarily affected the structure and development of the debt markets.<sup>8</sup> In 1994, to reduce existing regulatory distinctions between exchange-traded debt securities and debt securities that trade in the “over-the-counter” (“OTC”) market, we adopted Exchange Act Rule 3a12-11.<sup>9</sup> Rule 3a12-11 provides for the automatic effectiveness of Form

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<sup>5</sup> 15 U.S.C. 781(b).

<sup>6</sup> 15 U.S.C. 781(g).

<sup>7</sup> Section 12(g)(1) of the Exchange Act and Rule 12g-1 [17 CFR 240.12g-1] promulgated thereunder require an issuer to register a class of equity securities if the issuer of the securities, at the end of its fiscal year, has more than \$10,000,000 in total assets and a class of equity securities held by 500 or more recordholders.

<sup>8</sup> See Release Nos. 34-34922 (November 1, 1994) [59 FR 55342], and 34-34139 (June 1, 1994) [59 FR 29398].

<sup>9</sup> 17 CFR 240.3a12-11.

8-A registration statements for exchange-traded debt securities, exempts exchange-traded debt from the borrowing restrictions under Section 8(a)<sup>10</sup> of the Exchange Act, and exempts exchange-traded debt from certain proxy and information statement requirements under Sections 14(a), (b) and (c) of the Exchange Act.<sup>11</sup> Despite these efforts, the vast majority of secondary trading of debt securities continues to occur in the OTC market, which suggests that there still may be regulatory impediments that need to be addressed.<sup>12</sup>

In addition, we have sought to increase the level of transparency in the public debt markets. We have long believed that price transparency in the U.S. capital markets is fundamental to promoting the fairness and efficiency of our markets.<sup>13</sup> In 1998, the Commission's staff conducted a review of the public debt markets and found that in the area of corporate debt securities, price transparency was deficient.<sup>14</sup> Following the staff's 1998 review, the Commission requested the National Association of Securities Dealers, Inc. ("NASD") to adopt rules requiring dealers to report transactions in corporate debt securities and preferred stock to the NASD and to develop a real-time price quotation system.<sup>15</sup>

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<sup>10</sup> 15 U.S.C. 78h(a).

<sup>11</sup> 15 U.S.C. 78n(a), (b) and (c).

<sup>12</sup> The NYSE estimates that there are over 22,000 publicly offered corporate bond issues having a par value in excess of \$3 trillion but only 8% of the \$3 trillion par value is registered under the Exchange Act and so may be traded on the NYSE's Automated Bond System. See the NYSE's application for exemptive relief.

<sup>13</sup> See Testimony of Chairman Arthur Levitt Before the House Subcommittee on Finance and Hazardous Materials, Committee on Commerce, Concerning Transparency in the United States Debt Market and Mutual Fund Fees and Expenses (September 29, 1998).

<sup>14</sup> Id.

<sup>15</sup> Id. The NASD was asked to undertake this initiative for two reasons. First, the NASD is the self-regulatory agency for the OTC market, the market on which the vast majority of debt securities are traded. Second, the Commission believed that the NASD possessed the required infrastructure to undertake the initiative and this would obviate the need to "reinvent the wheel." See Testimony of Chairman Arthur Levitt Before the House Subcommittee on Finance and Hazardous Materials, Committee on Commerce, Concerning Hedge Fund Activities in the U.S. Financial Markets (March 18, 1999).

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

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

In granting this relief, we expect that the NYSE will design and implement all rules related to the relief in a manner that protects investors and the public interest and does not unfairly discriminate between customers, issuers, brokers or dealers.

Accordingly, IT IS ORDERED pursuant to Section 36 of the Exchange Act that, under the terms and conditions set forth below, a NYSE member, broker or dealer may effect a transaction on the NYSE's Automated Bond System in a debt security that has not been registered under Section 12(b) of the Exchange Act without violating Section 12(a) of the Exchange Act.

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

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

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

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

- (1) The issuer of the debt security has registered the offer and sale of such securities under the Securities Act of 1933;<sup>16</sup>
- (2) The issuer of the debt security, or the issuer’s parent company if the issuer is a wholly-owned subsidiary,<sup>17</sup> has at least one class of common or preferred equity securities registered under Section 12(b) of the Exchange Act and listed on the NYSE;
- (3) The transfer agent of the debt security is registered under Section 17A<sup>18</sup> of the Exchange Act;
- (4) The trust indenture for the debt security is qualified under the Trust Indenture Act of 1939;<sup>19</sup> and
- (5) The NYSE has complied with the undertakings to distinguish between debt securities registered under Section 12(b) of the Exchange Act and listed on the NYSE and debt securities trading under this order, as set forth in the NYSE’s exemptive application.

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<sup>16</sup> 15 U.S.C. 77a et seq.

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

<sup>18</sup> 15 U.S.C. 78q-1.

<sup>19</sup> 15 U.S.C. 77aaa - 77bbbb.

By the Commission.

[Name]  
[Title]