

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59011; File No. SR-NYSE-2008-122)

November 24, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Expand the Exception to NYSE Rule 2B to allow Archipelago Securities LLC to Route Orders to the NYSE in its Capacity as an Order Routing Facility of NYSE Alternext US LLC

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 19, 2008, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to expand the exception to NYSE Rule 2B to allow Archipelago Securities LLC (“Arca Securities”), an NYSE affiliated member, to route orders to the NYSE, in its capacity as an order routing facility of NYSE Alternext US LLC (“NYSE Alternext”). A copy of this filing is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the Exchange’s principal office and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments

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

<sup>2</sup> 17 CFR 240.19b-4.

it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

On September 29, 2008, the Securities and Exchange Commission (“SEC” or “Commission”) approved the routing of orders by Arca Securities to the NYSE and certain revisions to Exchange Rule 2B.<sup>3</sup> In that filing, the Exchange discussed Arca Securities’ status as an order routing facility of NYSE Arca, Inc. (“NYSE Arca”).<sup>4</sup> In its capacity as an order routing facility, Arca Securities receives routing instructions from NYSE Arca and routes orders to various away market centers, including the NYSE, for execution. The Exchange notes that Arca Securities is subject to independent oversight and enforcement by the Financial Industry Regulatory Authority (“FINRA”), an unaffiliated self-regulatory organization (“SRO”) that is Arca Securities’ designated examining authority. In this capacity, FINRA is responsible for examining Arca Securities with respect to its books and records and capital obligations, and

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<sup>3</sup> See Securities and Exchange Act Release No. 34-58680 (September 29, 2008), 73 FR 58283 (October 6, 2008) (order approving SR-NYSE-2008-76).

<sup>4</sup> Arca Securities also currently acts as the outbound order routing facility of the NYSE. In this capacity, Arca Securities facilitates the acceptance of executions that result in an odd-lot or a sub-penny execution since NYSE systems are unable to accept such executions after Arca Securities routes an Exchange order to an away market center. See, Securities Exchange Act Release No. 34-55590 (April 5, 2007), 72 FR 18707 (April 13, 2007) (notice of immediate effectiveness of SR-NYSE-2007-29). Recently, the NYSE modified its electronic trading system in order to accommodate away market center executions in sub-pennies; implementation of this modification should substantially reduce the need for Arca Securities to facilitate sub-penny executions. See Securities Exchange Act Release No. 34-58936 (November 13, 2008) (notice of filing and immediate effectiveness of SR-NYSE-2008-117).

shares with NYSE Regulation, Inc. (“NYSE Regulation”) the responsibility for reviewing Arca Securities’ compliance with intermarket trading rules such as SEC Regulation NMS. In addition, through an agreement between FINRA and the NYSE pursuant to the provisions of SEC Rule 17d-2 under the Securities Exchange Act of 1934, FINRA’s staff reviews for Arca Securities’ compliance with other NYSE rules through FINRA’s examination program. NYSE Regulation monitors Arca Securities for compliance with NYSE trading rules, subject, of course, to SEC oversight of NYSE Regulation’s regulatory program.

In addition, the Exchange has established certain mechanisms designed to address the Commission’s concerns regarding affiliated members. Pursuant to NYSE Rule 2B, the Exchange has established and implemented procedures and internal controls reasonably designed to ensure that Arca Securities does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated members of the Exchange in connection with the provision of inbound order routing to the Exchange. In addition, NYSE Regulation has agreed to collect and maintain certain surveillance related information concerning Arca Securities. NYSE Regulation has further agreed to provide a report to the Exchange’s Chief Regulatory Officer, on at least a quarterly basis, utilizing a quantitative approach in assessing Arca Securities’ compliance with applicable NYSE or SEC rules. By this filing, the Exchange proposes to expand the exception to NYSE Rule 2B to allow Arca Securities to route orders to the NYSE, in its capacity as an order routing facility of NYSE Alternext.

Recently, NYSE Alternext filed with the Commission a proposal to use Arca Securities as its approved outbound order routing facility.<sup>5</sup> Pursuant to that proposal and NYSE Alternext rules governing its Routing Broker,<sup>6</sup> Arca Securities will receive its routing instructions from NYSE Alternext and report any such executions back to NYSE Alternext. Arca Securities has no discretion and cannot change the terms of an order or the routing instructions. Moreover, each type of order is subject to the same principles governing the Exchange's authority to route orders to away market centers, namely: use of Arca Securities for outbound routing is only available to—and is optional for—NYSE Alternext members, the primary regulatory responsibility for Arca Securities lies with an unaffiliated SRO, and appropriate procedures are in place to manage any conflicts of interest or potential information advantages. In the capacity as a facility of NYSE Alternext, Arca Securities will receive routing instructions from NYSE Alternext and will route orders to various away market centers, including the NYSE, for execution.

The Exchange is submitting this filing in order to expand the exception to NYSE Rule 2B to allow Arca Securities to route orders to the NYSE, in its capacity as an order routing facility of NYSE Alternext. Specifically, NYSE Regulation has agreed with the Exchange that it will collect and maintain the following information of which NYSE Regulation staff becomes aware

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<sup>5</sup> See SR-NYSEALTR-2008-07 (filing seeking approval for Arca Securities to operate as the outbound order routing facility of NYSE Alternext). Arca Securities will perform only the functions described in SR-NYSEALTR-2008-07 and the functionality approved in SR-AMEX-2008-62. See Securities Exchange Act Release No. 34-58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (order approving SR-AMEX-2008-62).

<sup>6</sup> NYSE Alternext recently received approval to implement Rules 13 and 17, which define the term Routing Broker and establish the conditions under which its Routing Broker shall operate. See, Securities Exchange Act Release No. 34-58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (order approving SR-AMEX-2008-63).

– namely, all alerts, complaints, investigations and enforcement actions where Arca Securities (in its capacity as a facility of both NYSE Arca and NYSE Alternext, routing orders to the NYSE) is identified as a participant that has potentially violated NYSE or applicable SEC rules – in an easily accessible manner, so as to facilitate any review conducted by the SEC’s Office of Compliance Inspections and Examinations. NYSE Regulation has further agreed with the Exchange that it will provide a report to the Exchange’s Chief Regulatory Officer, on at least a quarterly basis, which: (i) quantifies all alerts (of which NYSE Regulation is aware in its tracking system) that identify Arca Securities as a participant that has potentially violated NYSE or SEC rules and (ii) quantifies the number of all investigations that identify Arca Securities as a participant that has potentially violated NYSE or SEC rules.<sup>7</sup> In addition, the agreement between FINRA and NYSE pursuant to the provisions of Rule 17d-2 under the Act, as well as the provisions of NYSE Rule 2B(2) will apply to routing by Arca Securities to the NYSE in its capacity as a facility of NYSE Alternext. The Exchange proposes that the Commission authorize the NYSE to receive inbound routes from Arca Securities (in its capacity as a facility of NYSE Alternext, routing orders to the NYSE) on a pilot basis. The Exchange requests that this pilot period run concurrently with a twelve month pilot period for the NYSE’s receipt of “PO+” orders from Arca Securities, which commenced on September 29, 2008.<sup>8</sup> The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein.

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<sup>7</sup> The Exchange, NYSE Regulation, and SEC staff, may agree going forward to reduce the number of applicable or relevant surveillances that form the scope of the agreed upon report.

<sup>8</sup> See supra note 3.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>9</sup> of the Securities Exchange Act of 1934 (the “Act”), in general, and furthers the objectives of Section 6(b)(5),<sup>10</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. Specifically, the Exchange is submitting this filing in order to expand the exception to NYSE Rule 2B to allow Arca Securities to route orders to the NYSE, in its capacity as an order routing facility of NYSE Alternext.

### B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were solicited or received with respect to the proposed rule change.

## III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments:

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

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2008-122 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2008-122. This file number should be included on the subject line if e-mail is used. To help the Commission 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/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2008-122 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>11</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>12</sup> which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.<sup>13</sup> The proposed use of Arca Securities as the outbound routing facility of NYSE Alternext,<sup>14</sup> which the Commission approved today, will expand the activities of Arca Securities in

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<sup>11</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving Nasdaq's proposal to adopt Nasdaq Rule 2140, restricting affiliations between Nasdaq and its members); and 53382 (February 27, 2006, 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings) at 11255; see also Securities Exchange Act Release No. 58680, supra note 3.

<sup>14</sup> See supra note 5.

routing orders to the NYSE.<sup>15</sup> Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interests when the exchange is affiliated with one of its members, the Commission believes that it is consistent with the Act to permit Arca Securities to provide inbound routing to the NYSE from NYSE Alternext on a pilot basis, subject to the conditions described above.

NYSE Euronext, a Delaware Corporation ("NYSE Euronext") currently indirectly owns Arca Securities, a broker-dealer that is a member of the NYSE. In addition, NYSE Euronext indirectly owns three registered securities exchanges -- the NYSE, NYSE Arca, and NYSE Alternext. Thus, Arca Securities is an affiliate of each of these exchanges.

NYSE Rule 2B prohibits the NYSE, or any entity with which the NYSE is affiliated, from acquiring or maintaining an ownership interest in a member, absent Commission approval. Thus, Arca Securities's affiliation with the NYSE would violate NYSE rules, absent Commission approval.

The Commission has approved Arca Securities affiliation with, and operation as a facility of, the NYSE for the provision of outbound routing from the NYSE to other market centers, subject to certain conditions.<sup>16</sup> Arca Securities's operation as a facility providing outbound routing for the NYSE is subject to the conditions that: (1) Arca Securities is operated and regulated as a facility of the NYSE; (2) Arca Securities only provide outbound routing services unless otherwise approved by the Commission;<sup>17</sup> (3) the primary regulatory responsibility for

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<sup>15</sup> See Securities Exchange Act Release No. 59009 (November 24, 2008) (notice of filing and order approving SR-NYSEALTR-2008-07 on an accelerated basis). See also supra note 5.

<sup>16</sup> See Securities Exchange Act Release No. 58680 supra note 3. See also Securities Exchange Act Release No. 55590, supra note 4; and supra 4.

<sup>17</sup> See NYSE Rule 17(b)2.

Arca Securities lies with an unaffiliated SRO; and (4) the use of Arca Securities's for outbound routing is available only to NYSE members and the use of Arca Securities's routing function remains optional.<sup>18</sup> Arca Securities also operates as a facility of NYSE Arca and similarly provides outbound routing from NYSE Arca to other market centers, subject to conditions similar to those listed above;<sup>19</sup> and today the Commission also approved Arca Securities operation as a facility of NYSE Alternext to provide outbound routing from NYSE Alternext under similar terms.<sup>20</sup>

The operation of Arca Securities as a facility of NYSE Alternext providing outbound routing services from that exchange will be subject to NYSE Alternext oversight, as well as Commission oversight. NYSE Alternext will be responsible for ensuring that Arca Securities's outbound routing function is operated consistent with Section 6 of the Act and NYSE Alternext rules. In addition, NYSE Alternext, must file with the Commission rule changes and fees relating to Arca Securities's outbound routing function.

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the NYSE previously proposed, and the Commission approved, limitations and conditions on its acceptance of orders routed from its affiliate, Arca Securities, in its capacity as a facility of the NYSE.<sup>21</sup> The Exchange now proposes to accept inbound orders

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<sup>18</sup> Id. See also NYSE Rule 17.

<sup>19</sup> See Securities Exchange Act Release No. 52497 (September 22, 2005), 70 FR 56949 (September 29, 2005) (SR-PCX-2005-90) (order approving proposed rule changes in connection with the acquisition of the Pacific Exchange, Inc. ("PCX," n/k/a NYSE Arca) by Archipelago Holdings, Inc.). See also Securities Exchange Act Release Nos. 58681 (September 29, 2008), 73 FR 58285 (October 6, 2008) (SR-NYSEArca-2008-90).

<sup>20</sup> See Securities Exchange Act Release No. 59009, supra note 15. See also supra note 5.

<sup>21</sup> See Securities Exchange Act Release No. 58680, supra note 3.

that Arca Securities routes in its capacity as a facility of NYSE Alternext, subject to the same limitations and conditions:

- First, NYSE Arca states that the agreement between FINRA and the NYSE pursuant to Rule 17d-2 under the Act will apply to routing by Arca Securities to the NYSE in its capacity as a facility of NYSE Alternext. Pursuant to this agreement, FINRA is allocated regulatory responsibilities to review Arca Securities' compliance with certain NYSE rules.<sup>22</sup>
- Second, NYSE Regulation<sup>23</sup> will monitor Arca Securities for compliance with the NYSE's trading rules, and will collect and maintain certain related information.<sup>24</sup>
- Third, the NYSE states that NYSE Regulation has agreed with the NYSE that it will provide a report to the NYSE's CRO, on a quarterly basis, that: (i) quantifies all alerts (of which NYSE Regulation is aware) that identify Arca Securities as a participant that has potentially violated NYSE or Commission rules, and (ii) quantifies the number of all investigations that identify Arca Securities as a

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<sup>22</sup> NYSE Arca also states that Arca Securities is subject to independent oversight by FINRA, its Designated Examining Authority, for compliance with financial responsibility requirements. See supra section II.A.1.

<sup>23</sup> NYSE Regulation is a wholly owned subsidiary of the NYSE that performs the regulatory functions of the NYSE pursuant to a delegation agreement. NYSE Regulation also performs many of the regulatory functions of NYSE pursuant to a regulatory services agreement. See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) ("NYSE/Arca Order") at 11255.

<sup>24</sup> Specifically, NYSE Regulation "will collect and maintain the following information of which NYSE Regulation staff becomes aware – namely, all alerts, complaints, investigations and enforcement actions where Arca Securities (in its capacity as a facility of both the NYSE Arca and NYSE Alternext, routing orders to NYSE Arca) is identified as a participant that has potentially violated NYSE or applicable SEC rules – in an easily accessible manner so as to facilitate any review conducted by the SEC's Office of Compliance Inspections and Examination." See supra section II.A.1.

participant that has potentially violated NYSE or Commission rules.<sup>25</sup>

- Fourth, NYSE Rule 2B(2), which requires NYSE Euronext, as the holding company owning both the NYSE and Arca Securities, to establish and maintain procedures and internal controls reasonably designed to ensure that Arca Securities does not develop or implement changes to its system, based on non-public information obtained regarding planned changes to NYSE systems as a result of its affiliation with the NYSE, until such information is available generally to similarly situated members of NYSE, in connection with the provision of inbound order routing to the NYSE, will apply.<sup>26</sup>
- Fifth, the NYSE proposes that routing from Arca Securities to NYSE, in Arca Securities's capacity as a facility of NYSE Alternext, be authorized for a pilot period to run concurrently with a twelve month pilot period for the NYSE's receipt of "PO+" orders from Arca Securities, which commenced on September 29, 2008.<sup>27</sup>

The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that FINRA's oversight of Arca Securities,<sup>28</sup> combined with NYSE Regulation's monitoring of Arca Securities' compliance with the NYSE's trading rules and quarterly reporting to the NYSE's CRO, will help to protect the independence of the NYSE's regulatory responsibilities with respect to Arca Securities. Furthermore, the Commission believes that the NYSE's proposal to allow Arca

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<sup>25</sup> See supra section II.A.1.

<sup>26</sup> See id. See also NYSE Rule 2B(2).

<sup>27</sup> See supra note 8 and accompanying text.

<sup>28</sup> This oversight will be accomplished through the 17d-2 agreement between FINRA and NYSE.

Securities to route orders inbound to the NYSE from NYSE Alternext, on a pilot basis, will provide the NYSE and the Commission an opportunity to assess the impact of any conflicts of interest of allowing an affiliated member of the NYSE to route orders inbound to the NYSE and whether such affiliation provides an unfair competitive advantage.

The NYSE has asked the Commission to accelerate approval of the proposed rule change. The NYSE in part that the proposed changes are “required due to NYSE Alternext’s planned implementation of a new trading system and the use of Arca Securities as its outbound routing facility.”<sup>29</sup> The NYSE also states that accelerated approval “will permit the Exchange to amend its mechanisms that are designed to address the Commission’s concerns regarding affiliated members in time to provide these protections at the time of NYSE Alternext’s implementation of its new trading system, which is targeted for December 1, 2008.”<sup>30</sup> The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. The Commission notes that the protections proposed by the NYSE, which are designed to address conflicts of interest concerns identified by the Commission in connection with the inbound routing of orders to an exchange when the routing broker-dealer is an affiliate of that exchange, are substantially the same as the conditions the Exchange currently has in place to address inbound routing from NYSE Arca, which were previously approved by the Commission.<sup>31</sup> The Commission also notes that no comments were

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<sup>29</sup> See SR-NYSE-2008-122, Item 7.

<sup>30</sup> Id.

<sup>31</sup> See Securities Exchange Act Release No. 58680, supra note 3. See also Securities Exchange Act Release Nos. 58673, supra note 5, and 58681, supra note 19, (establishing similar protections for inbound routing from Arca Securities to Alternext and NYSE Arca, respectively).

received in connection with SR-NYSE-2008-76. Accordingly, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>32</sup> to approve the proposed rule change on an accelerated basis for a pilot period expiring September 29, 2009.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSE-2008-122) is hereby approved on an accelerated basis for a pilot period to expire on September 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>33</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>32</sup> 15 U.S.C. 78s(b)(2).

<sup>33</sup> 17 CFR 200.30-3(a)(12).