SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-55165)

January 25, 2007

Order Pursuant to Section 11A of the Securities Exchange Act of 1934 and Rule 608(e) Thereunder Extending a De Minimis Exemption for Transactions in Certain Exchange-Traded Funds from the Trade-Through Provisions of the Intermarket Trading System

This order extends, through March 4, 2007, a de minimis exemption to the provisions of the Intermarket Trading System Plan ("ITS Plan"),[1] a national market system plan,[2] governing intermarket trade-throughs that currently is due to expire on February 4, 2007. The de minimis exemption was originally issued by the Commission on August 28, 2002[3] and extended on May

1 The self-regulatory organizations ("SROs") participating in the ITS Plan include the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the Chicago Stock Exchange, Inc., the National Stock Exchange, Inc. (formerly the Cincinnati Stock Exchange, Inc.), the National Association of Securities Dealers, Inc. ("NASD"), the New York Stock Exchange LLC, NYSE Arca, Inc. (formerly the Pacific Exchange, Inc.), and the Philadelphia Stock Exchange, Inc. (collectively, the "participants"). See Securities Exchange Act Release No. 19456 (January 27, 1983), 48 FR 4938 (February 3, 1983).

2 Securities Exchange Act of 1934 ("Act") Rule 608(c) (formerly Rule 11Aa3-2(d)), 17 CFR 242.608(c), promulgated under Section 11A, 15 U.S.C. 78k-1, of the Act requires each SRO to comply with, and enforce compliance by its members and their associated persons with, the terms of any effective national market system plan of which it is a sponsor or participant. Rule 608(e) (formerly Rule 11Aa3-2(f)), 17 CFR 242.608(e), under the Act authorizes the Commission to exempt, either unconditionally or on specified terms and conditions, any SRO, member of an SRO, or specified security from the requirement of the rule if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

3 See Securities Exchange Act Release No. 46428 (August 28, 2002), 67 FR 56607 (September 4, 2002) (the "August 2002 Order"). The August 2002 Order granted relief through June 4, 2003.

30, 2003,[4] on March 3, 2004,[5] on December 3, 2004,[6] on September 6, 2005,[7] and on June 28, 2006.[8]

Specifically, this order continues the de minimis exemption from compliance with Section 8(d)(i) of the ITS Plan with respect to two specific exchange-traded funds ("ETFs"), the Dow Jones Industrial Average ETF ("DIA") and the Standard & Poor's 500 Index ETF ("SPY").[9] By its terms, the June 2006 Order continued the exemption from the trade-through provisions of the ITS Plan of any transactions in the two ETFs that are effected at prices at or within three cents away from the best bid and offer quoted in the Consolidated Quote System ("CQS") through February 4, 2007.

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4 See Securities Exchange Act Release No. 47950 (May 30, 2003), 68 FR 33748 (June 5, 2003) (the "May 2003 Order"). The May 2003 Order granted relief through March 4, 2004.

5 See Securities Exchange Act Release No. 49356 (March 3, 2004), 69 FR 11057 (March 9, 2004) (the "March 2004 Order"). The March 2004 Order granted relief through December 4, 2004.

6 See Securities Exchange Act Release No. 50795 (December 3, 2004), 69 FR 71445 (December 9, 2004) (the "December 2004 Order"). The December 2004 Order granted relief through September 4, 2005.

7 See Securities Exchange Act Release No. 52382 (September 6, 2005), 70 FR 53695 (September 9, 2005) (the "September 2005 Order"). The September 2005 Order granted relief through June 28, 2006.

8 See Securities Exchange Act Release No. 54063 (June 28, 2006), 71 FR 38433 (July 6, 2006) (the "June 2006 Order"). The June 2006 Order granted relief through February 4, 2007.

9 The Commission limited the de minimis exemption to these two securities because they share certain characteristics that may make immediate execution of their shares highly desirable to certain investors. In particular, trading in the two ETFs is highly liquid and market participants may value an immediate execution at a displayed price more than the opportunity to obtain a slightly better price. Unlike prior orders, the December 2004, September 2005, and June 2006 extensions of the de minimis exemption applied only to the DIA and the SPY, and not the QQQ, because, on December 1, 2004, trading of the QQQ transferred from the American Stock Exchange to Nasdaq, and thus trades in the QQQ ceased to be subject to the trade-through provisions of the ITS Plan. Accordingly, an exemption for the QQQ was no longer necessary. See December 2004 Order, September 2005 Order, and June 2006 Order.

In the Commission's previous orders to issue and extend the de minimis exemption,[10] the Commission discussed its basis for determining that the de minimis exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system. In the June 2006 Order, the Commission further noted that:

> In March 2004 and in May 2003, the Commission extended the three cent de minimis exemption for additional nine-month periods, in order to assess trading data associated with the de minimis exemption and to consider whether to adopt the de minimis exemption on a permanent basis, to adopt some other alternative solution, or to allow the exemption to expire. As a result of its review of trading data associated with the de minimis exemption, the Commission has proposed, as part of its market structure initiatives, Regulation NMS under the Act, which would include a new rule relating to trade-throughs.

On April 6, 2005, the Commission approved Regulation NMS under the Act.[11] In Regulation NMS, the Commission adopted an approach that, among other things, protects only automated quotations and excludes manual quotations from trade-through protection, and renders the de minimis exemption unnecessary. Given the significant systems and other changes necessary to implement Rule 610 and Rule 611,[12] the Commission originally established delayed compliance dates for Rule 610 and Rule 611, the first of which was scheduled to begin on June

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10 See supra notes 3 to 8.

11 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

12 Rule 610 generally prohibits national securities exchanges and national securities associations from imposing unfairly discriminatory terms that prevent or inhibit access to quotations, and establishes a limit on access fees, and requires each national securities exchange and national securities association to adopt, maintain, and enforce written rules that prohibit their members from engaging in a pattern or practice of displaying quotations that lock or cross protected quotations. Rule 611 requires trading centers to establish, maintain, and enforce written policies and procedures reasonably designed to prevent the execution of trades at prices inferior to protected quotations displayed by other trading centers, subject to an applicable exception.

29, 2006.[13] In the September 2005 Order, the Commission stated that until Regulation NMS is implemented, the reasons for maintaining the de minimis exemption in effect continue to be valid, and thus the Commission extended the de minimis exemption though June 28, 2006, which was the date before the initial compliance date for Rule 610 and Rule 611.

On May 18, 2006, the Commission extended the compliance dates for Rule 610 and Rule 611 to give trading centers additional time to finalize the development of their new or modified trading systems, and to give the securities industry sufficient time to establish the necessary access to such trading systems.[14] The initial compliance date was extended to a series of five dates, beginning on October 16, 2006, for different functional stages of compliance, with February 5, 2007 (the "Trading Phase Date") being the final date for full operation of Regulation NMS-compliant trading systems for initial trade-through protection under Rule 611, as described in the First NMS Extension Release. The Commission also extended the de minimis exemption through February 4, 2007, which was the day before the Trading Phase Date.[15]

On January 24, 2007, the Commission extended the Trading Phase Date to March 5, 2007.[16] Therefore, to maintain the status quo and avoid requiring market participants to make short-term trading or programming changes pending the extended implementation period for

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13 See supra note 11.

14 Securities Exchange Act Release No. 53829 (May 18, 2006), 71 FR 30037 (May 24, 2006) ("First NMS Extension Release").

15 See supra note 8.

16 Securities Exchange Act Release No. 55160 (January 24, 2007) ("Second NMS Extension Release"). To reflect the extended Trading Phase Date and avoid coinciding with major trading days in June 2007, the Commission also extended the Pilot Stocks Phase Date (as defined in the Second NMS Extension Release) until July 9, 2007, and the All Stocks Phase Date (as defined in the Second NMS Extension Release) until August 20, 2007. In contrast, the Specifications Date (as defined in the Second NMS Extension Release) of October 16, 2006 has already passed and was not extended. In addition, the Completion Date (as defined in the Second NMS Extension Release) of October 8, 2007 was not changed.

Rule 610 and Rule 611 of Regulation NMS, it is appropriate to extend the de minimis exemption through March 4, 2007, the day before the extended Trading Phase Date.[17] The Commission emphasizes, as it did in the previous orders,[18] that the de minimis exemption does not relieve brokers and dealers of their best execution obligations under the federal securities laws and SRO rules.

Accordingly, IT IS ORDERED, pursuant to Section 11A of the Act and Rule 608(e) thereunder,[19] that participants of the ITS Plan and their members are hereby exempt from Section 8(d) of the ITS Plan during the period covered by this Order with respect to transactions in DIAs and SPYs that are executed at a price that is no more than three cents lower than the highest bid displayed in CQS and no more than three cents higher than the lowest offer displayed in CQS. This Order extends the de minimis exemption from February 5, 2007 through March 4, 2007.

By the Commission.

Nancy M. Morris
Secretary

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17 The Commission expects most trading centers to be operating consistent with the requirements of Rule 611 by the Trading Phase Date.

18 See supra notes 3 to 8.

19 17 CFR 242.608(e).