October 20, 2005

Dear SEC:

I am writing with regard to amendments number 2 and 3 to the above-referenced rule submission. My correspondence of February 18, 2005 and June 15, 2005 demonstrated in detail the fundamental legal and technical problems with the proposal. As the amendments make only minor technical changes (but indicate that the prior rule submission is being superseded), I will not reiterate my objections except to ask that they be incorporated by reference herein. If anything, the NYSE's attempt to "defend" the proposal in its June 7, 2005 letter only demonsrated the validity of my objections.

My specific reason for writing has to do with concerns for the integrity of the SEC's rule approval process. My concerns focus on two areas:

1. In Item 1(b) of amendment number 2, the NYSE states: "The Exchange does not believe the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing." It is inconceivable that the NYSE can make this statement in good faith. As both my earlier letters point out, Rules 76/91 are clearly, by their plain terms, applicable to every single order received by the specialist. The NYSE is proposing a procedure that is absolutely at odds with Rules 76/91. The NYSE's Item 1(b) is a misrepresentation, pure and simple. Regardless of the ultimate disposition of this rule submission, the NYSE, in the interest of fair notice to the public and to the Commission, must be made to acknowledge the rules that are obviously inconsistent with its proposal, and propose for public comment appropriate amendments thereto.

2. In Item 5 of amendment number 2, the NYSE makes the following statement: "The Exchange has neither solicited nor received written comments on the proposed rule change." My comments on the proposal (amendment number 2 simply resubmits the original proposal with minor technical add-ons to the proposed exceptions) clearly predate the August 11, 2005 submission of amendment number 2. While technically my comments were forwarded to the SEC and not to the NYSE in the first instance, the NYSE had clearly "received" my February 18, 2005 letter because they attempted to respond to it in their June 7, 2005 letter. It defies belief to suggest that they did not similarly "receive" my June 15, 2005 comment letter. Yet, in their August 11, 2005 submission of amendment number 2, the NYSE represented to the Commission and to the public that it had received no comments whatsoever on the proposal.

There is real public harm here. Yes, my letters can be tracked down by the hyper-diligent on the SEC's website. But this is hardly the type of fair public notice contemplated by the SEC's rules, which require an SRO to disclose, and discuss, comments on a pending proposal, and to do so in the context of a broadly-disseminated notice in the Federal Register. Amendment number 2 clearly deceives the public in its statement that no comments have been received, thereby suggesting that no commentators have raised any

issues. Clearly, the purpose underlying the SEC's requirements, namely the fairest possible notice to the public, has been thwarted by the NYSE's misrepresentation.

As amendment number 2 has not yet been published in the Federal Register, it is incumbent upon the SEC staff to insist that the NYSE resubmit this matter with appropriate, accurate representations in Items 1(b) and 5.

The Proposed Exceptions

As I have noted in prior correspondence, even more significant than the major technical and practical problems with the proposal is the over-arching legal absurdity: the NYSE is proposing that in many instances orders be given prices that prevailed in the market before the orders even entered the market. This position is totally unkown in any market anywhere, has no conceivable basis in law or regulation, and would surely constitute a bizarre and embarrassing precedent should the Commission act favorably to the NYSE here.

The entire proposal is "tail wagging the dog" thinking at its most absurd. The proposal essentially attempts to "cure" the NYSE's defective surveillance routines by artificially transforming the trading process into something it can surveil, even if the result of such transformed trading is a legal absurdity unrecognisable to any market professonal anywhere.

As the proposal is ridiculous as a matter of law, I have not previously commented on the proposed exceptions to a rule that is highly unlikely to be approved. But I will take this opportunity to offer a few general observations. As with many other recent rule submissions, the NYSE presents substantive material as a matter of simple exposition. The NYSE offers no particular justification for any proposed exception, beyond an overall pro forma, boilerplate pulling together of a few pat phrases from Section 6(b)(5) of the Securities Exchange Act.

The only "rationale" on offer from the NYSE about the entire proposal is one sentence to the effect that it is desirable for public orders to trade with each other (an obvious truism, but only when the orders are in the market prior to a trade, not after the fact/assigned prices as in the NYSE proposal). Logically, this "rationale" ought to apply as equally to the situations represented in the proposed exceptions as to the general market. But the NYSE has offered no justification whatsoever as to why any particular exception should supersede its proposed general rule.

The NYSE is proposing to move from the clarity of the present (orders received by the specialist are executed by the specialist at the best possible prices after the orders enter the market) to a murky netherworld where an order enteror will be clueless as to how exactly an order will be priced (maybe as today, maybe not, contingent on events unascertainable by the order enteror). Any rational person trying to run a market that fairly served the public would find this untenable.

My purpose ultimately is not to suggest that a justification of the exceptions could possibly make the proposal acceptable. My purpose is simply to demonstrate that, even on the NYSE's own terms, this is a particularly shoddy piece of work.

Sincerely yours,

George Rutherfurd
Consultant
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