April 26, 2007

By internet comment form (<u>http://www.sec.gov/rules/sro.shtml</u>)
and e-mail to <u>rule-comments@sec.gov</u>

Nancy M. Morris, Secretary
Securities and Exchange Commission
Station Place
100 F Street, NE
Washington, DC 20549-1090

Ref. <u>File Number SR-Amex-2007-13</u>

Dear Securities and Exchange Commission:

Lek Securities Corporation ("LSC") respectfully submits this letter in support of the American Stock Exchange's proposed rule change SR-Amex-2007-13 (Release No. 34-55533, 72 Fed. Reg. 62 (April 2, 2007)). As set forth below, the proposed rule change is a long overdue and necessary correction to improper and abusive billing, by a single specialist of the exchange, on cancellations in unexecuted ETF orders. The rule was first proposed over three years ago, and should have passed then. It is long, long overdue.

LSC is a member of the New York Stock Exchange, the American Stock Exchange, the regional stock exchanges and the NASD. LSC is also a member of the six domestic options exchanges. The firm is best known for its ROX® electronic order management system, which provides its users direct access to a large number of exchanges, ECNs and market makers. The majority of LSC's business concerns transactions by off-exchange broker dealers routed electronically to the various exchanges for the best possible execution. Accordingly, LSC's customers are themselves professional market participants with substantial knowledge of and experience in the national market systems.

<u>The History of the Proposed Rule</u>. The proposed rule makes clear that specialist commissions may only be charged on ETF orders that are executed, and not on orders that are cancelled or expire unexecuted. One would have thought that this rule was unnecessary, since it is, and should be, the rule that specialists may not charge for transactions if they don't perform any service. Historically, specialists have not billed for either ETF transactions or cancellations. In December 2003, however, a solitary specialist (Susquehanna) started charging for cancelled ETF orders without obtaining any regulatory approval and without any economic justification for such a charge. No other specialist has ever charged for cancellations, before or since. Although the Amex proposed a rule change on September 2, 2004 to expressly prohibit the charging of commissions "for handling an order (or portion thereof) that is not executed," and

although that proposed rule received almost unanimous support[1] as being necessary to prevent and address overreaching (one commentator actually criticizing Susquehanna by name),[2] the Exchange withdrew it without comment October 6, 2004. Since then, only Susquehanna has charged for cancellations of unexecuted ETF orders.[3]

<u>The Benefits of the Proposed Rule.</u> There is no question that the Amex is correct that specialist commissions increase the cost of doing business on the exchange, and that these increased costs weaken the exchange's competition position relative to other markets. There is also no question that commissions on cancellations are particularly harmful to fair and orderly markets. Not only does charging a fee for doing nothing offend basic standards of fairness, but the fee makes it impossible for a buyer to determine the best price for a particular order at the time the order is placed. This is so

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[1] The comments are collected at http://www.sec.gov/rules/sro/amex/amex200475.shtml. Among those entities commenting strongly in favor of the rule were UBS Securities LLC and Citadel Derivatives Group LLC. Several individuals also commented in favor of the proposed rule.

[2] Specialist firm TimberHill Group stated that the proposed rule was necessary

> "t*o prevent the imposition by Susquehanna or other specialists of anti-competitive and potentially discriminatory commissions or fees on orders that they are responsible for handling in their privileged capacity as exchange appointed specialists."*

October 7, 2004 Comment by James D. Van Degraaf, Esq., on Behalf of TimberHill Group/Interactive Brokers LLC.[2] Only Susquehanna itself filed comments against the rule and in support of its billing for cancellations.

[3] Susquehanna brought a test arbitration against one of the biggest objectors to the cancellation fees, UBS Securities, LLC. Susquehanna contended that the withdrawal of the proposed rule was evidence that the Amex actually *approved* the charges. Although the panel in the UBS arbitration was concerned that the anticompetitive effect of Susquehanna's cancellation charges "might warrant further scrutiny", it ultimate felt its hands were tied and pleaded with the Amex to rule conclusively on the charges:

> "[T] he Panel does not view it as our function to second-guess or regulate the Amex. . . . We urge the Amex, in considering the evidence of the practical effect of these fees on the markets, to either explicitly permit or else limit cancellation fees."

June 2006 Award in Arbitration No. 04-08653 at 2. Susquehanna is now suing other firms who refused to pay the cancellation fees, including LSC.

because the fee is not assessed until a cancellation, and the buyer does not know at the time the order is placed if an order will be cancelled,

There is also no question that the proposed rule is necessary to stop the continuing abuse by a single specialist of its quasi-monopoly position. It is noteworthy that only one specialist charges for ETF cancellations, and that it only does so on a single exchange, the Amex. No other exchange permits billing for cancellations; we have been advised that when Susquehanna tried to bill for cancellations on the PHLX – its "home" exchange – the exchange immediately prohibited the practice. NYSE specialists not only do not bill for cancellations, they do not bill for *any* executions in ETFs. Cancellation fees for ETFs are therefore doubly abusive: ETF transactions are almost entirely automatic, which is why they are almost universally unbillable, and cancellations are similarly automatic transactions that involve no real work by a specialist. The fees amount to an unjustified tax or toll on an instrumentality of the exchange. To permit a specialist, in this case a solitary specialist, to bill for transactions that involve no work sanctions an abuse of the specialist's privileged position. Such charges are unfair, unjustified, and anticompetitive, and the Amex is right to make clear that such charges are a prohibited violation of the rules of the exchange. As the Amex made clear in connection with the recent amendments to 154(b), the prohibition on charging for cancellations merely codifies the existing practices on the exchange (see Release No. 34-54618; File No. SR-Amex-2006-98 (October 18, 2006) (rule merely codifies the exchanges' "long-standing business policy, which describes the circumstances under which specialists may charge members and member organizations a commission for executing orders")).

For the foregoing reasons, the Commission should approve SR-Amex-2007-13.

Very respectfully,

Samuel F. Lek