January 10, 2012

Re: SR-NYSE-2011-51

Dear Honorable Commissioners,

The Commenter expresses its gratitude to the Commission again for allowing comments/responses regarding the proposed rule change to consider the combination between NYSE Euronext and Deutsche Börse AG. The Commission's responsibility to factor in a variety of perspectives is an important part of the process and the SEC's action to do so is duly acknowledged.

In that regard, the Commenter also wishes to thank Ms. Janet McGinness for: a) having taken the time to respond for the NYSE to the Comment; and b), with all due respect, having helped make the Commenter's case. That inadvertent assistance was accomplished in several ways.

In her response, Ms. McGinness has confirmed the Exchange's efforts to extinguish all NYSE seat ownership (with or without OTR's) in 2006. The Commission will note that by Ms. McGinness' own definition, Separated OTR's do not fall into this category. They are, according to the Constitution, permanent licenses to trade all NYSE options products … having been separated from their original grantee/members, through an Exchange facilitated open market and placed into the hands of public investors.

Parenthetically and as a counter to the authority the Exchange has elsewhere expressed to be within its domain (see Comment), it is important to note that any prerogative it has exercised in an attempt to unilaterally extinguish OTR's or their inherent trading licenses has since been questioned by the court. The process of relying on its Board take action in a manner that, rightly or wrongly, it considers necessary and proper and then having that action validated by the rule change procedure, has been found by the court to be troubling; *"The notion that the ..... Board may unilaterally defeat contractual rights — Protected not only by state contract (or corporation law) but also by state fiduciary duty law—to achieve exclusive benefit of its seat members merely by filing with the SEC is troubling." It went on to assert, "In sum, it is not immediately and conclusively obvious why a regulatory act voluntarily (and not necessarily) taken by the ..... Board can be isolated from the reach of fiduciary duty law, especially when the consequences (great benefits to the Seat Members and great detriment to the ..... Full Members) were so apparent at the time when the .... Board decided to act." It continued, "Moreover, even if it turns out that the SEC's mandate requires that ..... Full Members be excluded from trading on the ..... —a point about which the Court expresses no formal view—it does not ineluctably follow that, in these unique circumstances, they are also divested of whatever economic (or contractual) rights they hold as the result of that status."* (see Comment) To put a point on it, the "troubling" case above involved the transfer of trading rights on another exchange from one investor group to another. How much more troubled will the court be when it finds that trading rights in the NYSE case have made their way from the unwilling "extinguished" to the rule-making "extinguisher"?

Two minor points raised by Ms. McGinness are her contention *"that NYSE set aside sufficient reserves to compensate the former holders of Separated OTRs …."* Firstly, the Commenter, who advocates for the 50 Investor/Owners of Separated OTR's but represents no one but himself, seeks only the full, rightful reclamation of his pre-exit, permanent license to trade all NYSE option products and the rightful share of revenues collected to date by and into the Exchange's own account from the

license leasing thereof. The "compensation" to which Ms. McGinness refers is nothing more than an equitable accounting request that, due to accumulating lease income, may reach unmanageable proportions. Secondly, Ms. McGinness' referral to Investor/Owners of Separated OTR's as *"former holders"* puts the Exchange at odds with both Investor/Owners and the SEC. For obvious reasons Investors/Owners find the language both inaccurate and unacceptable but interestingly enough, so does the Commission. It, as recently as June 24, 2011in approving the NYSE/AMEX joint venture, characterized Separated OTR ownership in the present tense, *"The Commission notes that the issue of the rights of owners of Separated OTRs..... the rights of owners of Separated OTRs."* (see Comment)

Furthermore, while Ms. McGinness is correct in asserting that the Commission shall approve a rule change whose terms are consistent with the requirements of the Exchange Act, the proposed sale of assets by the Exchange (option licenses) that were attempted to have been acquired from unwilling investors into what ultimately became its own account would hardly qualify as promoting fair and equitable principles of trade and is therefore outside the conditions set forth by the Act. Indeed, legitimacy and other concerns by that action exist that can only reflect badly on the industry as a whole.

Finally, Ms. McGinness' response has supported the Commenter's case most clearly by what it has not said. Of the multiple issues raised by the Comment, the number in the response that were rebutted, addressed or even mentioned is zero. The Exchange could help move the process along if it so chose, by replying to this letter regarding those issues including making an on-the-record declaration that, contrary to signals from members of the 1997 senior management team at the time, it was not its original intention in 1997 to exit the option business temporarily and to re-enter at a later date without investor/owners of the 50 Separated and 1,316 Non-Separated permanent Option Trading Rights.

The Commenter stands by his Comment of November 2, 2011 and the unfortunate but necessary conclusion to oppose the Deutsche Börse AG combination until the matter of OTR's has been satisfactorily resolved.

Respectfully,

/Andrew Rothlein/

Andrew Rothlein
Investor/Owner
NYSE Option Trading Rights