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May 5, 2006

HAND DELIVERY

Nancy M. Morris, Esq.
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549



Re: In the Matter of the Application of Independent Broker Action Committee, Inc.
For Stay of Commission Order Approving Proposed Rule Changes by the New
York Stock Exchange LLC, File No. SR-NYSE-2004-05

Dear Ms. Morris:

This firm represents the New York Stock Exchange LLC ("NYSE") in connection with the above-captioned submissions to the Commission. Enclosed are 8 copies of NYSE's Memorandum of Law in Opposition to Independent Broker Action Committee's Motion For a Stay of Authorization for the New York Stock Exchange to Implement Phase 2 and Subsequent Phases of the Hybrid Market, with attached documents.

Respectfully submitted,

David S. Cohen

Enclosures

cc: Counsel of Record (with enclosures)

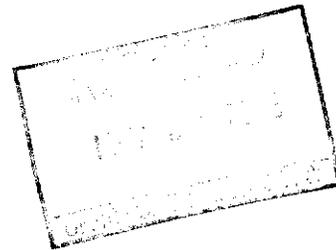
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

Independent Broker Action Committee, Inc.

For Stay of Commission Order Approving Proposed
Rule Changes by the New York Stock Exchange LLC

File No. SR-NYSE-2004-05



**NEW YORK STOCK EXCHANGE LLC'S MEMORANDUM OF LAW IN
OPPOSITION TO INDEPENDENT BROKER ACTION COMMITTEE'S
MOTION FOR A STAY OF AUTHORIZATION FOR THE NEW YORK STOCK
EXCHANGE TO IMPLEMENT PHASE 2 AND SUBSEQUENT PHASES OF THE
HYBRID MARKET**

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SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

Independent Broker Action Committee, Inc.

For Stay of Commission Order Approving Proposed
Rule Changes by the New York Stock Exchange LLC

File No. SR-NYSE-2004-05

**NEW YORK STOCK EXCHANGE LLC'S MEMORANDUM OF LAW IN
OPPOSITION TO INDEPENDENT BROKER ACTION COMMITTEE'S
MOTION FOR A STAY OF AUTHORIZATION FOR THE NEW YORK STOCK
EXCHANGE TO IMPLEMENT PHASE 2 AND SUBSEQUENT PHASES OF THE
HYBRID MARKET**

New York Stock Exchange LLC ("NYSE")¹ respectfully submits this opposition to the motion by Independent Broker Action Committee, Inc. ("IBAC") for a stay of the approval given to NYSE by the Securities and Exchange Commission (the "Commission") to implement the NYSE Hybrid MarketSM (the "Hybrid Market").² The Hybrid Market Order permits NYSE to implement the Hybrid Market in several phases, and IBAC seeks a stay of certain aspects of that implementation.

PRELIMINARY STATEMENT

IBAC purports to be a group of independent NYSE floor brokers whose members object to NYSE's efforts to modernize and improve the market NYSE has

¹ The rule changes here at issue were initially proposed by the New York Stock Exchange, Inc. NYSE is the survivor by merger of New York Stock Exchange, Inc. as a result of the consummation on or about March 7, 2006, of a series of mergers among New York Stock Exchange, Inc., Archipelago Holdings, Inc., and affiliated entities. As a result of the mergers, NYSE became a wholly-owned subsidiary of NYSE Group, Inc., a publicly held corporation.

² See *Order Approving Proposed Rule Change to Establish the Hybrid Market*, Exchange Act Release No. 34-53539, 71 Fed. Reg. 62, 16353 (Mar. 31, 2006) (the "Hybrid Market Order").

overseen since 1792. Faced with changing markets and rapidly advancing technology, NYSE sought to change its rules to create a hybrid market combining the best features of the auction market and electronic trading platforms. IBAC objects, and seeks to stand in the way of these changes because it fears they may impair its members' businesses. IBAC's goal is transparent: IBAC demands maintenance of the *status quo* for as long as possible,³ despite the fact that there is no basis for such a demand. In particular, IBAC does not assert that its members have any right — constitutional, statutory, regulatory, contractual, or otherwise — to force NYSE to maintain the auction market in its current form.

NYSE did not undertake to create the Hybrid Market in a haphazard way: It undertook the process over a long period of time with extensive input from all of NYSE's constituencies (including the floor brokers) and with the Commission's express approval at each stage. Independent floor brokers participated in that process, including by submitting comments and objections to the Commission. The Commission considered IBAC's arguments — the same arguments IBAC advances in support of its stay request — and approved the rule changes IBAC continues to challenge. Other than asserting that

³ IBAC makes little effort to hide this, arguing that NYSE should not be allowed to implement the Hybrid Market until it "demonstrates that all extant technological problems have been resolved." See Independent Broker Action Committee's Motion for a Stay of Authorization for the New York Stock Exchange to Implement Phase II and Subsequent Phases of the Hybrid Market ("IBAC Motion") at 1. Of course, IBAC does not even try to explain how anyone could implement a project as technically complex as the Hybrid Market in any way other than as the Commission has authorized NYSE to proceed. See Hybrid Market Order, 71 Fed. Reg. at 16383 ("The Commission believes that the staggered implementation would allow a gradual transition from the current auction market model to the Hybrid Market. Further, the Commission believes that the implementation plan would provide NYSE the opportunity to test the changes to its systems. The Commission believes that the proposed implementation plan is consistent with the requirements of the Act.").

there were additional technical problems with the Hybrid Market Phase 1 pilot program in April 2006, IBAC says nothing new in its stay motion, and offers no support for its assertions that allowing NYSE's modernization process to proceed will have any improper impact on anyone. IBAC thus presents no basis for the Commission to grant a stay.

STATEMENT OF FACTS

Although IBAC makes a number of claims about the development of the Hybrid Market, it provides no support for its claims and the record does not support them. To make the record clear for the purposes of evaluating IBAC's stay request, what follows is a summary of the development of the Hybrid Market and updates on certain developments since the Commission issued the Hybrid Market Order.

Background of the Hybrid Market

NYSE operates in a business environment that is experiencing significant and rapid technological change and is developing and expanding enhanced electronic trading technology in response.⁴ The centerpiece of these efforts is the Hybrid Market, which NYSE first proposed in February 2004.⁵ NYSE faces significant competitive pressures from U.S.-based and non-US based markets, ECNs, and other alternative trading systems, market-makers, and other execution venues.⁶ Regulation NMS, adopted

⁴ See Declaration of Nancy Reich, Anne Allen, and Louis Pastina, dated May 5, 2006 ("NYSE Decl.") ¶ 5. In contrast to NYSE's submissions, IBAC has submitted no factual support for its arguments. See Point I, *infra*.

⁵ See NYSE Decl. ¶ 5.

⁶ See *id.* ¶ 6.

on April 6, 2005, will further increase competition between markets as a result of its order protection rules.⁷

The Hybrid Market is an important component of NYSE's response to these competitive and regulatory pressures.⁸ The Hybrid Market is intended to integrate into one platform aspects of the physically-convened auction market and automated electronic execution, preserving the advantages stemming from face-to-face interaction.⁹ Any delay in implementing the Hybrid Market will adversely affect NYSE's operating results and ability to compete.¹⁰

As the Commission has approved, NYSE will introduce the various components of the Hybrid Market in several phases, each of which involves extensive testing and training prior to actual floor-wide implementation.¹¹ Each of these phases is being gradually rolled out in stages in order to test the systems and identify and address any systemic problems in a live environment.¹²

Following approval by the Commission, Phase 1 began as a pilot, limited to 168 stocks, on December 15, 2005.¹³ The installation of software and systems for e-Quoting for substantially all remaining stocks began on March 23, 2006, and was

⁷ See *id.* ¶ 7. The order protection rules apply only to orders that may be executed electronically. The Hybrid Market includes the automatic execution features necessary to assure that orders on the NYSE market receive the rules' protection. See *id.*

⁸ See *id.* ¶ 8.

⁹ See *id.* ¶ 9; see also *id.* ¶ 10.

¹⁰ See *id.* ¶ 8; see also *id.* ¶ 25.

¹¹ See *id.* ¶ 11.

¹² See *id.*

¹³ See *id.* ¶ 13.

completed by April 5, 2006.¹⁴ Before any aspect of Phase 2 becomes operational, all of the following must occur:

- a. Installation of systems and software for application programmed interfaces (“APIs”) on the NYSE floor.
- b. Agreements between specialists and Securities Industry Automation Corp. (“SIAC”) governing the location of the specialists’ systems employing algorithms at SIAC.
- c. Specialists must sign certifications, in accordance with NYSE Rule 104(i), that the systems employing algorithms and algorithms comply with all NYSE rules and regulations and the federal securities laws, including specialists’ negative obligations, before any algorithms can be used.
- d. Testing of the systems that use algorithms, both in terms of the messages sent by specialists and the messages received by NYSE, to ensure that the algorithms comply with system specifications governing their use.¹⁵

As in the case of Phase 1, Phase 2 will be implemented gradually.¹⁶ Once NYSE completes tests with a specialist and notes that its system and algorithms are functioning properly, NYSE will permit the specialist to begin limited use, likely focusing on a single type of message, with respect to a single book of one to 20 stocks.¹⁷ If the specialist’s system and algorithm perform satisfactorily, the specialist’s use of the API will expand to other types of messages, or other books.¹⁸

NYSE Regulation plans to issue guidance in or around the end of May 2006 to specialists and specialist firms reminding them that the negative obligation under

¹⁴ See *id.*

¹⁵ See *id.* ¶ 14.

¹⁶ See *id.* ¶ 15.

¹⁷ See *id.*

¹⁸ See *id.*

the federal securities laws and NYSE Rule 104 will continue to apply in the Hybrid Market, and clarifying NYSE's expectations with respect to compliance with that obligation.¹⁹ After specialists' algorithms have been fully tested and have become operational, NYSE plans to continue implementation of the remaining Hybrid Market phases.²⁰ In this manner, the use of algorithms will gradually expand among specialists and posts, as NYSE gains experience in how the use of algorithms affects NYSE's systems.²¹

Training and Testing Relating to the Hybrid Market

IBAC incorrectly asserts that the technology behind the Hybrid Market is "problematic" and not "ready for an effective hybrid market."²² To prepare floor brokers and specialists for their new tools, in Phase 1 NYSE offered and provided extensive training, which was well attended.²³ Installation of the systems and software for e-Quote capability proceeded smoothly, within normal expectations for the roll-out of new software.²⁴ Floor brokers and specialists brought any problems they experienced to the

¹⁹ See *id.* ¶ 16. The substance of the guidance will not be new, since the negative obligation has been part of the federal statutory scheme since 1934, and is well understood. Moreover, the Exchange does not intend to lift generally the size and other restrictions in Direct+ limiting automatic executions until the issuance of such guidance. To the extent that any algorithmic trading commences prior to the issuance of this guidance, trading will still continue to be largely manual in nature. See *id.* ¶ 16 n. 1.

²⁰ See *id.* ¶ 16.

²¹ See *id.* ¶ 15.

²² See Independent Broker Action Committee's Memorandum of Law in Support of its Motion for a Stay of Authorization for the New York Stock Exchange to Implement Phase II and Subsequent Phases of the Hybrid Market ("IBAC Memorandum") at 6-7.

²³ See NYSE Decl. ¶¶ 17-18.

²⁴ See *id.* ¶ 19.

attention of the Supervisors on NYSE's floor.²⁵ The problems they identified, none of which were significant, were addressed and remedied pursuant to NYSE's established protocols and procedures.²⁶ No major problems were encountered with the new systems.²⁷

One issue did arise with some frequency — a problem with the “cancel/replace” function with respect to e-Quotes. Although IBAC calls this “[t]he biggest single issue, and one that is still not fixed,”²⁸ IBAC is wrong — the issue is not nearly as significant as IBAC asserts. *First*, NYSE quickly developed a method for working around the problem and communicated it to the floor.²⁹ *Second*, NYSE expects to release a software update to eliminate the problem completely in the very near future.³⁰ *Third*, contrary to IBAC's suggestion, no orders were traded incorrectly as a result of this issue.³¹

Impact of the Hybrid Market on NYSE

The volume of activity on NYSE's floor has increased since Phase 1 of the Hybrid Market became fully functional, and the number of orders and quotes has significantly increased, especially with respect to the new tools made available to floor

²⁵ *See id.*

²⁶ *See id.*

²⁷ *See id.* ¶¶ 20-24.

²⁸ *See* IBAC Memorandum at 7.

²⁹ *See* NYSE Decl. ¶ 21.

³⁰ *See id.*

³¹ *Compare* IBAC Memorandum at 7 (“The ‘glitch’ in the system is that it *does not* recognize this change and therefore leads to over executions.”) (bold italics in original) *with* NYSE Decl. ¶ 25 (no over executions occurred).

brokers and specialists as part of Phase 1.³² Phase 1 of the Hybrid Market has successfully integrated into the daily workflow of NYSE, moving it one step closer to the full Hybrid Market.³³

*Exchange Rule 108*³⁴

IBAC asserts that the parity rule in existence prior to the amendments allowed by the Hybrid Market Order did not “entitle[]” specialists to trade on parity with floor brokers when opening or increasing the specialists’ proprietary positions.³⁵ IBAC is wrong. Prior to the amendment, specialists were entitled to trade on parity with floor brokers only when liquidating or decreasing a position, but specialists could also trade on parity when establishing or increasing a position when permitted by floor brokers.³⁶ Amended Rule 108(a) will permit specialists using algorithms to trade on parity automatically when establishing or increasing their position.³⁷ This amendment is necessitated by the change in human interaction resulting from electronic trading:

³² See NYSE Decl. ¶ 25.

³³ See *id.*

³⁴ IBAC makes a number of assertions about how amended Rules 60, 70.20, and 104 supposedly will operate to the detriment of floor brokers. See IBAC Memorandum at 4-5. IBAC has not correctly stated the substance of the rules or how they would operate in practice. For example, it is not correct that specialists will be able to algorithmically trade at the BBO or price improve “while everybody else is electronically locked out.” Compare IBAC Memorandum at 5 with NYSE Rule 104(c)(vi)(i).

³⁵ See IBAC Memorandum at 3.

³⁶ See NYSE Decl. ¶ 26. NYSE interpreted Rule 108(a) to mean that floor brokers permit specialists to trade on parity by not objecting or filing a complaint when the specialists do. It is often in the interest of floor brokers and their customers to allow specialists to trade on parity, as for example when customers want to participate in a transaction below a certain size or do not want to be the sole contra-party to an execution. In such cases, the customer is indifferent as to whether the party trading alongside is a specialist. See *id.* ¶ 27.

³⁷ See *id.* ¶ 28.

Specialists will not have the ability to alert floor brokers that they are trading on parity, nor will floor brokers have the opportunity to object before the trade takes place.³⁸ In order to meet their affirmative obligations in the hybrid market, specialists will have to send trading messages in response to orders.³⁹ They are allowed to effect proprietary transactions, in accordance with NYSE rules and the federal securities laws, in order to meet the immediate and reasonably anticipated needs of the market.⁴⁰

When viewed alongside the changes that follow from the transition to the Hybrid Market, this amendment is not nearly as ominous as IBAC complains. Under the amended rule, floor brokers will be able to exclude specialists from trading on parity (consistent with their customers' instructions and their best execution obligations).⁴¹ Floor brokers can send their orders through SuperDot, enter a Direct+ order, or hit a bid/take an offer.⁴² If floor brokers use e-Quotes, however, they are implicitly granting specialists permission to trade on parity when the specialists are establishing or increasing their position.⁴³ This is similar to the permission to trade on parity that floor brokers give specialists in connection with the execution of percentage orders.⁴⁴

Discretionary e-Quotes

NYSE is planning to provide floor brokers with an additional tool in the Hybrid Market for leveraging their judgment in quoting and trading on behalf of their

³⁸ *See id.*

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See id.* ¶ 29.

⁴² *See id.*

⁴³ *See id.*

⁴⁴ *See id.*

customers. This new functionality consists of the ability to enter discretionary trading and pegging (discretionary quoting) instructions for their e-Quotes. These “d-Quotes” are the subject of a proposed rule filing that NYSE has discussed with the Commission and will file shortly.⁴⁵

NYSE reviewed the d-Quote concept with its constituents. The original concept for the pegging function was that it would allow only for a discretionary price range.⁴⁶ During discussions with floor brokers regarding pegging, the floor brokers advocated for a discretionary size range as well. In response to the floor brokers’ concerns, this function was added to the d-Quote proposal and the proposed new rule will allow floor brokers to peg both e- and d-Quotes according to size and price functions.⁴⁷

On March 29, 2006, the d-Quotes concept was presented for approval to NYSE’s Market Performance Committee, at which floor brokers were present.⁴⁸ Following a discussion concerning the need to review and discuss many questions and scenarios as to how d-Quotes would be implemented, the Market Performance Committee (including the floor brokers on the committee) voted in favor of the proposal.⁴⁹

⁴⁵ See *id.* ¶ 30; see also *id.* ¶ 31.

⁴⁶ See *id.* ¶ 32.

⁴⁷ See *id.*

⁴⁸ See *id.* ¶ 33.

⁴⁹ See *id.*

ARGUMENT

I. STANDARD OF REVIEW

Perhaps to avoid the glaring deficiencies in its motion, IBAC does not address the well-established factors that the Commission considers when evaluating motions to stay its orders pending review by a court of appeals. As the Commission recently reiterated, it “generally considers” stay requests in light of four criteria:

- (A) whether the party seeking a stay has shown a strong likelihood that it will prevail on the merits of its appeal;
- (B) whether it has shown that, without a stay, it will suffer irreparable injury;
- (C) whether there would be substantial harm to other parties if a stay were granted; and
- (D) whether the issuance of a stay would likely serve the public interest.⁵⁰

IBAC also ignores the Commission’s Rules of Practice, which require that relevant portions of the record — such as a movant’s comment letters — be attached to a stay motion and that the motion be supported by sworn statements or affidavits with respect to disputed facts.⁵¹ Yet IBAC submitted no factual support whatsoever for its motion.

IBAC bears the burden of proof on all elements necessary for a stay, and its failure to carry that burden requires denial of its request. For example, the Commission has previously denied requests for stays pending review in situations just like this one: the movants satisfied none of the relevant requirements and in large part their “arguments [in favor of the stays] reiterate[d] positions that were raised in the public

⁵⁰ *In the Matter of the Application of Marshall Spiegel For Stays of Comm’n Orders Approving Proposed Rule Changes by the Chicago Bd. Options Exchange, Inc.*, File Nos. SR-CBOE-2004-16 and SR-CBOE-2005-19, Exchange Act Release No. 34-52611, Slip Op. at 3-4 (Oct. 14, 2005).

⁵¹ See Securities and Exchange Commission Rule of Practice 401(a).

comment process on the ... proposed rule changes and evaluated by the Commission before it reached its decision” regarding those rule changes.⁵² There is good reason for imposing such strict requirements on stay requests. As Judge Easterbrook explained:

A strong presumption of regularity supports any order of an administrative agency; *a stay pending judicial review is a rare event and depends on a demonstration that the administrative process has misfired.*⁵³

Because IBAC has submitted no evidence of a “misfire[]” or anything close to one, it has not met its burden and its request for a stay must be denied.

II. IBAC HAS NOT SHOWN A STRONG LIKELIHOOD THAT IT WILL PREVAIL ON THE MERITS OF ITS APPEAL

Ignoring the Commission’s prior decisions, IBAC makes the remarkable assertions that “the four conditions considered by the courts in determining whether to grant emergency relief need not be present” for the Commission to grant a stay and that “the Commission need not concede that IBAC will prevail on the merits of its legal challenge in order to determine that a stay is appropriate.”⁵⁴ As discussed above, the Commission reiterated just months ago that IBAC’s view of what is required for a stay is simply wrong, and indeed likelihood of success on the merits is critical for parties

⁵² See *In the Matter of Applications of William Timpinaro, Kenneth Suied, Lawrence Fishman, All-Tech Inv’t Group, Inc., Philip A. Dina Securities, First Westchester Securities,; and Barry Heifetz, Sheldon Maschler, Datek Secs. Corp., Inc. for Stay of Comm’n Order Approving Proposed Rule Changes by the Nat’l Assn. of Secs. Dealers, Inc. to Redefine Professional Trading Account and Day Trading*, Release Nos. 34-29809 & 34-29927, 50 S.E.C. Docket 238, 1991 WL 288326, at *3-7 (S.E.C. Nov. 12, 1991); accord *In the Matter of Comm’n Policy Concerning the Noncommercial Nature of Educ. Broadcast Stations*, Docket No. 21136, 87 F.C.C.2d 859, 1981 WL 158473, at *3 (F.C.C. Aug. 21, 1981) (stay denied when, *inter alia*, petitioners failed to allege personal harm and based their allegations of harm to others on speculation).

⁵³ *Busboom Grain Co., Inc. v. Interstate Commerce Comm’n*, 830 F.2d 74, 75 (7th Cir. 1987) (emphasis added); see also *Spiegel*, Slip Op. at 4 & n.16 (citing *Busboom*).

⁵⁴ See IBAC Memorandum at 8, 9.

seeking stays of Commission orders.⁵⁵ Because IBAC has no likelihood of success on the merits, its motion for a stay should be denied.⁵⁶

IBAC's primary argument seems to be that neither the Commission nor NYSE gave any consideration to views expressed by IBAC before the Commission approved the Hybrid Market proposal. But the extensive record, which contains numerous discussions of IBAC's arguments, shows that IBAC is wrong.⁵⁷

IBAC asserts that the Commission failed to address two specific issues in the Hybrid Market Order, but the record disproves both assertions. IBAC first claims that the Commission "fail[ed] to reconcile the [Hybrid Market] Order with existing law concerning the specialists' negative obligation"⁵⁸ As the Hybrid Market Order on its face demonstrates, that is wrong. The Commission specifically acknowledged

⁵⁵ See *supra* notes 50 & 52.

⁵⁶ Solely for the purposes of opposing IBAC's stay request, NYSE assumes that IBAC has the necessary standing to seek review in the Court of Appeals and that its petition is ripe. NYSE does not, however, concede that IBAC has standing in the Court of Appeals or that its petition is ripe, and NYSE specifically reserves the right to argue before the Court of Appeals that IBAC lacks standing and that its petition is not ripe. For example, as the Commission explained *twice* in the Hybrid Market Order, it granted accelerated approval to Amendment Nos. 6, 7, and 8, but simultaneously requested that any interested persons submit "written data, views and comments concerning Amendment Nos. 6, 7, and 8, including whether such amendments are consistent with the [Exchange] Act." Hybrid Market Order, 71 Fed. Reg. at 16387; see also *id.* at 16356 (similar). Indeed, IBAC submitted comments within the Commission's latest notice and comment period, see letter from Warren P. Myers to Nancy M. Morris, dated April 21, 2006 (the "April 21 Letter") and it does not claim that the Commission has rejected those comments. Lack of standing or a ripe controversy would be additional bases to find that IBAC was not likely to succeed on the merits.

⁵⁷ See Hybrid Market Order, 71 Fed. Reg. at 16354 n. 13; 16368 nn. 237-39; 16369 nn. 256 & 261; 16370 nn. 271-72; 16374 nn. 318-22; 16375 nn. 330-31 & 334; 16379 n. 366; 16380 nn. 373-74; 16381 nn. 384-86; 16382 nn. 390 & 392.

⁵⁸ See IBAC Memorandum at 10.

submissions by IBAC and others who submitted comments on this issue,⁵⁹ and determined that the potential benefits the new features might bring to the quality of the Hybrid Market justified the risks of unnecessary specialist trading:

Although the Commission recognizes that these features may inhibit somewhat the ability of specialists to assess the condition of the market to comply with their ongoing negative obligations under SEC Rule 11b-1 and NYSE Rule 104, the potential benefits these features may bring to the quality of the Hybrid Market justify the risks of unnecessary specialist trading.⁶⁰

IBAC next claims that NYSE did not submit sufficient information for the Commission to evaluate the burden the Hybrid Market would impose on competition.⁶¹ There are at least three fatal problems with this assertion. *First*, IBAC cites no authority for its assertion that NYSE's submission was in any way improper in this regard. *Second*, the Commission explicitly addressed the Hybrid Market's impact on competition — it just disagreed with IBAC's views.⁶² *Third*, IBAC offers nothing — no factual assertions or

⁵⁹ See Hybrid Market Order, 71 Fed. Reg. at 16370 & nn. 271-272; 16374 & nn. 318-322; 16380-81 & nn. 373, 374, 377, 378.

⁶⁰ *Id.* at 16380-81.

⁶¹ See IBAC Memorandum at 10-12. IBAC also claims that the Commission failed to consider "the technological problems already encountered in the Hybrid pilot," see IBAC Memorandum at 9, but gives no factual support for that assertion. In any event, IBAC vastly overstates the problems that arose during the Phase 1 pilot program. See NYSE Decl. ¶¶ 19-24.

⁶² Compare Hybrid Market Order, 71 Fed. Reg. at 16369 n. 256 (specifically acknowledging IBAC's argument that NYSE's submissions did not adequately address the impact of the Hybrid Market on competition) *with id.* at 16376 ("After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with the requirements of section 6(b) of the Act. ... The Commission also finds that the proposed rule change is consistent with section 6(b)(8) of the Act, which prohibits an exchange's rules from imposing a burden on competition that is not necessary or appropriate in furtherance of the Act.").

legal argument, just IBAC's conclusory assertion⁶³ — to suggest that the Commission's decision was wrong.

Remarkably, IBAC also asserts that "Amendment No. 8 was approved essentially simultaneously with its filing, and without any public comment at all."⁶⁴ This assertion is inconsistent with both the record and IBAC's own written submissions to the Commission. Although the Commission found good cause to grant accelerated approval of Amendment No. 8, it did so while explicitly seeking public comment regarding Amendment No. 8 for further consideration.⁶⁵ In fact, IBAC actually responded to the Commission's request for comments:

On March 22, 2006, by Exchange Act Release No. 34-53539, the Commission entered [the Hybrid Market Order]. Notwithstanding the Accelerated Approval, the Commission nevertheless invited comment to, *inter alia*, Amendment No. 8. We write now to express IBAC's comments in regard thereto.⁶⁶

IBAC's citation of *Connecticut Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525 (D.C. Cir. 1982),⁶⁷ is inapposite. As noted above, the Commission explicitly sought public comment on Amendment Nos. 6, 7, and 8,⁶⁸ and IBAC actually submitted comments.⁶⁹ But the petitioner's argument in *Connecticut Light*

⁶³ See IBAC Memorandum at 11.

⁶⁴ See *id.* at 12.

⁶⁵ See Hybrid Market Order, 71 Fed. Reg. at 16356 & 16384-87. It is noteworthy that IBAC offers no basis to challenge the Commission's findings in this regard, nor does IBAC assert that the Commission lacked authority to proceed as it did.

⁶⁶ April 21 Letter at 1 (italics in original).

⁶⁷ See IBAC Memorandum at 12.

⁶⁸ See Hybrid Market Order, 71 Fed. Reg. at 16356 & 16387.

⁶⁹ See April 21 Letter.

& Power was that the agency's notice of proposed rule-making failed to disclose technical materials related to the agency's decision to proceed with rule-making and that the agency failed to respond to requests to disclose those materials,⁷⁰ which is not what IBAC claims happened here.⁷¹ Indeed, IBAC's reliance on *Connecticut Light & Power* is somewhat surprising, because that decision supports the Commission's actions here. Amendment No. 8 was simply the most recent in a series of amendments that developed over years of submissions that took place in the public eye and with substantial opportunities for public comment. That its contents differed from prior NYSE submissions did not necessarily require another round of notice and comment,⁷² but the Commission solicited comments anyway. The Commission acted entirely properly in approving Amendment No. 8.

III. IBAC HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE INJURY IN THE ABSENCE OF A STAY

IBAC argues that two forms of irreparable injury would occur in the absence of a stay. On the one hand, IBAC argues that allowing implementation of the

⁷⁰ See 673 F.2d at 530-32. In any event, the Court of Appeals declined to remand the agency rule-making at issue in that case, which was (like the rule-making here) conducted against a background of years of submissions. See *id.* at 532.

⁷¹ Nor could IBAC seriously make such an argument because all the rule changes here at issue were proposed by NYSE, at which IBAC's members work on a daily basis. To argue that IBAC lacks the sort of "common knowledge" that was sufficient in *Connecticut Power & Light*, see *id.* at 531-32, would ignore reality.

⁷² See *id.* at 533 ("The agency need not renotice changes that follow logically from or that reasonably develop the rules it proposed originally. Otherwise, the comment period would be a perpetual exercise rather than a genuine interchange resulting in improved rules."); see also *id.* at 532 ("[T]his rule-making process took place against a background of five years during which the Commission explored safety proposals in a public forum and exposed the important technical studies to adversarial comment. Given this context, we conclude that the technical background of the rules was sufficiently identified to allow for meaningful comment during the rule-making process.").

Hybrid Market to proceed would cause injury to investors, such as from supposed technical problems that might arise during the implementation process.⁷³ IBAC also argues that its members will be at a competitive disadvantage with respect to the specialists if the implementation plan is allowed to proceed as approved by the Commission.⁷⁴ Both arguments fail.

Before even addressing IBAC's irreparable harm arguments, however, there is a serious question of standing. IBAC's members are independent floor brokers, not investors; investors are IBAC's members' clients. It is far from clear how IBAC could have standing to base its stay request on supposed harm to entities it does not even claim to represent.⁷⁵ IBAC, of course, says nothing about this issue, and proceeds as if investors' losses are its members' losses and vice-versa, but that is not the law.⁷⁶

Even if IBAC did have standing to assert these harms, neither satisfies the Commission's irreparable harm requirement. With respect to harm to investors, IBAC offers no particularized evidence that such harm has happened, could happen, or will happen; its claim is based on pure speculation.⁷⁷ As such, it does not suffice to demonstrate irreparable harm.⁷⁸ Moreover, the supposed problems IBAC identifies are in

⁷³ See IBAC Memorandum at 6, 7.

⁷⁴ See *id.* at 3-6.

⁷⁵ IBAC's certificate of incorporation is clear that its constituents are independent floor brokers. See Declaration of Douglas W. Henkin, dated May 4, 2006 Exh. A.

⁷⁶ *Accord Warth v. Seldin*, 422 U.S. 490, 511 (1975) (organization must be able to show injury to at least one of its members in order to have associational standing under Article III).

⁷⁷ See, e.g., IBAC Memorandum at 8 ("The potential consequences of a technological meltdown are frightening.").

⁷⁸ See *Spiegel*, Slip Op. at 10.

fact minor problems of the sort to be expected in the development of a system as complex as the Hybrid Market, and they have been or shortly will be fixed.⁷⁹

IBAC's assertion that its members would be economically injured by having to compete with specialists under different rules fares no better, because the Commission has repeatedly held that such assertions do not suffice to assert irreparable harm.⁸⁰ Moreover, the Commission has expressly held that any impact on competition caused by the Hybrid Market is necessary or appropriate in furtherance of the Exchange Act.⁸¹ IBAC thus has not pleaded irreparable harm.

IV. THERE WOULD BE SUBSTANTIAL HARM TO NYSE IF A STAY WERE GRANTED

NYSE has spent years and invested significant amounts of money and other resources to create the Hybrid Market. It undertook that process collaboratively, in systematic cooperation with the Commission and NYSE's constituencies. Equally important, the Hybrid Market is a significant part of NYSE's plan to comply with Regulation NMS.⁸²

⁷⁹ See *supra* notes 22-31 and accompanying text.

⁸⁰ See Spiegel, Slip Op. at 10 n. 44; *In the Matter of the Application of Robert J. Prager for Review of Disciplinary Action Taken by NASD*, Release No. 34-50634, 84 S.E.C. Docket 206, 2004 WL 2480717, at *1 (Nov. 4, 2004).

⁸¹ See Hybrid Market Order, 71 Fed. Reg. at 16376.

⁸² See, e.g., Hybrid Market Order, 71 Fed. Reg. at 16385-86 ("The Commission finds good cause to accelerate approval of this change because it would provide investors with a means to immediately access NYSE liquidity without relying on NYSE to access away markets' liquidity, and is designed to be consistent with Regulation NMS.").

The relief IBAC seeks would halt that work indefinitely.⁸³ Not only would that potentially render worthless the effort NYSE (and others, including the Commission) have put into developing the Hybrid Market, it would jeopardize NYSE's ability to comply with Regulation NMS and potentially have a negative impact on NYSE's competitive position. Under the Commission's decisions regarding stays pending appellate review, that is sufficient to warrant denying IBAC's request for a stay (even if IBAC met the other requirements for a stay, which it does not).⁸⁴

V. THE ISSUANCE OF A STAY WOULD NOT SERVE THE PUBLIC INTEREST

After considering substantial submissions from NYSE and those who submitted comments — including IBAC — the Commission approved the Hybrid Market implementation plan as consistent with the Exchange Act. In particular, the Commission rejected most of the arguments IBAC presents in support of its stay request.⁸⁵ Moreover, IBAC offers no explanation of how the stay it requests would serve any interests but those of IBAC's members. That is sufficient to deny a stay.⁸⁶

Put differently, granting a stay when the movant has merely renewed arguments the Commission has already rejected would send the wrong message to the public. As the Commission has explained in the past, a stay pending judicial review of

⁸³ See IBAC Motion at 1 (arguing that NYSE should not be allowed to implement the Hybrid Market until it “demonstrates that all extant technological problems have been resolved”).

⁸⁴ See *Spiegel*, Slip Op. at 11.

⁸⁵ See Hybrid Market Order, 71 Fed. Reg. at 16381-82. IBAC's only “new” arguments concern alleged technical problems that arose after the Commission issued the Hybrid Market Order.

⁸⁶ See *Spiegel*, Slip Op. at 11-12.

agency action is an extraordinary remedy.⁸⁷ It would be inconsistent with the strong presumption of regularity that attaches to agency action⁸⁸ to grant a stay when a movant simply recycles past submissions and argues that the agency was wrong.

CONCLUSION

For all the foregoing reasons, IBAC's motion for a stay should be denied in its entirety.

Dated: May 5, 2006

MILBANK, TWEED, HADLEY & McCLOY LLP

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-and-

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⁸⁷ See *id.* at 4.

⁸⁸ See *Busboom*, 830 F.2d at 75.

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

Independent Broker Action Committee, Inc.

For Stay of Commission Order Approving Proposed
Rule Changes by the New York Stock Exchange LLC

File No. SR-NYSE-2004-05



DECLARATION OF NANCY REICH, ANNE ALLEN AND LOUIS PASTINA

NANCY REICH, ANNE ALLEN, and LOUIS PASTINA declare,

pursuant to 28 U.S.C. § 1746:

1. Nancy Reich is a Vice President and Associate General Counsel in the Office of the General Counsel of NYSE Group, Inc. ("NYSE Group"). New York Stock Exchange LLC ("NYSE" or "Exchange") is a wholly owned subsidiary of NYSE Group. Ms. Reich's responsibilities include overseeing the development of rules and interpretations governing trading on the Exchange floor.

2. Anne Allen is an Executive Vice President, Market Operations of NYSE Group. Ms. Allen's responsibilities include overseeing the operation of the systems and trading on the Exchange floor.

3. Louis Pastina is a Senior Vice President, Market Development of NYSE Group. Mr. Pastina is responsible for, among other things, managing the Hybrid Market project.

4. The facts set forth herein are based upon our personal knowledge, discussions with our colleagues and NYSE members, and NYSE documentation. We

make this declaration in support of NYSE's opposition to the request for a stay filed by Independent Broker Action Committee, Inc. ("IBAC").

INTRODUCTION

5. NYSE operates in a business environment that is experiencing significant and rapid technological change. In recent years, NYSE's customers have demanded increased choice and greater flexibility of execution methods. NYSE is developing and expanding enhanced electronic trading technology in response. The centerpiece of these efforts is the NYSE HYBRID MARKETSM (the "Hybrid Market"), which NYSE first proposed in February 2004 in a proposed rule change, File No. SR-NYSE-2004-05.

6. NYSE faces significant competitive pressures from U.S.-based and non-U.S. based markets, ECNs and other alternative trading systems, market-makers, and other execution venues. NYSE competes with other market participants in a variety of ways, including, among other things, the quality of quoting and execution pricing, the speed of trade execution, and technological innovation. As a result of this competition, NYSE's share of trading in NYSE-listed securities declined in the period prior to commencement of the Hybrid Market.

7. Regulation NMS, adopted on April 6, 2005, will further increase competition between markets as a result of its order protection rules. The order protection rules apply only to orders that may be executed electronically. The Hybrid Market includes the automatic execution features necessary to assure that orders on the NYSE market receive the rules' protection.

8. The Hybrid Market is an important component of NYSE's response to these competitive and regulatory pressures. When successfully implemented, the Hybrid Market will change the way that securities are traded on NYSE's market and will differentiate NYSE from other trading venues. Any delay in implementing the Hybrid Market will adversely affect NYSE's operating results and its ability to compete.

9. The Hybrid Market is intended to integrate into one platform aspects of the physically convened auction market and automated electronic execution, preserving the advantages stemming from face-to-face interaction. Specialists will continue to provide liquidity and stability, in committing capital and meeting their regulatory obligations. Floor brokers will also continue to have a physical on-site presence that contributes to price discovery and improvement and the depth of market that are hallmarks of the Exchange's market. In the Hybrid Market, specialists and floor brokers will perform their functions both manually (as in the past) and electronically, using a variety of tools as described in NYSE's Proposed Rule Changes, and Amendments thereto, File No. SR-2004-05.

10. Four significant technological innovations of the Hybrid Market are:

- a. NYSE Floor Broker Agency Interest FilesSM, which enable floor brokers to electronically represent agency interest at various prices at or outside the Exchange Best Bid or Offer (BBO) with respect to orders they are handling ("Broker Agency Files"). This capability is also referred to as "NYSE e-QuotesSM" ("e-Quotes").
- b. NYSE Specialist Interest FilesSM, which will allow specialists to electronically place their dealer interest within the Display Book system at prices at or outside the Exchange BBO ("Specialist Interest Files").

- c. NYSE Specialist APISM, which is the name given to the functionality that permits specialists to maintain systems employing one or more algorithms to make trading and quoting decisions on behalf of the specialist. The system will transmit messages reflecting these decisions to post quotes and interact automatically with incoming orders via an Application Programmed Interface ("API"). The systems and algorithms are designed and developed by specialists.
- d. Enhancements to the operation of NYSE DIRECT+[®] ("Direct+"), the Exchange's electronic execution facility.

PHASED-IN INTRODUCTION OF THE HYBRID MARKET

11. As the Securities and Exchange Commission (the "Commission") has approved, NYSE will introduce the various components of the Hybrid Market in several phases, each of which involves extensive testing and training prior to actual floor-wide implementation. See Securities Exchange Act Release No. 53539 (Mar. 22, 2006), 71 Fed. Reg. 16353 (Mar. 31, 2006) ("Hybrid Market Order"). Each of these phases is being gradually rolled out in stages in order to test the systems and to identify and address any systemic problems in a live environment.

12. Phase 1 mainly affects floor brokers, providing agents with a new tool (e-Quotes) to express customer interest at or outside the Exchange BBO, to participate in executions. In addition, floor brokers were provided a reserve layering functionality for their e-Quotes. These features were designed with in-depth assistance by a broker-led technology committee. All of the functionality was reviewed with users and constituents, including floor brokers, within the NYSE committee process. Phase 1 also affects specialists, who are able to layer their interest at or outside the Exchange BBO, giving their bids and offers persistent standing. (This functionality is manual during Phase 1.)

13. Phase 1 began as a pilot, on December 15, 2005, following approval by the Commission. See Securities Exchange Act Release No. 52954 (Dec. 14, 2005), 70 Fed. Reg. 75519 (Dec. 20, 2005) (SR-NYSE-2005-87). The pilot, which lasted through the Commission's issuance of the Hybrid Market Order on March 22, 2006, was limited to 168 stocks. These pilot stocks, selected by NYSE in consultation with the Commission's Office of Economic Analysis, were widely distributed among specialists on the Exchange floor and included a range of securities in terms of anticipated volatility and trade volume. The roll-out of these pilot stocks was reflected in postings on the NYSE website, NYSE.com. By the conclusion of the pilot, software and systems required for e-Quote functionality had been rolled out for all of the pilot stocks and tested in the manner described in paragraphs 17 through 24 below. Software and systems for e-Quoting were installed for substantially all remaining stocks beginning on March 23, 2006. Installation was completed by April 5, 2006, when the first phase of the Hybrid Market became fully operational. The Market Performance Committee ("MPC"), comprised of floor brokers, specialists and representatives of institutional investors and allied members of the Exchange, as well as two of its subcommittees, the Technology Policy and Oversight Committee ("TPO"), and the Broker Technology Committee, each of which includes non-MPC member floor brokers, were updated as to the status of the pilot during this time period. Brendan R. Dowd, a partner of Warren P. Meyers (who purports to be the president and chairman of IBAC) is a member of the MPC. Gordon Charlop, also a partner of Warren Meyers, sits on the Broker Technology Committee and TPO.

14. Phase 2 introduces the API and algorithmic functionalities for specialists, who will use them to interact electronically with incoming orders and to quote electronically. Before any aspect of Phase 2 becomes operational, all of the following must first occur:

- a. NYSE must install systems and software for APIs on the NYSE floor. There are numerous components that must be in place, including the Display Book[®], the API Gateway, the incoming order dispenser, and the installation of additional flat panel screens on the trading floor.
- b. Specialists must execute contracts with Securities Industry Automation Corp. ("SIAC") governing the location of their systems employing algorithms at SIAC. These agreements have not yet been entered into.
- c. Specialists must sign certifications, in accordance with Rule 104(i), that the systems employing and algorithms comply with all NYSE rules and regulations and federal securities laws, including specialists' negative obligations.
- d. NYSE and specialists must both test the systems that use algorithms, both in terms of the messages sent by specialists and the messages received by NYSE, to ensure that the algorithms comply with systems specifications governing their use. This will involve several layers of testing: unit testing, product testing, operations testing, fallback and recovery testing, and capacity testing.

All of these steps must take place before specialists will be permitted to use algorithms to quote and interact electronically with orders.

15. As in the case of Phase 1, Phase 2 will be implemented gradually. Once the Exchange completes tests with a specialist and notes that its system and algorithms are functioning properly, NYSE will permit the specialist to begin limited use, likely focusing on a single type of message, with respect to a single book of one to 20 stocks. (Specialists, by virtue of the Hybrid Market rules approved by the Commission, are limited to five message types.) If the specialist's system and algorithm perform

satisfactorily, the specialist's use of the API will expand to other types of messages, or other books. In this manner, the use of algorithms will gradually expand among specialists and posts, as NYSE gains experience in how the use of algorithms affects the Exchange's systems and market.

16. NYSE Regulation plans to issue guidance at or around the end of May 2006 to specialists and specialist firms reminding them that the negative obligation under the federal securities laws and NYSE Rule 104 will continue to apply in the Hybrid Market, and clarifying the Exchange's expectations with respect to compliance with that obligation.¹ After specialists' algorithms have been fully tested and have become operational, NYSE plans to continue implementation of the remaining Hybrid Market phases. The current plans for these phases are described in NYSE's Proposed Rule Changes and amendments thereto, File No. SR-2004-05, and the Hybrid Market Order.

NYSE EXPERIENCE DURING PHASE 1

17. To prepare floor brokers and specialists for their new tools in Phase 1, NYSE offered training that focused on e-Quotes. The training, which began in November 2005, consisted of three phases: An overview in a classroom setting (28 sessions offered), training with hand-held devices in a training environment (99 sessions offered), and "mock trading" using e-Quote technology with NYSE hand-held devices, performed on the Exchange floor after the close (39 sessions offered). Floor brokers

¹ The substance of the guidance will not be new, since the negative obligation has been part of the federal statutory scheme since 1934, and is well understood. Moreover, the Exchange does not intend to lift generally the size and other restrictions in Direct+ limiting automatic executions until the issuance of such guidance. To the extent that any algorithmic trading commences prior to the issuance of this guidance, trading will still continue to be largely manual in nature.

using proprietary (rather than NYSE) hand-held devices were able to simulate trades with the Display Book, using NYSE facilities for functional training provided by their vendor.

18. This formalized training program was very well attended: 547 floor brokers attended the hands-on training (including mock trading) and 580 attended the overview sessions. The formal training identified and addressed user and systems problems as they arose. During the pilot, NYSE also provided on-floor informal training and assistance to floor brokers, both during and after trading hours.

19. Installation of the systems and software for e-Quote capability proceeded smoothly, within normal expectations for the roll-out of new software. Each year, NYSE rolls out between 600 and 700 software releases. As in any software rollout, users — in this case the floor brokers and specialists — brought problems to the attention of the Supervisors on NYSE's floor. The identified problems, none of which were significant, were addressed and remedied pursuant to NYSE's established protocols and procedures.

20. Many of the problems with e-Quote technology arose because of floor brokers' lack of familiarity with the hand-held devices and their functionalities. For example, the first trade in the Phase 1 pilot was executed manually, rather than with the broker's hand-held device, because the device was not configured properly. To prevent this from recurring, NYSE officials arrived at the Exchange at 7:30 each morning to ascertain whether the devices were properly configured, and to reconfigure them on behalf of the brokers until they were able to do it themselves correctly.

21. One minor problem with the software involved the "cancel/replace feature" with respect to booked/capped orders and e-Quotes. Because of a software

anomaly, hand-held devices do not always reflect accurate "leaves" on the recall of an order, potentially leading to errors.² Member firms were notified of this particular problem in an e-Broker advisory as soon as it came to NYSE's attention, in February 2006. These advisories were broadcast real-time to the user community and were reiterated numerous times in numerous media. NYSE has provided instructions on how to avoid the problem when using the software — *i.e.*, a workaround — and expects to implement a software release that will eliminate the problem during the week of May 8, 2006.

22. No other problem identified by IBAC relates specifically to the e-Quote software or suggests that the e-Quote software has caused, or could cause, any significant problems. Various instances involving brief "freezes" of the specialists' Display Book do not indicate fundamental problems with the e-Quote technology. The Display Book for Wells Fargo, which froze on March 8, 2006 and did not recover within the normal period, was the only stock that was affected in this way by the release of Display Book software supporting e-Quotes. The cause of that problem was addressed quickly and has not recurred since.

23. The hand-held devices have permitted NYSE officials to communicate with brokers about other possible problems (not involving e-Quotes) to avoid any potential harm to investors. In the April 20 example referred to by IBAC (IBAC Memorandum at 7), NYSE used the hand-held devices to send a message to brokers about a possible problem with the DOT system; the hand-held devices enabled

² This problem is referred to on page 7 of the IBAC Memorandum.

prompt dissemination of information about a possible problem to mitigate any effects related to that problem.

24. During April 2006, fewer than half of the 131 systems problems brought to the attention of Supervisors on the floor involved e-Quotes. Approximately half of those e-Quote problems (*i.e.*, 27) related to the cancel/replace feature. User error accounted for 11 reported problems, leaving a very small number of problems (relative to the number of orders and quoting activity) that were caused by e-Quote software or hardware. These numbers are extremely low in view of the magnitude and complexity of the software changes implemented in Phase 1.

25. The volume of activity on NYSE's floor has increased since Phase 1 of the Hybrid Market became fully functional, and the number of orders and quotes has significantly increased, especially with respect to the new tools made available to floor brokers and specialists as part of Phase 1. New messages enabled by the new technologies for the week of April 24, 2006 (the average daily results) were:

e-Quotes	7,548
Layers	9,519
Reserves	3,872
Replenishments	17,319
e-Quote Reports	42,294
g-Quotes ³	53
s-Quotes	14,218

³ The term "g-Quotes" refers to e-Quotes that are required to yield to other orders in compliance with Exchange Act Section 11(a)(1)(G).

c-Quotes ⁴	30,753
Automated CAP Reports	246,497
Automated Stop Reports	24,826

As shown by this data, reflecting an average 396,899 new messages per day, Phase 1 of the Hybrid Market has successfully integrated into the daily workflow of the Exchange, moving it one step closer to the full Hybrid Market. Hundreds of thousands of messages due to Phase 1 changes have been generated, with few errors. In fact, the NYSE uncomparad execution rate, around 0.07%, actually became lower during the implementation of Phase 1. No floor brokers have been "forced-in" on any trades, and all trades have cleared and settled appropriately.

EXCHANGE RULE 108

26. NYSE is amending Rule 108(a) to allow specialists to trade electronically on parity with floor brokers regardless of the specialists' position. Prior to the amendment, specialists were entitled to trade on parity with floor brokers only when liquidating or decreasing a position; specialists could trade on parity when establishing or increasing a position only when permitted by floor brokers.

27. NYSE has interpreted Rule 108(a) to mean that floor brokers permit specialists to trade on parity by not objecting or filing a complaint when the specialists trade on parity. It is often in the interest of floor brokers and their customers to allow specialists to trade on parity, as, for example, when customers want to participate in a transaction below a certain size or do not want to be the sole contra-party

⁴ The term "c-Quotes" refers to a specific type of percentage order, *i.e.*, "convert and parity, destabilizing, immediate or cancel." This type of order is also referred to as "CAP."

to an execution. In such cases, the customer is indifferent as to whether the party trading alongside is a specialist.

28. Amended Rule 108(a) will permit specialists using algorithms to trade on parity automatically when establishing or increasing their position. This amendment is necessitated by the reduction in human interaction resulting from electronic trading: Specialists will not have the ability to alert floor brokers that they are trading on parity, nor will floor brokers have the opportunity to object before the trade takes place. In order to meet their affirmative obligations in the hybrid market, specialists will have to send trading messages in response to orders. They are allowed to effect proprietary transactions, in accordance with Exchange Rules and federal securities laws, in order to meet the immediate and reasonably anticipated needs of the market.

29. Under the amended rule, floor brokers will be able to exclude specialists from trading on parity consistent with their customers' instructions and their best execution obligations. Floor brokers can send their orders through SuperDot[®], enter a Direct+ order, or hit a bid/take an offer. If floor brokers use e-Quotes, however, they are implicitly granting specialists permission to trade on parity when the specialists are establishing or increasing their position. This is similar to the permission to trade on parity that floor brokers give specialists in connection with the execution of percentage orders.

DISCRETIONARY E-QUOTES

30. NYSE is planning to provide floor brokers with an additional tool in the Hybrid Market for leveraging their judgment in quoting and trading on behalf of their customers. This new functionality consists of the ability to enter discretionary

trading and pegging (discretionary quoting) instructions for their e-Quotes. These "d-Quotes" are the subject of a proposed rule filing that NYSE has discussed with the Commission and will file shortly.

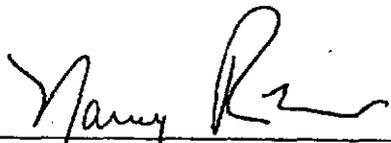
31. In the mostly manual pre-Hybrid Market, floor brokers had an opportunity to make trading decisions with respect to arriving orders. In a more electronic trading environment, a floor broker may not always have that opportunity. Although e-Quotes enable floor brokers' customer interest to participate in automatic executions at the Exchange BBO and in sweeps, they do not initiate trades with incoming orders at prices better than the BBO. In other words, e-Quotes currently do not provide floor brokers with the means to express a price range within which they are willing to actively trade. Thus, the proposed changes will provide floor brokers with the ability not only to quote in an attempt to draw interest, but at the same time to initiate trades with contra-side interest able to trade at prices at or within the BBO. Neither the specialist, nor the specialist system employing algorithms, will have access to the discretionary instructions entered by floor brokers. E-Quotes are also not provided to the specialists' algorithms.

32. NYSE reviewed the d-Quote concept with its constituents. The Broker Technology Committee assisted greatly in the design of the functionality. The original design for the pegging function was that it would allow only for a discretionary price range. During the discussions with floor brokers regarding pegging, floor brokers advocated for a discretionary size range as well. In response to the floor brokers' concerns, this function was added to the d-Quote proposal and the proposed new rule will allow floor brokers to peg both e- and d-Quotes according to *size* and *price* functions.

33. On March 29, 2006, the concept of d-Quotes was presented for approval to NYSE's Market Performance Committee. Brendan Dowd was present at the March 29 meeting and stated that he had seen NYSE's presentation on d-Quotes. Following a discussion concerning the need to review and discuss many questions and scenarios as to how d-Quotes would be implemented, the Market Performance Committee (including the floor brokers on the committee) voted in favor of the proposal. The chairman of the Market Performance Committee, Robert H. McCooey, Jr., encouraged the members of the committee to meet in groups, either large or small, to work out any issues that were raised in the discussion.

We declare under penalty of perjury that the foregoing is true and correct.

Executed on May 5, 2006
in New York, New York.



NANCY REICH



ANNE ALLEN



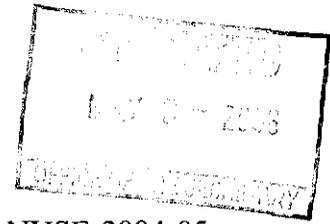
LOUIS PASTINA

SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Application of

Independent Broker Action Committee, Inc.

For Stay of Commission Order Approving Proposed
Rule Changes by the New York Stock Exchange LLC



File No. SR-NYSE-2004-05

DOUGLAS W. HENKIN declares, pursuant to 28 U.S.C. § 1746:

1. I am an attorney admitted to practice before the courts of the State of New York and a member of the firm of Milbank, Tweed, Hadley & McCloy LLP, counsel for New York Stock Exchange LLC ("NYSE") in this matter. I make this declaration in support of NYSE's opposition to the request for a stay filed by Independent Broker Action Committee, Inc. ("IBAC").

2. Attached hereto as Exhibit A is a true and correct copy of IBAC's Certificate of Incorporation, as received from the New York Secretary of State.

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 4, 2006
in New York, New York.



DOUGLAS W. HENKIN

FILED
JUN 10 2008
NEW YORK

F050826000661

CERTIFICATE OF INCORPORATION
OF
INDEPENDENT BROKER ACTION COMMITTEE, INC.

Under Section 402 of the
Not-for-Profit Corporation Law

We, the undersigned, being natural persons of at least 18 years of age, acting as incorporators of a charitable corporation under the New York Not-for-Profit Corporation Law, hereby adopt the following Certificate of Incorporation for such corporation

1 Name The name of the proposed corporation is

INDEPENDENT BROKER ACTION COMMITTEE, INC.

2 Description The corporation is formed under the New York Not-for-Profit Corporation Law and shall be a Type A corporation under Section 201 of that law. The corporation is not formed for pecuniary profit or financial gain, and no part of the assets, income, or profit thereof will be distributable to, or inure to the benefit of, its members, directors or officers except to the extent permitted under the statute

3 Purposes The purpose or purposes for which the corporation is formed is to independently study and review any and all proposals or recommendations for the public offering or other changes in the floor business plan of the New York Stock Exchange, as it affects the Members of the New York Stock Exchange on the floor, and to educate, advise and represent the Members of the New York Stock Exchange as to any such proposals or recommendations for the purpose of preserving the New York Stock Exchange auction market.

4 Office The corporation will have its office in the County of New York, New York

5 Initial Directors The names and addresses of the initial directors of the corporation are as follows:

<u>Name</u>	<u>Address</u>
Warren Meyers	400 East 90 th Street, Apt. 6D New York, NY 10128
David Elias	48 Steven Drive Hewlett, NY 11557
Robert McGrath	2584 Kevin Road Seaforth, NY 11783

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6. Duration. The corporation shall have perpetual existence.

7. Process. The Secretary of State is designated as agent of the corporation upon whom process against it may be served. The post office address to which the Secretary of State shall mail a copy of any process against the corporation served upon the Secretary is 400 East 90th Street, Apt. 6D, New York, NY 10128.

8. Registered Agent. Warren Meyers, whose address in New York is 400 East 90th Street, Apt. 6D, New York, NY 10128, is the registered agent of the corporation upon whom process against the corporation may be served.

IN WITNESS WHEREOF, the undersigned incorporator being at least eighteen years of age, has subscribed this certificate on the 19th day of August 2005.

Name and Address

Capacity in which signed

Signature

Linda Getzow
211 Westside Avenue
Freeport, NY 11520

Sole Incorporator



F050826000661

	CERTIFICATE OF INCORPORATION OF INDEPENDENT BROKER ACTION COMMITTEE INC.	UNDER SECTION 601 OF THE NOT-FOR-PROFIT CORPORATION LAW	 <p>THE GOLDSTON LAW GROUP, P.C. 65 BROADWAY, 10TH FLOOR NEW YORK, NY 10006</p> <p>CUST. REF. #528601MTD</p>
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STATE OF NEW YORK
DEPARTMENT OF STATE

FILED AUG 26 2005

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 5th day of May, 2006, I caused a copy of the NYSE MEMORANDUM OR LAW IN OPPOSITION TO INDEPENDENT BROKER ACTION COMMITTEE'S MOTION FOR A STAY OF AUTHORIZATION FOR THE NEW YORK STOCK EXCHANGE TO IMPLEMENT PHASE 2 AND SUBSEQUENT PHASES OF THE HYBRID MARKET to be served as follows:

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