

September 22, 2005

Dear SEC:

I am writing to supplement and expand upon my earlier comment on the above-referenced rule submission. By mischaracterising its proposal as a systems enhancement eligible for expedited approval, the NYSE has abused the Commission's rule approval process. In fact, the NYSE's proposal significantly alters the dynamics of order execution to the detriment of public orders that would be denied the opportunity for price improvement, and indeed even the opportunity for execution, as provided under NYSE rules. True to its recent form, the NYSE does not even acknowledge, much less propose to amend, rules obviously impacted by its proposal.

Clearly, this is an absolutely appropriate instance in which the Commission should use its statutory authority to abrogate the expedited effectiveness of the NYSE's proposal, and insist that the NYSE resubmit the proposal under the SEC's normal rule approval processes, with full opportunity for public comment prior to the Commission's taking action. Indeed, it is essential that the Commission take this action so that the integrity of its rule approval processes is not compromised, and the NYSE is not rewarded for circumventing the SEC's normal procedures.

The "Order Exposure/Price Improvement" Problem in Recent NYSE Rule Submissions

The NYSE is caught between the proverbial "rock and a hard place" in its efforts to automate its market, while still propagating the NYSE's sacred mantras about order exposure and price improvement, the historic strengths of the NYSE auction market. Recent NYSE initiatives have seriously compromised the order exposure/price improvement process as codified in the key NYSE auction market rules, Rules 76 and 91. But the NYSE has consistently refused to (i) acknowledge the applicability of these obviously relevant rules; (ii) make a case for not exposing orders to the auction for possible price improvement; and (iii) proposing appropriate amendments to these rules.

In SR-NYSE-2004-70, the NYSE proposed to allow specialists to simply assign prices to orders, without exposing them to the auction for possible price improvement as clearly required by Rules 76/91, which the NYSE did not acknowledge or propose to amend. (The NYSE had even, originally, submitted this proposal for expedited effectiveness, but the SEC staff, presumably spotting the mischaracterisation, refused to allow that. (See my comments on SR-NYSE-2004-70).

In SR-NYSE-2004-05, its "hybrid market" proposal, the NYSE proposed a "price improvement" methodology completely at odds with the time-tested effectiveness of Rules 76/91 (and which can, in fact, result in "price disimprovement", a result unheard of under Rules 76/91). without acknowledging that these rules otherwise apply, much less submitting appropriate amendments to those rules. (See my comments on SR-NYSE-2004-05).

In the proposal under discussion (SR-NYSE-2005-57), the NYSE is similarly proposing to dispense with the order exposure/price improvement methodology required to be followed by Rules 76/91, without acknowledging the applicability of those rules or proposing to amend them. (See discussion below as to why those rules are applicable to the NYSE proposal).

The NYSE's pattern is clear: it perceives a need to simplify/expedite/automate certain order execution processes, but at the same time it perceives a countervailing need to maintain the illusion (endlessly propagated by its marketing machine) that its auction market, keyed by its order exposure/price improvement rules, continues to function as ever before. (The NYSE even makes this preposterous claim in its hybrid market proposal. See my comments on that proposal with respect to the significant structural changes the NYSE is in fact proposing to its auction, all of which are unacknowledged, much less accompanied by appropriate rule amendment proposals).

The NYSE chooses to deal with the inherent tension/incompatibility between systemic execution/specialist assignment of prices on the one hand, and order exposure/price improvement on the other, in the worst possible manner: it simply ignores the order exposure/price improvement rules, and thereby avoids an uncomfortable discussion/justification as to why it is compromising its historic strength and in fact sharply reducing opportunities for order exposure/price improvement. The NYSE also makes a mockery of the SEC's requirement that an SRO identify all of its rules that are directly or indirectly impacted by a particular rule submission. (This is a serious matter that the SEC staff needs to address with the NYSE).

It is clearly the NYSE's prerogative to propose changes to its market that reduce or even eliminate opportunities for order exposure/price improvement. But, if the SEC's rule approval processed are to be treated with integrity, it is not the NYSE's prerogative to simply refuse to acknowledge, discuss, and propose to amend clearly relevant rules. There is a real harm here in that public investors, besieged as they are by the NYSE's marketing hyperbole, are kept in the dark about how the NYSE market actually functions.

The NYSE Has Mischaracterised Its Proposal

As I understand them, the SEC's rules permit expedited approval, without prior public comment, of SRO proposals that simply enhance existing systems/processes, but do not substantively change the dynamics of any order execution process, or substantively impact the type of execution a public order may receive. If any such substantive change is proposed, the SRO must submit its proposal under the normal prior public comment procedure.

On page 4 of its rule submission, the NYSE states that it is proposing to "systematize" (is this a word?) certain functions that are currently performed manually regarding the execution of elected stop orders and CAP-DI orders and converted CAP-DI orders. Critically, for purposes of this discussion, the NYSE then makes the (incredible) claim that "The rules regarding the election and execution of CAP-DI and stop orders and the

conversion and execution of CAP-DI orders remain the same." This latter statement, as I demonstrate below, is clearly false, but was, presumably, the basis on which the Commission granted the proposal expedited approval with no prior public comment. (I cannot fault the SEC staff here. The NYSE CAP rules are virtually incomprehensible, and the NYSE's mischaracterisations would be extremely difficult to spot. As noted above, the SEC staff alertly spotted the NYSE's mischaracterisations in SR-NYSE-2004-70, and refused to allow that proposal expedited approval).

The fundamental and material mischaracterisation in the NYSE's proposal is the notion that the NYSE is simply "systemitising" a manual process, without in any way changing the dynamics of that process to the detriment of public orders. As in other recent rule submissions, the NYSE simply ignores the specialist's agency responsibilities under its rules, particularly when one or more floor brokers are present, and the specialist is required to conduct a real auction and expose orders he or she is representing as agent for price improvement.

Systemic Execution of Elected CAP-DI and Stop Orders

The NYSE represents that, under its current rules, the specialist "will manually execute" an elected CAP-DI or limit order after determining whether there is liquidity against which the elected orders (or portions thereof) can trade. What the NYSE does not acknowledge is that the specialist makes such a determination by assessing interest on the book, as well as possible interest in the trading crowd. The NYSE claims that it is merely proposing that the specialist's computer (the Display Book) simply effect a systemic execution against against the contra side liquidity (if possible), thereby relieving the specialist of the necessity of performing a routine manual chore. On the surface, this does not appear unreasonable, provided that this simplistic scenario is in fact the order execution dynamic in all cases, and the system will simply relieve the specialist if what, in the NYSE's characterisation, appears to be a simple clerical task.

However, the NYSE is being entirely disingenuous here, as a systemic execution is possible only against contra side liquidity in the system (limit orders on the Display Book). Systemic execution is not available against liquidity in the trading crowd, which significantly factors into the execution process under current rules, but would be disregarded under the NYSE's proposal, to the detriment of public orders. When there is a trading crowd, the specialist is required to immediately expose "elected" orders in the auction market and obtain improved prices, if possible. In addition, an "elected" CAP-DI order may be executable only against interest in the trading crowd. Under the NYSE's proposal, the "elected" CAP-DI order would not be executed if there is no liquidity in the system against which the order can be executed. Under current rules, the specialist would expose the order to the trading crowd, which may very well provide an execution. There is real public harm here under the NYSE's proposal, as the CAP-DI order may never be executed, or may be executed subsequently at an inferior price.

The definition of a CAP-DI order in Rule 13 states that the order is to be executed immediately in whole or in part at the price of the electing transaction. While this rule (as

all the NYSE's order definitional rules) states the objective of order representation, it is completely silent (again, as are all the NYSE's order definitional rules) on the question of "how" the order is to be (manually) "immediately executed" in the auction. The reason the order definitional rules are silent on the "how" of execution is simple: "how" an order is "manually executed" is specified in NYSE Rules 76 and 91. NYSE rules preclude the specialist from simply assigning a price to an order. In all cases, and with respect to all orders specified in Rule 13, the specialist (in "manually executing" an order) is required under Rules 76 or 91 to expose the orders to the auction before completing an execution. (For purposes of this discussion, Rule 76 applies if the specialist is representing a CAP-DI or stop order and is also representing agency orders on the Display Book against which the CAP-DI or stop order would be executed. Rule 91 applies if the specialist is representing a CAP-DI or stop order and the liquidity against which those orders would be executed is the specialist's proprietary bid or offer).

There are no exceptions whatsoever specified in Rules 76 and 91 with respect to the execution of any order type; these rules apply universally to the specialist's representation of every type of order, and they are the fundamental, "linchpin" rules under which the NYSE conducts its auction market in all cases.

An "elected" portion of a CAP-DI order is essentially a limit order created by an immediately preceding trade at the size and price of that trade. As with any limit order (see definition in Rule 13), an elected portion of a CAP-DI order can only be executed at its limit price, or (as with all orders in the NYSE auction) at a better price if immediately obtainable as soon as the order is represented in the auction.

For example, a trade of 1000 shares at 20.05 creates a limit order ("carved out" of a larger CAP-DI order) of 1000 shares at a price of 20.05 (assume it is an order to buy, and the 20.05 price is the prevailing NYSE offer). As had been explained by the NYSE when CAP-DI orders were approved, a problem arose with CAP-D orders (before the "I" was added) in that (in my example) after the 1000 share limit order to buy at 20.05 was created, there might not be liquidity on the Display Book against which the order could be executed, or floor broker interest in the auction in trading at that price (or an improved price). In that instance, the specialist was required to place the limit order on the display book at 20.05. If the market subsequently moved away from that price, the order would not be executed. The specialist was not permitted to cancel the order.

By adding the "I" to a CAP-D order, the NYSE mandates, in effect, the cancellation of the limit order (or portion thereof) when there is no/insufficient contra side interest on the Display Book or in the trading crowd. Thus, a CAP-DI order limit order will not remain unexecuted on the display book, but will be canceled, and can be created again as subsequent trades take place in the market.

The creation of the CAP-DI order was intended to create a cancellation mechanism, but in no way changed the auction market dynamic and the specialist's auction market order exposure/price improvement responsibilities. Had the NYSE intended to do so, it would have had to amend Rules 76 and 91, which it declined to do. (This point was specifically

confirmed to me by NYSE staff when the CAP-DI rule was approved). Thus, when the CAP-DI limit order to buy 1000 shares at 20.05 is created (in my example) the specialist is required to proceed to attempt to immediately execute the order at its limit price. But the specialist must follow the manual "execution mechanism" procedures specified in Rules 76 or 91 to effectuate this objective, meaning that the order will be executed at its limit price, or at a better price if immediately available in the auction:

(i) if there are orders remaining on the Display Book at 20.05, and a trading crowd is present, the specialist must make a bid in the auction of 20.04 on behalf of the order to see if the crowd will provide price improvement, before completing the trade at 20.05;

(ii) if there is no contra side liquidity on the Display Book, but there is a trading crowd, the specialist would make a bid of 20.05 in the auction on behalf of the order to see if the crowd will trade at that price, and, if not, will cancel the order.

The problem with the NYSE's proposal is obvious: it ignores the trading crowd interest, which is not in the system because floor brokers with "working" orders seek to compete with the Display Book, and will "tip their hand" only when they are about to effect a trade. The NYSE is effectively taking elected CAP-DI and stop orders out of the auction, which means no prospect of price improvement (as clearly provided under current rules) and no exposure to the trading crowd (as provided under current rules) to provide an execution when the order would otherwise be canceled due to no/insufficient liquidity on the Display Book (a situation that can really harm the order if it is then executed subsequently at a worse price).

The NYSE is proceeding in a highly dubious manner by characterising its proposal as a mere systems enhancement with no consequences for order execution, when that is obviously not the case when a trading crowd is present.

The NYSE cannot seriously contend that, under its current auction market rules, the specialist would not obtain a better price for a CAP-DI order if immediately available (this would be absolute heresy in terms of the NYSE's historic "price improvement religion", to say nothing of being inconsistent with the rules) or that the specialist would cancel a CAP-DI order if there was trading crowd interest but no interest on the Display Book.

By any standard, the NYSE proposal raises serious order execution issues that cannot be shunted aside by resort to the SEC's expedited rule approval process.

The Problems with the NYSE's Order Execution Examples

Each of the NYSE's order execution examples on page 7 of its proposal presents a simplistic scenario in which no trading crowd is present.

Below, I note the problems with each, and how in fact the orders are required to be handled.

Example 1

In this example, the market is 20.05 - 20.07, 9000 by 9000. A CAP-DI order is entered to buy 10,000 shares at 20.15. (I refuse to use the NYSE's silly terminology about orders "arriving." Under the rules, orders are entered, they do not "arrive"). A limit order is then entered to buy 2500 shares at 20.07 and is executed at the offer price of 20.07. Under the NYSE's proposal, 2500 shares of the CAP-DI order (having been "elected" by the 2500 share trade) are automatically executed, with no specialist intervention, against the offer of 20.07 (which is then decremented to 4000 shares).

The problem with the NYSE's example (and the reason why this proposal does not qualify for expedited approval) is that it ignores the auction market dynamic called for in Rules 76/91. When the 2500 shares of the CAP-DI order are elected, the specialist becomes the agent for what has just become a 2500 share marketable limit order. As noted above, the specialist has always been the auction market agent for "elected" orders, and has always had order exposure/price improvement responsibility for these orders, as for all orders he or she represents as agent. (See NYSE Rule 13, definition of a limit order. The responsibility to expose orders for price improvement before immediately effecting a trade has always extended to both market and limit orders). The CAP-DI rule simply cancels an "election" if no one will trade with the order at its elected price or at a better price. (And God knows the specialists charge hefty enough commissions for acting as agents for CAP-DI orders!).

As agent for a marketable limit order, the specialist is charged with the duty, under NYSE rules, of executing the order at its limit price, or at a better price if immediately obtainable. Therefore, the specialist is required to expose the "elected" order to a trading crowd for possible price improvement before executing the order against the contra side quote. (I have specifically confirmed this point with an experienced NYSE specialist and an experienced NYSE floor broker). Thus, in the NYSE's example here, the specialist would not simply manually execute the "elected" order at 20.07 by assigning that price, but (particularly if there is a trading crowd) would first make an immediate bid of 20.06 on behalf of the order to try to obtain price improvement for it. Only if no one wanted to trade at 20.06 would the specialist execute the order at 20.07.

The NYSE proposal, by automatically executing the "elected" order at 20.07 irrespective of the possibility of trading crowd price improvement, changes the order execution dynamic to the detriment of the CAP-DI order. Thus, the NYSE proposal is clearly outside the realm of proposals eligible for expedited approval under SEC rules.

A serious difficulty with the NYSE proposal is manifest in the situation where the contra side liquidity against which the "elected" CAP-DI order would be executed is the specialist's own proprietary bid or offer. Assume, in the NYSE's example, that the 9000 share offer is the specialist's proprietary offer (with priority) and that there is a trading

crowd. NYSE Rule 91 is intended to specifically preclude situations where a specialist can trade as dealer against an agency order without permitting the trading crowd to offer price improvement. The NYSE proposal not only potentially disadvantages the CAP-DI order, but it gives the specialist's dealer account an opportunity to trade at a potentially inferior price, to the competitive disadvantage of floor brokers representing public orders who are "shut out" and denied the opportunity to receive an execution for those public orders by providing an improved price to the "elected" CAP-DI order.

Rules 76 and 91 have worked brilliantly for decades to benefit the public. Why does the NYSE act as though they don't exist? (Presumably, they do not want "sunlight" on the cutting back of price improvement). And no, the answer is not that floor brokers should put their orders on the Display Book. This defeats an institution's purpose in retaining a floor broker to exercise professional judgment to "work" a not held order, a critical aspect of many institutions' approach to trading on the NYSE. (As I discuss below, this is a highly significant competitive issue).

Example 2

In this example, the market is 20.05 - 20.07, 1000 by 1000. A CAP-DI order is entered to buy 10,000 shares at 20.15. A limit order to sell is then entered to sell 1500 shares at 20.05, and is executed against the 20.05 bid. As a result of the 1000 share execution, 1000 shares of the CAP-DI order are elected at 20.05, but, according to the NYSE, only 500 shares can trade because only 500 shares remain on the limit order to sell. Under the NYSE's proposal, the Display Book will systemically execute 500 shares of the CAP-DI order, and cancel the "election" of the other 500 shares (it thus no longer has the status of a limit order that can be executed).

The fundamental problem with this example is that it ignores the auction market execution dynamic when there is a trading crowd. Under NYSE rules, once the 500 shares of the CAP-DI order traded at 20.05, the specialist would be required to make an immediate bid of 20.05 on behalf of the remaining 500 shares to allow any floor broker with public orders in the trading crowd to trade against that order. If no floor broker wanted to effect such a trade, the "election" of the 500 shares would only then be canceled.

The NYSE's proposal harms both the public CAP-DI order, which does not get to trade with the trading crowd, and harms the public orders represented by floor brokers, which do not get to trade with the CAP-DI order. In the NYSE's example, if the market moves up, the 500 shares that could have been executed against a floor broker at 20.05 may never be executed, or may be executed at a higher price, forcing the CAP-DI order to pay more money to purchase stock. This is manifestly not in the public interest.

Example 3

In this example, the market is 20.05 - 20.07, 1000 by 1000. A stop order is entered to buy 1000 shares at 20.05. A limit order is then entered to sell 1500 shares at 20.05, and 1000

shares are executed against the prevailing bid of 20.05. The stop order is elected and 500 shares of the stop order trade systemically against the remaining 500 shares of the limit order to sell. The remaining 500 shares of the stop order, which is now a market order, "will trade" at what the NYSE contends is the "next best price", the 20.07 offer on the Display Book. (The NYSE rule submission is somewhat ambiguous here as to whether the 500 shares are systemically executed. At the top of page 7, the NYSE states that elected stop market volume will be executed in the same manner as any market order, which suggests representation by the specialist in the auction. But, in example 3, the NYSE uses the phrase "will trade" at the "next best price" (20.07), which is not necessarily the best price available in the auction, as price improvement may be possible at 20.06. The wording of example 3 thus suggests systemic execution. Since the rule submission is focused on systemic execution, I am assuming for purposes of the discussion below that the NYSE is talking about systemic execution of the 500 share balance of the stop order against contra side interest on the Display Book).

The problems with example 3 are obvious, and similar to the problems with example 1. Once the stop order is elected into a market order, the specialist, as agent, is responsible to try to obtain price improvement for the order. In the presence of a trading crowd, the specialist would bid 20.06 on behalf of the remaining 500 shares of the stop order to give floor brokers in the crowd an opportunity to provide price improvement. Only if no price improvement were afforded would the specialist effect a trade at 20.07.

The NYSE proposal disadvantages the public stop order by denying it the opportunity for price improvement, and disadvantages the public orders represented by floor brokers by denying them the opportunity to trade at 20.06. And, as in example 1, if it is the specialist's dealer offer at 20.07, the NYSE proposal preserves the specialist's proprietary trading opportunity, and insulates it from "price improvement competition" from the trading crowd.

There is an additional, and very serious, problem with the NYSE's proposed systemic execution of stop orders that does not exist with CAP-DI orders. The CAP-DI order, as an "elected" limit order, can only be executed at its limit price, or at a better price. The elected stop order, however, is a market order executable at whatever price is then available in the market. By "next best price", the NYSE appears to mean whatever the prevailing contra side interest is on the Display Book (this is the only price that can be systemically captured).

In the NYSE's simplistic example, the spread in the quotation is only 2 cents (20.05-20.07), so that an automated execution at 20.07 is reasonably related to the immediately prior trade at 20.05 (leaving aside the issue of possible price improvement at 20.06). However, suppose the market is 20.05 - 20.30. Under the NYSE's proposal (in the absence of any stated safeguards or criteria to the contrary), the 500 shares remaining on the stop order would be systemically executed at the "next best price" of 20.30, an outrageous result (up 25 cents on only 500 shares) that would not happen in the auction market. If there were a trading crowd, the specialist would make a bid on behalf of the order at a price reasonably related to the last sale of 20.05. In the absence of a trading

rowd (or in the absence of any trading interest by a broker in the crowd), the specialist would make a proprietary offer at a price reasonably related to the last sale (as required by Rule 104's affirmative obligation to maintain a fair and orderly market) and cross the stop order pursuant to Rule 91.

In the event, there is no way the specialist in the auction would allow the order to trade up 25 cents (or whatever a wide spread might be) on only 500 shares. The NYSE's proposal is clearly not in the public interest in this regard as there appear to be no safeguards whatsoever as to the price at which an elected stop order will be systemically executed.

The Expedited Approval of the NYSE's Proposal Must Be Rescinded

Under applicable law and rules, the SEC has the clear authority to rescind its expedited approval of the NYSE's proposal where it finds it in the public interest to do so. The SEC should make such a finding, and require the NYSE to resubmit its proposal under the normal prior public comment process, for the following reasons:

1. The NYSE should not be "rewarded" for what can only be described as a misrepresented proposal apparently intended to circumvent the Commission's normal prior public comment process. The NYSE's assertion that it is not changing any rules regarding execution of elected CAP-DI and stop orders is absurd on its face, as demonstrated above. The very essence of the NYSE's proposal is to deny those orders auction market executions that will be more beneficial to those orders in many instances than the executions they will receive under the NYSE's proposal. Any "inconvenience" to the NYSE occasioned by the rescission of SEC approval is entirely the fault of the NYSE for not properly representing this matter to the Commission in the first instance.
2. It is essential for the SEC to maintain the integrity of its rule approval processes. Expedited approval is intended only for administrative issues and routine system enhancements, not for substantive order execution matters. The NYSE has clearly taken advantage of the SEC's process here, and should be sharply held to account. The SEC's approval order (issued in good faith and in reliance on what it presumed to be the NYSE's good faith) recites the NYSE's misrepresentations as though they were accurate. The public record clearly needs to be corrected here if the SEC's rule approval processes are to be respected by SROs.
3. The issues raised by the NYSE's proposal are serious and substantive, as the proposal does not appear to be in the public interest at all. Certainly, the NYSE has made no demonstration whatsoever of any public benefit, other than its typical, meaningless, boilerplate conclusory assertions about promoting fair and orderly markets. (The NYSE never explains why any of its proposals are in the public interest, as required under the law; the NYSE merely asserts that this is so). There is no execution benefit whatsoever to elected CAP-DI or stop orders under the NYSE's proposal, as they are simply receiving the "worst price" available under current rules, and in fact these orders are potentially harmed:

(i) To the extent CAP-DI orders are executed, they are simply executed at prices they would receive today, in the absence of price improvement. The harm arises, however, from the fact that these orders are denied the opportunity for price improvement that they enjoy under current rules, and thus will be economically disadvantaged.

(ii) As demonstrated above, CAP-DI orders that would be executed under current order exposure rules may not receive an execution at all under the NYSE's proposal, or may receive executions subsequently at inferior prices.

(iii) As demonstrated above, elected stop orders would be denied the opportunity for price improvement, and could receive execution prices that bear no reasonable relation to the electing sale price, an impossible result under current auction market rules.

In fact, the only real beneficiary of the NYSE's proposal is the NYSE specialist (as in the case in a number of NYSE proposals submitted following the settlement of the SEC cases against them), who benefits as follows:

1. Although nominally the agent for elected CAP-DI and stop orders, the specialist is relieved of having to actually perform that function, as required under the order exposure/price improvement rules. But even though the specialist's computer will now do all the work, and orders that previously benefitted from the auction will no longer be so exposed, the specialist continues to be free to charge an agency commission as though he were in fact acting as a genuine fiduciary. This is truly outrageous.

2. In instances where the specialist's dealer account is the liquidity against which elected CAP-DI and stop orders will trade, the NYSE's proposal "locks in" the specialist's proprietary trading opportunity, and insulates the specialist against price improvement competition that may otherwise be present in the market. Net result: no public benefit, harm from denial of price improvement to the CAP-DI and stop orders and denial of floor broker opportunities to execute their public orders, but a guaranteed trading opportunity for the specialist.

3. The NYSE's proposal imposes serious burdens on competition, which the NYSE does not even acknowledge, much less attempt to justify. Under the NYSE proposal, only orders on the Display Book are captured systemically, and thus capable of being executed systemically. Therefore, under the NYSE's proposal, only orders on the Display Book can take the contra side of an execution against elected CAP-DI and stop orders. Under current rules, however, floor brokers have an equal opportunity to compete with orders on the Display Book (and the specialist's dealer account) with respect to being the contra party to elected CAP-DI and stop order executions. By incenting the placement of orders on the Display Book (to have an opportunity to be the contra side to CAP-DI and stop order executions), the NYSE is further "tilting" the competitive "playing field" in favor of the specialist. A proposal raising such serious competitive issues is clearly ineligible for expedited approval under the SEC's rule approval processes.

What the NYSE Needs To Do

The NYSE is obviously free to propose whatever it thinks make sense for its market. But it must do so in a manner that respects the SEC's requirements and processes, fully and fairly describes the proposal and all its order execution and competitive implications, and takes due consideration of all applicable NYSE rules.

The NYSE cannot simply resubmit this proposal as is (simplistic and "dumbed down") for normal prior public comment. In order to fairly present this proposal for public comment, the NYSE must:

- (i) explain, in plain, simple English (no resort to impenetrable CAP order jargon) the order execution differences, and economic consequences for the orders, as between executions under current auction market rules and executions under its proposal;
- (ii) provide a specific rationale and justification under the law (no meaningless, conclusory boilerplate), for abandoning the historic benefits of order exposure and price improvement;
- (iii) fairly discuss all competitive implications, including adverse impact on floor broker representation of public orders in the auction; and
- (iv) submit appropriate amendments to all applicable rules, including most particularly Rules 76 and 91.

Conclusion

The SEC must act decisively here. The NYSE proposal was granted expedited approval based on the NYSE's failure to accurately characterise this matter, and such an approval cannot stand as a matter of law. The Commission must rescind its expedited approval, and require that the NYSE resubmit its proposal in a form that fully, fairly, and with due respect for the SEC's processes, discusses all relevant issues and proposes amendments to all applicable rules.

Very truly yours,

George Rutherford
Consultant
Chicago, IL