October 12, 2005

Dear SEC:

Please consider this as an addendum to my October 11, 2005 correspondence on the above-referenced matter. After submitting that comment, I became aware that the NYSE had submitted amendment number 7 to SR-NYSE-2004-05. This amendment, in the words of the NYSE, simply contains "non-substantive conforming, stylistic, or typographical changes to certain Exchange rules governing the Hybrid Market." Among the "non-substantive conforming...changes" are amendments to Rule 13 permitting the automatic execution of elected stop and CAP-DI orders, the subject of SR-NYSE-2005-57 and its purported "clarification", SR-NYSE-2005-69. Amendment number 7 to SR-NYSE-2004-05 simply notes that the NYSE had obtained immediate effectiveness of the "systematization" of elected stop orders (this immediate effectiveness also extended to elected CAP-DI orders), but does not discuss in any manner whatsoever the substantive issues attendant upon such automated executions.

In my October 11, 2005 correspondence, I noted, among a host of other concerns, the need for the NYSE to submit appropriate rules governing the automated execution of elected stop and CAP-DI orders. The submission in amendment number 7 does not begin to do the job adequately, but my immediate concern here is an abuse of the SEC's rulemaking process that has gone from the egregious to the totally outrageous. The NYSE has not even remotely treated the Commission, or the public, fairly here. I have been reviewing U.S. SRO rule submissions for almost twenty years, and this is an absolute, all-time low. I cannot believe the Commission will stand for this.

First, the NYSE obtained immediate effectiveness (no prior public comment) of the concept of systematized executions of elected stop and CAP-DI orders (without submitting any rule amendments whatsoever) in SR-NYSE-2005-57. Central to obtaining that immediate effectiveness was the NYSE's misrepresentation that it was simply "systematizing" a manual process, and that there were no consequences as to the types of executions those orders would receive. My correspondence has amply demonstrated that the NYSE is, in fact, clearly changing, and not always for the better, the quality of public order executions. The NYSE obtained this "immediate effectiveness" without informing the Commission, or the public, in its rule submission that this "systemazation" is part and parcel of the so-called "hybrid market", a controversial proposal no aspect of which has otherwise been approved.

Presumably in response to my September 22, 2005 comments on SR-NYSE-2005-57, the NYSE submitted a "clarification" in SR-NYSE-2005-69 in which the NYSE "came clean" that it had in reality obtained immediate effectiveness of "hybrid market" concepts, although its earlier rule submission had contained no hint of that. My October 11, 2005 correspondence demonstrates how bizarre, illogical, and non-responsive to substantive issues the "clarification" actually is. The "clarifcation" is simply an "ex post facto" rationalisation that fails on every level.

As unbelievable as the above two rule submissions are, amendment number 7 to SR-NYSE-2004-05 is the piece de resistance. Notwithstanding the serious, substantive issues involved in "systematizing" executions of elected stop and CAP-DI orders, the NYSE hides behind the immediate effectiveness of SR-NYSE-2005-57and presents significant rule amendments as simply "non-substantive conforming changes", with no discussion in the context of the hyrid market proposal, the overarching framework in which the "systemazation" will operate, of the very real public order execution issues involved. The implicit message to the public here is clear: Don't bother commenting, the substance has already been approved and will not be discussed, and the rule amendments are simply technical addenda.

I will stop short of accusing the NYSE of intentional misconduct here. The NYSE staff has obviously mastered the "form" of the rules submission process (down to the neat, largely meaningless footnotes, a sure sign of legal hack work). But the NYSE staff's ability to engage in coherent, substantive, professionally responsive discussion that goes beyond simplistic exposition is another matter entirely. In the event, objectively speaking, a mess is a mess is a mess, whatever the NYSE staff was actually thinking (or not thinking). There is simply no way the general public can piece together this horrible puzzle (three separate SEC file numbers and the burden of over-turning an improperly obtained immediate effectiveness) and comment intelligently.

And the Commission itself has been "mousetrapped" in this instance into giving immediate effectiveness (!!!) no less to the very substantive hybrid market concept of "systematized" executions of elected stop and CAP-DI orders when it has not (and for good reason to date) approved any aspect of the hybrid market proposal that has been submitted under the Commission's normal, prior public comment process.

This is truly Alice-in-Wonderland material.

There is one obvious remedy. The Commission MUST rescind its approval of SR-NYSE-2005-57. (The NYSE should have the decency to withdraw the embarrassing "clarification" and consign it to the nearest waste bin). The Commission has the clear statutory authority to do so, and if this is not a compellingly appropriate case I cannot imagine whatever would be.

The NYSE must be directed to resubmit the proposed "systemazation" of elected stop and CAP-DI orders in a new, separate amendment to SR-NYSE-2004-05. In such amendment, the NYSE must fully and fairly present to the public and the Commission a full and complete discussion of all order execution issues, and the differing consequences for the quality of public order executions as between the physical auction market and the proposed "systematized" market for elected stop and CAP-DI orders.

The Commission absolutely must act to maintain the integrity of its rule approval process, and to provide the fairest possible opportunity for public comment on a substantive, controversial issue.

Sincerely yours,

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