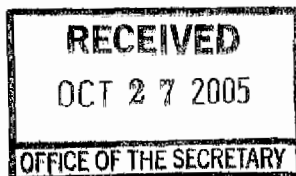


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October 6, 2005

FEDERAL EXPRESS

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20549-9303

Re: SR-NYSE-2005-63-1
Proposed NYSE Rule Amendment
Registered Competitive Market Makers

Dear Mr. Katz:

We represent the firm of Alan L. Sarroff L.L.C. ("ALS"), an NYSE member organization engaged in business for many years as a Registered Competitive Market Makers ("RCMM")¹ on the Floor of the New York Stock Exchange, Inc. (the "Exchange" or "NYSE"). We write to request that the Commission afford the public, and the affected NYSE members, a full and fair opportunity to comment upon a proposal by the NYSE that would impose substantial limitations on the business activities of the RCMM community, and that would inappropriately restrict access by an entire class of NYSE members to the services and facilities of the Exchange.

The NYSE Proposal

In SR-NYSE-2005-63, the NYSE proposes "to study the future viability of Competitive Traders ("CT's") and Registered Competitive Market Makers ("RCMMs") in light of the new Hybrid Market environment . . . [and] [w]hile the Exchange conducts this study . . . to place a

¹ The "Glossary" section of the NYSE's website defines RCMMs as follows: "NYSE floor members with a specific Exchange-imposed obligation to enhance the quality of NYSE markets by injecting their own or their firms' capital into difficult market-making situations. At the request of an Exchange official, an RCMM must make a bid or offer that narrows an existing quote spread or improves its depth. An RCMM may also be asked to assist a commission broker or floor broker in executing a customer's otherwise a non-executable order."

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moratorium on the qualification and registration of new CTs and RCMs . . . [and] is filing this *interpretation* with the Securities and Exchange Commission (the "Commission") for *immediate effectiveness*." (Emphasis added.) The NYSE proposes to impose this limitation summarily, without supporting facts and without an opportunity for public comment.

In attempting to do so, the NYSE has predetermined the outcome of its planned "study," stating at p. 4 of its submission to the SEC, that "the Exchange will consider the diminished impact and usage of RCMs and the effective non-usage of the CT status, the resources required to surveil their trading and the significant market timing and informational advantages that they enjoy [and] any regulatory requirements needed to increase market-maker liquidity obligations." At p. 5 of its submission, however, the NYSE further states that, "The Exchange has neither solicited nor received written comments on the proposed rule interpretation."

Submission by A.L. Sarroff, LLC

Although the NYSE staff and board proceeded with this proposal without consultation or notice to its membership, at least one of the affected RCMs provided extensive commentary to the NYSE on the subject matter of the proposal, shortly before the NYSE proceeded with it. On June 20, 2005, our clients provided a 10-page submission on the issue, addressed to the Exchange's President, with copies to other staff members, and beginning with the statement that, "I am writing you this letter as an introduction to the subject matter that you have agreed to discuss with me today. Our topic is the function and future on the NYSE of the Registered Competitive market-Maker ("RCMM") and the future role on the Exchange of A.L. Sarroff LLC ("ALS")."

This submission addressed in detail, with supporting facts and examples, how RCMs in general, and ALS in particular, have contributed to the liquidity, fairness and orderliness of the NYSE's market. Also addressed there were issues of regulatory oversight and cost. Based on these suggestions, the letter concluded, at p. 10, that "the regulatory and enforcement functions pertaining to RCMs in the new hybrid market would be cost-free to the NYSE and its affiliates, and would promote the interests of the marketplace and the public it serves." We enclose for the Commission's review the full text of that letter. After sending it, moreover, our client met with NYSE representatives and sent them further correspondence.

Unannounced NYSE Board Action

ALS was thereafter surprised to learn, by rumor and the internet, that without intervening consultation or notice, the NYSE's Board of Directors had resolved to prevent RCMs from

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expanding their staffs or increasing their businesses, and to prevent the registration of any new entrants to the RCMC business.²

In taking unilateral action in this matter, the Exchange now seeks SEC concurrence. We urge you to withhold your approval, and to substitute careful deliberation about the merits of the Exchange's proposal before taking (or permitting) an action that would restrict or abolish the businesses of our clients and their fellow RCMCs. As the NYSE's own submission confirms, RCMCs have been functioning productively on the NYSE for decades, and the Commission has found repeatedly that their positive contributions to the marketplace justify any advantages they may enjoy through their presence on the Floor.³ These determinations should not be annulled without appropriate opportunity for comment, followed by thoughtful deliberation.

REQUEST FOR SEC REVIEW

Requirements of the Exchange Act

The Exchange Act and the Rules of the Commission support our request for more careful review of the NYSE's moratorium proposal.

Section 19(b)(1) of the Exchange Act generally requires that, "The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning

² We have been reliably informed that there are several pending applications for RCMC registration, and that the NYSE moratorium on RCMC registration has been in effect since June 15, 2005. In its submission, however, the NYSE makes no reference to these pending applications, but states (at p. 4) that, "there are only 11 active RCMCs."

³ In SEC Rel. No. 17569, 1981 SEC LEXIS 1986, *3 (Feb. 24, 1981), for example, the SEC stated in relevant part that, "the Commission has determined that RCMCs and REMCs [the Amex equivalent of the RCMC] have the potential to provide sufficient benefits to their markets to warrant an exemption from the statutory prohibition pursuant to Section 11(a)(1)(H) of the Act. Specifically, the Commission believes that RCMCs and REMCs contribute to the maintenance of fair and orderly markets when trading response to call-ins, although such contribution presently is limited due to the infrequency with which the call-in obligation is invoked. Further, the Commission believes that RCMCs and REMCs possess the potential to add depth and liquidity to their respective markets even when not responding to call-ins and thus may add to the potential for competition on the floors of both the NYSE and Amex, consistent with the competitive objectives of the Securities Acts Amendments of 1975." See also SEC Rel. No. 34-33642, 1994 SEC LEXIS 474 (Feb. 18, 1994); SEC Rel. No. 34-27939, 1990 SEC LEXIS 748 (Apr. 24, 1990); SEC Rel. No. 19839, 1983 SEC LEXIS 1569 (June 2, 1983); and SEC Rel. No. 34-17569, 1981 SEC LEXIS 1986 (Feb. 24, 1981).

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such proposed [SRO] rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection." In arguing that the general rule be waived here,⁴ the NYSE's submission (at p. 5, Item 7(a) & footnote 7), invokes the authority of Section 19(b)(3)(A) of the Exchange Act, which states in relevant part as follows:

. . . [A] proposed rule change may take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization

Requirements of SEC Rules

SEC Rule 19b-4(c), however, in defining the term "stated policy, practice, or interpretation of the self-regulatory organization," construes it as a "proposed rule change *unless* (1) it is reasonably and fairly implied by an existing rule of the self-regulatory organization or (2) it is concerned solely with the administration of the self-regulatory organization is not a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization." (Emphasis added.)

The Exchange's proposal with regard to RCMMs is not "reasonably and fairly implied by an existing rule" because the Exchange's existing rule, NYSE Rule 107A, requires the registration of RCMMs who pass an examination and meet the Exchange's standards of membership and net capital compliance. The Rule does not allow for the summary exclusion of proposed RCMMs for reasons unrelated to their qualifications. Moreover, the NYSE's moratorium proposal does not pertain to the "meaning, administration, or enforcement of an existing rule," but would, on the contrary, abrogate the registration provisions of that rule, for reasons that have not been fully articulated or factually supported in the Exchange's submission.

The NYSE submission (at p. 5, Item 7(a) & footnote 8) also invokes the authority of SEC Rule 19b-4(f)(6), providing in relevant part that, "A proposed rule change may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act . . . if *properly* designated by the self-regulatory organization as: (1) Constituting a stated policy, practice, or interpretation

⁴ The NYSE's submission (p. 5, Items 6 and 7(b)) state that, "The Exchange does not consent at this time to an extension of the time period specified in Section 19(b)(2) of the Act . . . [and] the Exchange requests that the Commission waive both the five-day written notice and 30-day delayed operative date of [SEC] Rule 19b-4(b)(iii)."

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with respect to the meaning, administration, or enforcement of an existing rule . . . or . . . (6) Effecting a change that: (i) Does not significantly affect the protection of investors or the public interest; (ii) Does not impose any significant burden on competition; and (iii) By its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and public interest . . .” (Emphasis added.)

The requirements of subpart (1) of this Section (an interpretation “reasonably and fairly implied by an existing rule”) has not been satisfied, for the reasons discussed above. The requirement of subpart (6) is also unmet, because the moratorium proposal would impose an unwarranted burden on competition, particularly among members of the RCMC community, whose growth would be restricted, and who would suffer competitively, (a) in relation to other RCMCs, whose staffing is already complete, and who do not therefore need to hire additional traders, and (b) in relation to other “upstairs” competitors. The moratorium, as it is currently in effect, has also injured the business of ALS, by preventing the firm from employing additional RCMCs.

The requirements of subpart (6) are additionally unsatisfied because no competent evidence or regulatory deliberative process contradicts the longstanding NYSE and SEC determination that RCMCs make an important contribution to the fairness, orderliness and liquidity of the NYSE’s markets.

Past Cases of Unwarranted SRO Action

Unilateral and precipitous actions by self-regulatory organizations sometimes create unfairness, along with a need for extensive SEC corrective action. The law discourages arbitrary action by an SRO, and Section 6(b)(7) of the Exchange Act requires, as part of the basic charter of an SRO that it “provide a fair procedure” for the prohibition or limitation by an exchange with respect to access to its services.

For example, in *Matter of William J. Higgins, et al.*, SEC Rel. No. 34-24429, 1987 SEC LEXIS 1879, 48 S.E.C. 713 (1987), the NYSE summarily prohibited certain requested communication facilities on its trading Floor, claiming to have regulatory authority for that action where the Commission later found there to be none. In *Matter of Beatrice J. Feins*, SEC Rel. No. 33374, 1993 SEC LEXIS 3523, 51 S.E.C. 918 (1993), the American Stock Exchange prohibited a member from transferring his membership to his grandmother, claiming regulatory justification where there was none. And most recently, in *Matter of Bloomberg L.P.*, SEC Rel. No. 34-49076, 2004 SEC LEXIS 79 (Jan. 14, 2004), the NYSE imposed restrictions on a

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vendor's use of market quotation data disseminated by the Exchange, claiming that a valid rule permitted this, when in fact it did not.

Need for Fact-Finding and Deliberation – Lack of Urgency

Here too the NYSE proposes to act immediately, restricting new business activity and injuring long-established businesses. Those businesses have previously been found, by the Commission and the NYSE itself (see footnote 3 above), to serve legitimate and beneficial market objectives. We believe that they still do, and that they should not be restricted without fair procedure and appropriate fact-findings.

The inappropriateness of imposing such restrictions without comment and review is underscored by the fact this situation presents no real urgency. RCMC businesses, and the business of ALS particularly, have been functioning uneventfully for more than 20 years. The proposed immediate moratorium, on the other hand, in damaging these businesses, would needlessly dispense with fact-finding, notice, comment and deliberation.

CONCLUSION

The Exchange's proposal is unwarranted in law and would be unfair to existing and prospective RCMCs. We therefore urge the Commission to initiate conventional rule-making procedures in this matter, and to solicit public comment and invite parties to provide supporting facts and justifications for any action to be taken.

Thank you for your consideration.

Very truly yours,



George Brunelle

cc: Richard Ketchum, Esq.
Mr. Alan S. Saroff

Alan L. Sarroff L.L.C.

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June 20, 2005

HAND DELIVERY

Mr. John Thain
Chief Executive Officer
New York Stock Exchange, Inc.
11 Wall Street
New York, NY 10005

Dear Mr. Thain:

I am writing you this letter as an introduction to the subject matter that you have agreed to discuss with me today. Our topic is the function and future on the NYSE of the Registered Competitive Market-Maker ("RCMM") and the future role on the Exchange of A. L. Sarroff LLC ("ALS").

BACKGROUND OF OUR FIRM AND THE RCMM

ALS (or its predecessor) has been a member organization of the NYSE for more than 30 years. I myself became a member in 1974, as an institutional broker for Sanford C. Bernstein &

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Co. Beginning 1978, my functions on behalf of that organization expanded beyond institutional brokerage to include trading activity as a Registered Trader on the NYSE.

Throughout its many years in business, ALS has functioned, under various titles, as a market-maker. As the role of the market-maker has evolved, so has ALS. Originally, members were permitted to trade for their own accounts on the Floor, in the capacity of what was then called a "Registered Trader."¹ Registered Traders had no obligations to contribute toward the fairness and orderliness of the market, merely as to avoid interfering with it.²

In 1977, Registered Traders acquired an additional role, that of promoting market liquidity, and accordingly, they assumed the title of "Competitive Trader."³ Finally, in 1978, the SEC required Competitive Traders, on a "pilot" basis, to contribute affirmatively toward the fairness and orderliness of the markets.⁴ On February 24, 1981, the SEC made those responsibilities permanent, and approved their incorporation into a new set of NYSE Rules for what then came to be known as "Registered Competitive Market-Makers" ("RCMMs").⁵

¹ See Securities Exchange Act Release No. 7330, 1964 SEC LEXIS 133 (June 2, 1964).

² For example, NYSE Rules prohibited "congregating," and defined that term as trading activity in the Crowd, simultaneously, by four or more Registered Traders.

³ See Securities Exchange Act Release No. 13177, 1977 SEC LEXIS 2639 (January 17, 1977).

⁴ See Securities Exchange Act Release No. 14718, 45 FR 19738 (May 1, 1978).

⁵ See Securities Exchange Act Release No. 17568, 1981 SEC LEXIS 1992 (February 24, 1981).

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In approving the new role of RCMMs, the SEC stated, "[t]hat RCMMs and REMMs ["Registered Electronic Market-Makers"] contribute to the maintenance of fair and orderly markets when trading in response to ["blue light"] call-ins, although such contribution presently is limited due to the infrequency with which the call-in obligation is invoked."⁶ In so stating, the SEC expressed hope that RCMMs would make a greater contributions voluntarily, and the Commission remarked that, "Further, RCMMs and REMMs possess the potential to add depth and liquidity to their respective markets even when not responding to call-ins."⁷ ALS and other market-makers have realized that potential, as discussed below.

In the years since the advent of RCMMs, their role has grown on the NYSE and elsewhere,⁸ and they have made increasing contributions towards price improvement and liquidity. Many of these contributions have been made by ALS, and we provide some detailed examples below.

As the NYSE enters the era of the hybrid market, NYSE market-makers should continue to evolve, progressing from their current role as RCMMs into a new form of market-maker, one adapted to the new market, and to providing price improvement and added liquidity to a greater

⁶ Id.

⁷ Id.

⁸ Market-makers have also played a prominent role on other exchanges, particularly those engaged in options trading. Amex market-makers, for example, contribute to market quality in concert with Amex specialists. On the International Securities Exchange, market-makers have replaced specialists.

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degree than they do at present. We hope to work with you in recasting the role of NYSE market-makers, and in creating new rules and procedures to govern their new activities.

ALS's History of Price Improvement and Liquidity Enhancement

Over the past 18 months, on the "short side," ALS provided the NYSE market with over half a billion dollars in added liquidity. We did so mainly by shorting stock into rising markets and supplying price improvement. On the buy side of the market -- again viewing the past 18 months -- ALS covered short position and acquired new long positions, to the extent of approximately \$2 billion.

To provide you with greater perspective on these contributions, I have supplied some examples:

1. Sears Opening -- November 5, 2004

On November 5, 2004, news developments caused the NYSE trading in Sears to open late. In large volume, the stock traded sharply upward, and ALS sold heavily into the rising market, ultimately at a loss. The firm sold 8,000 shares at \$40.85; another 30,000 at \$42.50; 10,000 at \$42.50; 10,000 at \$42.80; 25,000 at \$43.80; 25,000 at \$43.50; 25,000 at \$43.50; 40,000 at \$44.75; and 20,000 at \$45.00. In all, ALS sold short 178,000 shares within about twenty minutes, all into a rising market. By the time Sears reached \$45.00 a share, the short position of ALS is believed to have equaled or exceeded that of the NYSE specialist. Intraday, the firm had sustained a loss of approximately \$600,000. By the end of the day, the firm had sustained a loss of approximately \$152,000. Meanwhile, ALS's trading, against the trend of the market, provided an indispensable complement to the specialist's efforts to stabilize the market and suppress volatility.

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2. Kerr McGee Corp. (KMG) – February 22, 2005

On February 22, 2005, after a long weekend, the stock of Kerr McGee Corp. (KMG) gapped upward on dramatically increased buying interest. A company press release had just announced a 526% increase in earnings, along with a strong acquisition program. Its stock rose from \$74.75 to \$76.20, declined to \$73.30, and then rose again to \$74.98. ALS traded a total of 163,200 shares, on both sides of the market. In conformity with NYSE Rule 107A (the NYSE Rule governing RCMs), ALS traded in a stabilizing manner, placed its capital at risk, and sustained a net profit of \$38,821. The price stabilization and added liquidity provided by ALS served the interests of both the NYSE and the public.

3. Valero Energy Corp. (VLO) – April 25, 2005

On April 25, 2005, Valero Energy Corp. (VLO) announced that it would acquire one of its rivals, Premcor, in an \$8 billion dollar deal that transformed Valero into North America's largest crude oil refiner. The stock opened at \$75.04, reached a high of \$78.95, and closed at \$75.87. During this trading, ALS continuously furnished price improvement and liquidity to the market, selling short into the rising market. ALS participated as seller on virtually all of the trades representing upside gaps. The resulting profit to ALS, \$36,957, had been more than paid for by the firm's risk of its capital, and by its contributions to market quality.

4. Molson Coors Co. (TAP) – April 28, 2005

On April 8, 2005, Molson Coors Co. (TAP) announced a net loss in its previous Quarter, and attributed the result to a sales decline in key markets. From a previous close of \$77.30, the stock opened down 9 ¼ points, at \$68.25, traded up to \$73.00, and closed down at \$61.75. As the market declined, ALS participated aggressively on the buy side, and over the course of the day purchased and sold 248,200 shares. In placing its capital at risk, adding liquidity and suppressing volatility, ALS received profits of \$70,883.

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5. Doral Financial Corp. (DRL) – March 18, 2005

On March 18, 2005, on rumors of seriously impaired financial condition, the stock of Doral Financial Corp. (DRL) opened at \$26.40, traded in a range of \$26.75 to \$19.60, and closed at \$21.50. The activity had been so tumultuous that the company issued a press release that evening, explaining that there had been no relevant corporate events to explain the activity, only a downgrade of the stock by certain analysts. During the day's trading, ALS did not shrink from participating in this market; they bought and sold a total of 383,800 shares throughout the day. At one point during the day, the firm's net losses had reached \$175,000, and by the end of the day, the firm had still sustained a large net loss.

ALS has sometimes made significant profits in its trading, but has sometimes sustained major losses. Its activities of an RCMM, in other words, are far from a "sure thing." The RCMM's position on the Trading Floor, in general, affords no guarantee of profitability, and the firm's capital, no less than that of an NYSE specialist, is always at risk.

Participation by ALS is predominantly directed towards break-out and break-down situations in high-activity stocks, featuring large disparities between supply and demand. Low-volume, inactive stocks, although they too may lack liquidity, usually do not require an infusion of liquidity in substantial size from market-makers, beyond what can be easily provided by the specialist. Break-out or break-down situations, on the other hand, demand liquidity in sizes that may exceed the capabilities of NYSE specialists, and in those instances, a well-capitalized and willing RCMM can, and often does, provide vital assistance.

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The Existing and Expected Capitalization of ALS

Besides its current capitalization, ALS hopes to attract substantial new investors. Recently, two major securities firms have approached ALS to invest in its NYSE market-making business. The anticipated funding from such sources would place ALS on a footing comparable to, or superior to, that of most of the NYSE specialist organizations.

Proposed New Role for NYSE Market-Makers

Historically, RCMs have had only a limited "affirmative obligation." When the SEC first approved the institution of RCMs, the market-makers were required to participate only when a "blue light" summoned them to the Trading Crowd, usually to assist a specialist in a break-out or break-down situation. At such times, RCMs were required to provide only minimal assistance. In practice, however, as noted above, RCMs have done more than was required, and we propose that, in future, they should do more than ever before.

Specifically, we propose that the new RCM operate as true market-maker, providing liquidity and price improvement in response to published bids and offers and incoming orders. As we conceive it, therefore, the function of the new RCM would include significantly greater "affirmative obligations" ~ in addition to the responsibilities currently imposed on RCMs for market stabilization.

The new RCM would be a close analogue of the specialist, but would operate freely within a wide range of stocks, participating throughout the Floor as market judgment and market needs would dictate. RCM trading would function not merely for RCMs' own profit, but in

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large part to provide stabilization, participation, liquidity and professional intervention in difficult market situations, while simultaneously deferring to public orders.

The key features of the new RCMM function would be these:

1. In place of the RCMM's former obligation to participate in response to "blue light" alerts, and then only to the extent of 100 shares, we propose that RCMMs undertake to provide added liquidity and price improvement to the extent of at least 10,000 shares per day.
2. On acquisitions most RCMM trades would be (as they are at present) either, (a) "stabilizing," defined as purchases on minus or zero-minus ticks, or (b) in a "tickless" market, would be subject to "G"-style yielding of priority, parity and precedence.
3. On liquidation, the RCMM would be entitled to compete, but only with respect to the liquidation of positions acquired in the course of RCMM market making activities.
4. While standing in the Trading Crowd, the RCMM could transmit orders by way of the "handheld" terminal, but only subject to a "G" limitation -- yielding priority, parity and precedence to public orders, but trading in parity with the NYSE specialist.
5. While trading on the Floor, the RCMM would contemporaneously record and execute all NYSE transactions through the BBS system, to promote accurate record keeping and effective surveillance, or alternatively, would transmit the orders through DOT, Archipelago or other automated systems.

REGULATORY ISSUES

Regulatory History

ALS has an impeccable record of compliance with applicable rules, as NYSE examination reports will confirm.

(00029115)

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1. On December 12, 2001, NYSE Examiners concluded that, "We have examined these functions [the RCMM, regulatory reporting and financial compliance functions of ALS] and found no problems worthy of comment."
2. On January 6, 2003, the NYSE again reviewed ALS and found that, "We have examined these functions and no exceptions were noted."
3. On December 23, 2003, an NYSE Examiner reviewed ALS for compliance with all of the aforementioned rules, plus the SEC's new Anti-Money Laundering ("AML") regulations. The Examiners concluded that the firm had complied with all of these rules, with one minor exception: 20 sell orders had not been marked "long" or "short" - an oversight that had been caused by a supervisor's honeymoon.
4. On February 10, 2005, NYSE Examiners concluded that, "We have examined these functions and no exceptions were noted."

Creation of Independent Surveillance and Enforcement Entity

Depending upon cost factors and logistical feasibility, we would like to explore the possibility of having RCMMs (or, if necessary, ALS alone) establish an independent entity to perform surveillance audits and enforcement functions with respect to the new RCMM regulations. That organization, in cooperation with our clearing affiliate, would generate periodic reports and conduct examinations. If necessary, they would either take appropriate disciplinary action, or refer the matter to the NYSE or the SEC.

The expense of programming and generating reports for this purpose could be borne by the RCMMs themselves, and the independent surveillance entity would be accountable to the NYSE. To the extent that direct surveillance activities were required from the NYSE, we

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propose that these be conducted under contract, as the Amex and the Philadelphia Stock Exchange now do through regulatory agreements with the NASD. In this way, RCMs would defray or absorb the cost of regulating their own activities.

CONCLUSION

In sum, the regulatory and enforcement functions pertaining to RCMs in the new hybrid market would be cost-free to the NYSE and its affiliates, and would promote the interests of the marketplace and the public it serves.

The foregoing is only a broad sketch of how market-makers may evolve in the new hybrid market. We would welcome your feedback, and that of your staff, modifying and expanding this outline to satisfy the Exchange's interests in promoting market quality, managing costs and blending the activities of market-makers into the Exchange's new market structure.

Thank you for your consideration.

Very truly yours,



Alan L. Sarroff

cc: Richard Ketchum, Esq.