

February 12, 2006

**Nancy Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549**

Dear Ms. Morris,

In its February 7, 2006 response to comments regarding separated OTR's in SR-NYSE-2005-77, the NYSE discusses matters that submitters of the original comment believe merit a closer look. The format of our reply is a replication of the NYSE comment with our remarks inserted (in blue) in some of the places that will warrant further SEC attention. We thank the SEC for allowing us the opportunity to reply.

8. The Proposed Rule Change adequately addresses the rights of holders of options trading rights. Addressing the rights of holders of option trading rights ("OTRs"), Andrew Rothlein, Michael Wallach, Gregory Tenbekjian, Ken Marks, Pamela Rothlein, Enid Wallach and Mary Ann May (the "OTR Commentators") argue that certain OTRs issued by the NYSE (namely, those OTRs that have been separated from their underlying NYSE memberships) are not treated properly in the Proposed Rule Change because they (along with all OTRs) will be extinguished in the merger without conferring their holders with any rights or benefits after the merger.

Investors in non-separated OTR's, as well as the approximately 50 donees thereof, voted to surrender their equity and options trading rights so that they might participate in the ARCA merger.

The NYSE disagrees. As the OTR Commentators concede, OTRs do not represent equity interests in the NYSE. Instead, OTRs are limited rights to physically enter the NYSE trading floor for the purpose of trading options admitted to dealings on the NYSE.²⁰ OTRs, like all NYSE trading rights, will be cancelled in the merger.

The OTR Commentators argue that an OTR carries the unfettered right "to trade all options under the auspices of the NYSE or its successor," whether by merger, acquisition or both. The specific wording of the NYSE's Constitution describing OTRs refutes this contention.²¹ In addition, no options are currently traded on the NYSE, and no options will be traded on NYSE Market immediately after the merger. The only entity affiliated with New York Stock Exchange LLC immediately after the merger that will trade options will be NYSEArca, which is not a successor to the NYSE and will be an entity separate from New York Stock Exchange LLC, with its own rules, regulations, qualifications, filings and requirements for options trading.

As President Thain explains as noted below, the Pacific Exchange, a prospective NYSE/ARCA affiliate, currently trades about 10% of U.S. options. Also, the NYSE's statement that "no options will be traded on the NYSE Market immediately after the merger" does not inspire much confidence regarding the institution's assertion above regarding its role in options trading.

There will be neither physical entry upon NYSE Market's trading floor to trade options **It should be noted that although the "specific wording of the NYSE Constitution" describes physical entry to the NYSE trading floor, when it was written, physical entry was the ultimate status achievable for a broker-dealer who wished to conduct a NYSE options business. One can readily extrapolate that the physical trading floor has evolved (or is evolving) into an electronic platform and is therefore includable in the NYSE Constitution's original definition.**

nor any options admitted to dealing on NYSE Market. Thus, none of the operative conditions of an OTR is met.

NYSE Market, NYSE Group, NYSE, Inc. A rose by any other name especially considering only a few of President Thain's public statements, to wit:

"Mr. Thain explained how the trading of options and an expanded selection of bonds and exchange-traded funds on the NYSE would benefit the U.S. securities marketplace." (July, 2005 NYSE Newsletter Articles)

We also pick up an options business. Through the Pacific Exchange, they now have about a 10 percent share in the options business. I believe there are a lot of opportunities between cash and options. The options market is also growing about three times faster than cash markets. There's a lot of opportunity for us to expand in the options business and to trade cash and options on the same platform. Right now if you're doing one side or the other, you have to leg into it. Yet there's really no platform today where you can execute both sides of a cash and options trade. That's a very good opportunity for us. (September 22, 2005 to the Investment Company Institute 2005 Equity Market Conference)

"It's clear we must do more." The Archipelago deal would allow NYSE to branch out into over-the-counter, options, (Forbes 4/20/05)

"We will pick up an options market." "I do believe there are too many exchanges in the U.S. - both cash exchanges and option exchanges-and I think that we will play a role in the consolidation process." Yale Economic Review, Fall, 2005)

If a person wishes to trade options through NYSEArca's facilities, he or she can do so by meeting NYSEArca's requirements and paying the appropriate fees, which are currently approximately \$1,850. The OTR Commentators discuss the anticipated benefits to OTR holders in connection with the NYSE's transfer of its options business to the Chicago Board Operations Exchange ("CBOE"). The NYSE disclosed and explained any potential benefits to OTR holders from this transaction in its filing with the SEC on Form 19b-4 dated February 28, 1997 (SR-NYSE-97-05) and Amendment No. 1 thereto (the "OTR Filing"), which filing

22 See Exchange Act Release No. 34-38542 (April 23, 1997).

23 See id.

24 Id.

was approved by the SEC on April 23, 1997.²²

The OTR Commentators assert that the terms of the OTR Lease Pool, an arrangement

designed to benefit OTR holders such as the OTR Commentators, were not fully known to participants.

What was said was that the terms were not fully known as the participants attended the regular briefing sessions designed to inform and hopefully receive input as to the formulation of the arrangement.

However, the OTR Filing fully disclosed these terms: The NYSE specifically described the creation of a Lease Pool arrangement pursuant to which certain CBOE trading permits would be leased out for a period of 7 years, with the proceeds from the leases to be distributed pro rata to the approximately 92 persons who, as a result of their OTRs, were entitled to the possible benefits discussed in the OTR Filing. The concept of compensating certain OTR holders was approved by the NYSE's board of directors, communicated to NYSE members by means of a special membership bulletin dated September 6, 1996, discussed at length and with specifics in both the OTR Filing and the SEC's approval order, and approved by the SEC in its approval order. In connection with its approval of the Lease Pool concept, the SEC stated in Section IV of its approval order that it "believes that the established limit on Permits, the manner in which they are to be distributed, and the lease pool program, are all *reasonable provisions.*"²³

Options participants did not invest in NYSE OTR's for the purpose of participating in a temporary Lease Pool. NYSE OTR investments were made on a long term basis as is evidenced by their declining to surrender their OTR's as condition of Lease Pool participation in 1997.

Moreover, as the NYSE noted in Section 3.A.(vi) of the OTR Filing, with respect to separated OTRs, "all OTRs . . . will have only speculative value at the conclusion of the transfer."

Doesn't the NYSE, as stated, owe its existence to investing/speculating? Should the NYSE be making market assessments?

The NYSE made every effort consistent with sound business practices to maximize benefits to OTR holders, notwithstanding the absence of any obligation to do so. As the SEC explained in Section IV of its approval order:

The Exchange conducted a careful assessments [sic] and review of its options business and determined that it no longer wished to continue this business. There is nothing in the [Exchange] Act that compels the NYSE to continue to trade a particular product line. *Moreover, the NYSE is permitted to terminate the options business entirely*

If it wanted to terminate its option business entirely, why did it continue to maintain its option exchange registration, keep in place its option rules, and insist on including an options re-entry clause in its transfer agreement with the CBOE?

. . . . Rather than simply terminate its options business, the NYSE attempted to package its options business as a whole and attempted to transfer it to another

exchange in return for certain privileges accruing to NYSE options members [T]he Commission believes that the NYSE has made reasonable efforts to achieve a solution that has maximized the value of the NYSE Options program.²⁴

The SEC made its comments when it was under the impression the NYSE would be terminating its option business, not temporarily exiting it.

The NYSE's records indicate that each of the OTR Commentators was among the 92 holders of those OTRs that the Lease Pool was designed to benefit. The NYSE understands from the CBOE that all requisite Lease Pool payments were made. By their 25 See letter from Andrew Rothlein, Michael Wallach, Gregory Tenbekjian, Ken Marks, Pamela Rothlein, Enid Wallach and Mary Ann May, dated December 23, 2005 (information after asterisk on page 6).

own admission in their comment letter, the OTR Commentators appear to have received from the Lease Pool more than four times the aggregate revenue that they could have expected to receive from leasing their OTRs for use on the NYSE.²⁵

Their attempt to compare this substantial increase in lease revenue to other standards, such as the value of a regular CBOE Trading Permit, is simply inapposite.

The comparison was, as stated, to “CBOE Option Trading Permits”, not regular CBOE seats. “CBOE Option Trading Permits” licensed the holder to trade exactly the same option products as Lease Pool Permits no more, no less.

Thus, it appears that the OTR Commentators already have received in connection with their OTRs any compensation that was contemplated as possible from those OTRs in connection with the CBOE transaction.

The NYSE is aware of no representations from any source as to other compensation for or potential benefit from such OTRs.

In sum, the NYSE respectfully submits that the OTRs are not being treated in an “unfair” manner in the merger. As the OTR Commentators concede, the OTRs are not equity interests in the NYSE and, therefore, are not entitled to merger consideration or any other benefits that the OTR Commentators seek to obtain.

* * *

Thank you for your consideration of these responses. We would be pleased to answer any questions or provide further information that you may find helpful.

Sincerely,

Mary Yeager

Assistant Secretary

cc: Chairman Christopher Cox

Commissioner Paul S. Atkins

Commissioner Roel C. Campos

Commissioner Cynthia A. Glassman

Commissioner Annette L. Nazareth

Mr. Robert L.D. Colby

As time passes and events unfold regarding the role of the NYSE in the options business, we as OTR investors are probably more pleased than before that we have retained our rights to effect options trades on the NYSE. Although it is still difficult to understand why we are being made to engage in a process to claim what is rightfully ours, those rights may have the potential to far exceed any disbursement the exchange could have contemplated paying, including a full membership merger distribution. We thank the SEC for recognizing us as the full, rightful, and permanent licensees of all NYSE option products.

Respectfully submitted,

Andrew Rothlein

(Please note that due to a possible SEC time deadline, this reply is being filed by only one of the original comment signers.)

**cc: Chairman Christopher Cox
Commissioner Paul S. Atkins
Commissioner Roel C. Campos
Commissioner Cynthia A. Glassman
Commissioner Annette L. Nazareth
Mr. Robert L.D. Colby**