

BAKER
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COUNSELLORS AT LAW

File No: NYSE-2005-77

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December 16, 2005

**VIA EMAIL and
VIA FEDERAL EXPRESS**

Mr. Jonathan G. Katz
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

VIA FEDERAL EXPRESS

Mr. Robert L.D. Colby, Acting Director
Division of Market Regulation
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

Re: Proposed Trading License Auction SR-NYSE-2005-77

Gentlemen:

This firm is co-counsel with Kurzman Eisenberg Corbin Lever & Goodman, LLP in representing the Independent Broker Action Committee (IBAC) in connection with the above-referenced matter, which requires immediate attention.

Enclosed herewith is a letter from IBAC relating to the proposal by the New York Stock Exchange (NYSE) to conduct next Tuesday an auction of "trading licenses." This auction requires adoption by the NYSE of proposed rules that are the subject of rule filing SR-NYSE-2005-77. As stated in the enclosed letter, the NYSE has announced its intention – prior to any action by the Securities and Exchange Commission in reviewing or approving the NYSE's rule proposals – to proceed with the auction on Tuesday, December 20, 2005. In the enclosed letter,

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IBAC requests that the Commission take immediate action to cause the NYSE to delay the conduct of any auction until after the Commission acts on the NYSE's rule filing.

Very truly yours,



Marc D. Powers

cc (with enclosure):

David S. Shillman, Associate Director
Nancy J. Sanow, Assistant Director
Heather A. Seidel, Staff Attorney
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

Warren P. Meyers, President
Independent Broker Action Committee

Andrew J. Goodman, Esq.
Kurzman Eisenberg Corbin Lever & Goodman, LLP

File No: NYSE-2005-77

Independent Broker Action Committee

Website: www.IBAC.us

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Re: Proposed Trading License Auction SR-2005-77

Gentlemen:

Independent Broker Action Committee, Inc. ("IBAC") is a recently formed not-for profit corporation whose membership consists of independent brokers on the floor of the New York Stock Exchange ("NYSE"). IBAC was formed for the purpose, among others, of reviewing and commenting on the NYSE's proposals to the Securities and Exchange Commission (the "Commission" or "SEC"). In the short time of its existence, IBAC's membership has already grown to over 100 dues-paying members, reflecting the commitment and concern of the NYSE floor brokerage community with respect to the NYSE's proposals. We write to express our objection to the NYSE December 8, 2005 Membership Bulletin (the "Bulletin") purporting to schedule an initial auction of Trading Licenses, notwithstanding that the Commission has not yet approved this basic NYSE organizational change. This auction scheduled for next Tuesday must be immediately halted in its tracks. We wrote to the NYSE on Wednesday asking to delay the auction, but it has refused to do so as of this writing.

On November 3, 2005, the NYSE filed SR - 2005 -77, requesting a number of rule changes relating to the function and operation of the Exchange subsequent to the closing of its proposed

merger with Archipelago, Inc. On December 1, 2005, the NYSE filed Amendment No. 1 to SR – 2005 -77. Among the changes requested in SR – 2005 – 77 is the abrogation of NYSE seats in favor of “Trading Licenses” sold at annual auctions.

There is no doubt that this is a major rule change requiring Commission approval. 17 C.F.R. §19b-4(b) specifies the changes which require SEC approval and provides in pertinent part:

(b) The term stated policy, practice, or interpretation means:

(1) Any material aspect of the operation of the facilities of the self-regulatory organization; or

(2) Any statement made generally available to the membership of, to all participants in, or to persons having or seeking access (including, in the case of national securities exchanges or registered securities associations, through a member) to facilities of, the self-regulatory organization (“specified persons”), or to a group or category of specified persons, that establishes or changes any standard, limit, or guideline with respect to:

(i) The rights, obligations, or privileges of specified persons or, in the case of national securities exchanges, registered securities associations, persons associated with specified persons.

The demise of seats and the creation of licenses and the concomitant auction processes affect a material aspect of the NYSE operation, and even more obviously impacts the rights of independent brokers, and in particular lessee members of the Exchange. The NYSE recognizes and concedes this by including the license and auction procedures in its filing.

The statute cannot be any clearer: “No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.” 15 U.S.C. §78s(b)(1).

The legislative history of the promulgation of this section confirms the importance of this point:

First, although self-regulatory organizations are required to file proposed rule changes with the SEC, there is no requirement that they file an explanation or justification for their proposals. In order to facilitate expeditious Commission review and evaluation of such proposals and to assume informed public comment on them, Section 19(b)(1)¹ would require all self-regulatory organizations to file with the SEC in connection with any proposed rule change a “concise general statement of the basis and purpose” of the proposed rule change. It is the Committee’s intention in adopting this standard to hold the self-regulatory organizations to

¹ 15 U.S.C. §78s(b)(1).

the same standards of policy justifications that the Administrative Procedure Act imposes on the SEC. S. Rep. 94-75, 1975 U.S.C.C.A.N. 179, 207-208.

To date, the Commission has not approved SR – 2005 – 77. Indeed, the proposal has not yet even been published for comment. Nevertheless, late Thursday, December 8 and Friday, December 9, 2005, the NYSE issued a Special Membership Bulletin (the “Bulletin”) setting the initial Trade License auction for December 20, 2005, before the Commission can possibly act on SR – 2005 – 77. In fact, the Bulletin explicitly states “that the rules of NYSE LLC regarding the Trading License auction are still pending approval at the SEC, and will not have been approved at the time the auction takes place.” (Emphasis added) Bulletin, p 4, n. 1. The Bulletin contemplates announcing the auction results the very next day, December 21.

Holding the auction at this time appears to be a blatant violation of the statute. Apparently cognizant of this, the Exchange concedes that the auction results are not effective unless and until the Commission approves SR – 2005 – 77. But this does not save the Exchange from an apparent violation, since holding the auction -- with the resultant “fait accompli” -- makes a mockery of the statutory comment process. Conversely, the Exchange suffers no prejudice by waiting until if, as and when the Commission approves of SR-2005-77 before scheduling and conducting the auction.

Instead of allowing a fair, open policy discussion, holding the auction before the Commission acts skews the entire comment process. Successful bidders will obviously endorse the process; while the Exchange will attempt to discount any objections as motivated by bitter, economically self-interested losing bidders. Consequently, the Exchange is changing an objective public policy issue into a purely economic one. The Exchange will also doubtless argue the difficulty of undoing a completed process, thereby bootstrapping their statutory violation into an argument to approve SR 2005 – 77.

Once again, the legislative history points to the importance of the integrity of the comment process:

Second, the Committee believes that interested persons should have a meaningful opportunity to obtain accurate information about proposed changes in self-regulatory rules and to comment on the need or justification for these changes. Section 19(b)(1) would require the SEC to give notice and provide an opportunity for interested persons to participate in the process of reviewing a proposed change in a self-regulatory organization’s rules. (Emphasis added) S. Rep. 94-75, 1975 U.S.C.C.A.N. 179, 208.

SR 2005 – 77 requires complex analysis to fully comprehend the impact of the NYSE proposed “Dutch” auction as presently structured. This is precisely why the Securities Exchange Act of 1934 (“SEA”) contemplates publication and a fair comment period. Our organization is in the process of analyzing the proposal and intends to submit meaningful, reasoned comments. Our

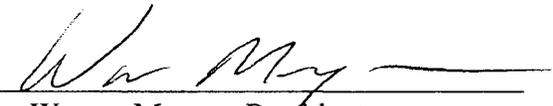
members fully anticipated this opportunity in light of the SEA filing requirements. We are apprehensive about the Exchange's alacrity on such short notice.

Conversely, there is, and can be, no *bona fide* reason for the Exchange's untoward haste. The system cannot become effective anyway without Commission approval. Moreover, the Exchange has shown the ability to act extraordinarily promptly in this regard. The Bulletin was issued December 8, for an auction a mere 12 days later, results to be announced the very next day. There is absolutely no reason why the Exchange cannot effectuate this timetable if, as and when the Commission approves SR 2005 – 77. There is absolutely no reason to destroy the integrity of the comment process.

Accordingly, we urgently request the Commission today to cause the Exchange to delay conduct of any Trading License auction before the Commission acts on SR 2005 – 77.

Respectfully,

Independent Brokers Action Committee

By: 
Warren Meyers, President

Cc: David S. Shillman, Associate Director
Nancy J. Sanow, Assistant Director
Heather A. Seidel, Staff Attorney
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