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November 28, 2006

Ms. Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 205-9303

Re: Securities Exchange Act Release No. 54618; SR-Amex 2006-98

Dear Ms. Morris:

The Exchange submits this letter in response to the comments on the above-referenced filing submitted by Jonathan Q. Frey, Managing Partner, J. Streicher & Co. L.L.C. in his letter dated November 13, 2006 ("Streicher Letter"). The Exchange's filing would prohibit specialists in equity securities from charging a commission on certain types of transactions. We note that the proposed rule change will provide certainty and transparency regarding the costs of trading market and marketable limit orders—the overwhelming percentage of orders placed for execution on the Exchange—thereby benefiting investors and intermarket competition. The Streicher Letter sets forth three spurious general objections and requests the Commission not approve the proposal. This letter will respond to those objections after a brief discussion of the proposal and what it seeks to accomplish.

1. Proposed Rule 154(b)

The proposed rule essentially codifies that specialists should not charge a commission for the execution of market and marketable limit orders for which they do not provide a service. The rule also sets forth those types of executions for which specialists do provide a service and provides that specialists may (but are not required to) charge a commission for those services. Similar rules have been adopted by the New York Stock Exchange[1] and the Chicago Board Options Exchange[2]. Prior to now the

[1] *See,* NYSE Rule 123B(b)(1) and Supplementary Material .10, which generally prohibit NYSE specialists from charging a commission on orders sent to them electronically unless the orders remain on the book for more than five minutes,

[2] *See,* CBOE Rule 8.85(b)(iv), which prohibits *inter alia* the charging of commissions by designated primary market makers ("DPMs") for orders that are automatically executed through a CBOE system.

Exchange has not found it necessary to codify this concept in a rule since anecdotal evidence it has received over the years largely supported its belief that specialists followed this concept voluntarily. In the months leading up to the filing of this proposal, the Exchange learned from its members that, without notice in some instances, certain specialists began charging for the execution of equity orders for which they did not provide a service as well as increased their commission rates for the execution of all types of orders in equities. Once the Exchange began receiving complaints, and noticing a concurrent sharp drop-off in market share, it determined to act by proposing the adoption of a rule that will specifically prohibit the charging by specialists of a commission on:

- Orders in equities sent to specialists electronically unless the order remains on the book for more than two minutes;
- Limit orders sent to the specialist (not through the Exchange's electronic order routing systems) and executed in less than two minutes; and
- Orders in equities executed on an opening or reopening.

The proposed rule also references Rule 152(c), which prohibits the specialist from charging for orders executed against it as principal, and sets forth eight instances in which the specialist may (but is not required to) charge a commission.

The Exchange believes that the specialist performs no meaningful service for orders routed electronically and executed automatically or shortly after receipt such as market and marketable limit orders. The execution of limit orders that have rested on the specialist's book for more than two minutes whether electronically delivered through Exchange systems or hand delivered by a floor broker can be charged a commission because of the responsibilities the specialist assumes with respect to the order. For example, a specialist that receives a limit order that betters the market but is not immediately executable must decide whether to execute the order or display it. If the order is displayed, the specialist must yield precedence to it and insure that the order is properly represented in any trade that occurs on the floor. As noted earlier, the NYSE prohibits charging a commission for the execution of an order for the first five minutes after receipt. Given the speedy manner within which many orders are executed today, the Exchange nevertheless believes that the two minute timeframe is appropriate.

2. The Proposed Rule will Enhance Amex's Market Quality

The Streicher Letter states that the Commission should reject the proposed rule change because "it will adversely impact investors by reducing the qualify [sic] of markets offered by the Amex." The Streicher Letter then cites a 1998 CBOE proposal to allow resident market makers to set and impose a fee on options contracts traded by market makers. The purpose of the fee was to subsidize and thereby reduce the commissions charged by the CBOE order book officials for the purpose of increasing the competitiveness of the CBOE. The United States Department of Justice ("DOJ") commented on the CBOE proposal stating that it had the effect of placing "pressure on market makers to increase their spreads in order to finance the subsidies." DOJ further noted that increased spreads would result in inferior prices to consumers and called upon

the CBOE to state why its proposal would "not adversely affect spreads and/or net consumer costs." The Streicher Letter fails to acknowledge however that after the CBOE responded to DOJ's comments, the Commission rejected DOJ's concerns and approved the CBOE"s rule change as originally proposed[3]. With respect to whether the CBOE's proposal would result in the widening of spreads, the Commission noted generally that:

> options market makers are required to establish quote ranges that promote fair and orderly markets. Artificially wide quote spreads are inconsistent with that requirement.[4] In addition, competition for order flow among competing market makers as well as between those firms and specialists on other markets serves to narrow spreads. The Commission does not believe that there is anything particularly unique in the current proposal that would make it more likely that a market maker would widen spreads. ... Additionally, the best execution obligations of upstairs order routing firms would reduce the likelihood that spreads will be widened by requiring that those firms direct order flow to markets that are disseminating superior quotes.

Similar to the Commission's views with respect to the CBOE's proposal, the Exchange believes that the widening of spreads as a result of the adoption of a rule limiting the types of orders for which a specialist may charge a commission is extremely unlikely and the Streicher Letter's argument meritless. The purpose of the proposal is to attract and maintain order flow to Amex specialists by providing transparency, clarity and consistency to the costs of doing business on the Exchange. It is against each specialist's own economic interest to widen its spreads and thereby risk losing order flow to any one of a number of competing marketplaces. The Streicher Letter offers no evidence to suggest that spread widths have widened when the cost of doing business on an exchange has decreased.

The Streicher Letter concedes that "while an increase in spreads may not be practical in highly competitive markets, many of the securities listed on the Amex are thinly traded with most of their trading taking place primarily on the Amex. For these securities there is often little effective competition from other markets." Unfortunately, these assertions are inconsistent with the facts. All Amex listed securities trade in at least one additional market center—either NYSEArca, Nasdaq, a regional exchange or an ECN. The large majority of Amex issues trade on multiple venues. The Amex does not have a monopoly in the trading of any of its listed securities. Indeed, we have quite the opposite of a monopoly given the robust competition among exchanges and alternative markets for

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[3] *See,* Securities Exchange Act Release No. 41121 (February 26, 1999) 64 FR 11523 (March 9, 1999) Order Approving SR-CBOE 98-35.

[4] The Commission cites CBOE's Rule 8.7(a), which is substantively identical to Amex Rule 170 and states "[t]ransactions of a Market Maker should constitute a course of dealing reasonably calculated to contribute to the maintenance of a fair and orderly market, and no Market Maker should enter into transactions or make bids and offers that are inconsistent with such a course of dealings."

order flow. Widening of the spreads in these securities will likely result in further market share erosion as order flow providers mindful of their best execution responsibilities direct their orders elsewhere.

Finally, the Streicher Letter also asserts that it is not likely that members will pass on reduced charges that result from the rule's limitations on commissions to investors; while the Exchange agrees that there is no guarantee that public customers will ultimately benefit from the reduction or elimination of certain charges, the Exchange intends that the proposal have this result and will publicize its approval. Indeed, customers would be in a better position to negotiate for lower commissions if their firm's costs were reduced.

3. The Proposed Rule Change Promotes Increased Transparency of the Types of Orders for which Specialists may Charge a Commission.

The Streicher Letter points to other rules in place at the Exchange that are better suited to addressing the problem sought to be addressed by the proposed rule change. As described above and in the filing itself, the Exchange seeks to increase the transparency and clarity regarding the full cost of doing business on the Exchange. Specialists, unlike the Exchange itself, are not required to make their charges publicly available.[5] The two rules cited by the Streicher Letter—Rules 26 and 27—provide the Exchange with the ability to (1) limit or prohibit the awarding of new allocations to specialists who fail to respond to competition by offering competitive markets and competitively priced services; and (2) remove allocations from specialists who fail to meet certain levels of performance in the handling of those securities. While these rules and others such as Rule 170 are useful to the Exchange in its efforts to be competitive, these rules do not provide the transparency and clarity being sought by the instant proposal.

4. The Proposed Rule Change Does Not Require Significant Implementation Costs and is being Implemented on a Permanent Basis.

The Streicher Letter asserts that since the proposal is "expected to remain in effect for a relatively short period, its significant implementation costs cannot be justified." The Exchange does not intend for the proposed rule to remain in effect for a short period of time and no where in its proposal does it state such an intent. It is expected however that with the implementation of the AEMI system and Regulation NMS the proposed rule will be expanded to include ETFs and will be revised (i) to state that commissions can not be charged for orders that are not executed (i.e., orders that are cancelled); and (ii) to eliminate references to order types not included in the AEMI system such as non-regular way orders. The essential elements of the rule and its limitation on the types of orders for which a specialist may charge a commission will stay the same. In addition, as noted above and in the proposed rule filing, most if not all specialist units have until recently been abiding by the provisions of the proposed rule since it merely codifies those types of orders for which the specialist provides no service and should not be charging a commission. It should also be noted that the Exchange has received complaints from order flow providers that some specialist units recently increased their commission rates and began charging for certain order types without providing notice or attempting to

[5] Rule 19b-4 of the Securities Exchange Act of 1934 requires the Exchange to post its fee schedule on its website.

renegotiate their commission schedules. Those specialist firms that currently bill a commission for the execution of the type of orders that will be prohibited under the proposed rule, should find that contracting members to advise that commissions will be eliminated for certain order types will be welcomed by order flow providers.

Again, the Exchange urges the approval of its proposed rule filing in order to correct a competitive imbalance between the Amex and its competitors and to provide needed investor protections.

In closing, it should be noted that the Streicher Letter provides the views and concerns of only one specialist firm at the Amex. For an opposing viewpoint see the letter from William Silver, Managing Partner, Weiskopf, Silver & Co. LP dated November 6, 2006, supporting approval of the proposed rule change noting that it is "a very constructive step towards fostering greater competition in the National Market System."

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The Exchange appreciates the opportunity to respond to the Streicher Letter and respectfully requests for the foregoing reasons and the reasons set forth in the proposed rule filing that the Commission approve the proposed adoption of Rule 154(b). Please contact the undersigned if you need any additional information regarding this proposal.

Sincerely,