Stephen A. Hochman
Attorney-at-Law
Mediator • Arbitrator
600 lexington avenue
new york, new york 10022

(212) 750-8700

fax (212) 223-8391
Shochman@prodigy.net

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F. Street NE
Washington, DC 20549-9303

January 16, 2007

Re: File Number SR-NYSE-2006-45

Dear Ms. Morris:

Although most of the provisions contained in the proposed rule change are housekeeping in nature as they remove references relating to an expired mediation pilot program, there is one provision which I submit should not be approved. That provision is contained in the second sentence of subparagraph (a)(2) under proposed Rule 638, which states as follows:

> The mediator may not act as an arbitrator and may not represent any party in an arbitration relating to the matter mediated.

My objection relates to the portion of that sentence which purports to prohibit the mediator from acting as an arbitrator relating to the matter mediated. That prohibition would prevent the parties from agreeing to the process known as "med-arb." In med-arb, the neutral first acts as a mediator and attempts to facilitate a resolution of the dispute on terms that both parties decide is preferable to their arbitration alternative. In the mediation phase of the process, the parties have the sole right to decide on the terms of a settlement, and the neutral has no power to impose a resolution. However, if the parties have failed to reach a settlement in the mediation process, they might choose to request the neutral to switch roles from serving as a mediator to serving as a sole arbitrator with the power to decide the dispute. Of course, if this were to occur, the parties and the neutral would have to first agree on the ground rules of the arbitration (e.g., whether the neutral should conduct a traditional arbitration by deciding who wins and who loses and, if claimant wins, the amount of the damage award, or whether the neutral should instead decide on what he or she determines would be a fair or appropriate settlement based on the odds of claimant winning on liability and the likely amount of damages that an arbitrator would award after a finding of liability. (This latter alternative is sometimes colloquially referred to as binding mediation.)

Needless to say, it would be inappropriate for a neutral who has mediated a dispute to subsequently represent one of the parties in a matter relating to the same dispute, but there is no need for the Exchange to adopt a rule expressly prohibiting that particular type of inappropriate conduct. There are many other types of inappropriate mediator conduct that the Exchange quite properly does not address in its proposed Rule, and mediators are generally familiar with the ethical and other rules that apply to them.

The problem with the above quoted sentence contained in proposed Rule 638 is that it purports to interfere with the right of disputants to agree to an ADR process of their own choosing merely because they are required to arbitrate their dispute pursuant to the rules of the Exchange if they are unable to voluntarily settle their dispute prior to arbitration. The Exchange has no right to deprive parties of their contractual right to voluntarily agree to med-arb, or any other ADR process of their choosing, either prior to or after the institution of the arbitration. Thus, I respectfully suggest that the SEC disapprove the inclusion of the above quoted sentence in subparagraph (a)(2) of the proposed amendment to Rule 638.

Of course, the Exchange could refuse to offer to facilitate the mediation as provided in subparagraph (a)(4) of proposed Rule 638 (*e.g.*, by making Exchange's meeting facilities available without charge) unless the parties agree to be bound by the Exchange's mediation rules. However, if the Exchange were to conditions its cooperation in facilitating the mediation process on the parties agreement to restrict their ADR processes to those approved by the Exchange, that would be hostile to the public policy of encouraging parties to settle their disputes by whatever appropriate dispute resolution procedures they may choose.

It is unfortunate that the Exchange has chosen to discontinue its prior mandatory mediation pilot program. Contrary to my experience and the experience of many of the federal and state court mandatory mediation programs around the country, settlement rates in mandatory mediation programs are high (*e.g.*, 80%). My own experience as a mediator in the Exchange's pilot mandatory mediation program was that all but one of the 19 cases I mediated settled in mediation. Although many sophisticated practitioners are aware of the benefits of mediation and will choose it voluntarily, there are some who need it to be mandated in the first instance, after which they often become believers in the process and realize that mediation often works after direct settlement discussions have failed.

Although none of the 19 cases that I mediated in the Exchange's mandatory pilot program was a med-arb, I have served as a neutral in several med-arbs, as well as two arb-meds, but only when the parties have initiated the request for the dual process and were fully aware of the ground rules and the potential disadvantages. Although it is commendable that the Exchange is willing to make its meeting rooms available for those parties who voluntarily chose to mediate, it should not impinge on the rights of the parties to design their own mediation process.

Respectfully submitted,

Stephen A. Hochman