

July 29, 2008

Michael A. Macchiaroli
Associate Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Via Fax: (202) 772-9273

Via Email: tradingandmarkets@sec.gov

**Re: Comments on the Securities and Exchange Commission's Recently Proposed
Changes to Rule 17a-5 under the Securities Exchange Act of 1934**

Dear Mr. Macchiaroli:

The New York State Society of Certified Public Accountants, representing 30,000 CPAs in public practice, industry, government and education, submits the following comments to you regarding the Commission's Recently Proposed Changes to Rule 17a-5 under the Securities Exchange Act of 1934.

The NYSSCPA Stock Brokerage Committee deliberated the above referenced issue and has these thoughts and comments to share for your consideration. If you would like additional discussion with the committee, please contact Jeffrey I. Rosenthal, Chair of the Stock Brokerage Committee, at (212) 840-3456, or Ernest J. Markezin, NYSSCPA staff, at (212) 719-8303.

The NYSSCPA thanks you for the opportunity to have its opinion considered.

Sincerely,



Sharon Sabba Fierstein
President

Attachment

**COMMENTS ON THE SECURITY AND EXCHANGE COMMISSION'S
RECENTLY PROPOSED CHANGES TO RULE 17A-5 UNDER THE
SECURITIES EXCHANGE ACT OF 1934**

July 29, 2008

Principal Drafters

David H. Grumer
Paul S. Ehrenstein

NYSSCPA 2008 – 2009 Board of Directors

| | | |
|--|--|--|
| Sharon Sabba Fierstein, <i>President</i> | Scott M. Adair Edward L. Arcara | Gail M. Kinsella Nancy A. Kirby |
| David J. Moynihan, <i>President-elect</i> | John Barone Susan M. Barossi | J. Michael Kirkland Kevin Leifer |
| Richard E. Piluso, <i>Secretary/Treasurer</i> | S. David Belsky Warren M. Bergstein | Elliot A. Lesser David A. Lifson |
| Barbara S. Dwyer, <i>Vice President</i> | Thomas Boyd Anthony Cassella | Anthony J. Maltese Mark L. Meinberg |
| Joseph M. Falbo Jr., <i>Vice President</i> | Cynthia D. Finn Robert L. Goecks | Avery E. Neumark Robert A. Pryba, Jr. |
| Elliot L. Hendler, <i>Vice President</i> | David R. Herman Scott Hotalen | Joel C. Quall Ita M. Rahilly |
| Margaret A. Wood, <i>Vice President</i> | John B. Huttlinger, Jr. Martha A. Jaeckle | Judith I. Seidman Thomas M. VanHatten |
| Louis Grumet, <i>ex officio</i> | Suzanne M. Jensen Lauren L. Kincaid | Liren Wei Charles J. Weintraub |

NYSSCPA 2008 – 2009 Industry Oversight Committee

| | | |
|-------------------------------|----------------------|----------------------|
| Thomas V. Irvin, <i>Chair</i> | Steven B. Chatwin | John F. Myklusch |
| Michael F. Rosenblatt | Kenneth J. Krick | Jeffrey I. Rosenthal |
| Peter L. Berlant | Howard S. Landsberg | Judy M. Sescil |
| Bradford R. Campbell | Stephen J. Mannhaupt | Victor Valdivia |
| Anthony Cassella | Robert H. Moses | |

NYSSCPA 2008 – 2009 Stock Brokerage Committee

| | | |
|------------------------------------|--------------------|-----------------------|
| Jeffrey I. Rosenthal, <i>Chair</i> | Robert A. Fortino | John S. Miller |
| David H. Grumer | Bruce S. Glaser | Charles J. Pagano |
| Jeffrey Abramczyk | Robert L. Goecks | Gary R. Purwin |
| Steven C. Bender | Mark K. Goodman | Martin Racek |
| Maurice Berkower | John C. Guttilla | Michael F. Rosenblatt |
| Michael P. Bronstein | Dean H. Hiltzik | Sunil K. Singla |
| Charles M. Carlson | Kevin J. Joyce | Marc H. Stoltz |
| Mark D. Carroll | Robert J. Kaufmann | Michael E. Stupay |
| John Cavallone | Philip C. Kempisty | Samuel R. Telzer |
| Wai-Mon Chan | Jay D. Levy | Christian J. Tiriolo |
| Scott D. Daniels | Mark R. Levy | Edmund L. Towers |
| Paul S. Ehrenstein | Suzanne L. Mannell | |
| Richard M. Feldman | Guy Miller | |

NYSSCPA Staff

Ernest J. Markezin

New York State Society of Certified Public Accountants

Comments on the Security and Exchange Commission's Recently Proposed Changes to Rule 17a-5 under the Securities Exchange Act of 1934

The Stock Brokerage Committee of the New York State Society of Certified Public Accountants has studied the Proposed Changes and makes the following specific comments to the excerpted sections referenced in italics below.

(c)(6)(i)(C) PCAOB registration required of auditors:

The definition of “non-Issuer” brokers and dealers that shall be audited by auditors who are registered with the Public Company Accounting Oversight Board (“PCAOB”) is a broker or dealer that holds customers’ cash and securities or otherwise owes cash or securities to customers.

We believe that the definition of such broker-dealers should be consistent with SEC Rule 15c3-1(a)(2)(i), *Brokers or Dealers That Carry Customer Accounts*. Our concern is that this definition is too broad and could place an undue burden on too many registered brokers or dealers. The following exceptions should be incorporated:

1. Brokers and dealers that meet the requirements for the exemption of SEC Rule 15c3-3(k)(1),
2. Brokers and dealers that meet the requirements for the exemption of SEC Rule 15c3-3(k)(2)(i) and (k)(2)(ii),
3. A broker or dealer who owes cash to a customer or former customer by virtue of a settlement or court decision and is otherwise not required to be audited by an auditor registered with PCAOB, and
4. Introducing brokers and dealers who hold recaptured commissions in a special reserve account and are required to maintain a minimum of \$250,000 of net capital.

(c)(6)(ii)(B) Independence of auditors who need not be registered with PCAOB:

Observation: The current draft indicates that if the auditor need not be registered with the PCAOB, then AICPA rules and certain enumerated sections of Section 210.2 will apply. However, there is a comment on page 19 of the comparative pages in the third column marked “changes marked...” The comment asks whether it is desirable to have different sets of independence standards.

The Society supports the separate definitions of independence that you have proposed.

We acknowledge that a difference in independence standards exists. We appreciate the heightened level of independence that is assigned to auditors of Issuers and those other brokers and dealers that hold customers' cash and securities (and are not otherwise exempted).

We believe it is important to maintain these separate definitions for the following reasons:

1. The imposition of the PCAOB independence standards on auditors who are not registered with PCAOB will likely create confusion among auditing firms.
2. The imposition of PCAOB independence standards will have a negative effect on brokers and dealers. Businesses that are smaller than those who must be audited by the PCAOB registered auditors will find the standards to be excessively burdensome. These businesses will need to retain "secondary" service providers for services that they previously could have expected to receive from one professional.

(h)(4) Material Inadequacy:

The last sentence of (h)(4) states that the term material inadequacy "includes all significant deficiencies." We disagree that it is in the public interest to include all significant deficiencies as material inadequacies. Such a requirement would result in disclosure of information beyond that which is required for other filers. While a potential significant deficiency may rise to the level of a material weakness or a material inadequacy and therefore require disclosure, this is not always the case. Some significant deficiencies may not rise to the level of being material. Consequently, we believe that the definition of material inadequacy contained in SEC Rule 17a-5(g)(3) should be the governing guidance. Our reasoning is stated below:

1. Our professional standards define "significant deficiencies" as having more than a remote likelihood of financial statement misstatement that is more than inconsequential (AU §325.06). As noted in the text of the footnote to AU §325.06, this means a reasonable possibility of occurring.

Furthermore, the misstatements that are referred to ("more than inconsequential" (AU §325.07), as used in the definition of "significant deficiency") describe the magnitude of potential misstatement that could occur as a result of a significant deficiency. They also serve as the threshold for evaluating whether a control deficiency, or combination of control deficiencies, is a significant deficiency. A misstatement is inconsequential if a reasonable person would conclude, after considering

the possibility of further undetected misstatements, that the misstatement, whether considered individually or when aggregated with other misstatements, would clearly be immaterial to the financial statements.

Although attempts are made to provide guidance on these definitions, these terms are untested and difficult to apply.

The outcome would be that communications that normally would have been conducted directly between auditors and those responsible for governance will make their way into reports submitted to recipients of the Rule 17a-5 reports. Due to the broad interpretations of “reasonably possible” and “more than inconsequential,” we believe that an auditor’s report on internal accounting control will have citations of material inadequacies with such frequency that it will call their usefulness into question.

2. Our professional standards (AU §325.06) provide for material weaknesses – a higher form of internal control deficiency. A material weakness is defined as “a significant deficiency, or combination of significant deficiencies, that results in more than a remote likelihood that a material misstatement of the financial statements will not be prevented or detected.”

Due to the use of the term “material” as the criteria, we believe that the term “material weakness” is more closely aligned to the definition of material inadequacies in SEC Rule 17a-5(g)(3), that states, “A material inadequacy in the accounting system, internal accounting controls, procedures for safeguarding securities, and practices and procedures referred to in paragraph (g)(1) of this section which is expected to be reported under these audit objectives includes any condition which has contributed substantially to or, if appropriate corrective action is not taken, could reasonably be expected to (i) inhibit a broker or dealer from promptly completing securities transactions or promptly discharging his responsibilities to customers, other broker-dealers or creditors; (ii) result in material financial loss; (iii) result in material misstatements of the broker's or dealer's financial statements; or (iv) result in violations of the Commission's recordkeeping or financial responsibility rules to an extent that could reasonably be expected to result in the conditions described in paragraphs (g)(3) (i), (ii), or (iii) of this section.”

Additionally, we believe that SEC Rule 17a-5 should be modified so that the definition of a material inadequacy and a material weakness are similar. This would reduce confusion in interpreting the rule when a material inadequacy is discussed by auditor, broker-dealer and others. We recommend the following wording for section (h)(4) of SEC Rule 17a-5:

The term material inadequacy includes all material deficiencies as defined in *AICPA Statement of Auditing Standards No. 112, Communicating Internal Control Related Matters Identified in an Audit* (except as modified in the last paragraph of this section)

The term shall include, but shall not be limited to deficiencies in:

- internal accounting controls,
- procedures for safeguarding securities,
- practices and procedures includes any condition which has contributed substantially to, or, if appropriate corrective action is not taken, could reasonably be expected to:
 - (i) inhibit a broker or dealer from promptly completing securities transactions or promptly discharging his responsibilities to customers, other brokers and dealers or creditors;
 - (ii) result in material financial loss;
 - (iii) result in material misstatements in the broker's or dealer's financial statements;
 - (iv) result in violations of the Commission's recordkeeping or financial responsibility rules to an extent that could reasonably be expected to result in the conditions described in paragraphs (i), (ii), or (iii) above.

The term material inadequacy shall exclude matters of an accounting nature that do not have an effect on net capital or any other items described in the preceding paragraph.