SIFMA
Securities Industry and
Financial Markets Association

June 22, 2007

By Electronic Delivery

Nancy M. Morris, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File No. SR-NYSE-2007-21 – NYSE Rule 92

Dear Ms. Morris:

The Securities Industry and Financial Markets Association's ("SIFMA")[1] NYSE Rule 92 Working Group ("Working Group") submits this letter in response to the request by the Securities and Exchange Commission ("SEC" or the "Commission") for comments regarding the proposed rule change and amendment No. 1 to New York Stock Exchange LLC ("NYSE" or "Exchange") Rule 92 ("Proposed Amendment").[2] We support the Proposed Amendment's objectives and commend the Exchange for seeking to harmonize Rule 92 with the NASD's Manning Rule[3] and to address changes in the marketplace resulting from the implementation of the NYSE Hybrid Market and Regulation NMS ("Reg NMS").[4] We believe, however, that the Proposed Amendment, in some instances, unnecessarily imposes greater or different requirements on firms than those currently imposed by the Manning Rule. Accordingly, the Working Group welcomes the opportunity to comment on these aspects of the Proposed Amendment and respectfully requests that the Proposed Amendment be reconsidered and/or revised as set forth below.

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1 SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. More information about SIFMA is available at www.sifma.org.

2 Securities Exchange Act Release No. 55804 (May 23, 2007), 72 Fed. Reg. 30410 (May 31, 2007) ("Proposing Release").

3 NASD IM-2110-2.

4 17 CFR 242.600 et seq.

Specifically, some SIFMA firms have expressed significant concern regarding the requirements that firms (i) obtain blanket affirmative consent from customers in order to trade along with such customer orders; (ii) report the initial leg of a riskless principal transaction as "riskless principal" and provide certain trade execution and order information to the Exchange's Front End Systemic Capture database ("FESC"); and (iii) in allocating securities where the riskless principal transaction includes Rule 92(b) proprietary orders,[5] orders from customers who have consented to trading along with such Rule 92(b) proprietary orders, and orders from customers who have not consented or cannot consent, utilize a methodology whereby the Rule 92(b) proprietary orders and any customer orders that have consented yield to the non-consenting customer orders. Further, we believe that clarification regarding the proposed exception for intermarket sweep order ("ISO") facilitation trades is necessary.

I. Affirmative Consent

The Proposed Amendment would require firms to obtain affirmative blanket consent to trade along with a customer's orders under Rule 92(b), subject to certain disclosure requirements (and without taking into account customer status as institutional or individual), instead of obtaining and documenting consent to trade along with customer orders on an order-by-order basis. We believe, however, that negative consent with affirmative disclosure for both institutional and individual customers would better align the Exchange's regulatory requirements with today's market conditions while also more effectively mitigating the administrative and recordkeeping burdens associated with providing customers with adequate disclosures. Accordingly, we advocate that the consent requirements in the Proposed Amendment be reconsidered and revised to permit negative consent with affirmative disclosure. Customers still would be permitted to affirmatively revoke consent on an order-by-order basis.

In the Proposed Amendment, the Exchange acknowledged many similar instances where firms are permitted to rely on blanket approval, provided certain conditions are met, to execute proprietary orders while holding customer orders executable at the same price (*e.g.*, with respect to volume weighted average price ("VWAP") trades).[6] We believe the interpretations noted by the Exchange directly support the notion of negative consent with affirmative disclosure rather than affirmative consent. For example, NYSE Information Memorandum 05-52 (cited in footnote 8 of the Proposing Release) requires only that customers be provided with a periodic affirmative notice regarding a firm's practice of proprietary trading while holding customer VWAP orders; it does not make any reference to affirmative consent. Similarly, NYSE Information Memorandum 05-81 refers only to disclosure of a specialist's intent to trade on parity with orders executed with other brokers and the brokers' opportunity to object. Further, although not cited in the Proposing Release, the consent requirements under NASD Rule 2441

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[5] "Rule 92(b) proprietary orders" are defined as "transactions in which the member or member organization is: (1) liquidating a position held in a proprietary facilitation account and the customer's order is for 10,000 shares or more; (2) creating a bona fide hedge; (3) modifying an existing hedge; or (4) engaging in a bona fide arbitrage or risk arbitrage transaction." Proposing Release, *supra* note 2, at fn.5.

[6] *See* NYSE Information Memo 05-52 (Aug. 1, 2005).

(Net Transactions with Customers) also permit firms to obtain negative consent for institutional customers.[7]

In addition to the support for negative consent with affirmative disclosure, the cost to firms to gather affirmative blanket consent from customers and to maintain records and reprogram systems likely would negate the benefit of not having to obtain order-by-order consent. In fact, the reprogramming alone may prove to be so impractical that firms would be forced to continue to obtain consent on an order-by-order basis.

II. Transaction Reporting

As noted above, SIFMA firms are concerned about two transaction reporting issues discussed in the Proposed Amendment: (a) the requirement to report the initial leg of a riskless principal transaction as "riskless" when the order is sent to the Exchange and (b) the requirement to report certain transaction information to FESC. The Proposed Amendment suggests that firms must mark the initial leg of the riskless principal transaction as "riskless" when the order is sent to the Exchange ("traditional approach") as opposed to submitting an order to the Exchange marked as "principal" and a separate non-tape, non-clearing report on the second leg(s) of the facilitation transaction to the customer ("alternative approach").[8] Under the NASD's riskless principal trade reporting requirements, firms are afforded the option of taking the traditional or alternative approach. The majority of SIFMA firms have adopted the alternative approach and have programmed their systems accordingly. If required to report the initial leg of a riskless principal transaction as "riskless," it would be a change in current business practice and the requirement would result in a significant cost to firms to reprogram their systems. We believe that the Proposed Amendment should be consistent with the NASD's riskless principal transaction reporting requirements and incorporate the alternative approach.[9]

Further, under the Proposed Amendment, firms are required to submit allocation reports to FESC linking the original riskless principal order with the underlying customer allocations.[10] This requirement imposes a new obligation on firms as, currently, firms do not submit allocation information to FESC. Moreover, the Proposed Amendment does not make clear whether such reporting requirements may be met with a drop copy to FESC at the end of the day or if such information must be submitted immediately after execution or, given the fact that the first leg of

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[7] *See* Securities Exchange Act Release No. 54088 (Jun. 30, 2006), 71 Fed. Reg. 38950, 38951-52 (Jul. 10, 2006) (notice of filing and order to adopt NASD Rule 2441 to require disclosure and consent when trading on a net basis with customers); NASD Notice-to-Members 06-47.

[8] *See* NASD Rule 4632(d)(3)(B); NASD Notice-to-Members 99-66.

[9] We understand that the NYSE may be developing a proprietary trade reporting facility ("NASD/NYSE TRF") similar to the NASD/Nasdaq trade reporting facility ("NASD/Nasdaq TRF"). Consideration should be given for whether riskless principal trading can be submitted to the NASD/NYSE TRF (when developed and made available) in the same way it is submitted to the NASD/Nasdaq TRF. Further, if the NASD/Nasdaq TRF and the NASD/NYSE TRF will be under the regulatory purview of the new joint self-regulatory organization, consideration should be given to permitting firms to submit transaction information to either the NASD/Nasdaq TRF or the NASD/NYSE TRF.

[10] Proposing Release, *supra* note 2, at 30411.

a transaction in a NYSE-listed stock could be executed on several different exchanges, whether the allocation of the whole order must be reported to FESC or only the portion of the order executed on the Exchange. We respectfully question whether there is a compelling reason for imposing this additional transaction reporting requirement on firms and would like the Exchange to reconsider this aspect of the Proposed Amendment for possible alternatives.[11] In any event, if the NYSE determines to move forward with requiring FESC reporting, we believe the Proposed Amendment should confirm that an end-of-the day drop copy of Rule 92 riskless principal transactions will meet the rule requirement.[12]

III. Allocation

If a riskless principal transaction includes a Rule 92(b) proprietary order, an order from a customer that has consented to trade along with the Rule 92(b) proprietary order, and an order from a customer that either has not consented or cannot consent to trading along, we understand that, under the Proposed Amendment, the Rule 92(b) proprietary order and the customer order that has consented to trading along must yield to the non-consenting customer order. Although the Proposed Amendment implies that this requirement is consistent with the NASD's Manning Rule, we respectfully question why the nature of the customer orders and their rights regarding allocation change merely based on the inclusion of a Rule 92(b) proprietary order in the riskless principal order. We believe this interpretation should be reconsidered by the Exchange and it should be clarified that the orders of customers who have consented to trading along are not required to yield to orders of customers who cannot consent or have not consented.

IV. Principal ISOs

We understand that the Proposed Amendment would permit firms, in certain situations, to route ISOs to the Exchange subject to meeting certain conditions, which include requiring the firm to yield its principal executions to any open customer orders that are required to be protected by Rule 92. It is not clear, however, whether the retention of executions associated with principal ISOs would conflict with the requirements of Rule 92 where the firm is holding unexecuted orders for customers who have chosen not to receive the benefit of better-priced ISOs. According to the Proposed Amendment, Rule 92 allocation procedures would seem to require that firms allocate fills from riskless principal facilitation trades (including principal ISOs routed in conjunction with those trades) to open customer orders. We believe clarification of how firms should allocate fills from principal ISOs in accordance with Rule 92 is necessary.

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[11] The 60-second allocation requirement outlined in the Proposed Amendment would force firms to facilitate customer orders piece-meal after each execution rather than allowing the firm to provide customers with the entire position sought at the average price incurred by the firm. The logistical problems caused by the 60-second requirement are compounded by the requirement to report allocations to FESC.

[12] We understand from our conversation with NYSE staff on April 4, 2007 that such timing would be appropriate.

We appreciate the opportunity to provide you with these comments, and believe the above recommendations respond to the Working Group's and the NYSE's goals of protecting investors' interests while also addressing the realities of the marketplace. We welcome the opportunity to continue this dialogue with the NYSE or SEC staff. If you have any questions or would like to discuss our comments further, please feel free to contact me at 202.434.8400.

Sincerely,

Ann Vlcek
Managing Director and
Associate General Counsel
SIFMA

cc: Chairman Christopher Cox, Securities and Exchange Commission
Commissioner Paul S. Atkins, Securities and Exchange Commission
Commissioner Roel C. Campos, Securities and Exchange Commission
Commissioner Annette L. Nazareth, Securities and Exchange Commission
Commissioner Kathleen L. Casey, Securities and Exchange Commission
Erik R. Sirri, Securities and Exchange Commission
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