September 29, 2008

Ms. Florence Harmon
Deputy Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Release No. 34-58429; File No. SR-NYSE-2008-71: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 123B (Exchange Automated Order Routing System) to Allow A Member Organization to Provide Other Market Participants with Access to the Exchange on an Agency Basis

Dear Ms. Harmon:

The Securities Industry and Financial Markets Association[1] ("SIFMA") appreciates the opportunity to comment on the New York Stock Exchange LLC ("NYSE" or "Exchange") proposal to amend NYSE Rule 123B to set forth the requirements that would allow a member organization to provide other market participants with access to the Exchange on an agency basis for the entry and execution of orders on the Exchange (the "NYSE Proposal").[2] As discussed below, while we appreciate and support the efforts of the Exchange to facilitate efficient access to its markets, we believe it is paramount that the Securities and Exchange Commission ("SEC" or "Commission") first work together with FINRA and our national securities exchanges (self-regulatory organizations or "SROs") to develop comprehensive and consistent sponsored access best practices for our markets. While, as a general matter, firms acknowledge and agree with the importance of addressing documentation and similar administrative issues, our principal goal for

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[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices 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] Exch. Act Rel. No. 58429 (Aug. 27, 2008); 73 Fed. Reg. 51676 (Sept. 4, 2008).

sponsored access is to ensure that uniform guidance is provided to members, particularly on regulatory expectations regarding trading oversight, supervision and risk controls. In our view, the SEC, FINRA and exchange SROs must, through joint guidance, establish best practices that create a level playing field on which all broker-dealers must operate. Additionally, inconsistent and problematic access requirements pose considerable burdens upon firms and their clients, and do not contribute to the efficiency of our market system made possible by the sponsored access model. SIFMA member firms have offered suggestions in the past for developing consistent best practices in the context of sponsored access, and they stand ready again to assist in this process. Finally, please note that firms also have specific concerns with the NYSE proposal in particular.

In light of the foregoing, we respectfully request that the Commission abrogate the NYSE Proposal or, in the alternative, the NYSE suspend its operation until such time as the concerns expressed herein are properly addressed and consistent and practicable solutions are developed.

Critical Need for Consistent Sponsored Access Standards or Best Practices

SIFMA firms note a number of differences among the sponsored access rules, definitions and forms currently in effect or proposed by Arca, NASDAQ, NYSE and BATS. Specifically, these SRO rules on sponsored access: (i) are not identical in text, (ii) do not make clear what constitutes sponsored access, (iii) are interpreted differently, and (iv) vary in terms of the documentation requirements (with some being quite burdensome). These disparities are problematic given that clients seek sponsored access to the marketplace at large, and firms must put in place different procedures for a client depending upon which market(s) they wish to access through a sponsored relationship.

The inconsistency and lack of clarity in the definitions, applications, and processes set forth by these rule changes and agreements causes confusion for firms and impacts their ability to interact productively with their clients with regard to sponsored access. It is our understanding that the SEC and FINRA have been planning to issue guidance in this area to help address the need for consistency and clarity in sponsored access requirements. We would urge the Commission to open these joint efforts to other SROs that seek to establish rules governing the sponsored access activities of members. We believe that substantive and jointly developed SEC/FINRA/SRO guidance regarding firms' compliance and control obligations is critical to establishing uniformity for sponsoring members and promoting operational efficiency. For these reasons, we recommend that the Commission abrogate the NYSE Proposal or, in the alternative, the NYSE suspend its operation until such joint guidance is issued. We also would recommend an interim moratorium on similar filings by other SROs.

In addition, certain firms generally rely to a large extent upon the exchanges (in the form of their technical/risk management products) to assist with the pre-trade surveillance and risk controls typically undertaken by members in the traditional direct market access ("DMA") model (e.g., fat finger checks, rejecting prohibited order types, and locate checks). Yet, most

exchanges offer their products only on an "as is" basis (i.e., the exchange is not liable for malfunctions in their products). Because exchange sponsored access rules generally require members to maintain reasonable controls and procedures with respect to sponsored access to ensure compliance with the exchange's rules, would the exchanges offer comfort that member use of exchange offered products would satisfy exchange imposed obligations? It should be recognized that members are reliant on technology and functionality provided by the exchanges to manage trading risks associated with sponsored access arrangements, and it therefore would be somewhat inequitable to hold a member responsible for any possible shortcomings of an exchange's own product offering.

SIFMA Firms' Specific Concerns with the NYSE Proposal

SIFMA firms also have specific concerns with the NYSE Proposal, which include the following:

1. **Process:** Firms believe that the NYSE Proposal should have been filed for public notice and comment. The NYSE Proposal is sufficiently different from other existing SRO rules on which it is based to keep it from being considered a "copycat" filing.

2. **Definitions:** There is a lack of clarity as to whether this rule change applies solely to sponsored access or to DMA as well. The NYSE Proposal has no definition of sponsored access (a very important term given the subject matter and scope of the rule), and a distinction from DMA should be made. We believe that only "direct" sponsored access (i.e., where client orders do not pass through the broker-dealer's trading and supervisory infrastructure/system on the way to the NYSE) should be subject to the rule, as opposed to DMA or "pass through" access (i.e., where client orders pass through the broker-dealer's trading and supervisory infrastructure/system on the way to the NYSE). Common nomenclature should be used for ease of understanding across markets, and a uniform standard of conduct should be made applicable to all sponsoring members.[3]

3. **List of authorized traders:** The NYSE Proposal states that sponsored participants must keep a list of authorized traders, and that the sponsoring firms also must keep such a list. Because the sponsoring firm accepts responsibility for the transactions of sponsored participants, regardless of the sponsored participant's identity, some firms question whether there is a benefit to requiring such lists, particularly when the lists are difficult to obtain from clients and may turn stale quite quickly.

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[3] A few firms asked, for example, whether arrangements through "service bureaus" such as Lava and UNX (that are capable of hosting member firm specified controls) would be considered "DMA" or "sponsored access." We also note the need for consistent definitions of sponsored access and DMA on a global basis.

4. **Updating NYSE agreement:** The NYSE Proposal requires firms that sponsor clients to designate on their existing NYSE agreements the names of such sponsored participants. The NYSE should permit such designation in a simple and efficient manner other than revising the existing agreement or, at a minimum, provide clarity with respect to how firms should make such designation.

5. **Notice of consent:** The NYSE Proposal requires firms to provide the NYSE with a signed "notice of consent" for each sponsored client, but the NYSE has not provided such a form.

6. **Agreements between member and sponsored participant:** The NYSE Proposal does not clearly state whether the member and the sponsored participant must enter into a written agreement reflecting the material provisions of the new rule. Although such an agreement is implied in the NYSE Proposal, the NYSE should specify whether a member-participant agreement is voluntary/best practice or mandatory.

SIFMA firms would like to note an important and positive feature of the NYSE Proposal – the rule change does not appear to require the tri-party agreement structure employed by at least two other exchanges. Tri-party agreements have been strongly opposed by firms' clients, as such agreements essentially result in a non-member being subjected to an exchange's jurisdiction (which would appear to be inconsistent with those exchanges' own bylaws and rules). The tri-party agreement model also poses significant administrative complexities and burdens for firms that already maintain and administer their own set of contracts for DMA services. Specifically, a tri-party agreement structure would introduce yet another layer of contractual provisions, some of which could conflict with the member's form of agreement or fall out of synch as standards, technology, or market structure change. If the staff finds merit in introducing contractual privity between the sponsored client and the market center being accessed, thereby imposing direct liability upon the sponsored client, the sponsoring broker-dealer should enjoy a commensurate reduction in liability and responsibility. Rather than mandating tri-party agreements as control mechanisms, we believe it to be more efficient if sponsoring members were permitted to privately contract with sponsored clients on reasonable terms that promote responsible conduct and respect a uniform regulatory baseline.

Conclusion

SIFMA appreciates the opportunity to address the important issues raised by the NYSE Proposal. As noted above, SIFMA strongly believes that it is critical for the industry, in partnership with the regulatory community, to develop consistent sponsored access standards and best practices before any SRO rule change in this area becomes effective or is implemented. Consistent sponsored access standards across markets would greatly simplify firms' compliance with such requirements, foster uniform behavior, and contribute to the efficiency of our markets.

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If you have any comments or questions, please do not hesitate to contact me at 202.962.7300.

Sincerely,

Ann Vlcek
Managing Director and
Associate General Counsel
SIFMA

cc: Robert L.D. Colby, Securities and Exchange Commission
David Shillman, Securities and Exchange Commission
John Roeser, Securities and Exchange Commission