Invested in America

December 7, 2011

By Electronic Mail (rule-comments@sec.gov)

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: File Number SR-NYSE-2011-55; Notice of Filing of Rule Change Proposing a One-Year Pilot Program Adding New Rule 107C To Establish a Retail Liquidity Program; NYSE Request for an Exemption from Rule 612 of Regulation NMS

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the New York Stock Exchange's ("NYSE" or "Exchange") proposed Retail Liquidity Program ("Program") submitted to the Securities and Exchange Commission ("Commission" or "SEC"), as well as the related request for exemptive relief pursuant to Rule 612(c) of Regulation NMS under the Securities Exchange Act of 1934.[2] The Program seeks to attract additional retail order flow via NYSE-listed securities while also providing price improvement through sub-penny pricing.[3] The proposed Program would create two new classes of market participants: Retail Member Organizations ("RMO") and Retail Liquidity Providers ("RLP").

While the proposed Program would be implemented as a pilot program and there may be benefits to being a RLP and/or a RMO, SIFMA believes that the Program and related request for an exemption from the prohibitions against sub-penny ranking and quoting under Regulation NMS[4] raise significant market structure implications that require additional time to be considered before implementation. In addition, this proposal's plan for selective quote dissemination raises

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1 SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association ("GFMA"). For more information, visit www.sifma.org.

2 *See* Letter from Janet M. McGinness, Senior Vice President-Legal & Corporate Secretary, Office of the General Counsel, NYSE Euronext to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission dated October 19, 2011 (''Sub-Penny Rule Exemption Request'').

3 The proposed Program would be implemented as a one-year pilot program.

4 Rule 612(a) of Regulation NMS.

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issues of fair access under Regulation NMS,[5] which in turn raises questions regarding a firm's best execution and Order Protection Rule ("OPR") obligations. The proposal also raises other concerns that are noted below. While SIFMA supports and encourages the exchanges to provide innovative products to investors, SIFMA believes that the market structure implications of this proposal must be thoroughly considered before the Program is approved to ensure the continued, proper functioning of our marketplace. Indeed, SIFMA believes that this initiative, in light of its far reaching implications for Regulation NMS and market structure, should have been a SEC initiative and not a NYSE one.

A. Proposal Raises Issues Under Rule 612 of Regulation NMS re: Sub-Penny Pricing

Rule 612 under Regulation NMS prohibits national securities exchanges from accepting or ranking certain orders based on an increment smaller than the minimum pricing increment. Under the NYSE's proposal, the Rule 612 tick size would be reduced to $.001, and a precedent would thereby be set that most certainly would be copied by other exchanges. At this time and without additional time to study this Proposal, it is unclear whether the resulting impact on our existing market structure would compromise the fairness that is paramount to our markets and/or would have adverse consequences for both retail and institutional investors.

In the NYSE's request for exemptive relief, the Exchange states that the sub-penny rule was designed to deal with concerns related to public display or private communication of quotes in sub-penny increments, concerns that the NYSE believes are not implicated by the Program's non-displayed Retail Liquidity Identifier ("RLI").[6] SIFMA, however, believes that the NYSE is in fact disseminating over their "private communication" lines what essentially is a quote to indicate that they have resting liquidity priced at a sub-penny increment better than the current best bid or offer. In this regard and also because the Exchange is internally accepting and prioritizing orders in sub-penny increments, SIFMA believes the Program does contemplate both sub-penny trading and sub-penny quoting.

The NYSE also explains that it has "reservations about the current regulatory disparities," and that the proposed Program would enhance price competition for retail orders as well as offer a "Surveillance Alternative to the Existing Oversight of Internalization."[7] At this time, SIFMA is not presented with any evidence supporting the position that investors' orders (and we are considering here both their limit orders and market orders) would be better served by this Program and, regarding regulatory oversight, we note the critical role that FINRA plays in overseeing off-exchange broker-dealer trading today.

Finally and as more fully discussed in SIFMA's comment letter on the SEC's Concept Release on Equity Market Structure,[8] SIFMA member firms continue to have concerns that quoting in sub-penny increments would not contribute to the maintenance of orderly markets.

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5 Rule 610(a) of Regulation NMS.
6 *See* NYSE Sub-Penny Rule Exemption Request at 5.
7 *Id.* at 9.
8 *See* SIFMA Comment Letter on the SEC's Concept Release on Equity Market Structure at 14, available at http://www.sifma.org/workarea/downloadasset.aspx?id=897.

B. Proposal Raises Issues Under Rule 610 of Regulation NMS re: Fair Access

The NYSE's Program contemplates both selective viewing of data through a proprietary date feed and selective access to that quote. Specifically, the NYSE will be providing selective access via a RLI, a flag that indicates that a better price exists on the exchange, which will be distributed through proprietary market data feeds and not through the Consolidated Quote Stream. Market participants that do not pay for this proprietary data feed, which often may be smaller firms, will not have access to this liquidity information. Also, even if market participants can access the proprietary data feeds, they will be unable to access the quote unless they can attest that the request is to fill an order for a retail customer. This requirement thus precludes institutional investors from accessing that quote. SIFMA believes that this Program therefore raises selective access concerns and appears to run contrary to the mandate in Regulation NMS for open, non-discriminatory access to quotes.

This selective distribution of and access to quotes also raises concerns for firms in meeting their best execution and OPR obligations. SIFMA member firms question whether, when they see the RLI, they can ignore the quote even though it is a better price than the NBBO or whether they must take it into account. This Program therefore has the potential to create uncertainty among broker-dealers in regard to their best execution and OPR obligations and possibly creates an unlevel playing field. Also, since the OPR requires firms to access better-priced ("protected") quotes, which are the best prices displayed on market data feeds, most firms' smart order routers are currently programmed to access the best price they see via the feeds used; these systems would have to be reprogrammed to ignore the RLI if it is not considered protected. Finally, SIFMA notes that, if other markets are granted similar sub-penny exemptions, there is a potential for even greater confusion among market participants regarding which is the best available market to access (unless sub-penny quotes and sizes are included in the consolidated quote, which in turn raises the concerns mentioned previously).

C. Other Related Issues

SIFMA notes that other concerns also are raised by this proposed Program that could have far reaching implications for market structure. For one, there has been a lengthy, unresolved debate over the years on the merits of including access fees in quotes, something that was not feasible unless you allowed sub-penny quotes. Another concern raised is with the exchanges' practice of charging their member firms a myriad of fees, including various types of access fees, market data fees and regulatory fees. This new proposal would set up yet another reason to increase the regulatory charge, due to new retail participant flow identification and tracking. The Program also increases the reliance on Exchange-provided private market data feeds to secure the new quote/indication. Also, it remains unclear what the impact will be of certain, different obligations between the Exchange and broker-dealers, particularly when the Exchange is operating what is effectively a "dark pool" for retail flow; for example, firms have a Manning obligation whereas the Exchange does not, and it is unclear what the expectations are regarding the NYSE's price/time priority requirements.

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SIFMA supports the efforts of the Exchange to continue to provide innovative products to all customers. SIFMA, however, believes that the proposed Program raises broad market structure concerns and therefore respectfully requests that additional time be provided to allow all market participants an opportunity to further study the long-term impact of this Program on the markets. SIFMA appreciates the opportunity to comment on the Exchange's proposed Program. If you have any questions or wish to discuss these comments with us, you may contact the undersigned at avlcek@sifma.org.

Sincerely,

Ann L. Vlcek

Ann L. Vlcek
Managing Director and
Associate General Counsel
SIFMA

cc: Mary L. Schapiro, Chairman
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Troy A. Paredes, Commissioner
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