



November 1, 2005

Jonathan G. Katz
 Secretary
 Securities and Exchange Commission
 100 F Street, N.E.
 Washington, D.C. 20549

Re: File No. SR-NYSE-2004-12 (Proposed NYSE Rule 470)

Dear Mr. Katz:

I serve as counsel to a company listed on the New York Stock Exchange. Recently, I became aware of some comments submitted in response to the above referenced proposal by the Exchange to address certain abuses by exchange members in the allocation and distribution of IPO shares.

As the Commission considers the proposed rule, submitted comments and what action to take with respect to the proposal, I wished to communicate my particular concurrence with a concern expressed in the comments of John Faulkner, Capital Market Committee Chairman for the Securities Industry Association regarding IPO "spinning": Mr. Faulkner's comments note both the unfairness of the presumption contained in the proposed rule that IPO allocations are influenced by directors' investment banking decisions, as well as the risk that issuing companies will lose access to capital and the expertise of underwriters with knowledge of the companies' capital needs.

SIA is especially troubled by the proposed presumption of an expectation to receive or intent to seek investment banking business in the current proposal. We believe that the presumption is unfair and overreaching because, notwithstanding steps that member firms have taken in recent years to prevent investment banking personnel from having input into allocation decisions relating to individual investors, and notwithstanding the provisions of the Voluntary Initiative expressly prohibiting such input, the proposals would assume the existence of a violation unless proven otherwise. The presumption would fundamentally shift the burden of proof to member firms to demonstrate that a past allocation is not part of a quid pro quo arrangement for investment banking business. The receipt of an investment banking mandate should not retroactively taint a prior allocation in the absence of evidence of such an arrangement. Given that the purpose of the proposed rules is to prevent the use of allocations to secure investment banking business, it is

alarming to think that a violation could be found automatically and retroactively without any proof of intent to engage in such spinning activities. The determination of whether an allocation is a part of an illicit spinning scheme should continue to be based on a facts and circumstances assessment and an illegitimate purpose should not be assumed from an allocation to a good client. Finally, it is significant that neither the Voluntary Initiative nor the IPO Report recommended a presumption of a violation based on future business transactions of the member.


The proposal's presumption could, in effect, disqualify a broker-dealer who has made an allocation from obtaining an investment banking mandate, even where there is no connection whatsoever between the allocation and the later interest of the company in retaining the services of the broker-dealer. **Issuers could find their access to capital impaired if they are unable to work with an underwriter that has experience and knowledge of the issuer's capital needs or specializes in the type of transaction that the issuer is seeking.**

If, despite these strong concerns, the Commission and the SROs retain the proposed presumption, SIA suggests at a minimum that the SROs establish a safe harbor from the presumption using the procedures described in the proposing release as evidence that could be used to rebut a presumption. The safe harbor would require that the underwriter establish that it has procedures reasonably designed to ensure that investment banking personnel responsible for making allocations are not told the identities of the beneficial owners of retail accounts (i.e., accounts not included in the institutional "pot") to which shares are being allocated.

February 15, 2005 letter from John Faulkner to Jonathan G. Katz (emphasis added)

I appreciate your having taking the time to consider my views and trust that the Commission will endeavor to address the concerns raised by Mr. Faulkner as well as the other commenting parties.

Sincerely,


Michael Touff
Senior Vice President and
General Counsel