December 20, 2013

**Via Electronic Mail (rule-comments@sec.gov)**

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR–NYSE–2013–72: Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Establish an Institutional Liquidity Program on a One-Year Pilot Basis

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the above-referenced rule proposal filed by the New York Stock Exchange LLC ("NYSE" or "Exchange") with the Securities and Exchange Commission ("Commission"). Under the proposal, as a one-year pilot program, the NYSE would add new NYSE Rule 107D to establish an Institutional Liquidity Program ("ILP" or ''Program'') to attract buying and selling interest in greater size to the Exchange for NYSE-listed securities by facilitating interactions between institutional customers (and others with block trading interest) and providers of liquidity exceeding minimum size requirements.[2]

SIFMA supports competition in the securities industry, and we encourage all market participants, including the NYSE, to develop and provide innovative products to investors. In the context of NYSE's proposal, we support the concept of size discovery and the ability to provide investors with additional liquidity options. However, as described in more detail below, SIFMA believes that the ILP raises broader policy issues that the Commission should consider and resolve in its review of the proposal. For example, NYSE's proposal would result in a departure from an exchange's statutory role of providing market participants with non-discriminatory access, and we believe that the Commission should clarify whether exchanges are now permitted to compete for market share by segmenting order flow. In addition, we believe

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[1] The Securities Industry and Financial Markets Association (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 http://www.sifma.org.

[2] *See* Securities Exchange Act Release No. 70909 (November 21, 2013), 78 FR 71002 (November 27, 2013).

the Commission should consider the proposal in the context of its views on indications of interest and the recent issues and discussions around Securities Information Processor ("SIP") infrastructure.

The proposal would create two new order types, the "Institutional Liquidity Order" ("ILO") and the "Oversize Liquidity Order" ("OLO"). An ILO would be a non-displayed limit order for NYSE-listed securities of 5,000 or more shares with a market value of at least $50,000, or a child order of a recorded instruction that meets those size requirements. ILOs would be eligible to interact with displayed liquidity on the Exchanges book, as well as with contra-side OLO's and ILO's.[3] An OLO would be a non-displayed limit order for NYSE-listed securities with a minimum size of 500 shares,[4] and OLOs would only be able to interact with contra-side ILOs. In addition, the Exchange would disseminate a Liquidity Identifier ("LI") in connection with the ILP through the Consolidated Quotation System ("CQS"), which is a SIP. Under the ILP, an LI in a symbol would indicate the existence of an OLO or ILO in that security, but the LI would not include the price, side, or size of the OLO or ILO interest.

**Market Segmentation**

It is a reality in today's equity markets that exchanges and broker-dealers compete with each other as commercial entities. In that context, it is completely understandable that NYSE would propose a new business initiative designed to increase its market share. The fact remains, however, that exchanges and broker-dealers are subject to differing statutory and regulatory requirements. SIFMA believes that approval of the ILP would reflect a policy change by the Commission under the current statutory and regulatory scheme. The Commission should clarify whether it supports making such a policy change to facilitate one exchange's commercial interests.

More specifically, the Commission should address how permitting an exchange to segment order flow is consistent with the exchange's obligation under Section 6(b)(5) of the Exchange Act to prevent unfair discrimination among market participants. If it is approved, the ILP would be an additional segmentation of order flow on an exchange, building on the segmentation that began when the Commission approved NYSE's Retail Liquidity Program ("RLP"). When the NYSE proposed the RLP, SIFMA expressed concern about the market structure impact of allowing an exchange to segment off a portion of its order flow, particularly in light of an exchange's statutory obligations under Section 6(b)(5) of the Exchange Act. In approving the RLP, the Commission specifically found that the focus on retail order flow

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[3] It should be noted that the proposal would place the onus on the broker-dealer to demonstrate that the child slices of the parent order meeting the ILO criteria were eligible for ILP. By contrast, NYSE's Retail Liquidity Plan ("RLP") requires broker-dealers routing retail flow to provide NYSE with an attestation.

[4] OLOs may have a minimum size of 300 shares for securities with an Average Daily Volume of less than one million shares.

supported that segmentation, and the Commission noted in particular that the RLP would provide guaranteed price improvement to retail orders.

Through the ILP, NYSE would segment order flow even further, but without the same focus on retail investors or guaranteed price improvement that the Commission identified in the context of the RLP. NYSE also makes references to the "more robust post-trade transparency of exchanges"[5] and to broker-dealer execution venues as "less-regulated and less-transparent" than exchanges. But in making these statements, NYSE does not acknowledge that broker-dealers have legal and regulatory obligations, including best execution, that that do not apply to exchanges when interacting with different customer order flows. In addition, the NYSE asserts that ILP "has the potential to attract additional institutional and block trading interest to the Exchange environment…" However, NYSE has not provided any specific evidence of how ILP would attract actual block interest to the Exchange, particularly given that average order and execution size in the U.S. marketplace, both on and off exchange, is well below block size. It is more realistic to expect that ILP would simply result in child slices of a larger block size parent order that meets the ILO criteria to be sent to the NYSE. SIFMA understands the NYSE's desire, as a for-profit corporation, to increase the order flow that is executed on the Exchange, but we do not believe that the goal of increasing exchange execution volumes, in and of itself, supports a change in legal and regulatory policy. In the absence of a policy declaration from the Commission, or more specific evidence from the NYSE that the proposal would serve a broader policy goal, we believe these generalized assertions do not justify carrying out a significant change to equity markets policy through the commercial initiative of a single exchange.

The proposal also raises questions about the roles and obligations of exchanges and broker-dealers. In support of the proposal, NYSE effectively argues that ILP would satisfy Section 6(b)(5) simply because broker-dealers are allowed to segment order flow and NYSE would simply replicate what broker-dealers are permitted to do off-exchange. NYSE certainly is correct in stating that broker-dealers commonly differentiate between customers based on the nature and profitability of their business,[6] and that alternative trading systems are permitted to segment order flow. However, broker-dealers engage in that activity without the legal and regulatory benefits that exchanges enjoy under the current regulatory structure. In particular, exchanges operate under a rules-based, and Commission-enforced, limitation on liability, which presumably would apply to the operation of the ILP.

In this context, NYSE's proposal also raises the fundamental issue of distinguishing the commercial offerings of a national securities exchange from the functions that an exchange

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[5] In this regard, SIFMA notes that it has expressed support for a Financial Industry Regulatory Authority ("FINRA") proposal to require disclosure by ATSs. We also continue to urge the Commission to work with exchanges to establish a reporting regime in order to provide consistent and standardized public disclosure of exchange execution volume carried out by displayed orders, partially displayed/partially undisplayed orders, and fully undisplayed orders.

[6] *See* 78 FR at 71009.

carries out in its role as a self-regulatory organization ("SRO"). As SIFMA has noted previously, that the Exchange Act recognizes that national securities exchanges act in two distinct statutory roles: (1) as national securities exchanges, where they act as market participants; and (2) as SROs, where they act as market regulators.[7] SIFMA also has recognized that some courts have extended regulatory immunity to SROs in cases where they "stand in the shoes"[8] of the Commission to perform a variety of regulatory functions that would otherwise be performed by the Commission.[9] However, SROs do not enjoy complete immunity from suits; it is only when they are acting under the aegis of the Exchange Act's delegated authority that they so qualify. When conducting private business, they remain subject to liability.[10] The U.S District Court made this point clearly in a recent decision, concluding that exchanges do not enjoy regulatory immunity for activities designed to increase trading volume.[11] To be clear, NYSE has not asserted regulatory immunity in its proposal. However, the issue is inherent in the comparisons NYSE draws in the proposal between the ILP and the functions that broker-dealers are permitted to carry out. We believe the ILP would clearly be a commercial offering that should not enjoy immunity from liability that is not available to broker-dealers providing identical services. Accordingly, we request that any final disposition by the Commission on the proposed rule change explicitly recognize the distinction between regulatory and commercial functions of an exchange.

**Use of Indicators; Dissemination through the SIPs**

As noted above, the ILP would include dissemination of the LI through the CQS to indicate the existence of an OLO or ILO. The LI raises an issue about which the Commission has expressed concern but where it has not taken final action, namely the use of indications of interest ("IOIs") to solicit order flow. In a 2009 proposal, the Commission raised concerns about IOIs, including that the use of IOIs could undermine incentives to display limit orders and to quote competitively.[12] SIFMA believes the LI would raise similar issues, even as part of the public quote stream, because they would substitute IOIs for displayed limit orders in disseminating the existence of ILOs and OLOs. SIFMA believes that, if the Commission remains concerned about the use of IOIs, it should clarify its policy in this regard before approving a proposal that would sanction and increase the use of IOIs.

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7 *See, e.g.*, Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA to Elizabeth M. Murphy, Secretary, Commission Dated August 22, 2012.

8 *See D'Alessio v. NYSE, Inc*., 258 F.3d 93, 105 (2d Cir. 2001).

9 *See DL Capital Group, LLC v. Nasdaq Stock Mkt., Inc*., 409 F.3d 93, 97 (2d Cir. 2005).

10 *See Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998).

11 *In re Facebook, Inc., IPO Securities and Derivative Litigation*, MDL No. 12-2389 (S.D.N.Y. 2013).

12 *See* Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009).

Separately, recent experience with SIPs has shown that they are critical aspects of market infrastructure and that changes to their operation or use should be carefully considered. As noted above, the ILP would add a new message, the LI, to the CQS, one of the SIPs. Certainly, we recognize the interest in having these messages disseminated to the public, not just through proprietary data feeds. However, the recent focus on the SIPs and Chair White's call for a review of their operational resiliency leads us to question whether it is appropriate to add additional message traffic to the SIP, particularly message traffic that serves only one market and not the investing public at large. In reviewing the NYSE's proposal, the Commission should consider whether it is appropriate to set uniform standards for adding message types to the SIPs. As we noted recently, SIFMA believes that the addition of new fields and indicators to the SIP feeds should only occur if they are absolutely necessary for the benefit of the entire market. Operational risk considerations must be taken into account when an industry utility, such as the SIP, is modified to disseminate fields and indicators that are specific to one market.

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SIFMA greatly appreciates the Commission's consideration of the issues raised above in connection with the NYSE's proposed Program. SIFMA would be pleased to discuss these comments in greater detail with the Commission and the Staff. If you have any questions, please contact either me (at 202-962-7383 or tlazo@sifma.org) or Timothy Cummings (at 212-313-1239 or tcummings@sifma.org).

Sincerely,

Theodore R. Lazo
Managing Director and
Associate General Counsel

cc: Mary Jo White, Chairman
Luis A. Aguilar, Commissioner
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