



November 23, 2009

Mr. David Shillman
Associate Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-NASDAQ-2008-104, as amended; Sponsored Access

Dear Mr. Shillman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciated the opportunity to discuss with your staff and you on November 19, 2009 certain provisions in The NASDAQ Stock Market LLC (“NASDAQ”) sponsored access rule proposal, as amended. As a preliminary matter, SIFMA firms agree with the general principle that, in providing sponsored access to clients, certain pre-trade and post-trade controls are both necessary and appropriate. We expand upon this position and other related points in the comment letter we filed on February 26, 2009 on NASDAQ’s original proposal, and therefore wish to incorporate by reference the comments made therein.²

As discussed in our call last week with you, a number of SIFMA member firms believe that several provisions in NASDAQ’s proposal lack clarity as to the scope and application of the rule. This lack of clarity creates confusion among firms and possibly among the self-regulatory organizations (“SROs”)³ and, we believe, supports our view that this proposal would benefit from notice and industry comment. Securing industry comment would help to ensure that NASDAQ’s rule would clearly target the types of access that need addressing and set forth the appropriate compliance controls for broker-dealers and other market participants involved in sponsored access. In addition, and because we understand that other SROs will be filing copycat

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 develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. 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 Letter from Ann Vlcek, Managing Director and Associate General Counsel, SIFMA, to Elizabeth M. Murphy, Secretary, SEC (February 26, 2009) available at <http://www.sifma.org/WorkArea/showcontent.aspx?id=10516>.

³ At least two SIFMA member firms have noted, from their conversations with NASDAQ and other SROs, that the SROs have conflicting interpretations of some of the provisions in NASDAQ’s rule proposal, as amended.

rule changes that will become effective immediately upon filing, fine-tuning NASDAQ's proposal in such a manner will ensure that there is an appropriate, uniform, and predictable rule across markets (and thus serve as well to prevent regulatory arbitrage).⁴

SIFMA firms' interests in rulemaking in this area are in line, we believe, with the SEC's interests – namely, to ensure that broker-dealers have instituted appropriate pre- and post-trade controls with regard to sponsored access in order to minimize systemic risk for our industry. We maintain, though, that firms for the most part have effective controls in place already. For many years now, firms have recognized the risks to their own firm and to the industry in providing access to markets for others, and have therefore implemented effective pre- and post-trade controls to address such risks. Firms therefore do not see sponsored access as generally being an area posing high risks at this time for the protection of investors and the integrity of the industry. Firms do recognize, however, that there may be a minor set of situations, commonly referred to as purely direct or naked access,⁵ which could benefit from further rulemaking. SIFMA firms therefore suggest that the industry – the SEC, SROs and firms – can afford to spend a reasonable period of time working together in a coordinated manner to identify the different forms of access⁶ and areas of risk and to come to a consensus on the appropriate rules that should be instituted to address those areas of risk that require attention. Accordingly, we do not believe that a quick approval of the NASDAQ proposal without an opportunity for comment is warranted.

In its proposal, NASDAQ proposes to define (1) the scope of what it would consider to be a “sponsored access” arrangement; (2) the relevant parties – thus, the broker-dealer that sponsors a client or other counterparty's access to an exchange would be a “Sponsoring Member,” and the sponsored client/counterparty would be the “Sponsored Participant;” and (3) the obligations on the Sponsoring Member in three different areas – Contractual Provisions, Financial Controls and Regulatory Controls. Individual firms raised on our call with you issues of concern or instances where there is a lack of clarity in each of these areas. As we also stated on our call and as noted above, we believe that these provisions would benefit from industry comment and coordinated deliberations among all market participants. If NASDAQ's proposal is approved as written, we believe that there could be considerable confusion over its scope and application and thus a lack of uniformity among SROs and potentially with the SEC's own sponsored access rulemaking effort. Particularly because pre- and post-trade risk controls are

⁴ As noted in our February 2009 letter, SIFMA firms request, to the extent that the NASDAQ sponsored access rule that is ultimately approved by the SEC forms the basis for so-called “copycat” rule filings on the part of the other exchanges that provide for sponsored access, that all such rules carry the same implementation or effective date and that sufficient lead time be provided to firms to enable them to effect systems changes, allow for testing where necessary, alter agreements, and update policies and procedures.

⁵ With “naked” sponsored access, customers will go directly to exchanges using the sponsoring member's MPID. In these cases, there may be a lack of pre-trade controls imposed by the firms themselves, but customers typically have their own pre-trade controls (and the ability to make changes) or the market center offering such access will have such pre-trade controls.

⁶ Our February 2009 comment letter carefully describes the various forms of access to the markets, and notes the types of access (such as most types of sponsored access) for which firms already have pre-trade and post-trade controls. We note in this regard that some recent press articles appear to suggest that most or all types of sponsored access do not have such controls, which is an inaccurate characterization.

already in place and no real issues have arisen in the past several years regarding most forms of sponsored access (with the exception being, again, for “pure” naked access), it would seem reasonable to provide time to comment on this proposal as amended and ensure that the industry implements the right approach.

SIFMA firms strongly believe that having a clear, narrowly tailored, practical, uniform, and consistently interpreted and enforced (and therefore predictable) sponsored access rule is critically important to the industry, as it will serve to mitigate any systemic risks to our industry and ensure a level playing field. Once again, our February 2009 letter expands upon our recommendations in this regard.

We would be pleased to discuss these comments in greater detail with the SEC. I can be reached in this regard at 202-962-7300 or at avlcek@sifma.org.

Sincerely,

Ann Vlcek
Managing Director and
Associate General Counsel

cc: The Hon. Mary L. Schapiro, Chairman, SEC
The Hon. Kathleen L. Casey, Commissioner, SEC
The Hon. Elisse B. Walter, Commissioner, SEC
The Hon. Luis A. Aguilar, Commissioner, SEC
The Hon. Troy A. Paredes, Commissioner, SEC
Jamie Brigagliano, Division of Trading and Markets, SEC
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