

May 22, 2007

**BY E-MAIL TO: rule-comments@sec.gov**

Ms. Nancy M. Morris  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, D.C. 20549-1090

Re: File No. SR-NYSE-2007-02; Proposed Rule Change and Amendment  
No. 1 Thereto to Adopt New Rule 447 (“Emergency Powers”)

Dear Ms. Morris:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> and its Business Continuity Planning Best Practices Committee appreciate the opportunity to comment on the above-referenced rule filing (“Proposed Rule 447”) submitted to the Securities and Exchange Commission (“Commission”) by the New York Stock Exchange LLC (“NYSE” or the “Exchange”).<sup>2</sup> The NYSE’s stated purpose for Proposed Rule 447 is to provide the Exchange with a basis of authority pursuant to which it may consider granting exemptive regulatory relief during an emergency. SIFMA strongly supports the NYSE in taking affirmative steps to remedy its current lack of exemptive authority. We also believe that Proposed Rule 447 is a step in the right direction to ensure that the U.S. capital markets remain effective during an emergency.

Although we support and endorse the NYSE in its efforts,<sup>3</sup> we have a few recommendations for improving Proposed Rule 447 and request certain clarification to

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<sup>1</sup> 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 that work 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.

<sup>2</sup> The Commission issued a notice of the proposed rule filing on April 19, 2007. Securities Exchange Act Release No. 55646, 72 FR 20573 (April 25, 2007).

<sup>3</sup> As a preliminary matter, we understand that Proposed Rule 447 was written by the NYSE as a “regulatory” rule, not as a marketplace rule. As discussed, we welcome the NYSE in its efforts in this area. Given the merger between NYSE Regulation, Inc. and the National Association of Securities Dealers (“NASD”) that will result in a consolidated self-regulatory organization (the “consolidated SRO”), we urge the quick adoption of Proposed Rule 447, or a similar rule, that will be available to the consolidated SRO.

make clear that the authority that the NYSE is seeking is limited. To that end, we have suggested draft language intended to address many of our areas of concern. See SIFMA Suggested Language, attached hereto as Exhibit A.

As a general matter, we have a number of questions and concerns with respect to Proposed Rule 447 as currently drafted. In particular, we: (i) question whether Proposed Rule 447 adequately protects member organizations' business practices from the potential of undue interference by the NYSE; (ii) are troubled by an apparent lack of oversight and review of the Exchange's actions pursuant to such exemptive authority; and (iii) are concerned by the lack of clarity in many of the provisions of Proposed Rule 447.

While SIFMA understands and supports the Exchange's goal of granting regulatory relief during an emergency, we are concerned that a literal reading of Proposed Rule 447 provides the NYSE not only the authority to grant such relief, but also the ability unilaterally to impose unlimited additional requirements on member organizations that can have very serious competitive and financial effects on the securities industry and markets. Moreover, the requirements may be particularly impractical for firms to satisfy during emergency conditions. Based on our discussions with the NYSE staff, we believe there is no intent to seek such unlimited authority; instead, we believe the current language represents an attempt to provide the Exchange with flexibility. We are therefore offering a number of suggestions and language changes that we believe will clarify the intent of the NYSE staff and provide an appropriate degree of flexibility, while avoiding the unintended result of providing the NYSE with unlimited authority to impose additional requirements.

## **I. The Commission's "Emergency" Authority**

Given that Proposed Rule 447 has no apparent limitations and/or restrictions on the Exchange's application of the rule, we question whether the Exchange's exemptive authority should be more liberal than the Commission itself has pursuant to Section 12(k) of the Exchange Act. Indeed, the Commission's emergency authority, however broad it may be, is circumscribed by a number of procedural safeguards. These limitations include (i) a determination by the Commission that its actions are necessary in furtherance of the protection of investors and in the public interest; (ii) a limited duration to the effectiveness of the Commission's emergency orders; (iii) a right to appeal actions by persons aggrieved by the Commission's exercise of its emergency authority; and (iv) a right to review and override by the President of the United States for any actions taken by the Commission in its exercise of its emergency authority.

As a result of the limitations placed on the Commission's exercise of emergency authority, we do not believe Congress intended for the Commission to be able to provide the SROs a more liberal emergency exemptive authority than the Commission itself has pursuant to Section 12(k) of the Exchange Act. We therefore strongly urge the Commission to consider the potential implications of approving Proposed Rule 447 without any limitations to the Exchange's exemptive authority under Proposed Rule 447.

## II. Exemptive Relief

It is our understanding from the description of Proposed Rule 447 that the NYSE intends, at least in most circumstances, to grant regulatory relief as a result of a member organization's request for such relief. We also understand from the description of Proposed Rule 447, however, that there could be situations where the Exchange may decide it needs to, at its own initiative, provide "categorical relief to a class of its membership across rule lines – as circumstances may necessitate, and/or to impose additional and more rigorous requirements in response to emergency conditions."<sup>4</sup> The text of the proposed rule, however, does not distinguish between these two possible avenues of granting relief. As a result, we recommend that the Exchange explicitly amend Proposed Rule 447 to clarify that the NYSE may grant regulatory relief either upon requests from member organizations or upon the Exchange's own initiative.

In addition, Proposed Rule 447 does not include a process by which member organizations would apply for regulatory relief in an emergency situation. We recommend, therefore, amending the language of the proposed rule to provide for such a process.

## III. Additional Restrictions and/or Requirements

While we understand from discussions with the NYSE staff that the Exchange is not seeking to unilaterally impose additional restrictions and requirements upon member organizations in the event of an emergency, a literal reading of Proposed Rule 447 appears to provide the NYSE the authority to impose a number of potentially far reaching requirements and restrictions. These restrictions and requirements could have serious anti-competitive implications, and, on a practical level could be very difficult for firms to satisfy in an emergency situation.

In particular, we point to subsections (6), (7) and (8) of Proposed Rule 447. As currently drafted, Proposed Rule 447 would allow the NYSE to, at its discretion, require such actions as "the curtailment or reduction of business activity," the "closure of offices or locations," or "to take such similar action" without any limitations. Although we can envision individual circumstances where such requirements might be appropriate, we are concerned that the wholesale application of such requirements could place some member organizations at an unnecessary competitive disadvantage or that the requirements could be imposed on a cross-section of member organizations, including those that are fully capable of staffing all of their business operations or that have developed a robust Business Continuity Plan. As a result, we believe that the Exchange should not be able to unilaterally exercise its authority in a manner that imposes the across-the-board application of the requirements in subsections (6), (7) and (8) of Proposed Rule 447.

We recognize, however, that in granting regulatory relief to member organizations, the NYSE should have the ability to consider all of a member organization's operations and to be able to achieve the correct balance between the

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<sup>4</sup> See Securities Exchange Act Release No. 55646, 72 FR 20573 (April 25, 2007).

granting of regulatory relief and imposing certain operational restrictions that best serve investors and the marketplace. As a result, instead of the Exchange having the authority to impose wholesale restrictions and requirements on member organizations, as Proposed Rule 447 would currently allow, we recommend amending Proposed Rule 447 in such a manner that the Exchange's authority under subsections (6), (7) and (8) is confined to imposing such requirements or restrictions only in connection with the Exchange's grant of regulatory relief under subsections (1) through (5) of Proposed Rule 447. In determining whether to restrict one or more member organization's activities, or otherwise impose new requirements or restrictions, the Exchange should also be required to take into account certain aspects of the member organization's businesses and preparedness for the particular emergency, including, but not limited to (i) the Business Continuity Plan the member organization has in place; (ii) the level of absenteeism at particular firms; (iii) the extent to which the firm's business is automated; (iv) the extent to which employees may work from home; (v) the level of need in a particular community; and (vi) such other factors as the Commission, whether in the emergency order that triggers the operation of Proposed Rule 447 or through subsequent communications with the Exchange, may identify as relevant.

We believe that these conditions and limitations on the Exchange's ability to impose additional requirements or restrictions on member organizations would, (i) more clearly establish the statutory validity of the Exchange's authority; (ii) avoid imposing undue and unnecessary requirements on individual Exchange members; and (iii) ensure that member organizations consider all of the potential costs to their business model associated with seeking and obtaining the forms of regulatory relief that may be granted by the Exchange.

#### **IV. Procedural Safeguards to Ensure that Member Organizations are Protected and that the Exchange's Actions are Viable and Valid**

As previously discussed, it is our belief that the NYSE's authority under Proposed Rule 447 should be limited and have built-in procedural safeguards that would not only ensure that member organizations are protected, but also would ensure that the Exchange's grant of regulatory relief during an emergency is both viable and valid. As a result, we recommend amending Proposed Rule 447 in order to establish procedural safeguards and protections. As a general matter, it is our belief that the Exchange's general authority under Proposed Rule 447 should be circumscribed in a manner similar to the conditions and limitations upon the Commission's emergency authority under Section 12(k) of the Exchange Act.

We recognize that in situations where member organizations avail themselves of regulatory relief granted by the Exchange it is because they have determined that they cannot effectively continue to meet all of their regulatory obligations while ensuring that their customers are adequately served and protected during an emergency. As a result, we acknowledge that the Exchange should be able to grant such relief expeditiously and need not be subject to numerous restrictions and procedures. Given that the Exchange envisions situations, however, where it would impose greater restrictions and requirements on member organizations, we strongly urge the NYSE to amend Proposed

Rule 447 to include certain procedural protections that would be applicable in these circumstances.

Proposed Rule 447 cross-references Section 12(k)(7) of the Exchange Act for the definition of an “emergency.” We note, however, that other subsections of Section 12(k) of the Exchange Act also provide certain procedural limits that guide the Commission’s actions during an emergency. To assure that the validity of the Exchange’s authority is not questioned and to assure that appropriate limitations apply to the Exchange’s authority, we believe the Exchange should be subject to the same type of procedural limitations as the Commission during an emergency. In particular, with respect to additional requirements or restrictions the Exchange intends to impose on member organizations, we believe that (i) the NYSE should be required to make a determination that its actions meet certain criteria; (ii) the actions taken by the Exchange should be of limited duration; (iii) the actions taken by the NYSE should be subject to a right of appeal to a higher level; and (iv) the actions taken by the NYSE should be subject to review and override by the Commission. We recognize that the Commission’s broad oversight of the Exchange provides a number of protections but, given the broad grant of discretionary exemptive authority contained in Proposed Rule 447, we believe this rule should contain more specific procedural standards than contained in the proposal.

#### **A. Trigger Mechanism**

The text of the proposed rule indicates that the NYSE shall obtain the “concurrence” of the Commission, prior to (i) determining that an “emergency,” as defined by Section 12(k)(7) of Exchange Act, exists; and (ii) implementing the particular type of relief that may be appropriate in the circumstances. Proposed Rule 447, however, does not provide a definition for the term “concurrence.” We also note that the description of Proposed Rule 447 states that the Exchange may proceed and grant regulatory relief without formal agreement from the Commission. While we understand that a mechanical approach may not provide the Exchange with enough flexibility in granting regulatory relief, we are concerned that without delineating certain parameters or guidelines, member organizations may be adversely affected by Exchange actions taken with no formal notice to, or finding or approval by, the Commission or its staff. As a result, we recommend amending Proposed Rule 447 so that the NYSE is only able to exercise its exemptive authority to grant regulatory relief or impose additional restrictions and requirements on member organizations, upon the Commission’s publication of an “emergency order” pursuant Section 12(k)(2) of the Exchange Act.

We believe that in the event the Commission has not yet otherwise issued an emergency order pursuant to Section 12(k)(2) of the Exchange Act, the NYSE should be required to first petition that the Commission determine that an “emergency” (as defined by Section 12(k)(7) of the Exchange Act) exists and to issue an emergency order pursuant to Section 12(k)(2) of the Exchange Act. Such requests should be submitted in a writing (including by electronic means) that provides: (i) a detailed summary of the reason an “emergency” exists and the reason regulatory relief or additional restrictions upon member organizations are warranted; (ii) a determination that the regulatory relief is in the public interest and for the protection of investors; (iii) a summary of what will be

accomplished by the grant of the regulatory relief; (iv) a description of any proposed regulatory relief considered; and (v) the anticipated impact on member organizations of such relief, including, but not limited to, the burden on competition that may be imposed on either a category of firms or a specific firm.

### **B. Time Limits**

Under Section 12(k)(2) of the Exchange Act, the Commission is bound by a specific time limit of 10 business days for any emergency orders. Furthermore, even with additional extensions, an emergency order by the Commission may not be in effect for more than 30 calendar days. We believe that these time limits recognize the public policy need to limit the running of any summary action taken during an emergency. Proposed Rule 447, on the other hand, has a 90 day time limit. As previously discussed, we believe the Exchange's exemptive authority under Proposed Rule 447 should be subject to limitations similar to the Commission's emergency authority pursuant to Section 12(k) of the Exchange Act. As a result, the Exchange's exemptive authority should also be limited to no more than a maximum of 30 calendar days. Rather than require the Exchange and member firms to seek extensions after 10 business days, however, we believe the Exchange's authority should be valid for 30 calendar days from the date on which the Exchange first gives notice that it is exercising its authority pursuant to an emergency order of the Commission, with additional 30 calendar day extensions as appropriate.

### **C. Appeals**

Under Section 12(k)(5) of the Exchange Act, a person aggrieved by an order issued by the Commission under its emergency power authority may, under Section 25(a) of the Exchange Act, appeal the emergency order to the Court of Appeals. Proposed Rule 447 has no such appeals process, thus not subjecting Proposed Rule 447 to an oversight or review mechanism. As a result, Proposed Rule 447 should be amended to include an appeal process similar to the one available for Commission emergency orders. This mechanism would allow member organizations to appeal to the Commission the Exchange's regulatory relief or additional requirements or restrictions that, for example, have the unintended consequence of adversely affecting member organizations.

### **D. Override Authority**

We note that Section 12(k)(3) of the Exchange Act provides the President of the United States with the authority to in effect override the Commission's actions taken under Sections 12(k)(1)(B) and 12(k)(2) of the Exchange Act. Thus, the authority to override Commission actions provides a level of review and protection to persons affected. This same level of protection is not, however, available under Proposed Rule 447. As a result, we recommend amending Proposed Rule 447 to include a mechanism by which any and all of the Exchange's actions under its exemptive authority can be reviewed by the Commission and, if necessary, overruled.

## **E. Notice to the Membership**

The description of Proposed Rule 447 indicates that in the event the Exchange determines not to extend regulatory relief past 90 days, it would alert member organizations to the date on which the relief would expire. We do not understand why the Exchange is limiting the instances in which it would alert members to when it has determined not to extend regulatory relief. It is our belief that member organizations should be kept informed at all times of the steps the Exchange intends to take during an emergency, to the extent possible. As a result, SIFMA recommends amending Proposed Rule 447 to include a notification mechanism for (i) when the Commission has issued an emergency order pursuant to Section 12(k)(2) of the Exchange Act; (ii) when the Exchange determines that an emergency exists and how it will be exercising its exemptive authority pursuant to the rule; and (iii) when any particular action taken by the Exchange pursuant to the rule will expire.

## **V. Individual Rule Provisions**

In addition to the more general concepts discussed above, several specific provisions of the proposed rule raise questions that should be addressed.

As currently drafted, Proposed Rule 447(3) would require member firms to obtain customer consent in order to have access to “recourse and means not customarily utilized by broker-dealers.” We are concerned, however, with the practical implications of the requirement for customer consent. As can be anticipated, it will be extremely challenging for member organizations to obtain customer consent during an emergency. Thus, we suggest that customer consent be a requirement only to the extent that customer consent is available. If a member organization is unable to obtain customer consent after reasonable attempts are made, access to alternative means and systems should still be available to members under specified conditions, e.g. for a limited period.

In addition, we request that the NYSE provide answers to the following questions with respect to the below rule provisions:

- Proposed Rule 447(1) – Why did the Exchange expressly carve out trade reporting and settlement reports?
- Proposed Rule 447(3) – What other “means or recourse” does the Exchange envision to value securities? What is “functionally equivalent” material?
- Proposed Rule 447(4) – What other “tests or alternative qualifications” will the Exchange consider for the assumption of positions or functions within a member organization?
- Proposed Rule 447(6) – If the intent is to provide member organizations with a more flexible approach of doing business during an emergency, under what circumstances does the Exchange envision imposing additional “requirements or prerequisites applicable to outsourcing”?

- Proposed Rule 447(7) – Would the prohibition against solicitation of new accounts include accepting unsolicited accounts? Has the Exchange considered the likelihood that a member organization will be able to enhance insurance coverage at a reasonable price during a major emergency? How practical will it be for member organizations to add supervisory personnel or procedures during an emergency?

## VI. Conclusion

SIFMA appreciates the opportunity to comment on this rulemaking. We reiterate our support for Proposed Rule 447 but strongly urge the Commission and the NYSE to consider our comments and suggestions. If you have any questions or comments, please contact Dennis C. Hensley (212-839-5731) or Marisol Rubecindo (212-839-8520) of Sidley Austin LLP, or me at 202-434-8400.

Sincerely,



Alan E. Sorcher  
Managing Director and  
Associate General Counsel

Attachment: Exhibit A

cc: Alton Harvey, Securities and Exchange Commission  
William Jannace, NYSE Regulation



**SIFMA SUGGESTED LANGUAGE****Rule 447 Emergency Powers**

Scope – the Exchange’s exemptive authority under this Rule shall be available to the Exchange only when: (i) the Securities and Exchange Commission (“Commission”) has issued an “emergency order” pursuant to its authority set forth in Section 12(k)(2) of the Securities Exchange Act of 1934, as amended (“Exchange Act”), which order expressly authorizes or instructs the Exchange to take such action as it deems appropriate under this Rule; and (ii) such Commission emergency order is still in effect, in accordance with the provisions of Section 12(k) of the Exchange Act. In the event the Commission has not yet otherwise issued an emergency order pursuant to such authority, the Exchange may, pursuant to paragraph (e) of this Rule, petition the Commission to determine that an “emergency,” as defined in Section 12(k)(7) of the Exchange Act, exists and to issue an emergency order pursuant to Section 12(k)(2). The Exchange’s exemptive authority under this Rule shall continue in effect for a maximum of 30 calendar days from the date on which the Exchange first gives notice, pursuant to paragraph (g) of this rule, that it is exercising its authority pursuant to an emergency order of the Commission, with additional 30 calendar day extensions as appropriate.

- VII. Exemptive Relief – The Exchange, either upon a member organization’s request or at the Exchange’s own initiative, where it is necessary and in the public interest and for the protection of investors, and on such conditions, if any, which it may impose, may take the following actions:**
- A. defer or extend the time frames otherwise applicable for the filing of documents or reports with the Exchange (other than trade reports or reports arising from the settlement of transactions) or the obtaining of Exchange approval where such approval is required;**
  - B. defer or extend the time periods otherwise applicable for requesting margin extensions via Exchange automated extension processing systems, or for complying with testing, training or continuing education requirements;**
  - C. permit recourse to means and systems not customarily utilized by broker-dealers for: the direct receipt, transmission, or delivery of funds and securities, to and from customers; the valuation of securities; and the transmission of statements, confirmations, proxy materials and other functionally equivalent material;**
  - D. permit the closure of main offices or the recognition of alternative tests and/or qualification criteria for tests or criteria otherwise required as a prerequisite to the assumption of a position or function;**

- E. modify or waive, in whole or in part, requirements pertaining to the registration and supervision of branch offices and their personnel (but not requirements relating to the maintenance of books and records or the obligation for a member organization to maintain essential supervision of all its associated persons) and the payment of late fees.**
- VIII. Member Organization Requests – Whenever a member organization requests that the Exchange provide exemptive relief under paragraph (a) of this Rule, the member shall make such requests in a writing (including by electronic means) that provides a summary of the relief requested and the reason the relief is necessary.**
- IX. Additional Restrictions and/or Requirements – In granting the regulatory relief under paragraph (b) of this Rule, the Exchange may, as a condition to the granting of such regulatory relief, also:**
  - A. alter or rescind approval, expand requirements or prerequisites applicable to outsourcing;**
  - B. require the curtailment or reduction of business activity and/or solicitation of new accounts or new products, the enhancement of insurance coverage, the closure of offices or locations, and the addition of supervisory personnel or procedures; or**
  - C. take such other similar action, or withhold taking similar action, in anticipation of, during the course of, or as a consequence of, said “emergency.”**
- X. In determining whether to restrict one or more member organization’s activities, or otherwise impose new requirements or restrictions in accordance with this paragraph (c) of this Rule, the Exchange shall consider:**
  - A. the Business Continuity Plan the member organization has in place;**
  - B. the level of absenteeism at a particular member organization;**
  - C. the extent to which the member organization’s business is automated;**
  - D. the extent to which personnel may work from home;**
  - E. the level of need in a particular community; and**
  - F. such other factors as the Commission, whether in the emergency order that triggered the operation of this Rule or through subsequent communications with the Exchange, may identify as relevant.**
- XI. Petition for Commission to Issue an Emergency Order Pursuant to Section 12(k)(2) of the Exchange Act – In the event the Commission has not yet**

otherwise issued an emergency order pursuant to Section 12(k)(2) of the Exchange Act, the Exchange shall first petition that the Commission determine that an “emergency” (as defined in Section 12(k)(7) of the Exchange Act) exists and to issue an emergency order pursuant to Section 12(k)(2) of the Exchange Act. Such request shall be submitted in a writing (including by electronic means) that provides:

- A. a detailed summary of the reason an “emergency” exists and the reason regulatory relief is warranted;
- B. a determination that the regulatory relief is in the public interest and for the protection of investors;
- C. a summary of what will be accomplished by the grant of regulatory relief;
- D. a description of any particular type of regulatory relief considered; and
- E. the anticipated impact on member organizations of such relief, including, an analysis with respect to the burden on competition that may be imposed on either a category or a specific firm.

**XII. Limitations on Exchange’s Authority; Appeal to Commission**

- A. a person aggrieved by the Exchange’s exercise of authority under this Rule may appeal the Exchange’s grant of regulatory relief and the imposition of any related new requirements or restrictions, to the Commission; and
- B. the Commission may direct that any or all action taken by the Exchange under this Rule shall not continue in effect.

**XIII. Notice to the Membership – The Exchange shall provide notification to its membership via an Information Memo and the Exchange’s Electronic Filing Platform (“EFP”):**

- A. when the Commission has issued an emergency order pursuant to Section 12(k)(2);
- B. when the Exchange determines that an emergency exists and indicating how the Exchange will be exercising its exemptive authority pursuant to this Rule; and
- C. when any particular action taken by the Exchange under this Rule will expire.