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

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

Dear Ms. Murphy:

Pershing LLC ("Pershing") appreciates the opportunity to comment on the Securities and Exchange Commission's (the "SEC" or "Commission") recently proposed Rule 15c3-5 which establishes new Risk Management Controls for Brokers or Dealers with Market Access. Pershing is a leading global provider of clearance, custody and execution services which provides financial outsourcing solutions to over 1,100 financial intermediaries, including broker-dealers, registered investment advisors and professional money managers.

Pershing supports the Commission's goal to eliminate "unfiltered" or "naked" access to the markets and agrees that that pre and post-trade controls are essential tools to: (i) manage financial and regulatory risk to the sponsoring member and other market participants and (ii) minimize the likelihood of severe events that could have systemic implications and undermine market integrity. However, we ask the Commission to consider and clarify certain key issues prior to adoption and implementation of proposed Rule 15c3-5. Specifically, Release No. 34-61379 (the "Release) and the proposed Rule 15c3-5 do not appear to recognize the long established and recognized concept of the allocation of responsibilities as provide for by NYSE Rule 382 and FINRA Rule 3230. As discussed further below, Pershing believes that the proposed 15c3-5 should not disturb the ability to contractually allocate responsibilities between broker-dealers.[1]

Reliance Upon Another U.S. Regulated Broker-Dealer

In 1982, the New York Stock Exchange adopted and the SEC approved NYSE Rule 382.[2] Rule 382 set forth categories of functions that could be allocated between the parties in written agreement. These categories included: 1) opening, approving and monitoring accounts; 2) extension of credit; 3) maintenance of books and records; 4) receipt and delivery of funds and securities; 5) safeguarding of fund and securities; 6) confirmations and statements; and 7) *"acceptance and execution of transactions (responsibility to accept/reject orders, responsibility for errors in execution, procedures for proper transmission of order and for screening order prior to execution and settlement of contracts.)*[3]

[1] For the purposes of this comment, Pershing is discussing market access arrangements between U.S. regulated broker-dealers only.
[2] See NYSE Information Memo 82-18 and SEC Release No. 18497.
[3] *Emphasis Added* See NYSE Information Memo 82-18

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In 1994, NASD adopted and the SEC approved Section 47, Article III, of The Rules of Fair Practice which was subsequently renumbered FINRA Rule 3230.[4] FINRA Rule 3230 is the analog of NYSE 382 and enumerates the same categories of functions that may be allocated among the parties to a clearing agreement.[5] These rules were subsequently amended to enhance an introducing broker-dealer's ability to supervise their own and their customer's activities. Pershing recognizes that technology and the markets have fundamentally changed since the adoption of these rules but the underlying concept is the same. Each of the parties to a clearing and/or execution relationship is an independently registered and regulated entity with the obligation to comply with the securities laws, rules and regulations. Rules 382 and 3230 provide for an efficient mechanism to allocate responsibilities to those parties in the relationship best positioned to ensure compliance.

Pershing does not believe firms that provide market access should be able to blindly offer access to any and all comers. Further, Pershing is not advocating a position that pre and post-trade controls are not necessary. To the contrary, as stated previously, they are essential. However, Pershing does believe strongly that, where a member firm (the "Clearing Firm")[6] provides access to a U.S. regulated broker-dealer (the "Entering Broker"), the Clearing Firm should be able to rely upon the representations of or demonstration by the Entering Broker that appropriate financial and regulatory risk management controls are in place provided such reliance is reasonable. For example, the Commission has already implemented such a concept in connection with Regulation SHO where member firms can rely upon other member firms for pre-order locate and order marking requirements.[7] Proposed 15c3-5(c)(2)(i) requires that the risk management controls must prevent the entry of orders unless all regulatory requirements have been satisfied on a pre-order entry basis.[8] As drafted and without clarification, proposed Rule 15c3-5(c)(2)(i) would no longer allow a Clearing Firm to rely upon an Entering Broker for order marking and pre-order locate requirements even though the Entering Broker has an independent regulatory obligation to do so and is in the best position to ensure compliance with the Regulation SHO.

There are many other examples of where the purposes and goals of the proposed Rule 15c3-5 are best served by allowing an Clearing Firm rely upon an Entering Broker to implement Financial and Regulatory Risk Management controls as long as such reliance is reasonable. In each of the following examples specifically, the Entering Broker has an independent regulatory obligation to supervise its business and the conduct of its customers.

- Proposed Rule 15c3-5 mandates that procedures are designed to prevent the entry of orders in a security that the broker-dealer, customer or other person is restricted from trading.[9] A Clearing Firm will not be in a position to readily ascertain that the Entering Broker or its

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[4] See NASD Notice to Members 94-7
[5] See NYSE Rule 382 and FINRA Rule 3230 for comparison.
[6] References to Clearing Firm are not intended to limit the discussion to only Fully Disclosed Clearing Arrangements. These arguments equally apply to omnibus clearing arrangements, "execution and flip" arrangements and, by analogy to any arrangement where access is provided to a U.S. regulated broker-dealer.
[7] See Regulation SHO Rule 203(b)(1) and (2) and Regulation SHO FAQ's Section 4 (http://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm). In fact, Regulation SHO goes further to allow a broker-dealer to rely upon the representations of *"any person"*, including non-U.S. broker-dealers and public customers, as long as such reliance is reasonable. Another example of reliance by a Clearing Firm upon an Introducing Broker is in the context of compliance with the anti-money laundering rules and regulations. A Clearing Firm may rely upon an Introducing Broker in connection with customer identification procedures.
[8] This concept is stated throughout SEC Release No.34-61379 (e.g. pages 13, 19, 29, etc.)
[9] See proposed Rule 15c3-5(c)(2)(ii)

customer is restricted from entering orders for certain securities or for certain order types. For example, the Clearing Firm would not know, or have reason to know, due to the allocation of responsibilities under Rules 382 and 3230, if the customer is in a control position with an issuer or for some other reason is subject to a "blackout period". Similarly, a Clearing Firm would not be aware of any securities subject to an internal restriction at the Entering Broker due to non-public discussions between the Entering Broker and an issuer. The Entering Broker which already has the regulatory obligation to monitor such activity is in the best, and in most cases the only, position to ensure compliance on both a pre and post-trade basis.

- Proposed Rule 15c3-5 mandates that procedures are designed to restrict access to authorized persons.[10] The Entering Broker would be in the best position to vet and approve users of its order management systems, as well as to ensure the physical and electronic security of its own order management system. While a Clearing Firm has an obligation to secure physical and electronic security over its own systems, a Clearing firm has no authority to supervise the Entering Broker's personnel, oversee the Human Resource functions of the Entering Broker or set policy for the Entering Broker with respect to the customers which the Entering Broker decides to grant access to the introducing broker-dealers order management system.

- Proposed Rule 15c3-5 requires that appropriate surveillance personnel receive immediate post-trade execution reports.[11] There must be clarification as to which broker-dealer's surveillance personnel must receive and review such information. For example, since a Clearing Firm does not "know" the Entering Broker's client (in the context of NYSE Rule 405 and FINRA Rule 3110), the Clearing Firm is not in a position to identify all forms of suspicious or manipulative trading activity (e.g. insider trading, wash sales, or other scienter-based violations of the securities laws). The Entering Broker which already has the regulatory obligation to monitor such activity is in the best , and in most cases the only, position to ensure compliance on both a pre and post-trade basis. This is not to say a Clearing Firm can ignore obvious red flags, however, the Clearing Firm should be able to reasonably rely upon the Entering Broker to comply with its obligations to supervise its business and the conduct of its customers.

Responsibilities of Exchanges, Market Centers and ATS's

Pershing believes that exchanges, market centers and ATS's are best positioned to implement certain financial risk management controls in connection with entry of erroneous orders. Specifically, with respect to orders entered or executed at prices not reasonably related to the current market, trading halts or other erroneous orders. At least one exchange had just such risk management controls in the past. The exchange's error filters would review each order submitted to the exchange prior to execution. With the implementation of Regulation NMS, latency issues inherent with pre-trade risk management filters caused the exchange to discontinue the use of the error filters because it found itself at a competitive disadvantage. The Commission should consider a mandate for all exchanges, market centers and ATS's to implement appropriate and uniform financial risk management controls in connection with erroneous orders to level the playing field and eliminate any competitive disadvantage. By requiring markets to maintain uniform error filters in all exchanges, market centers and ATS's, the market will not be exposed to the risk that any individual broker's risk management system may be inadequate or fail. In

[10] See proposed Rule 15c3-5(c)(2)(iii)
[11] See proposed Rule 15c3-5(c)(2)(iv)

other words, the protection of the market is more efficiently and properly administered by the markets themselves rather than by an overall risk management system that relies upon a myriad of diverse systems and inconsistent policies that each market participant individually establishes.

CEO Certification Requirements

Pershing requests that the Commission clarify whether the Chief Executive Officer or equivalent certification required under proposed Rule 15c3-5(e)(2) is a new and independent requirement or whether the certification would be covered under existing processes such as the FINRA Rule 3130 certification through which the CEO certifies that the member firm has processes to establish, maintain, review, test and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with applicable FINRA rules, MSRB rules and federal securities laws and regulations. Pershing strongly recommends that the Commission allow firm to satisfy the CEO certification requirement through already existing processes such as FINRA 3130.

Low Cost Estimates

The Release estimates that overall implementation costs would be approximately $51,000 per broker dealer, with annual maintenance costs of $47,300 per broker-dealer. Pershing believes these estimates grossly understate the implementation and maintenance costs. Based upon estimates and proposals reviewed to date, the cost to build or buy the appropriate technology alone easily exceeds $500,000 per year and could potentially be double that amount. This does not include the potential that additional surveillance personnel will have to be added to staff.

Once again, Pershing would like to thank the Commission for the opportunity to comment on this important rule proposal.

Sincerely,

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Pershing LLC

Cc: The Hon. Mary L. Schapiro, Chairman
The Hon. Luis A. Aguilar, Commissioner
The Hon. Kathleen L. Casey, Commissioner
The Hon. Troy A. Paredes, Commissioner
The Hon. Elisse B. Walter, Commissioner
Robert W. Cook, Director, Division of Trading and Markets
James Brigagliano, Deputy Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets