**Memorandum in Opposition**

May 22, 2015

S. 4846 (Bonacic): Senate Floor
A. 6714 (Weinstein): Assembly Committee on Judiciary

> An ACT to amend the civil practice law and rules, the business corporation law, the general associations law, the limited liability company law, the not-for-profit corporation law and the partnership law, in relation to consent to jurisdiction by foreign business organizations authorized to do business in New York.

The Securities Industry and Financial Markets Association[1] (SIFMA) and The Clearing House Association L.L.C. (TCH)[2] bring together the shared interests of hundreds of broker-dealers, banks and asset managers. We are writing in opposition to S. 4846/A. 6714 – a bill which would, according to its sponsors, generally subject out-of-state business organizations that apply for authority "to do business" in the State of New York to the general (all-purpose) jurisdiction of New York State courts.

According to the sponsor's memo, this bill was introduced in response to *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014). In *Daimler*, the U.S. Supreme Court held that an out-of-state business simply "doing business" in another state failed to satisfy the necessary due process requirement to subject a corporation to general jurisdiction in that state's courts. We contend that this bill would give rise to the same constitutional and due process issues that the U.S. Supreme Court addressed in its *Daimler* decision.

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[1] SIFMA is the voice of the U.S. securities industry, representing the broker-dealers, banks and asset managers whose 889,000 employees provide access to the capital markets, raising over $2.4 trillion for businesses and municipalities in the U.S., serving retail clients with over $16 trillion in assets and managing more than $62 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA has offices in New York and Washington, D.C. For more information, visit http://www.sifma.org.

[2] Established in 1853, The Clearing House is the oldest banking association and payments company in the United States. It is owned by the world's largest commercial banks, which collectively hold more than half of all U.S. deposits and which employ over one million people in the United States and more than two million people worldwide. The Clearing House Association L.L.C. is a nonpartisan advocacy organization that represents the interests of its owner banks by developing and promoting policies to support a safe, sound and competitive banking system that serves customers and communities. Its affiliate, The Clearing House Payments Company L.L.C., which is regulated as a systemically important financial market utility, owns and operates payments technology infrastructure that provides safe and efficient payment, clearing and settlement services to financial institutions, and leads innovation and thought leadership activities for the next generation of payments. It clears almost $2 trillion each day, representing nearly half of all automated clearing house, funds transfer and check-image payments made in the United States. *See* The Clearing House's web page at www.theclearinghouse.org.

S. 4846/A. 6714 attempts to address the concerns of the Supreme Court by explicitly stating that an organization's application for authority to do business in New York (which requires the designation of a service agent in New York – generally the Secretary of State) constitutes that organization's consent to the general jurisdiction of the courts of New York. Unfortunately, this basic approach poses potential conflicts with Supreme Court precedent and raises other concerns outlined below.

Simply put, this bill attempts to address the constitutional and due process concerns raised in *Daimler* – which stated that simply "doing business" in a State failed to satisfy such concerns – by relying on a **pre-requisite** condition to do business in the State (i.e., registration with the New York Secretary of State). Reliance on a pre-requisite to engage in a level of New York-based activity which the *Daimler* court has found to be Constitutionally insufficient to confer general jurisdiction to a forum state should fail to meet the standard established by the Supreme Court. Further, such a change would sow confusion among the courts and business community and give rise to the same costly and time consuming litigation already seen in both Connecticut and Delaware.[3] As such, we are asking you to join us in opposition to S. 4846/A. 6714.

We appreciate your consideration of our concerns and look forward to future discussions on this bill. In the meantime, please do not hesitate to contact SIFMA's local counsel, Bob Reid, of Reid, McNally and Savage at 518-465-7330, SIFMA's Nancy Lancia at 212-313-1233, SIFMA's Marin Gibson at 212-313-1317, or The Clearing House's Jill Hershey at 202-649-4601, should you have any questions.

[3] *Brown v. CBS*, 19 F. Supp. 3d 390, 397-400 (D. Conn. 2014) (holding that imposition of general jurisdiction on foreign registered entity, pursuant to Connecticut's statute providing general jurisdiction over such entities, violated due process); *AstraZeneca AB v. Mylan Pharms., Inc.*, No. 14-696-GMS, ___ F. Supp. 3d ___, 2014 WL 5778016, at *5 (D. Del. Nov. 5, 2014) (holding that foreign entity's compliance with Delaware registration "cannot constitute consent to jurisdiction" and state court precedent to the contrary "can no longer be said to comport with federal due process") (citing *Daimler*, 134 S. Ct. at 761-62), *appeal granted*, App. No. 2015-117 (Fed. Cir. Mar. 17, 2015). *But see Acorda Therapeutics, Inc. v. Mylan Pharms, Inc.*, ___ F. Supp. 3d ___, No. 14-935-LPS, 2015 WL 186833, at *13-*14 (D. Del. Jan. 14, 2015) (disagreeing with *AstraZeneca*, and asserting general jurisdiction based on Delaware registration); *Forest Labs., Inc. v. Amneal Pharm. LLC*, No. 14-508, 2015 WL 880599, at *15 (D. Del. Feb 26, 2015) (same); *Otsuka Pharm. Co. v. Mylan Inc.*, Civ. A. No. 14-4508 (JBS/KMW), 2015 WL 1305764, at *11 (D.N.J. Mar. 23, 2015) (same).