

December 5, 2007

**Via Electronic Mail** ([rule-comments@SEC.gov](mailto:rule-comments@SEC.gov))

Ms. Nancy M. Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

**Re: File No. SR-NASD-2007-043**  
**File No. SR-NASD-2007-031**  
**File No. SR-NYSEArca-2006-21**

Dear Ms. Morris:

The Market Data Subcommittee of the Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> Technology and Regulation Committee appreciates the opportunity to comment on SR-NASD-2007-031 (“NYSE TRF”) and SR-NASD-2007-043 (“NSX TRF”). These filings seek to increase the market data rebates paid to SIFMA member firms for reporting off-exchange transactions (or “printing” trades) on these Transaction Reporting Facilities (“TRFs”). Because these proposed rule changes provide relevant evidence to the issues under consideration in the ongoing NetCoalition proceeding, we have copied these comments to that file as well.

In particular, the proposed TRF market data rebates demonstrate: (1) unreasonable fees levied on firms to purchase market data, resulting in excess market data revenues; (2) a lack of transparency regarding the costs of collecting and distributing the market data and the resulting revenues; (3) the ability of self-regulatory organizations to allocate the costs of collecting and distributing market data to others – when it is in their interest to do so – but apparently not when it would reveal unreasonable mark-ups in the fees; and (4) the potentially unfair competitive impacts caused by the use of market data profits by certain exchanges to gain advantages in their other businesses.

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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.

## **I. Rebates are Evidence that Market Data Fees are not Fair and Reasonable**

These rebates are further evidence that market data fees are excessive, have no fair or reasonable basis, and are not used by the exchanges to cover regulatory costs. Rebating all (or most) market data revenue earned by TRF prints demonstrates that the exchanges (here, through the National Market System Plans<sup>2</sup>) significantly mark up the fees that investors and broker-dealers must pay for market data (in this case, for the consolidated quote) in order to subsidize the exchanges' other competitive activities. Investors should not have to pay to subsidize this competition, but current application of SEC rules requires that they do.

Regulation NMS Rule 603, the "Display Rule," makes it mandatory for member firms and their customers to buy the consolidated quote data, despite its diminished value due to decimalization and the impacts of Regulation NMS Rule 611, the "Order Protection Rule," which together have resulted in far less liquidity reflected in the consolidated quote. Exchanges then use the revenue extracted from the mandatory purchase of the consolidated quote data to compete in other areas, such as providing rebates on transaction reporting. At best, the rebates are an inefficient method for redistribution of excessive fees. At worst, the rebates show how for-profit exchanges are able to use their regulatory status to charge excessive fees. For SIFMA member firms that can benefit from the rebates, they are certainly better than nothing, but these proposals fail to address the underlying issues and concerns at issue in the NetCoalition Petition.

## **II. TRF Cost Allocations are Evidence that Market Data Costs can be Allocated**

It is significant to note that FINRA, as the "SRO Member" of each TRF, is able to allocate costs across the different TRFs that it services. After allocating capacity and other costs, FINRA then deducts them before passing along the market data revenue share of each TRF to the respective "Business Member" (here, NYSE or NSX). This is evidence that allocation of such costs is not only possible when it comes to market data, but that it is actually being done. FINRA's ability to allocate costs here rebuts the exchanges' previous arguments (in relation to the NetCoalition Petition and in other market data contexts) that it is too difficult to allocate costs and, therefore, cost cannot be a basis for determining statutory reasonableness when it comes to the SEC's review of market data fee filings.<sup>3</sup>

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<sup>2</sup> These are the Consolidated Tape Association and the Nasdaq UTP Plans, covering what are commonly referred to as Tapes A (NYSE-listed), B (Amex-listed), and C (Nasdaq-listed).

<sup>3</sup> Nasdaq has challenged CTA fees for failing to provide sufficient cost justification. The Commission has concurred, underscoring that CTA new entrant fees should be transparent, based on objective and specific costs, and not pose an unnecessary competitive burden. For discussion of the Commission's assessment of the importance of providing cost allocation, see Comment Letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA re: File No. SR-NYSEArca-2006-21 (Aug. 1, 2007), and Markham Erickson, Executive Director and General Counsel, NetCoalition re: File No. SR-NYSEArca-2006-21 (Sept. 14, 2007).

### **III. Impact on Competition and Lack of Transparency of Costs and Revenues**

Although the rebates result in some SIFMA member firms recouping a portion of the market data fees, we have two concerns with the filings and proposed rule changes: (A) the absence of any consideration about the burden on competition; and (B) the lack of transparency regarding both the market data revenues that result in the rebates and the TRF costs that are deducted before the revenue is allocated to the Business Members.

#### **A. Impact on Competition**

The NYSE TRF filing does not address the competitive impacts of the proposed rebate program. It appears that any potential short-term benefits from the rebates may be severely diminished by the long-term impact of less competition. As the Business Member of the NYSE TRF, it appears that the NYSE (not FINRA) initiated these rule filings, and the NYSE makes the decisions on whether there should be market data rebates for users of the TRF and at what level.<sup>4</sup> The proposed 100% rebate, without any deductions for costs allocated, appears to indicate that the NYSE may be willing to take a loss on its TRF business. The possible result, intended or unintended, may drive smaller TRFs (such as the NSX) out of the TRF business, thus resulting in fewer TRF choices. Already, the much smaller NSX has had to increase its TRF rebate to 75% in response to NYSE's move.

The rule filing, by merely stating in a conclusive manner that "FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the Act," does not meet the Exchange Act's requirements. Such potential anti-competitive behavior should be examined closely.

#### **B. Lack of Transparency of Revenue and Costs**

The lack of transparency regarding market data costs and revenues is at the heart of the NetCoalition Petition (File No. SR-NYSEArca-2006-21), and is clearly exhibited here in the context of the TRF filings. As with other recent market data rule change proposals, SIFMA member firms and other members of the public are unable to comment fully on the wisdom behind these proposed rule changes or on their consistency with the Exchange Act due to the complete absence of information regarding (i) the market data revenue allocated to TRF activities based on the Regulation NMS market data allocation formula, and (ii) the costs that are deducted before rebates are applied. Application of the Regulation NMS market data allocation formula and allocating TRF costs are regulatory functions, which give the public a right to review market data revenue and TRF cost data.

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<sup>4</sup> We understand that, prompted by NYSE's apparent loss leader approach to TRF rebates, Nasdaq is filing its own rebate proposal. We most likely will have the same concerns with that filing as expressed herein, if the Nasdaq proposal similarly attempts to use excessive market data revenues for rebates to attract more trade prints. Depending on the level of the rebate and any conditions attached thereto, SIFMA plans to comment on that proposal once the Commission publishes it for comment.

In the absence of this data, it is not possible to conclude that the proposed rule changes are consistent with Sections 15A(b)(5), (6), and (9) of the Exchange Act.

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Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Melissa MacGregor, Vice President and Assistant General Counsel, SIFMA, at 202-962-7385.

Respectfully submitted,

Christopher Gilkerson and Gregory Babyak

Co-Chairs, Market Data Subcommittee of the  
SIFMA Technology and Regulation Committee

cc: The Hon. Christopher Cox, Chairman  
The Hon. Paul S. Atkins, Commissioner  
The Hon. Annette L. Nazareth, Commissioner  
The Hon. Kathleen L. Casey, Commissioner  
Dr. Erik R. Sirri, Director Division of Market Regulation  
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