

# ABA

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February 12, 2007

Via E-mail to: rule-comments@sec.gov

U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-9393  
Attention: Nancy M. Morris, Secretary

*Re: SR-NYSEArca 2006-21*

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee") of the Section of Business Law of the American Bar Association (the "ABA") in response to the December 27, 2006 order of the Securities and Exchange Commission (the "Commission") providing the opportunity for statements by persons or parties in support of or in opposition to approval by the Commission's staff of NYSEArca, Inc.'s ("NYSEArca's") proposed rule change, File No. SR-NYSEArca 2006-21 ("NYSEArca Proposal").

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the ABA Section of Business Law, nor does it necessarily reflect the view of all members of the Committee.

## **I. Introduction**

By filing this comment letter, the Committee expresses no view as to the specifics of the NYSEArca Proposal, or the merits of NetCoalition Inc.'s petition for Commission review of the Commission staff's approval of the proposal. Rather, we write to urge the Commission to address market data fees as part of a comprehensive modernization of self-regulatory organization ("SRO") funding, governance, structure and transparency in light of the many recent and impending market structure developments. The forthcoming combination of the NASD's and

New York Stock Exchange's ("NYSE's") member regulation operations into a single SRO makes this an ideal time for the Commission to address these issues comprehensively.<sup>1</sup>

## II. Discussion

In 1999, the Commission published a concept release on the "Regulation of Market Information Fees and Revenues",<sup>2</sup> which was intended as a comprehensive review of market data fees and the role of revenues in funding SROs. This release was followed by the creation, in 2000, of the Commission's Advisory Committee on Market Information to assist the Commission in its evaluation of issues related to the availability of market information. Following publication of the Advisory Committee's Report,<sup>3</sup> however, there was no significant public Commission consideration of market data fees until Regulation NMS was proposed in 2004, and the consideration of market data fees and revenues was limited primarily to the joint SRO plans related to providing market data to the consolidated tape.<sup>4</sup>

We agree with the Commission's observation in the Regulation NMS adopting release that "[t]he Commission's review of SRO structure, governance, and transparency provides a useful context in which [the] competing policy concerns [of SRO funding and market data fees] can be evaluated and balanced appropriately."<sup>5</sup> As we understand it, however, the Commission's review of SRO structure, governance, and transparency has not progressed materially beyond the publication, in 2004, of proposed rules (the "SRO Governance Proposal") and a concept release concerning self-regulation.<sup>6</sup> Nonetheless, since that time there has been a steady spate of SRO organizational changes launching these entities as proprietary, for-profit organizations and dramatically decreasing industry, investor and public involvement in their governance and rulemaking initiatives. The imminent combination of the NYSE and NASD member regulation operations will make the opportunity for broad participation even more remote.

With this trend away from self governance, exchange members are afforded less of an opportunity to act as a check on SRO rules, including those relating to market data fees, to ensure that they are designed

to promote just and equitable principles of trade, . . . to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not

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<sup>1</sup> See *NASD Member Firms Embrace Streamlined, More Efficient Regulation: Securities Industry Overwhelmingly Approves NASD By-Law Changes Needed for Planned Consolidation of NASD and NYSE Member Regulation* (Jan. 21, 2007) and *NASD and NYSE Group Announce Plan to Consolidate Regulation of Securities Firms; Single Organization Will Eliminate Overlapping Regulation and Reduce Costs to Industry* (Nov. 28, 2006) (joint NASD/NYSE press release).

<sup>2</sup> See Release No. 34-42208, 64 FR 70613 (Dec. 17, 1999) ("Market Data Concept Release").

<sup>3</sup> See *Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change* (Sept. 14, 2001).

<sup>4</sup> See Release No. 34-49325, 69 FR 11126 (Mar. 9, 2004).

<sup>5</sup> See Release No. 34-51808, 70 FR 37496, 37561 (June 29, 2005).

<sup>6</sup> See Release No. 34-50699, 69 FR 71126 (Dec. 8, 2004) and Release No. 34-50700, 59 FR 71,256 (Dec. 8, 2004).

designed to permit unfair discrimination between customers, issuers, brokers or dealers.<sup>7</sup>

In recent years, greater pressure has been placed on this analysis as SROs have transformed themselves to compete with their broker-dealer members for market share and trading volume. Thus, although SROs remain largely the exclusive purveyors of market information for their associated exchanges, they are no longer necessarily neutral public utilities for the mutual benefit of their respective members.<sup>8</sup> This necessarily bears on the Commission's view of SRO rulemaking, particularly in the context of rules imposing fees on exchange members and on public investors, as is the case here.

Steps have been taken to allay concerns about potential conflicts-of-interest associated with the role of member firms in the governance of particular SROs.<sup>9</sup> The Committee believes, however, that action is also needed to address other potential conflicts, such as the ability of exchanges to use their position as exclusive purveyors of market data to disadvantage the investing public as well as their members with whom they compete. The Committee urges the Commission to tackle comprehensively the issues of SRO governance and funding, including the associated issue of market data fees.

### III. Conclusion

The Committee appreciates the opportunity to submit these comments. Members of the Committee are available to meet with the Commission and its staff to discuss the issues raised by this letter.

Respectfully submitted,

/s/ Keith F. Higgins

Keith F. Higgins  
Chair, Committee on Federal Regulation of Securities

Drafting Committee  
K. Susan Grafton  
Brandon Becker  
Barbara Stettner

cc: Hon. Christopher Cox, Chairman  
Hon. Paul S. Atkins, Commissioner  
Hon. Roel C. Campos, Commissioner

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<sup>7</sup> 15 U.S.C. 78f(5). In the particular case of market data fees, the Commission's historical standards for review have been that the information be obtained on terms that are "fair and reasonable", that all persons be able to obtain information on terms that are "not unreasonably discriminatory and that the SRO's rules provide for the "equitable allocation of reasonable dues, fees and other charges among its members, issuers and others persons". See Market Data Concept Release, *supra* note 2, 64 FR at 70618.

<sup>8</sup> See Market Data Concept Release, *supra* note 2.

<sup>9</sup> See Release No. 34-53382, 71 FR 11251 (Mar. 6, 2006).

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Hon. Annette L. Nazareth, Commissioner

Hon. Kathleen L. Casey, Commissioner

Dr. Erik R. Sirri, Director, Division of Market Regulation

Robert L.D. Colby, Deputy Director, Division of Market Regulation

Elizabeth King, Associate Director, Division of Market Regulation

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