

February 14, 2008

Via Electronic Mail (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-FINRA-2007-041 and
File No. SR-NYSEArca-2006-21 (Order Granting NetCoalition Petition for
Review)**

Dear Ms. Morris:

The Market Data Subcommittee of the Securities Industry and Financial Markets Association (“SIFMA”)¹ Technology and Regulation Committee appreciates the opportunity to comment on SR-FINRA-2007-041. This filing seeks to increase the market data rebates paid to our members for reporting off-exchange transactions (or “printing” trades) on the NASD/Nasdaq Trade Reporting Facility (“TRF”). This proposal, similar to the NYSE and NSX TRF proposals before it,² provides relevant evidence to the issues in the ongoing NetCoalition proceeding. Accordingly, please include this comment letter in the NYSEArca-2006-21 file as well because it relates to the matters at issue in the NetCoalition Petition for Review of that rule proposal.

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

The Nasdaq TRF proposed rebates are further evidence that market data fees are excessive, without a fair or reasonable basis, and that they are not used by the exchanges to pay for necessary regulation as they usually say is the case. Instead, the increases in

¹ 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.

² See Comment Letter from SIFMA Market Data Subcommittee to Nancy Morris in Files No. SR-NASD-2007-043, SR-NASD-2007-031, SR-NYSEArca-2006-21 (Dec. 5, 2007).

rebates show that the exchanges (here, through the National Market System Plans³) significantly mark up the fees that investors and broker-dealers must pay for market data (here, the consolidated quote). Regulation NMS Rule 603 (the Display Rule) makes it mandatory for member firms and their customers to buy the consolidated quote data despite its value being diminished by the combined impact of decimalization and Regulation NMS Rule 611, the Order Protection Rule, which has resulted in far less liquidity reflected in the consolidated quote. The exchanges are then using the revenue received from our members' mandatory purchase of the consolidated quote to compete in other areas, such as providing rebates for transaction reporting on that TRF. At best, this is an inefficient method for redistribution of excessive market data fees. For our members who both pay the excessive mark-ups on market data and report trades on a TRF, it might be better than nothing, but it fails to address the underlying issues and problems.

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 four different TRFs that it services. FINRA does so in order to deduct the capacity and other costs before it passes along the market data revenue share of each TRF to the respective "Business Member" (here, Nasdaq). We believe that this is evidence that allocation of costs is possible for the collection and distribution of market data, and thus runs counter to the past arguments of the exchanges (in relation to the NetCoalition Petition and other market data contexts) that it is too difficult to allocate costs and, therefore, that cost cannot be a basis for determining statutory reasonableness when it comes to the SEC's review of market data fee filings.

Impact on Competition and Lack of Transparency of Costs and Revenues.

Although we recognize that the rebates result in some of our members being able to recoup a portion of the excessive market data fees the exchanges levy through the National Market System plans, we have two concerns with the above-referenced proposed rule changes: (i) the absence of any consideration of the burden on competition; and (ii) the lack of transparency in the TRF costs deducted before the revenue is allocated to the Business Members and in the market data revenues that result in the rebates.

A. Impact on Competition

It appears that the NYSE, as the Business Member of the NYSE TRF, initiated the recent round of TRF market data revenue rebate rule filings. As we noted in our prior comment letter on the NYSE TRF facility,⁴ in proposing a 100% rebate without deducting any costs allocated to it, it appears that NYSE is willing to take a loss on its

³ These are the Consolidated Tape Association and the Nasdaq UTP Plan, covering what are commonly referred to as Tapes A (NYSE-listed), B (Amex-listed), and C (Nasdaq-listed).

⁴ See *supra* note 2.

TRF business, perhaps with the aim – or at least possible result – of driving the smaller NSX out of the TRF business. We have not studied, nor pass a judgment on, whether this could be anti-competitive behavior, but we do note that Nasdaq has been forced to respond with its instant filing and has admitted that the Nasdaq TRF will be operating at a loss because of the newly proposed rebates. We believe this represents a classic case of cross-subsidization: a for-profit entity using excessive market data revenues collected where there is no competition pursuant to a regulatory mandate, to fund other commercial activities.

While in the short-run higher rebates may appear beneficial to our members, in the long-run this may not be the case. The much smaller NSX has had to increase its TRF rebate to 75% in response to NYSE’s move, which raises a question about the long-term impact on NSX and other potential TRFs. It would not be good for our members or the securities markets in general if NYSE’s 100% rebate of excessive market data fees, and Nasdaq’s proposed tiered rebate schedule, were to result in fewer TRF choices in the future, thereby diminishing competition. The TRF filings are deficient in that they do not address these competitive impacts. 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 requirements of the Securities Exchange Act of 1934 (“Exchange Act”).

B. Lack of Transparency in Revenue and Costs

We and other members of the public are unable to comment fully on the policies behind the proposed rule change or on their consistency with the Exchange Act due to the complete absence of information regarding: (i) the costs that are deducted before rebates are applied; and (ii) the market data revenue allocated to TRF activities based on the Regulation NMS market data allocation formula. Allocating TRF costs and application of the Regulation NMS market data allocation formula are regulatory functions and, therefore, the public has a right to review market data revenue and TRF cost data related to them. 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, SIFMA Staff Adviser to the Market Data Subcommittee, 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. Kathleen L. Casey, Commissioner
Dr. Erik R. Sirri, Director Division of Market Regulation
Robert L.D. Colby, Deputy Director Division of Market Regulation
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