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Plaintiff In Propria Persona

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HERBERT LESLIE GREENBERG, Plaintiff, v. UNITED STATES SECURITIES AND EXCHANGE COMMISSION, Defendant.	CASE NO. CV 06-7878-GHK(CTx) **REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS** [Fed. R. Evid. 201] HEARING DATE: April 2, 2007 TIME: 9:30 A.M. JUDGE: Honorable George H. King Filed concurrently: 1. Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss

REQUEST FOR JUDICIAL NOTICE

Plaintiff HERBERT LESLIE GREENBERG ("GREENBERG") hereby requests that the Court take judicial notice of the following documents attached as Exhibits A through D, inclusive. This request is made pursuant to Rule 201 of the Federal Rules of Evidence and the authorities cited below. This request is made in connection with the hearing of the Motion to Dismiss the Complaint for Declaratory and Injunctive Relief ("Motion") of defendant SECURITIES AND EXCHANGE COMMISSION ("SEC").

BASIS FOR REQUESTING JUDICIAL NOTICE

On a motion to dismiss, a court may take judicial notice of matters of public record in accordance with Federal Rule of Evidence 201 without converting the motion to dismiss to a motion for summary judgment. Lee v. City of Los Angeles, 250 F.3d 668, 688-689 (9th Cir. 2001) (citing Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986)). Courts may take judicial notice of documents outside of the complaint that are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed.R.Evid. 201(d); Wietschner v. Monterey Pasta Co., 294 F. Supp. 2d 1102, 1109 (N.D. Cal. 2003). Courts can take judicial notice of such matters when considering a motion to dismiss. Wietschner, 294 F. Supp. 2d at 1109; MGIC Indem. Corp. v. Weisman, 803 F. 2d 500, 504 (9th Cir. 1986). Further, Courts "may take judicial notice of facts of 'common knowledge' in ruling on a motion to dismiss." Newcomb v. Brennan, 558 F.2d 825, 829 (7th Cir. 1977).

As explained further below, the Court may take judicial notice of Exhibits A through D, inclusive.

Exhibit	Description
A	"NASD's Chief Fights For United Regulators," Wall Street Journal (12/15/06) "SEC Commissioner Annette Nazareth warned ... 'These (NYSE, NASD) are quasi-public entities' --- supervised by the SEC --- and not just member clubs.'"
B	Speech by SEC Staff: Remarks Before the SIA Research Conference by Annette L. Nazareth, Director, Division of Market Regulation, SEC (10/16/03) Available at: http://www.sec.gov/news/speech/spch101603sia.htm (last visited February 28, 2007). "[F]ew, if any, of the SROs, including the NYSE, had focused their reviews on their own transparency.... [I]t is incumbent on us to ask why these quasi-public institutions are not subject to...."
C	Securities Industry Association Letter of Comment to SEC (4/6/01) Available at: http://www.sec.gov/rules/proposed/s70301/franke1.htm (last visited February 28, 2007). "As fittingly observed by the Commission, SROs are 'quasi-public agencies'...."
D	NYSE in the News (4/8/05) Available at: http://www.NYSE.com/about/1113302992920.html (last visited March 8, 2007). "CNBC interview with NYSE Chairman, Marshall N. Carter and NYSE CEO, John A. Thain ... Carter: I think the biggest challenge for the board is to deal with ... strategy for the exchange. ... The range of options are (sic) all the way from a quasi-public utility, the way we are now...."

The Exhibits B and C are documents on file at the official website of defendant SEC. Exhibit D is on file at the official website of the NEW YORK STOCK EXCHANGE ("NYSE"). The contents of these documents are public records that are "not subject to reasonable dispute [and] capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b)(2). These exhibits reflect the proceedings before defendant SEC and public statements of a SEC Commissioner and the Chairman of the NYSE, and are appropriate for judicial notice.

Plaintiff GREENBERG requests that this Court take judicial notice of the Exhibits A though D, inclusive, to demonstrate to demonstrate the Motion that the Motion lacks merit and sets forth positions inconsistent with defendant SEC's long-held positions and the securities industry.

In the Motion, defendant SEC argues that self-regulatory organizations ("SROs") are "private" organizations vis-à-vis "quasi-public" entities. (Motion, pages 11:15 - 12:16.) However, defendant SEC's official publications and website are replete with admissions that SROs are "quasi-public" entities. See, e.g., Exchange Act Release No. 34-43860 (January 19, 2001); 66 Fed. Reg. 8912, 8913 (February 5, 2001); http://www.sec.gov/rules/proposed/34-43860.htm ["(C)ongress has stated on a number of occasions, SROs are 'quasi-public agencies ... '."]. A SEC Commissioner states that SROs are "quasi-public" entities. Exhibits A and B. Major participants in the securities industry have acknowledged that SROs are "quasi-public" entities. Exhibits C and D. Thus, defendant SEC's factual contentions have no evidentiary support and/or its legal contentions are not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law. See Fed.R.Civ.P. 11(b)(3) and (2).

For the foregoing reasons, the Court may properly consider the exhibits in ruling on the Motion.

DATED: March 15, 2007

HERBERT LESLIE GREENBERG
Plaintiff In Propria Persona

EXHIBIT "A"

MONEY & INVESTING
THE WALL STREET JOURNAL.
FRIDAY, DECEMBER 15, 2006 C1

NASD's Chief Fights For United Regulators

Critics Challenge the Benefits Of Tie-Up With NYSE Unit; A Q&A Session Gets Heated

By RANDALL SMITH

Delray Beach, Fla.

MARY SCHAPIRO, chief executive of the National Association of Securities Dealers, faced tough questions from some of her staunchest critics here this week as she barnstormed for votes on a regulatory merger with the New York Stock Exchange.

At a meeting aimed at selling the union, Mark Beloyan, president of a small brokerage, asked why NASD members are being offered only $35,000 apiece if the merger is approved. The NASD, he said, could afford four times as much.

Ms. Schapiro replied that tax rules limit such payouts by nonprofit concerns like NASD, which polices Wall Street firms. Compliance consultant Karen Fischer asked whether members weren't entitled to funds that NASD received from selling stock in the **Nasdaq Stock Market** Inc., estimated at $1.5 billion. When Ms. Schapiro repeated her initial answer, Ms. Fischer said, "That isn't answering the question I asked."

HEARD ON THE STREET

One big reason for the opposition from NASD members: The dissidents are worried they will lose their voice because it will end the NASD's current "one firm, one vote" policy, which favors small firms that account for 90% of the NASD's 5,100 members. The policy gives a small firm with five brokers the same voting power as Merrill Lynch & Co. with 15,000.

Instead of electing up to 15 of 18 NASD governors, small firms would elect three of 23 directors in the merged organization.

Near the end of the 80-minute question-and-answer session, the questions grew more personal. How

Please Turn to Page C2, Column 1

NASD Members Fret Over Merger

Continued From Page C1

much were executives paid at the NASD? asked Long Island brokerage executive Alan Davidson, a longtime NASD dissident.

HEARD ON THE STREET

Was it true Ms. Schapiro made $3.5 million? "Not even close. I wish I did," she replied, adding that her pay was public record. Ms. Schapiro made $2.1 million in 2005, counting deferred compensation.

The meeting at a beachfront hotel was part of a 27-city tour to places like Stamford, Conn., and Seattle by NASD officials to win votes against opposition by small-firm dissidents who won two out of three contested board seats in the NASD's last nationwide vote.

The merger vote, planned for mid-January, is turning into a battle royale, with dissidents throwing rocks on an opposition blog and the NASD marshaling support from Wall Street lobbyists and top officials of the Securities and Exchange Commission. Though Tuesday's meeting was closed to the public, accounts of the questions and answers were provided by several of the estimated 50 attendees.

Flanked by a handful of supporters on a dais, Ms. Schapiro gave a 30-minute talk and fielded a few dozen questions. If the deal is defeated, she warned, the securities industry risks the loss of self-regulation, as the accounting industry has, or a big-firm takeover of regulation that could weaken the role of small firms.

"We fought hard to stop the trend of removing all industry representation" from securities self-regulation in the merger, with 10 industry directors on its board, she said. The new agency will be committed to "reducing regulatory costs and reducing burdens" for members.

Though NASD officials were relieved that the tone of the meeting was polite, afterward the hard feelings that have split the organization boiled over.

One Schapiro ally on the stage, Boca Raton bond broker James Klotz, exchanged words in the hallway with dissident leader Richard Goble of North American Clearing Inc. in Longwood, Fla. When Mr. Goble made a remark that Mr. Klotz felt impugned his integrity, Mr. Klotz responded by calling Mr. Goble an expletive.

Ms. Schapiro was more restrained, greeting Mr. Goble with a "hello, Richard," without breaking stride as she passed him on her way out.

An NASD-commissioned poll of 400 members in early December, soon after the merger was announced, found 43% in favor, 14% opposed and 43% undecided. After stating their views, those polled were reminded the SEC favors the deal and that it would reduce members' regulatory burden and give them $35,000 each.

SEC Commissioner Annette Nazareth warned in an interview that the industry's top self-regulator can't be "dominated" by its members so much that "the regulatory mission suffers." She added, "These are quasi-public entities"—supervised by the SEC—"and not just member clubs."

Ms. Schapiro is also getting help from the securities industry's lobbying group, the Securities Industry and Financial Markets Association, which has been pushing for the elimination of regulatory overlap between NASD and the NYSE since 2000.

A member of SIFMA's small-firms committee, Deborah Castiglioni, chief executive of Cutter & Co. in Chesterfield, Mo., endorsed the merger publicly after a SIFMA-arranged call with Ms. Schapiro. The entire committee and two other small-firm groups have endorsed the merger as well.

At the NYSE, the merger has already received needed approvals by directors of the exchange's regulatory unit and its parent, NYSE Group Inc.

EXHIBIT "B"

U.S. Securities and Exchange Commission

Speech by SEC Staff:
Remarks Before the SIA Research Conference

by

Annette L. Nazarethi

Director, Division of Market Regulation
U.S. Securities and Exchange Commission

New York City
October 16, 2003

Good afternoon. I am delighted to be here today to discuss sell-side research issues and other current matters affecting the securities markets. Before I begin, I must note that my remarks represent my own views, and not necessarily those of the Commission or my colleagues on the staff.[1]

It almost goes without saying that our marketplace has recently endured a series of severe jolts to investor confidence. Over the past year or two, there has been the steady stream of revelations concerning alleged conflicts of interest that have compromised the integrity of the financial services industry. And the detrimental activity rooted in these conflicts has occurred not just in one isolated corner of our markets, but rather across a broad array of areas, including accounting and auditing, corporate governance, sell-side research, investment banking, and more recently, the mutual fund arena and SRO governance. Congress and regulators continue to respond aggressively with regulatory reforms and enforcement actions designed to restore investor confidence. Our primary focus has been to eliminate or reduce conflicts of interest and, to the extent they remain, to assure they are better disclosed. The industry has also shown a willingness to do its part. The reputational black eye endured by the financial services industry has served as a stark reminder of one indisputable truth - that the securities markets thrive when investors have confidence in the fairness and integrity of the system, and that they suffer immeasurably if investors refuse to participate due to a lack of confidence in the markets and market professionals. While challenges certainly remain ahead, significant steps have been taken, and I do believe we are on the right path.

This afternoon, I'd like to highlight some of the steps the Commission has taken to address conflicts in sell-side research and corporate governance. I'll also share some concerns with respect to an emerging area where conflicts of interest are once again being scrutinized - the area of SRO governance.

I. Analyst Conflicts

The potential for conflicts of interest has always been present in the research analyst-investor relationship. There have been longstanding concerns that analysts could issue recommendations for the sake of benefiting their own personal holdings or the trading positions of their firms. To address these potential conflicts, securities firms developed compliance procedures designed to mitigate them. More recently, however, additional conflicts of interest arose as a result of the commingling of investment banking and research services. As investment banking became a more prominent part of the business model for multi-service securities firms, research analysts became key players in landing investment-banking business - playing increasingly important roles as part of the sales teams for investment banks. They became media stars generating millions of dollars for their firms and themselves.

The increased prominence of research analysts exacerbated certain potential conflicts of interest, and in many cases impaired the independence and objectivity of their research. Analysts were able to parlay their media stardom into an ability to move markets at the drop of a "strong buy" recommendation. Too many analysts became focused on the large revenue possibilities associated with bringing in new investment banking clients, rather than issuing objective research based upon a company's fundamentals.

As you all know, the Commission participated in a joint formal inquiry into market practices concerning research analysts, and the conflicts of interest that can arise from the relationship between research and investment banking. This inquiry found a number of serious problems afflicting a significant portion of sell-side research. First, we found that firms' use of research analysts in bringing in investment banking business intruded heavily upon analyst independence. Analysts were pressured to initiate and maintain favorable coverage on investment banking clients. These pressures were exacerbated by the fact that analysts were evaluated, in part, by investment banking professionals, and that their compensation was influenced by their contribution to investment banking revenues.

Serious problems developed as a result of these pressures. In certain instances, the firms' marketing or "pitch" materials implicitly promised that a company would receive favorable research if it agreed to use the firm for its investment banking business. Also, some firms accepted payments for research without disclosing those payments. Even worse, the inquiry exposed instances where research analysts published fraudulent research reports that were contrary to their true views, which were expressed only to favored customers, if at all.

The joint inquiry resulted in a settlement of enforcement actions by the Commission, the NASD, the NYSE, and the States against ten of the nation's largest securities firms, alleging undue influence by investment banking interests on the firms' research. This Global Settlement included substantial monetary relief, imposed structural reforms - such as firewalls and compensation restrictions - that seek to promote analyst independence, mandated additional disclosures regarding potential conflicts, and required that firms provide independent research, at no charge, to accompany their own.

In addition to the structural reforms and disclosure provisions included in the Global Settlement, the Commission recently approved a comprehensive set of SRO rules that seeks to promote independence of analysts and the integrity of sell-side research in a number of significant ways. These rules impose structural reforms designed to eliminate pressure on research analysts from investment banking. They also impose trading restrictions on analysts and firms. Finally, they require specific disclosures of material conflicts - including compensation from the issuers that are the subject of research reports. The Commission also added its own rule - Regulation AC - to promote the integrity of research by requiring that analysts certify to the truthfulness of their research reports.

Underpinning all of these regulatory efforts is the principle that investors must have confidence that an analyst's recommendation is based on an honest evaluation of the performance of the company, and not impaired by conflicts of interest such as the firm's efforts to gain investment banking business or an analyst's attempt at self-enrichment.

We have achieved much in our effort to address the conflicts of interest associated with sell-side research. Our work, however, may not be completed. Among other things, the Commission is considering whether any of the provisions of the Global Settlement should be applied to the industry more broadly. Specifically, Commission staff is evaluating the possibility of recommending a comprehensive Commission rulemaking that would incorporate into one single federal standard all of the rules applicable to research analysts, including the SRO rules and certain provisions of the Global Settlement. In addition, recognizing that our markets are becoming increasingly global in nature, the staff has been working with foreign regulators in an attempt to harmonize our respective rules dealing with research analyst conflicts of interest.

While our efforts at identifying and addressing conflicts of interest will continue, I believe it is the firms themselves that are in the best position to identify and manage these conflicts. When assessing your business practices, I strongly encourage you to think broadly and critically about the types of conflicts of interest that may arise, and to devise creative and effective solutions to mitigate them. I know that this is a daunting challenge. Potential conflicts of interest are inherent in many aspects of the financial services business. But managing those conflicts is central to the success of our financial system.

If there is one lesson we should all take from the recent spate of scandals, it is this - there is no safety in numbers. You cannot hide under the shade of "standard industry practice." The research analyst debacle has clearly demonstrated that the excuse of "everyone else is doing it" is an ineffective defense. Firms that ignore conflicts of interest do so at their peril, and I strongly encourage you to be proactive in identifying and addressing potential conflicts. Furthermore, I believe a constructive environment where the Commission and the industry work effectively and in concert on these issues could help enormously in restoring investor confidence, to the benefit of us all.

I am pleased to observe that the industry appears to be taking significant steps in this direction. Substantial resources are being committed to implement the recently approved SRO rules and the Global Settlement, and some firms appear committed to exceed, rather than merely meet, these standards, both in terms of timing and substance. Industry groups also are taking important steps to build upon existing law and guidance to more effectively address analyst conflicts. The Bond Market Association, for example, is developing "best practices" guidelines to manage research analyst conflicts in the fixed income markets which, as you know, were not the focus of the recent reform efforts. An exercise such as this evidences a commitment to reform through pro-active efforts to identify and manage potential conflicts of interest in the securities business. I applaud those involved in these worthy endeavors.

II. Corporate Governance

Another significant rulemaking effort undertaken recently by the Commission to address potential conflicts of interest has focused on corporate governance reform. After all, we must ensure that investors participate in a marketplace where a company's activities are transparent, and its governance reflects the interests of shareholders - not the self interest of management.

The Commission's actions, which are by now well-known, have included new rules to: require CEOs and CFOs to certify as to the accuracy of their quarterly and annual reports; accelerate the disclosure of personal securities trading by corporate insiders and prevent executives from trading during pension blackouts; and require disclosure of whether a company has a code of ethics for executive officers, and whether it has a designated "audit committee financial expert." In addition, the Commission adopted rules requiring heightened standards of auditor independence and better disclosure of off-balance sheet arrangements, and prohibited markets from listing the security of any issuer that does not comply with the requirements governing audit committees. Finally, as you may know, the Commission expects to consider shortly a series of important NYSE and Nasdaq rules that impose a wide range of corporate governance standards on listed companies. All of these provisions - and that's not the complete list - are aimed at rooting out and reducing potential conflicts of interest relating to corporate governance, and disclosing those that still exist.

III. SRO Governance

The last topic I'd like to touch upon is SRO governance. Recent revelations concerning allegations of governance failures at the NYSE highlight the importance of ensuring that our SROs focus on the effectiveness of their internal governance standards. As you know, earlier this year Chairman Donaldson called upon each of the SROs to review their governance practices in light of the Sarbanes-Oxley Act, and urged them to meet the same high governance standards as those imposed on public companies. As a result, the NYSE formed a Special Committee on Governance whose mandate, among other things, was to conduct a full-scale assessment of the NYSE's governance practices.

I believe it is telling that few, if any, of the SROs, including the NYSE, had focused their reviews on their own transparency, such as that relating to their decision-making processes or the compensation of senior executives. In light of recent events, it is incumbent on us to ask why these quasi-public institutions are not subject to transparency and reporting requirements substantially similar to those applicable to public companies. I would expect the benefits of increased transparency to be realized almost immediately. "Transparency is the best disinfectant" is an oft-quoted statement of William O. Douglas, but one that rings particularly true in this context.

Another area relating to SRO governance that the Commission is likely to revisit is the composition of SRO Boards of Directors. About five years ago, there was a significant effort to move SRO Boards towards having a majority of "public" directors. However, some SROs, including the NYSE, instead have Boards comprised of a majority of "non-industry" directors which, as defined, includes representatives of companies that are listed on, or have other material relationships with, the exchange. As our notions of best practices in governance evolve - and the bar clearly has been raised in light of the Sarbanes-Oxley Act - it is incumbent on us to revisit what it means to be a "public" director of an SRO. In light of our strong interest in ensuring that the self-regulatory function is as fair and rigorous as possible, would it not make sense to refine our concept of a "public" director to include only those persons with no material relationship with the exchange, whether as a representative of a regulated firm, a listed company, or otherwise? The independence standards soon to be applicable to the Boards of listed companies could serve as an appropriate model in this regard. We also should be looking for guidance to the various current "best practices" on governance - such as the ABA's Cheek Report and the Business Roundtable's recommendations, as well as those established pursuant to the Sarbanes-Oxley Act - and analyzing where the SROs' governance is at variance. There may be legitimate reasons for some of the distinctions, but we should critically analyze those differences to ensure that the best and most appropriate governance practices are in place at our SROs.

Finally, it has often been said that the success of self-regulation depends upon the independence of the regulatory function from the business interests of the market with which it is associated and the participants in that market. As we review corporate governance at the exchanges, we must again consider whether improvements can be made in the structure of self-regulation. At a minimum, I believe it makes sense to separate the regulatory function and the market function within an SRO, through distinct budgeting and oversight lines within the same legal entity, or through a separate corporate structure. An alternative model, which some have advocated, is to have a single SRO responsible for member regulation, and each exchange retain responsibility for market regulation. This "hybrid SRO" model could help reduce the number of regulators of broker-dealers, but it also could raise questions as to which regulatory functions relate to member regulation and which relate to market regulation. I am not, at this stage, advocating one model over the other. There are any number of ways to structure an SRO to achieve a more independent regulatory function, and I do not believe it is necessary for the Commission to mandate one single model at this time. Rather, we should work diligently with the SROs and market participants to identify and study the options in more depth, and then build consensus on the structure or structures that most effectively mitigate the potential conflicts of interest inherent in the notion of self-regulation.

In closing, I would like to reiterate how critically important it is for each of you, as well as all members of the securities industry, to embrace all of the recent reforms I have discussed today. Having just experienced one of the most challenging times in our markets' history, we have a unique opportunity to address these issues, and ensure that the U.S. securities markets continue to be the fairest, deepest, and most liquid in the world.

Thank you.

Endnotes

[1] The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publications or statements by any of its employees. The views expressed herein are mine and do not necessarily reflect the views of the Commission or my colleagues on the staff of the Commission.

http://www.sec.gov/news/speech/spch101603pfr.htm

EXHIBIT "C"

April 6, 2001

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

Re: Proposed Rule Changes of Self-Regulatory Organizations (Release No. 34-43860; File No. S7-03-01)

Dear Mr. Katz:

The Federal Regulation Committee, Self-Regulation and Supervisory Practices Committee, Trading Committee and Compliance & Legal Division (collectively, the "Committees") of the Securities Industry Association ("SIA")[1] appreciate the opportunity to comment on the above-referenced rule filing, in which the Securities and Exchange Commission (the "Commission") proposes to adopt Rule 19b-6 of the Securities Exchange Act of 1934 ("Act") in place of existing Rule 19b-4 ("Rule Proposal"). New Rule 19b-6 would, *inter alia*: (i) require the Commission to issue a release announcing a proposed self-regulatory organization ("SRO") rule change within 10 business days of filing with the Commission, or such longer time as the SRO consents to in writing; (ii) eliminate the five-day pre-filing and 30-day operational delay requirement for non-controversial rule changes; and (iii) permit almost all trading rules to become effective immediately upon filing with the Commission. The Commission also proposes to create accompanying new Form 19b-6 to reflect the changes made by the Rule Proposal.

The Committees commend the Commission staff on its efforts to streamline the SRO rule-filing procedures, and concur that prompt public notification of all SRO rule filings will promote effective and efficient rulemaking. Accordingly, the Committees support the Commission's issuance of a release announcing SRO rule changes within 10 business days of filing with the Commission.

The Committees also appreciate the need for innovation and regulatory flexibility in this highly competitive and rapidly changing securities market. The Committees, however, strongly oppose the proposed accelerated SRO rulemaking procedures because, contrary to the Commission's stated objectives, we do not believe they will enhance investor protection and provide greater regulatory certainty. Notwithstanding inherent delays, existing notice and comment procedures are a vital component of the regulatory process. They enable interested parties to provide valuable information about actual market practices and potential consequences early enough in the process to avoid promulgation of ineffective or overly burdensome rules and regulations. By permitting SRO rules, and particularly those relating to trading practices, to become effective immediately upon filing with the Commission without benefit of prior public review and comment, the Rule Proposal increases the likelihood of inefficient or otherwise potentially deficient SRO rulemaking.

Our primary objection to the Rule Proposal is its sweeping inclusion of almost all SRO "trading rules" within the scope of rulemaking that may qualify for expedited treatment -- rules that in the past have prompted lengthy debates, as well as subsequent clarifications, interpretive guidance and repeated delays. We are especially concerned by the elimination of a 30-day operational delay for these types of rules. As detailed below, even seemingly minor trading rules may necessitate changes in policies, procedures and technology for full compliance. The logistics and resources involved in interpreting, effecting and testing such changes for member firms can be substantial and often require significant lead-time. Rule 19b-6 does not provide firms with adequate time in advance of effectiveness to prioritize obligations and take the necessary preparatory steps to ensure compliance. Rather, it forces firms -- for fear of regulatory liability -- to hastily commit time, effort and resources to conform both systems and procedures to a new rule without the appropriate analysis and resolution of actual and corollary issues. Such rushed compliance only increases the likelihood of mistakes, confusion, additional cost, systems disruptions and market risk, all of which ultimately impact markets adversely and detract from customer protection.

Moreover, by relying exclusively upon post-effective notice and comment procedures to raise regulatory deficiencies, the Rule Proposal invites potentially inferior SRO rulemaking that must later be abrogated by the Commission upon consideration of public comment, thus requiring more active and costly intervention by the Commission and staff. Meanwhile, member firms, having already devoted resources and incurred related costs in making the necessary adjustments, will face additional burdens and expense to unwind the initial changes.

In light of the foregoing, we urge the Commission to reconsider the current Rule Proposal. Instead, should the Commission nevertheless conclude that accelerated approval of SRO rule filings is necessary, we respectfully request the Commission seriously consider the alternatives presented in Part IV of this letter, which we believe more sensibly balance competitive incentives with the appropriate levels of investor protection, regulatory certainty and fairness.

I. Prior Notice and Comment Fosters
Effective and Efficient Rulemaking

Among the most troubling aspects of the Rule Proposal is its deferral of public notice and comment until after the SRO rule is in effect and operative. In the Rule Proposal, the Commission seeks to permit certain categories of SRO rules that "effect minor changes," as well as the vast majority of trading rules, to become effective immediately upon filing with the Commission without benefit of prior public review and comment. The stated objective of such a process is to enable SROs to introduce changes to their markets more swiftly, and thereby better compete with Alternative Trading Systems ("ATSs") that are not subject to the same regulatory filing requirements under the Act.

The Committees are aware of the existing business tensions between entities that are regulated as broker-dealers and those that are not. Notwithstanding such tensions, we cannot ignore the different roles ATSs and SROs serve and the extent to which member firms may be adversely affected by the imposition of new regulatory obligations that were not properly vetted prior to implementation. As fittingly observed by the Commission, SROs are "quasi-public agencies" that "exercise certain quasi-governmental powers over members through their ability to impose disciplinary sanctions, deny membership, and require members to cease doing business entirely." Indeed, SROs are legally bound to enforce their rules against their members, subject to Commission sanctions for failure to do so. By contrast, ATSs are private entities that neither establish conduct rules, nor have the ability to discipline subscribers other than by exclusion of trading. Thus, notwithstanding the Commission's attempt to level the regulatory playing field, we believe that the proposed procedures are ripe for abuse and indeed inconsistent with elemental notions of fairness and due process.

The public notice and comment procedures under Section 19(b)(1) of the Act serve several fundamental policy objectives. Chief among them is regulatory efficiency and transparency.[2] Specifically, such procedures ensure that affected parties are afforded a reasonable opportunity to review and question SRO action prior to implementation. Likewise, the process enables parties of differing perspectives to provide additional information and alternative solutions not always contemplated or addressed in a rule proposal. Consequently, there is less necessity for SROs to repeatedly correct, clarify or otherwise substantiate their rule proposals. In the end, this produces more precise, well-tempered, resource-efficient regulation that ultimately serves investor, industry and regulator alike.

Under the Rule Proposal, market participants will not have an opportunity to view the rule change in its entirety and raise concerns until the rule's publication in the *Federal Register* after it becomes effective. Such a *post-facto* regime hardly provides meaningful comment since firms would have already responded to the rule change by making the requisite systems and procedural adjustments to conform to their new regulatory obligation. Meanwhile, the public is left with potentially flawed regulation that must be rescinded subsequently upon scrutiny and abrogation by the Commission.

II. Trading Rules are Especially
Unsuitable For Immediate Effectiveness

Public notice and comment is particularly valuable within the realm of trading rules, where industry familiarity and experience are often crucial to a thorough assessment of a rule's practical implications. Because trading technology and broker-dealer automated systems have become increasingly sophisticated, ostensibly minor changes to trading practices often have far-reaching ramifications beyond those initially envisioned by an SRO rule. Input and analysis from all interested parties, such as compliance, trading, systems and third party technology providers, uncovers possible problems or potential consequences that may have been overlooked by an SRO rule proposal. It also allows the industry to offer alternate solutions in light of actual business practices and existing systems. By allowing for such productive dialogue prior to rule effectiveness, the current regulatory structure avoids undue effort, expense and repeated regulatory clarifications.

Consider, for example, the NASD's riskless principal trade reporting rules. At first blush, these rule changes appeared fairly straightforward. Yet, as everyone soon learned, compliance with the rules had far-reaching systems implications that were neither contemplated nor addressed in the adopting releases. Consequently, implementation was postponed several times while the NASD repeatedly clarified various aspects of the rule and incorporated suggestions of the industry.

Another example is the NASD's most recent marketable limit order interpretation, which became immediately effective because it was an "interpretation" rather than a rule change. By treating marketable limit orders as market orders rather than limit orders, the NASD prevented such orders from continuing to "jump" from the back of the market order queue to the front of the limit order queue. While the end result was probably correct from a policy standpoint, the problem was that the firms' systems were programmed precisely the opposite way in compliance with previous interpretations. Consequently, firms were "out of compliance" as soon as this new interpretation was announced, which could have been avoided had member firms been given the opportunity to raise these issues prior to implementation.

Therefore, while the Committees recognize that the current notice and comment procedures may prolong enactment of SRO rulemaking, we firmly believe that, in the long run, they promote transparent, efficient and effective regulation.

We also believe that the Commission cannot rely solely upon the SROs' internal vetting processes to properly capture the divergent perspectives and concerns of affected parties. For instance, internal SRO procedures may involve review and majority approval of rule proposals by special function committees. While these committees typically include industry members, there is no assurance that a handful of industry representatives will provide the "big picture" view obtainable through broader notice and comment procedures. In fact, such committees may not include industry members from the relevant business unit or with the requisite expertise to conduct a proper analysis of the rule's ramifications. Thus, absent procedures that canvass all interested parties, there is great risk that SROs will not fully appreciate the implications of a new trading rule, including whether such rule will make "fundamental structural changes to the market" or "significantly affect the protection of investors."

We appreciate the Commission's concern that undue delays in implementing changes to capital markets may stifle innovation. Nevertheless, the speed of rule changes must be predicated upon the reasonable exposure of rules by SROs to affected parties before they become effective, particularly if members will be subject to sanctions for non-compliance. Although the option is available to them, SROs often do not provide notice to members or a comment period with respect to such proposed rule changes. Consequently, firms first learn about rule changes when the Commission notices them for public comment. Given such practices, it is unreasonable for the Commission to further restrict the availability of meaningful review and comment for those most impacted by the adoption of SRO rules.

III. Rule 19b-6 Does Not Provide Adequate
Time For Normal Preparatory Efforts

Equally problematic is the ability of SROs to mandate and enforce instantaneous compliance with Rule 19b-6 changes without regard for normal preparatory efforts. As proposed, Rule 19b-6 eliminates the 30-day operational delay for "non-controversial" rule filings, and permits those rules, along with the vast majority of SRO trading rules, to become effective and operative immediately upon filing with the Commission.[3] The practical effect is that, irrespective of operational burdens or attendant costs, member firms will be obligated to implement the requisite rule change upon announcement by the Commission, or face potential disciplinary action for failure to do so. Experience shows, however, that despite best efforts, prompt implementation of trading rule modifications simply may not be feasible given the inherently technical characteristics of such rules.

As with any rule change, those relating to trading practices will typically require some form of change to broker-dealer systems, policies and procedures. Due to the complexity and interdependency of systems, however, trading rule modifications may necessitate a host of technology adjustments that extend well beyond trading utilities. These could include linking information not previously connected, or capturing specific data from platforms not already integrated within the mainframe systems. It could also include modifying trade reporting protocols, surveillance systems and supervisory procedures.

Firms, therefore, must be afforded adequate time to prioritize, plan for and implement the necessary changes. They also must be able to analyze, expose and resolve any inevitable systems "glitches" in advance of implementation in order to avoid unnecessary regulatory liability. There is also testing and training of personnel to be considered. Some firms also rely on third-party providers for trading functionalities who have their own agenda or timetables. Add to the equation increased demands on information technology staff, as well as other ongoing systems challenges, regulatory obligations and business initiatives with which members must contend on a daily basis, and it becomes increasingly evident that SRO trading rules are particularly unsuitable for the expedited treatment proposed under Rule 19b-6.

At best, there will be rushed compliance, which only increases the likelihood for mistakes, confusion, and operational disruption -- all requiring additional time, work and money to resolve. At worst, the realities of implementation will prevent timely compliance, thus exposing firms to unnecessary regulatory liability.[4] Thus, notwithstanding increased competitive pressures from ATSs, reducing regulatory filing requirements for SROs, as articulated in the Rule Proposal, will not promote innovation, enhance investor services or create regulatory certainty as envisioned by the Commission. Accordingly, we request the Commission to reconsider the current proposal. Should the Commission, nonetheless, determine that investors are better served by streamlining the regulatory rule filing requirements for SROs as proposed, we strongly urge the Commission to give serious consideration to the alternatives we offer below.

IV. SIA Alternatives

Before subjecting firms to new regulatory obligations that were not noticed for public comment in advance of effectiveness, the Commission should ensure that adequate safeguards are maintained and practical impacts carefully deliberated. Specifically, a better alternative is one that expressly limits the scope of rules that may qualify for expedited treatment to those rules that can be implemented readily with minimal impact on member firms' technical and supervisory systems. Under the Rule Proposal, the only SRO rules ineligible for immediate effectiveness are those that "make fundamental structural changes to that SRO's market and that significantly affect investors or impose a significant burden on competition." SROs, therefore, may create new substantive obligations for firms without any required analysis of whether compliance can be accomplished readily. Nor are SROs compelled to examine potential administrative, operational or economic burdens to the industry prior to filing with the Commission. To promote efficiency and avoid overly burdensome regulation, the Commission should specifically require SROs to undertake the foregoing analysis and certify to such minimal impact as part of their Form 19b-6 filing as a precondition for immediate effectiveness. Such an approach, we believe is entirely consistent with the Commission's objectives, as well as the mandates of Section 3(f) of the Act.[5]

Alternatively, the Commission should suspend operation of a new or amended trading rule for 30 days in order to permit the marketplace to identify possible unintended consequences and implementation complications in time to take corrective action. It will also permit the Commission to abrogate the rule and activate the normal notice and comment procedures without risk of systems disruptions.

Finally, the Commission should include a mechanism for the consideration of applications, on an equally streamlined and expedited basis, for emergency stays of rules in the event of exigent or unanticipated occurrences relating to rule implementation.

V. Conclusion

The Committees appreciate the opportunity to provide comments on the Rule Proposal. While the Committees commend the Commission's efforts to improve SRO rule filing procedures, Rule 19b-6 is fraught with difficulties and does not adequately take into account the practical implications of the proposed accelerated rulemaking. The Committees believe that the regulator's need for flexibility must be balanced against the need for regulatory transparency, consistency and fairness. Accordingly, we strongly urge the Commission to reconsider the Rule Proposal and at a minimum seriously consider the alternatives presented by the Committees.

If you have any questions or would like to discuss our comments further, you can contact Amal Aly, Staff Advisor to the Self-Regulation and Supervisory Practices Committee at (212) 618-0568.

Sincerely,

Christopher R. Franke
Chairman
Self-Regulation and Supervisory Practices Committee

Joseph Polizzotto
Chairman
Federal Regulation Committee

Peter C. Cohan
Chairman
Trading Committee

Michael H. Stone
President
Compliance and Legal Division

cc : Honorable Laura S. Unger, Acting Chairman
Annette Nazareth, Esq., Director, Division of Market Regulation
Robert L. D. Colby, Esq., Deputy Director, Division of Market Regulation
Belinda Blaine, Esq., Associate Director, Division of Market Regulation
Jack Drogin, Esq., Assistant Director, Division of Market Regulation
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Footnotes

1 The Securities Industry Association brings together the shared interests of more than 680 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of more than 50-million investors directly and tens of millions of investors indirectly through corporate, thrift, and pension plans. The industry generates more than $300 billion of revenues yearly in the U.S. economy and employs more than 600,000 individuals. (More information about the SIA is available on its home page: http://www.sia.com.)

2 Notably, during the past year, SIA has undertaken a project to improve and enhance global regulatory transparency. The lynch-pin of this effort has been the development of a paper entitled, *Promoting Fair and Transparent Regulation*, outlining the fundamental principles upon which transparent markets are built. Among the principles noted under rulemaking and interpretation, are that: (i) regulators should utilize open and public processes for consultation with the public on proposals for new regulations and changes to existing regulations; and (ii) market participants should be given a reasonable period of time to implement new regulations. We believe these goals are in the best interests of the public and that the proposed changes to Rule 19b-6 contravene the core principles of regulatory transparency.

3 With respect to the "non-controversial" category, such rule filings qualify for immediate effectiveness provided the rule does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) permit unfair discrimination between customers, issuers, and brokers or dealers. Trading rules, which are governed under a separate provision, similarly become operative immediately upon filing, provided the SRO certifies that it is has established surveillance and enforcement procedures for activity conducted pursuant to the trading rule. The only trading rules ineligible for immediate effectiveness are those that would make fundamental structural changes to the market, significantly affect the protection of investors or impose a significant burden on competition.

4 Several SROs, including the NASD, have imposed numerous and significant disciplinary actions against member firms for supervisory deficiencies, in the areas of

trade reporting, market-making activities, and order-handling practices. Of particular focus are firm's written supervisory procedures, are routinely scrutinized by regulators during regulatory examinations.

5 Section 3(f) requires the Commission, whenever engaged in the review of an SRO rule, to consider whether the rule is necessary or appropriate in the public interest and whether it will promote efficiency, competition and capital formation. 15 U.S.C. 78c(f).

EXHIBIT "D"

NYSE in the News

April 8, 2005: **CNBC interview with NYSE Chairman, Marshall N. Carter and NYSE CEO, John A. Thain**

BOB PISANI, CNBC: The big discussion is what is going on at the New York Stock Exchange.

Hey, come on over here, Marshall Carter. Let`s say hello to the new kid on the block here. Marshall Carter, the new chairman of the New York Stock Exchange, this morning. How are you, sir?

MARSHALL CARTER, CHAIRMAN, NEW YORK STOCK EXCHANGE: Good to see you.

PISANI: Hi, John Thain, the CEO, of course, of the New York Stock Exchange. Come on in, say hello to everybody.

Marshall Carter, your first real interview as chairman of the New York Stock Exchange, say hello to the viewers at CNBC. I know, of course, this is a very big week for you, there has been a lot of changes under your predecessor, John Reed. What is your biggest challenge now? I know that you talked to the membership yesterday. What is the first item on your list to-do?

CARTER: I think the biggest challenge for the board is to deal with John Thain and the staff on the strategy for the exchange. We have to take a serious look at our business motto. We have to take a serious look at our ownership structure, and that`s nothing new. That has been widely reported.

PISANI: One of the big issues, of course, that I know Mr. Thain has been dealing with all this year, is how to get the revenues up. Your revenue base has been flat for a number of years now. What are you going to do to get some more revenues here?

CARTER: Well, I think we need more product, whether we do that vertically, or horizontally, geographically, vertically, buy more product, options, bonds, things of that nature, we need more product here on the floor.

PISANI: So are we going to see for example derivative trading, will we be seeing options trading, or futures trading or anything more?

CARTER: Well, let me ask John. John?

JOHN THAIN, CEO, NEW YORK STOCK EXCHANGE: Well, as I`ve said before, I think we would like to see some derivative trading, some options trading, and certainly some fixed income trading.

PISANI: Now, of course, there`s been a lot of discussion as well about expanding the trading hours here at the New York Stock Exchange, maybe opening earlier, can you bring us up-to-date on what if anything is happening on that front?

CARTER: Well, we are taking a hard look at that. John had some specifics yesterday in the members meeting he might want to share with you.

THAIN: Well, we talked about that with our board of executives and our board of directors and with the members. And, you know, there is pros and cons to that. But when we look at our market share, we do miss a couple of percentage points of market share because trading occurs when we are not open.

CARTER: And yet, with a fully-independent board, we really rely on our board of executives as the practitioners, the people that really know the mechanics of the market to give us the input on these kind of questions.

PISANI: So is it more likely or less likely we might see expanded trading hours in the next six months?

CARTER: Well, it is something that we`ll probably decide on within the next few months, but right now, we really don`t have an answer to that.

PISANI: There has also been a lot of discussion about possibly going to a for-profit status, perhaps, as a precursor to going public here at the New York Stock Exchange. A lot of members have been excited by that idea. Is that likely to happen Mr. Carter? And is there any kind of a timeframe?

CARTER: Well, I wouldn`t want to put a timeframe or percentage on that, but John has a special task force that has taken a hard look at that. And the board has been discussing that in some detail. The range of options are all the way from a quasi-public utility, the way we are now, all the way to a full-blown public offering global company, and there is almost any range in that span.

PISANI: Is it likely, though, to happen, though, within the next year? Do you see something actually happening along that line? I mean, we have seen, Mr. Thain, prices going up in the last few weeks. Obviously, some people are hoping that the option of going to for-profit as a way of going public is going to happen?

THAIN: Yes, I think we will decide which direction we want to go really within the next year for sure. And I don`t want to put any probabilities or any particular timeframe on it, but it is something that we really do have to address and give an answer to.

PISANI: Let me ask about the hybrid trading model. Mr. Thain, I think, this is probably one of your big issues going forward, big things you want to work on, can you explain to our viewers a little bit why hybrid trading is important. Hybrid trading, of course, would allow expanded computerized trading down here in addition to the floor-based model. Why is it important for the average person that`s out there? And how is it going to help the New York stock exchange? Mr. Charter.

CARTER: I would be happy to answer that. The floor of the New York Stock Exchange is a great place, provides a great marketplace, the opportunity to get price improvement, all of the liquidity and all of the lower cost of trading here. But there are people who want to trade quickly. They want to trade electronically. So we want to give our customer base a choice. We want to let them trade electronically, instantaneously, if that`s how they want to trade, but we still want to give them the benefit of giving their orders to a floor broker, to having the specialist price improve. And so we`re going to really run a system to give customers a choice.

PISANI: Very quickly, we have to go. Is the floor still relevant? There are a lot of people who say the floor is a bit outmoded, that we don`t need it anymore. Do we need the floor and why?

CARTER: It`s absolutely still relevant. As you look around here, you will see people, but the majority of what you see is electronic trading and electronic machines. It just has the human interface, which we think is very necessary to keep prices consistent and to avoid turbulence in the market.

THAIN: You know, we have $20 trillion worth of company stock that trades here, there is a reason why that trades here, and that`s because this system works.

PISANI: Marshall Carter, congratulations on your new position. John Thain, CEO of the New York Stock Exchange, thanks for coming by.

PROOF OF SERVICE

I am over the age of 18 years and not a party to this action. My business address is: 10732 Farragut Drive, Culver City, CA 90230-4105
Telephone No. (310) 838-8105; Facsimile No. (310) 838-8105.

On March 16, 2007 I served true copies of documents entitled:

REQUEST FOR JUDICIAL NOTICE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

upon the parties in this action addressed as stated on the attached service list:

[ ] **OFFICE MAIL:.** By placing in sealed envelope(s), which I place for collection and mailing today following the ordinary business practices. I am readily familiar with this office's practice for collection and processing of correspondence for mailing; such correspondence would be deposited with the United States Postal Service on the same day in the ordinary course of business.

[X] **PERSONAL DEPOSIT IN MAIL:** By placing in sealed envelope(s), which I personally deposited with the U.S. Postal Service at Culver City, CA, with first class postage thereon fully prepaid.

[ ] **EXPRESS U.S. MAIL:** Each such envelope was deposited in a facility regularly maintained at the U.S. Postal Service for receipt of Express Mail at Culver City, CA, with Express Mail postage paid.

[ ] **HAND DELIVERY: I** caused to be had delivered each such envelope to the office of the addressee.

[ ] **FEDERAL EXPRESS BY AGREEMENT OF ALL PARTIES:** by placing in sealed envelope(s) designed by Federal Express with delivery fees paid or provided for, which I deposited in a facility regularly maintained by Federal Express or delivered to a Federal Express courier, at Culver City, CA.

[ ] **ELECTRONIC MAIL:** By transmitting the document by electronic mail to the electronic mail address as stated on the attached service list.

[ ] **FAX (BY AGREEMENT ONLY):** By transmitting the document by facsimile transmission. The transmission was reported complete and without error.

[X] **(Federal)** I declare that I am employed in the office of a member of the bar of this Court, at whose direction the service was made. I declare under penalty of perjury that the foregoing is true and correct.

DATED: March 16, 2007

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PAULETTE D. GREENBERG

<u>HERBERT LESLIE GREENBERG v. SEC</u>

United States District Court - Central District of California

Case No. CV 06-7878 GHK (CTx)

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