A. *Implied Preemption*

In the absence of express authority to compel disclosure, an argument can often be made that state intellectual property rights are impliedly preempted by federal securities law. As discussed above, state law intellectual property rights have been preempted to a degree by federal intellectual property law. When Congress has "struck the balance" between private incentives and public access, states are not permitted to "second-guess" Congress' judgment by affording greater protection under state law.[259] Even when specific rights under state law would not be protectable under federal copyright or patent law, such as information or utilitarian design concepts, such rights may be preempted if they fall within the "broad scope" of protectable "subject matter."[260]

Federal securities law also contains extensive examples of express and implied preemption, largely motivated by the desire to allow the SEC to dictate the scope of limits of securities regulation and eliminate duplicative and potentially inconsistent state regulation. Amendments to the federal securities laws adopted in 1996 as part of the Capital Market Efficiency Act[261] preempt state rules and regulations governing public offerings and offering documents, even when such securities or securities are themselves exempt from federal registration.[262] Certain state law securities fraud class actions were also precluded

259. *See* Bonito Boats v. Thunder Craft, 489 U.S. 141, 152 (1989) (patent law); Feist Publ'n, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340 (1991) (copyright).

260. *See Bonito Boats*, 489 U.S. at 155 (citing Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470 (1974)) (distinguishing state law protection of trade secrets from state law protection for unpatented items in the public domain); W.T. Rogers Co. v. Keene, 778 F.2d 334 (7th Cir. 1985) (protecting state law trade dress claims).

261. Capital Markets Efficiency Act of 1996, Pub. L. No. 104-290, 110 Stat. 3416 (1996) (codified in scattered sections of 15 U.S.C.).

262. 15 U.S.C. § 77r (2000) (preempting any state law, rule, regulation, order, or other administrative action with respect to "covered securities," the "registration or qualification of securities, or . . . securities transactions," the use of "any offering document, . . . proxy statement, report to shareholders, or other disclosure document" other than incorporation documents, or merit-based prohibitions, limitations or conditions on their offer or sale).

by the Securities Litigation Uniform Standards Act,[263] even when the underlying cause of action is not actionable under federal securities law.[264] The Exchange Act has also been read not only expressly to preempt antitrust law when Congress has instructed the Commission to adopt rules to address a particular practice,[265] but also impliedly to preempt antitrust enforcement if there exists the mere potential for SEC rulemaking in a particular sphere of securities regulation.[266]

The Commission has occasionally asserted such preemptive power with respect to state intellectual property. For example, the Commission has suggested that the power to require *consolidated* dissemination of market information impliedly preempts assertion of *individual* rights therein:

> This question presumes, however, that essentially state law concepts of ownership prevail in this area. In fact, market information, at least since 1975, has been subject to comprehensive regulation under the Exchange Act, particularly the national market system requirements of Section 11A. To implement the national market system, the Commission has required the SROs to act jointly pursuant to various national market system plans in disseminating consolidated market information.
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> . . .
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> The plans also govern two of the most important rights of ownership of the information—the fees that can be charged and

263. *See* Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, § 101(b)(1)(B) (codified at 15 U.S.C. § 78bb(f)).

264. *See* Merrill Lynch, Pierce, Fenner & Smith v. Dabit, 547 U.S. 71, 126 S. Ct. 1503, 1506, 1515 (2006) (holding that a state securities fraud class action on behalf of long-term "holders" of a security was precluded by Securities Litigation Uniform Standards Act of 1998, even though the plaintiffs would not meet the "purchaser or seller" standing requirement for a Rule 10b-5 class action).

265. *See* United States v. Nat'l Ass'n Sec. Dealers, Inc., 422 U.S. 694 (1975); Gordon v. NYSE, 422 U.S. 659 (1975); Silver v. NYSE, 373 U.S. 341, 357 (1963); *In re* Stock Exchanges Options Trading Antitrust Litig., 317 F.3d 134 (2d Cir. 2003); Friedman v. Salomon/Smith Barney, 313 F.3d 796 (2d Cir. 2002); *see also* Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607 (2003).

266. *See, e.g.*, Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 U.S. 762, (2006), *cert. vacated and granted*, No. 05-1157, 2007 WL 789065, 75 USLW 3497 (U.S. Mar. 19, 2007).

> the distribution of revenues derived from those fees. As a consequence, no single market can be said to fully "own" the stream of consolidated information that is made available to the public. Although markets and others may assert a proprietary interest in the information that they contribute to this stream, the practical effect of comprehensive federal regulation of market information is that proprietary interests in this information are subordinated to the Exchange Act's objectives for a national market system.[267]

This argument would presumably be extended even to those market participants who do not share in consolidated market revenues. To a degree, this structure is motivated by the need to fund SROs.[268] On the other hand, the inability to regulate the fee structure of and access to non-SRO markets might have led the Commission to foreclose such markets from selling substantively similar market information until Regulation ATS extended similar requirements to other trading venues.

While preemption of state or federal intellectual property rights may be a useful strategy for achieving regulatory objectives, it "lacks nuance."[269] In *Nasdaq v. Archipelago*,[270] for example, the district court rejected the argument that the Exchange Act's national market system authority preempted Nasdaq's proprietary interest in the Nasdaq-100 index. In so doing, the Court relied heavily on the Commission's own amicus brief, which argued that no conflict of interest existed between protecting the

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267. Market Data Concept Release, 64 Fed. Reg. 70,613, at 70,615 (Dec. 17, 1999).

268. *See* Listing and Trading of Affiliated Securities by a Self-Regulatory Organization, Exchange Act Release No. 50699, 69 Fed. Reg. 71,126 (Dec. 8, 2004); *see also* Letter from Mark E. Lackritz, President, Securities Industry Association, to Jonathan G. Katz, Secretary, SEC, Mar. 9, 2005, *available at* http://www.sia.com/2005_comment_letters/5218.pdf (advocating the use of membership and regulatory fees to fund self-regulation rather than subsidies from the sale of market data).

269. *See* Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 136-37 (1999); *see also* Kathleen K. Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL'Y 83, 132 (2006); Samuel M. Bayard, *Chihuahuas, Seventh Circuit Judges, and Movie Scripts, Oh My!: Copyright Preemption of Contracts to Protect Ideas*, 86 CORNELL L. REV. 603, 643 (2001).

270. 336 F. Supp. 2d 294, 301-03 (S.D.N.Y. 2006).

commercial value of indices by charging licensing fees for their use and the objectives of the Unlisted Trading Privileges Act in permitting unlisted trading of listed securities by competing exchanges.[271] Such "all-or-nothing" regulation of information rights might thus result in underregulation as well as overregulation.

B. *Compulsory Licensing and Rate Regulation*

Another commonly advocated approach for balancing the competing objectives of intellectual property law is compulsory licensing. Widely used for regulating natural monopolies, compulsory licensing systems have been extended to the licensing of intellectual property. Thus, in the field of copyright, compulsory licensing is mandated for certain works, such as cable, sound recordings, public broadcasts, and satellite transmissions.[272] While historically license fees have been set by regulatory bodies, modern compulsory licensing schemes may rely on private negotiations among intellectual property owners (pursuant to an exemption from antitrust law), backstopped by arbitration or regulatory action.[273]

In the absence of a statutory scheme, various agencies have sought to create compulsory licensing systems through enforcement mechanisms, either by settlement decrees or by judicial order.[274] The SEC has, in the context of wholesale market data transactions, traditionally sought to establish some control over rate-setting on two footings. First, the SEC has the authority to disapprove rules that do

271. *Id.* (referring to the amicus brief of SEC).

272. *See* 17 U.S.C. §§ 111, 114, 118, 119 (2000).

273. *See* Reichman, *supra* note 9, at 2523-24.

274. The Justice Department monitors the rates charged for licensing music pursuant to consent decrees negotiated with American Society of Composers, Authors, and Publishers and Broadcast Music, Inc. *See, e.g.*, United States v. Broadcast Music, Inc., 1996-1 Trade Cas. ¶ 71,378 (S.D.N.Y. 1994); United States v. Broadcast Music, Inc., 1966 Trade Cas. ¶ 71,941 (S.D.N.Y. 1966); United States v. ASCAP, 1950-51 Trade Cas. ¶ 62,595 (S.D.N.Y. 1950); United States v. ASCAP, 1940-43 Trade Cas. ¶ 56,104 (S.D.N.Y. 1941); United States v. Broadcast Music, Inc., 1940-43 Trade Cas. ¶ 56,096 (E.D. Wisc. 1941). The Federal Communications Commission has entered into consent decrees with common carriers regarding access to telecommunications networks. *See, e.g.*, Verizon v. FCC, 535 U.S. 467 (2002); Lemley & McGowan, *supra* note 139, at 541.

not comply with the Exchange Act's statutory requirement that exchanges provide for the "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."[275] The SEC also has authority to "to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this chapter in planning, developing, operating, or regulating a national market system."[276]

Because neither provision confers upon the Commission express authority to engage in ratemaking, Commission action has historically consisted of negotiation among SROs in the shadow of its plenary authority. Commission rules, for example, require self-regulatory organizations to collect top-of-book information, consolidate the information across markets through the use of an exclusive securities information processor, and disseminate the data to the public. Since SRO rates must be approved by the Commission, any increase in rates must be negotiated with the Commission. In disputes between SROs and non-SROs with respect to approved rules, however, the Commission can be no more than a passive intervenor in judicial proceedings.[277]

Perhaps the most significant issue in Commission ratesetting efforts is the lack of any statutory metric by which to determine what rates are appropriate and how rates should be allocated.[278] Ratemaking may proceed in a number of ways: cost-plus approaches seek to determine the cost of providing a service and then to add a reasonable rate

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275. 15 U.S.C. § 78f(b)(4) (2000); *see also* 15 U.S.C. § 78o-3(b)(5) (2000) (requiring the rules of a national securities association to "provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls").

276. 15 U.S.C. § 78k-1(a)(3)(B).

277. Nat'l Ass'n of Sec. Dealers v. SEC, 801 F.2d 1415 (D.C. Cir. 1986).

278. By contrast, Congress has expressly provided a cost-basis mechanism for the computation of the aggregate amount of fees to support the creation of accounting and auditing standards under Sarbanes-Oxley. *See* Sarbanes-Oxley Act of 2002 § 109, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7219 (2005)) (providing that each funded standard-setting board shall establish a budget, which shall be funded by the allocation of fees to public issuers based on their relative share of equity market capitalization).

of return to justify capital investment, while market-based approaches may seek to determine the "value" of a service by measuring the commercial value of comparable, unregulated services in the marketplace.[279] Data vendors have lamented the lack of such price analysis when approving SRO rate schedules, noting that the Commission merely compares the rates set by oligopolists against one another, rather than requiring an independent basis for approving such rates.[280]

The Commission has considered whether cost-plus licensing is feasible in the context of market information. While the Commission has stated that the price of market data should be reasonably related to the cost of production and has solicited comment on various approaches for allocating costs to the production of data by exclusive processors, it has not formally applied a cost-based standard to proposed fee schedules. First, cost-plus licensing would require greater transparency in the finances of self-regulatory organizations, and decisions~~terminations~~ as to which SRO services should be included in determining~~e~~ the cost of producing market information, as opposed to facilitating trades, supervising members, listing companies, and all of the other SRO services from which SROs draw income.[281] Second, cost-plus

279. *See generally* Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885 (2003); Joseph D. Kearney & Thomas W. Merrill, *The Grand Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1340-46 (1998).

280. Petition for Commission Review of Exchange Act Release No. 54,597 (File No. SR-NYSEArca 2006-21), *available at* http://www.sec.gov/rules/other/2006/netcoalitionpetition111406.pdf (seeking full Commission review of NYSEArca rulemaking approved by delegated authority to the Division of Market Regulation). In the petition, a coalition of internet data providers sought reconsideration of a proposed fee schedule for NYSEArca limit order book quotations because the Division failed to apply a cost-based standard, but referred generally to the consistency of NYSEArca's classification of fees with that of other exclusive processors, such as Nasdaq, the Options Price Reporting Authority, the NYSE, and the CT and CQ Plans. Petitioner noted, inter alia, that Archipelago had provided this information for free prior to its merger with the NYSE.

281. *See, e.g.*, Reichman, *supra* note 9, at 2533-45. *See generally The SEC's Market Structure Proposal: Will It Enhance Competition?: Hearing Before the Subcomm. on Capital Mkts., Ins., and Gov't Sponsored Enters. of the H. Comm. on Fin. Servs.*, 109th Cong. (2005); Market Data Concept Release, 64 Fed. Reg. 70,613, at 70,629 (Dec. 17, 1999). The Commission has recently proposed rules

licensing requires the SEC to approve the stratification of different classes of investors for purposes of developing fee schedules.[282]

Value-based approaches are even more difficult to fathom. Rebates paid by exchanges and other market centers to individual members and customers may provide some evidence that market data fees are set too high. Nevertheless, it is difficult to separate out whether such rebates are designed to mitigate market data overcharges or whether such rebates are a form of ex-post payment for order flow.[283] The Commission has made attempts to determine the proportionate "value" of one SRO's quotation information versus another's based on the quality of such information.[284] Such approaches, however, entail consideration of a number of variables—such as the market capitalization and liquidity of the item being quoted or the volume of trades, or the amount of time the market is quoting at the inside quote—which a regulatory formula can only crudely approximate.[285] Once enshrined in

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to require greater separation between SROs' regulatory and operational functions and to require internal controls to ensure that regulatory monies do not subsidize operational activities. *See* Fair Administration and Governance of Self-Regulatory Organizations, Exchange Act Release No. 50,699, 69 Fed. Reg. 71,126 (Dec. 8, 2004) (proposed rules to be codified at 17 C.F.R. §§ 240.6a-5(n)(1), (4), 240.15Aa-3(n)(1), (4)).

282. *See, e.g.*, Petition for Rulemaking, submitted by Andrew C. Wells, Securities Industry Association, to Jonathan G. Katz, SEC (Apr. 14, 2005), *available at* http://www.sec.gov/rules/petitions/petn4-499.pdf (petitioning the Commission to review the inconsistent definitions of "professional" and "nonprofessional" investors for purposes of determining the terms on which such persons may purchase market information).

283. SELIGMAN, supra note 22, at 397-416 (describing "give-up" arrangements on stock exchanges as symptomatic of "higher-than-competitive-level transaction costs" before the abolition of fixed commission schedules in 1975).

284. *Cf.* Reichman, *supra* note 9, at 2533-45. The Commission's proposal was motivated, in part, by the gamesmanship involved in allocating revenues by traditional formulae based on the number or volume of transactions. Regulation NMS Proposing Release, 69 Fed. Reg. 11,126, at 11,179-80 (Mar. 9, 2004).

285. The formula for the allocation of market data revenues by SRO exclusive processors under NMS Plans essentially allocates income first to individual "eligible securities" reported under a Plan based on a relative measure of total transaction volume ("security income allocation"), and then distributes the security income allocation to individual Plan participants based on the proportionate dollar volume of transaction reports reported by the

national market system plans, moreover, further amendments may be prolonged by dissenting parties who have little interest in accommodating their competitors.

Compulsory licensing has other limitations, including the difficulty of limiting the scope of information subject to a Commission-established licensing regime. For example, in the context of market information, the more pressure is placed to make visible top-of-book data accessible, the more incentive market centers have to render the top-of-book information as valueless as possible, while creating more content-laden, lesser-regulated categories of data.[286] Thus, attempts to regulate the cost of market data run the risk of eroding the value of the "core market data" that is subject to compulsory licensing. On the other hand, an attempt to regulate all market data would paralyze innovation in market data products, if only because the Commission would be called upon in each case to determine whether the fees charged for each stratum of data are reasonable.[287]

C. *Nondiscriminatory Access*

The Commission has also experimented with the regulation of selective disclosure of information under the rubric of fair and reasonable or nondiscriminatory access. Recent scholarship has advocated the use of fair or nondiscriminatory access requirements for the licensing of intellectual property.[288] Under such approaches, regulators would not oversee the rate-setting process but would be entitled to intervene in any denial of licenses to individual market participants on the basis of unfairly discriminatory

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participant in such security (adjusted to minimize the impact of "qualified" transactions over five thousand dollars) and the relative percentage of time the participant published an automated quote equal to the national best bid and offer (weighted by the dollar size of the quote) in such security. *See* Regulation NMS Adopting Release, 70 Fed. Reg. 37,496, at 37,610 (June 2, 2005).

286. *See supra* note 52 (description of branded depth-of-book information products).

287. Indeed, recent reform efforts have deregulated certain categories of market information. As part of its Regulation NMS, the Commission eliminated the prohibition against the display of an individual market center's last sale data without an accompanying consolidated feed. *See* 17 C.F.R. § 242.601 (2006).

288. *See generally* Spulber & Yoo, *supra* note 279; Kearney & Merrill, *supra* note 279.

criteria. Thus, persons who have been discriminated against might either have the right to appeal a denial of access to a court or to the Commission, or would be able to raise discriminatory denial as a defense in a subsequent proceeding to enforce the owner's property right.

The virtue of such approaches is that they permit the intellectual property owner to license the requested intellectual property at a fee set by market forces, rather than regulatory fiat. Enforcement, moreover, does not require the same regulatory apparatus to determine cost of inputs, as long as there are sufficient purchasers of an owner's intellectual property to determine the appropriate "value" of each configuration of property licensed. Nondiscriminatory licensing requirements have, for example, figured prominently in iterations of recent database protection legislation.[289]

The federal securities laws contain various provisions conferring authority on the SEC to ensure fair access to market services provided by SROs. These provisions were designed to complement the requirement that all brokers and dealers be members of an exchange or national securities association. For example, denials of exchange membership, other than on the basis of one of several statutory criteria, are appealable to the Commission. The Exchange Act also confers upon the Commission broad, if little-used, authority to require the registration of "securities information processors" and to hear appeals for denial or limitation of services. Thus, the SEC's rules on the sale of market data by exchanges and national securities associations refer to "fair" and "nondiscriminatory" standards for licensing.[290]

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289. Initial drafts of the EU Database Directive required compulsory licensing of databases held by "sole source" owners in a fair and nondiscriminatory manner. *See, e.g.*, J. H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data*, 50 VAND. L. REV. 49 (1997). Such requirements were dropped in the final Directive. *See* Council Directive 1996/9, 1996 O.J. (L 77) (EC).

290. Under Commission rules, the distribution of market data must take place on terms that are "not unreasonably discriminatory." The wholesale distribution of market data in a national market system stock by the exclusive processor for one or more SROs (or by a broker who is the exclusive source of such information) to vendors and other SIPs, moreover, must be effected on terms that are "fair and reasonable." 17 C.F.R. § 242.603(a) (2006).

The SEC has attempted to extend the idea of "fair access" beyond the express provisions of its statutory authority. For example, the SEC requires high-volume "alternative trading systems" to establish written standards for granting access to trading and to provide access to its services by applying such standards in a fair and nondiscriminatory manner.[291] The asserted statutory basis for this rule was that, since such systems could be regulated as exchanges, the SEC's greater power to impose the full regulatory regime for exchange regulation includes the lesser power to mandate fair access.

Extending a fair access requirement to other areas, such other types of information or standards, would be within the Commission's authority if the Commission has greater authority to prohibit or limit the transactions or products at issue.[292] In areas where no such statutory authority exists, however, the Commission would have to pursue indirect rulemaking that would further attenuate its authority.[293] It could be argued, for example, that index providers are in effect securities information processors, since the ongoing function they provide is to compute the value of an index, and should be required to grant licenses for the use of such information in a nondiscriminatory manner. Alternatively, the Commission might attempt to use its authority under Exchange Act § 19(c) or the Unlisted Trading Privileges Act to prohibit any self-regulatory organization from listing an index-based product unless the index provider agrees to license use of its index to other markets on similar terms.[294]

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291. 17 C.F.R. § 242.301(b)(5) (2006); Regulation ATS Adopting Release, 63 Fed. Reg. 70,844, at 70,872-75 (Dec. 22, 1998).

292. 15 U.S.C. §§ 77z-3, 78mm (2000) (permitting the SEC to grant exemptive relief for any class or classes of persons, securities, or transactions, from the provisions of the Securities and Exchange Acts).

293. In Goldstein v. SEC, 451 F.3d 873 (D.C. Cir. 2006), the D.C. Circuit expressed doubt that, when a statutory term is "susceptible of several meanings, as many terms are," it follows that "Congress has authorized an agency to choose any one of those meanings" without reference to the context in which the term is used. *Id.* at 878. The D.C. Circuit's logic may call into question such selective reinterpretation of statutory terms in order to assert such authority selectively over new classes of market participant.

294. 15 U.S.C. § 78*l*(f)(1)(D)-(E) (2000) (requiring the Commission to consider, when extending unlisted trading privileges to any security, to take

In particular, as securities are increasingly cross-listed abroad, and hardwired linkages become concomitantly difficult to mandate by regulation, fair access requirements might serve as a better approach to data dissemination. For example, commentators have considered whether, in lieu of consolidating quotation and transaction information through the "exclusive processors" of one or more SROs,[295] individual market centers could be relied upon to provide fair access to competing data consolidators, who could then disseminate a~~n~~ consolidated best bid and offer or last sale data to end-users.[296] Some discrimination among end-users might be inevitable—for example, due to creditworthiness, prior contractual breaches, or other misbehavior—but these are recognized grounds for exclusion from existing fair access rules.[297] The presence of competition and threat of antitrust enforcement may, in any event, be more persuasive than the threat of reprimands or fines resulting from Commission enforcement.[298]

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into account "the desirability of removing impediments to and the progress that has been made toward the development of a national market system").

295. *See, e.g.*, 15 U.S.C. § 78f(e) (2000) (membership in national securities exchanges limited to registered broker-dealers); 15 U.S.C. § 78k-1(b) (2000) (imposing different registration requirements on "exclusive" and non-"exclusive" SIPs).

296. The Commission wishes investors to have a uniform "NBBO" representing all market centers to ensure that execution opportunities are simultaneously disclosed to professional market participants and investors. *See supra* note 47 and accompanying text. While individual data vendors or end-users can compile such resources by collecting information from different suppliers, the Commission has expressed concern that not all investors will have identical information if time lags, transmission errors, or unsynchronized clocks result in different computations of the NBBO or last sale data. *See generally* SEC, REPORT OF THE ADVISORY COMMITTEE ON MARKET INFORMATION: A BLUEPRINT FOR RESPONSIBLE CHANGE (2001), *available at* http://www.sec.gov/divisions/marketreg/marketinfo/finalreport.htm.

297. *See* Securities Exchange Act of 1934 § 6(b), 15 U.S.C. § 78f(b) (2000); *see also* Rule 301(b)(5) of Regulation ATS, 17 C.F.R. § 242.301(b)(5) (2006); Regulation ATS Adopting Release, 63 Fed. Reg. 70,844, at 70,872-75 (Dec. 22, 1998)..

298. Although the Commission has the power to suspend or revoke the registration of an SRO under § 19(h) of the Exchange Act, Commission sanctions against SROs for failure to enforce securities laws typically involve censure, fines, and injunctive relief. For example, see administrative proceedings against stock exchanges in 2005-2006: *In re* PHLX, Exchange Act Release No. 53,919 (June 1, 2006), *available at* http://www.sec.gov/litigation/admin/2006/34-53919.pdf; *In re* NYSE, Exchange Act Release No. 51,524 (Apr. 12,

If, on the other hand, intermediation is mandated for regulatory purposes, the Commission could ensure that mandatory intermediation does not lead to abuses of market power by eliminating conflicts of interest that might lead to discriminatory denials of access. For example, an exchange that both serves as primary market for a security and controls the primary information processor for its listed securities has significant power to set fees in ways that discourage competition by rival market centers or data providers.[299] Rival market centers may balk, for example, at providing their data to such an "exclusive processor" controlled by a competitor, even if its compensation is set by a Commission formula, to the extent that the exclusive processor may control the format and terms of the transmission. Similarly, rival data vendors may seek to purchase raw data from exclusive processors at wholesale prices, even as such exclusive processors have retail distribution networks of their own.[300] Restricting vertical integration of market centers, data consolidators, and wholesale and retail information vendors might allay these concerns.

D. *Timing of Regulatory Approvals*

Temporally limited monopolies are perhaps the key tool used to balance private incentives and public access in

2005), *available at* http://www.sec.gov/litigation/admin/34-51524.pdf; *In re* Nat'l Stock Exch. et al., Exchange Act Release No. 51,714 (May 19, 2005), *available at* http://www.sec.gov/litigation/admin/34-51714.pdf; *In re* Nat'l Ass'n Sec. Dealers, Inc., Exchange Act Release No. 37,538 (Aug. 8, 1996), *available at* http://www.sec.gov/litigation/admin/3437538.txt (imposing remedial sanctions).

299. For example, the Commission required Nasdaq to open bidding for a new exclusive securities information processor for Nasdaq-listed securities to satisfy concerns of rival trading systems that were required to provide access to their quotes equivalent to access via Nasdaq or another SRO. *See* Order Approving Proposed Rule Changes by the Nat'l Ass'n of Sec. Dealers, Inc, Exchange Act Release No. 43,863, 66 Fed. Reg. 8,020, at 8,021-22 (Jan. 26, 2001).

300. *In re* Bunker Ramo Corp., Exchange Act Release No. 34-15,372, 1978 WL 171128 (Nov. 29, 1978); Nat'l Ass'n Sec. Dealers, Inc. v. SEC, 801 F.2d 1415 (D.C. Cir. 1986); Domestic Secs. v. Instinet Corp., 1998 WL 1178670 (Nat'l Ass'n Sec. Dealers Arbitration Award) (Sept. 9, 1998); *see also* LEE, *supra* note 53, at 171-77; Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1997) (describing the marginal cost problem and the merits of price discrimination).

intellectual property law. While information must be shared to be commercially valuable, often the lead time necessary to extract value from the information will be significantly less than the time necessary for the information to become widely available.[301] National market system plans, for example, release information about quotations and transactions to the public domain within fifteen to twenty minutes, which appears for most equity securities to be sufficient time for the trading value of such information to dissipate.[302] In such cases, intervention may be necessary to require disclosure more promptly if regulatory policy is to limit intellectual property rights.

By contrast, when the necessary lead time to recoup an investment is significantly longer than the time within which information is likely to become publicly available, regulatory intervention is necessary to preserve the value of proprietary rights. As with copyright and patent regimes, it has frequently been suggested that statutory periods of time be established for information products that fall short of existing intellectual property regimes, either to recover research and development costs or to establish dominant market share before they are appropriated by competitors.[303] For yet other types of information, such as indices and standards, ongoing protection might be necessary to justify continued effort to "maintain" the information product.

To a certain degree, regulated markets are at a significant disadvantage to other market participants when developing new information products. Any substantively new exchange rules, policies, facilities, or derivative products must undergo public notice and comment, which

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301. Reichman, *supra* note 9, at 2547.

302. *Cf.* 17 C.F.R. § 242.605 (Regulation NMS rule suggesting that the quality of a market center's price discovery may be determined, in part, by the average spread realized within five minutes of a transaction); *see also* Nat'l Ass'n of Sec. Dealers, NASD Manual: Rule 6230 (CCH 2006), *available at* http://nasd.complinet.com/nasd/display/display.html?rbid=1189&record_id=1159007287&element_id=1159006397&highlight=6230#r1159007287 (establishing 15-minute window for reporting transactions in registered corporate debt securities).

303. *See* Reichman, *supra* note 9, at 2438-42; Lunney, *supra* note 11, at 596-98 (discussing the underproduction of easily copied works).

gives competitors advance notice.[304] Even with expedited review for some products,[305] the lag time between announcement and implementation may be critical to a product's success. By contrast, when non-SRO market participants seek consultation with or approval from regulatory personnel with respect to new products, they often seek informal relief, which itself may often be kept confidential for a period of time to preserve the requesting party's competitive edge.[306]

Historically, one regulatory technique to preserve some value for intellectual property in the absence of express statutory authority has been to delay regulatory approvals for *rival* products that are substantially identical to a new product.[307] The CFTC, for example, has historically viewed such objectives as a necessary consideration in its oversight of futures markets.[308] By contrast, the SEC has taken the position that rival exchanges may copycat certain rule changes on an expedited basis. Even if rival developers of financial products may be required to seek Commission approval (for example, if the original no-action relief is confined to the description of the creator's product), some competitors may be willing to gamble that the agency will not take a contradictory position if relief is sought very shortly before rollout, if at all.

Commission inaction in the face of product allocation arrangements may likewise be viewed, more benignly, as an attempt to allow market participants to recoup the costs of product development through a temporary monopoly. The Commission's willingness to tolerate delays in the commencement of multiple trading despite orders

304. 15 U.S.C. § 19(b) (2000); 17 C.F.R. § 240.19b-4 (2006) (defining the term "proposed rule change").

305. *See* 17 C.F.R. §§ 240.19b-5, 240.19b-4(e) (2006) (fast-tracking of rule changes for derivative products for which adequate standards and surveillance agreements exist).

306. *See generally* Procedures Applicable to Requests for No-Action and Interpretive Letters, Exchange Act Release No. 6,269, 45 Fed. Reg. 81,917 (Dec. 12, 1980) (describing procedures for the submission of confidential requests for no-action and interpretive letters).

307. Ronald W. Anderson, *The Regulation of Futures Contract Innovations in the United States*, 4 J. FUT. MARKETS 297 (1984); Mulherin, Netter & Overdahl, *supra* note 12, at 595-625; *supra* note 106.

308. *See supra* note 208 and accompanying text.

permitting or requiring competitive trading of such products[309] may in some respects be explained as sympathy for such arrangements. Such relief, however, is problematic because of its unpredictability, and may be justified more by the Commission's relative appetite for taking enforcement action against certain market participants rather than an economic analysis of the costs of product development. In parallel circumstances, for example, the Commission has aggressively sought to squelch exclusivity arrangements among market participants even where no anticompetitive behavior may exist.[310]

IV. A REGULATORY AGENDA

Critics of the SEC frequently lament the agency's failure to articulate principles for securities disclosure and regulation. To be fair, many of the alternative regulatory regimes favored by such commentators would require the Commission substantially to scale back its oversight of securities markets in a manner inconsistent with its legislative mandate to further "the protection of investors and the public interest." As such, the Commission's deregulatory efforts have been modest in ambition and incremental in scope, such as reforms of the public offering process and the dismantling of the more anticompetitive exchange rules held over from before the federal securities laws.

At the same time, the Commission is aware that greater deregulation will be necessary as a result of structural changes. The combined impact of demutualization and globalization of markets will require greater reliance on comity and less reliance on domestic rulemaking to achieve regulatory goals. As of 2006, the two largest U.S. stock exchanges by volume and number of listings—the NYSE and the Nasdaq Stock Market—have both become publicly held, for-profit corporations. Industry associations have raised concerns about the continuing vitality of a self-regulatory system in which broker-dealers

309. *See* Competitive Developments in the Options Markets, Exchange Act Release No. 49,175, 69 Fed. Reg. 6,124, at 6,125 (Feb. 9, 2004).

310. *See* Steven Vames, *SEC's BrokerTec Probe Puts a Model to the Test,* WALL ST. J., May 22, 2002, at C15.

are regulated by potential competitors, and SROs themselves have conceded that the current system of securities market oversight is inadequate.[311]

Meanwhile, NYSE has merged with Euronext, N.V., and both NYSE-Euronext and Nasdaq are considering further mergers with other international exchange holding companies.[312] Regulators on both sides of the Atlantic have maintained that domestic securities regulation will not pose an obstacle to consummation of such mergers, even as the prospect of greater cross-listing, trading, and eventually clearance and settlement will further draw into focus disparities between the respective regulatory regimes.[313] While the SEC has acceded to, or at least considered the possibility of, recognizing the adequacy of foreign securities regulation,[314] the significant volume of trading in U.S. securities overseas[315] and anecdotal evidence respecting the reduction of cross-listings by foreign companies following

311. *See* Comments on Exchange Act Release No. 50,700 (Concept Release Concerning Self-Regulation) (Nov. 18, 2004), *available at* http://www.sec.gov/rules/concept/s74004.shtml (last visited Feb. 18, 2007).

312. *See* Fleckner, *supra* note 6, at 2559 (describing the NYSE merger with Archipelago Holdings and Nasdaq's acquisition of Instinet); Roberta S. Karmel, *The Once and Future New York Stock Exchange: The Regulation of Global Exchanges*, 1 BROOK. J. CORP., FIN. & COM. L. (forthcoming 2007), *available at* http://www.ssrn.com/abstract=958260; Jenny Anderson & Heather Timmons, *NYSE Group Reaches Deal To Acquire Euronext*, N.Y. TIMES, June 2, 2006, at C3; James Kanter & Heather Timmons, *Nasdaq Raises Its Stake In London Stock Exchange*, N.Y. TIMES, May 4, 2006, at C6.

313. *See, e.g.*, Press Release, SEC, Fact Sheet on Potential Cross-Border Exchange Mergers (June 16, 2006), *available at* http://www.sec.gov/news/press/2006/2006-96.htm.

314. On March 1, 2007, Erik R. Sirri, Director of the SEC's Division of Market Regulation, revived discussion of proposals to exempt foreign exchanges from U.S. registration subject to conditions established by rule. Erik R. Sirri, Director, SEC Division of Market Regulation, Trading Foreign Shares, (March 1, 2007), *available at* http://www.sec.gov/news/speech/2007/spch030107ers.htm; *see also* Regulation of Exchanges, Exchange Act Release No. 38,672, 62 Fed. Reg. 30,485, pt. VII.B.1 (June 4, 1997) (soliciting comment on a proposal to rely on home-country regulation of non-U.S. securities exchanges).

315. Sec. Indus. & Fin. Markets Ass'n (SIFMA), *Securities Industry and Financial Markets Fact Book Global Addendum 2006*, SIFMA RES. REP., Nov. 2006, at 57-58, *available at* http://www.sia.com/research/pdf/RRVol1-2.pdf (reporting $4.495 trillion in gross purchases and $121.585 billion in net purchases of foreign equity securities by U.S. investors of foreign stocks).

Sarbanes-Oxley[316] suggest that such efforts have been insufficient to staunch investor demand.

These developments suggest that, where possible, the Commission should consider greater reliance upon private incentives (through proprietary rules), while using rulemaking judiciously to address situations in which traditional conflicts of interest or fraud come into place. With the erosion of formal distinctions among market centers—SRO and non-SRO—and market participants—dealers and institutional traders—the Commission will need to develop better approaches to encourage the development of robust corporate and market information, such as those inherent in the proprietary claims that exist under intellectual property law. It may also be easier to export rules grounded in universal norms of ownership and authorial integrity, rather than a set of regulations geared exclusively to a single set of market institutions.[317]

A. *Acknowledge Proprietary Claims*

A preliminary step would be for the Commission to acknowledge that the rights of information owners under state law are not preempted except as expressly provided by statute or Commission regulations. The Commission's mixed signals as to the proprietary rights of creators have

316. *See* Stephen Labaton, *Treasury Chief Urges 'Balance' in Regulation of U.S. Companies*, N.Y. TIMES, Nov. 21, 2006, at C1 (comments of Treasury Secretary Henry M. Paulson, Jr.).

317. *See, e.g.*, Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1, 25 (1999) (suggesting that property-type rules are dominant in international law because of the costs of developing an institutional apparatus to enforce liability-type rules); Lao, *supra* note 16, at 1676; *see also* Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998); Amir N. Licht, *Regulatory Arbitrage for Real: International Securities Regulation in a World of Interacting Securities Markets*, 38 VA. J. INT'L. L. 563 (1998). *But see* Jeffrey E. Garten, *Self-Regulation in the Global Context*, 2000 COLUM. BUS. L. REV. 23 (arguing for centralization of self-regulatory powers to deal with regulatory problems posed by globalization). The increasingly transjurisdictional nature of regulatory enforcement requires greater emphasis on information sharing and reliance on the cooperation of complementary regulators in other jurisdictions. *Cf.* Joel Klein & Preeta Bansal, *International Antitrust Enforcement in the Computer Industry*, 41 VILL. L. REV. 173 (1996) (discussing the relative merits of information sharing, positive comity and unilateral enforcement of U.S. antitrust law).

led market participants to argue, as in *Archipelago*, that the preemptive scope of the federal securities laws reach further. Clarifying that Commission rules derogate from such common law rights, rather than supplant them, is a first step toward creating incentives for market participants to bargain for licenses.

Where proprietary claims under state law are in doubt—such as claims over the use of indices and the design of financial products—the Commission should consider using its regulatory authority to provide greater protection (or at a minimum, legal certainty). Listing of index-based products, for example, could be conditioned upon obtaining a license from the relevant index provider; such a requirement could be justified on investor protection concerns by a desire to ensure that index providers have the ability to exercise some control over the use of their work product.

B. *Permit Greater Nondiscriminatory Selectivity in Disclosure or Licensing*

To the extent that some ability to exclude is required to preserve the value of information, absent independent judicial or regulatory valuation, Congress may wish to give the Commission greater authority to permit selective licensing or disclosure in appropriate circumstances. Permitting creators of information to provide selective access to various categories of information defined by safe harbors, subject to Commission review, may be one way to address this issue. Just as the Commission recognizes the importance of intermediaries in the context of market information and order execution, recognition might be given to the role of analysts and institutional shareholders in the dissemination of corporate information. While it may be inappropriate to discriminate within such categories, permitting selective disclosures to all similarly situated analysts or shareholders on a nondiscriminatory basis could encourage the flow of information to markets while mitigating harmful asymmetries of information.

Where certain categories of information contribute to the formation of "downstream" information (such as the contribution of company information to market prices or the contribution of market prices to index prices), the Commission should consider whether conflict-of-interest

rules, rather than rate regulation, might help to address issues of fair access. In the few, if any, situations in which access to a particular market center or data provider is considered "essential," it may make sense to adopt Commission rules that prohibit vertical integration of the "essential" information with downstream users (e.g., indices) or intermediaries (such as data vendors) in order to eliminate conflicts of interest that might result in the limitation of downstream uses. Otherwise, privately adopted limitations on information or other goods that are "inputs" for subsequent processes are best left to antitrust law.[318]

More generally, the Commission should reconsider the respective roles of securities and antitrust law in policing access. There are many areas of securities regulation where the Commission rightly believes regulatory oversight of restraints on trade is preferable to antitrust enforcement or litigation, such as the conduct of syndicated offerings and governance of traditional non-profit exchanges, where "coordinated" industry action is still practically necessary to achieve regulatory objectives. Where such coordination is no longer required due to erosion of market power, it is debatable whether ex ante Commission rulemaking or rule approvals are clearly superior to ex post antitrust enforcement. Antitrust regulators have considerable experience with pricing and intellectual property licensing agreements in multiple industries, while Commission personnel are, by definition, limited in focus to a single industry.[319] Moreover, the conflicts posed by vertical arrangements—which typically involve SROs or other dominant market centers—may well be more effectively policed under antitrust law, given the significant risk of regulatory capture.[320]

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318. *See* Kieff & Paredes, *supra* note 13, at 190-93.

319. *Cf.* BREYER, *supra* note 128, at 156-83, 197-219 (discussing relative benefits of antitrust enforcement and regulatory supervision); Kieff & Paredes, *supra* note 13, at 199 (suggesting that "courts generally should enforce restrictive licenses involving [intellectual property] as long as they are enforceable under contract law and do not run afoul of the antitrust laws").

320. *See supra* note 133.

C. *Reconsider Investor-Negotiated Disclosure for Certain Information*

The Commission should also endeavor to encourage licensing or disclosure of information though negotiated bargaining, and concomitantly to undo regulatory structures that misalign creative effort and revenues. Even in situations where it is difficult to identify the social value of information, it may be preferable to achieve the appropriate equilibrium through ongoing negotiation between producers and principal consumers, rather than to proceed by isolated multilateral rulemaking exercises which are reviewed sporadically, if at all. Standard setting organizations may also be used as a proxy for end-users when bargaining costs with principal consumers would be excessive. Bargaining may, as today, be backstopped by the Commission's enforcement power or by default rules, as discussed further below.

The licensing of market information, for example, is likely to take place among a relatively well-informed community of market participants and is therefore an ideal candidate for a bargaining framework. Unlike current national market system plans, which are limited to SROs by SEC rule,[321] mechanisms for the collection and sale of market information to wholesale data vendors could be adopted through a representative sampling of all reporting market centers. End-users should also be able to shop for data, paying more for higher-quality data and less for lower-quality data,[322] to force market centers to improve the quality (and not merely quantity) of price discovery that takes place through their systems—rather than pay a

321. *See* Securities Exchange Act of 1934 § 11A(a)(3), 15 U.S.C. § 78k-1(a)(3) (2000).

322. Consider, for example, the NASD's proposal to require separate identifiers for "dealer-to-dealer" transactions and "dealer-to-customer" transactions in corporate debt securities reported through TRACE. NASD, Notice to Members 06-22 (May 2006), *available at* http://www.nasd.com/Rules Regulation/NoticestoMembers/2006NoticestoMembers/NASDW_016574. The former data may be considered significantly more valuable than the latter because of the active bargaining that is presumed to take place between market professionals. One could envision similar designations in equity markets distinguishing transactions among market makers, transactions resulting from the crossing of customer limit orders, and internalized transactions resulting from the execution of market orders.

uniform price that ostensibly funds self-regulation generally.

In the context of public company disclosure, devices that might formerly have been used to encourage negotiated disclosure between issuers and shareholders, such as listing agreements and corporate codes, have fallen by the wayside as competition for listings has intensified and securities offerings have taken place on a national (and international) scale.[323] In their place, however, have emerged private standard-setting organizations or rating agencies that perform similar functions.[324] To the extent that there are significant benefits to being included in a higher exchange tier or as an index component, changes in such eligibility determinations can often have a significant impact on corporate disclosure or accounting practices without regulatory action.[325] Greater reliance on such intermediaries to oversee certain aspects of financial reporting or corporate governance might ease the burden of mandatory rules.

It has also been frequently suggested that issuers be permitted to opt out of particular disclosure rules—conditioned on compliance with such standards—with the periodic approval of a majority of public shareholders for disclosure items where the cost of compliance is high and the cost-benefit ratio of disclosure is difficult to assess.[326] For example, issuers may ask disinterested shareholders to vote, on an annual basis, to opt out of particular auditing standards or internal financial and non-financial disclosure control requirements.[327] Alternatively, the Commission

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323. *See* Palmiter, *supra* note 29, at 2-3.

324. *See* Cunningham, *supra* note 110, at 294.

325. *See, e.g.*, Cassell Bryan-Low, *S&P Sheds Light On Accounting For Pension Costs*, WALL ST. J., Oct. 24, 2002, at C1 (describing the impact of S&P's decision to use actual returns as opposed to expected returns in calculating pension costs); Howard Silverblatt, *Option Expensing: The Time Is at Hand*, BUS. WK. ONLINE, Nov. 22, 2005, http://www.businessweek.com/investor/content/nov2005/pi20051122_3318_pi015.htm (describing the impact of S&P's decision to expense options in earnings estimates).

326. *See, e.g.*, Romano, *supra* note 25, at 1595-97.

327. In other contexts, the Commission and SROs have entertained shareholder initiatives to change corporate governance practices—such as shareholder nominations or executive pay—as a means of encouraging shareholder participation in corporate governance. *See, e.g.*, Security Holder

could simply migrate to a "principles-based" system of disclosure and grant safe harbors for compliance with rules articulated by "recognized" national standard setters.

It might also be feasible to encourage providers of accuracy enhancing information—such as rating agencies or auditors—to enter into agreements for the sale of their work product to end-users of such information. To the extent that rating agencies and auditors rely exclusively on fees from issuers, they experience a conflict of interest in developing their initial assessments. Allowing them to sell their work product (on nondiscriminatory terms, as discussed below) or otherwise consult with shareholders or other end-users independent of management could not only reduce some of the financial conflicts, but also improve the flow of information to the marketplace.

D. *Delineate Scope of Information Rights and Protected Uses*

Managing the scope of proprietary claims is one method by which the Commission could achieve its goal of balancing the right to compete against the threats of free-riding and proliferation. As discussed above, regulators may prefer that trading activity be concentrated in a few, super-regulated entities rather than spread across multiple market participants. And yet, due to its obligation to preserve competitive opportunities, the Commission must leave open the regulatory possibility—if not probability—of viable challengers.

One approach to addressing the issue would be to permit branding of more quotation information. For example, in the context of market information, market makers are not only able, but encouraged, to siphon order flow away from primary market centers by holding themselves out as willing to trade at the primary market center's quoted price.[328] To the extent that market data

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Director Nominations, Exchange Act Release No. 48,626, 68 Fed. Reg. 60,784 (Oct. 23, 2003) (proposing Rule 14a-11); NYSE, Listed Company Manual, 303A.08, *available at* http://www.nyse.com/RegulationFrameset.html?nyseref=http%3A//www.nyse.com/audience/listedcompanies.html&displayPage=/about/listed/1022221393251.html (shareholder approval of equity compensation plans).

328. *See supra* text accompanying notes 199-201.

dissemination is controlled by licensing agreements that could, in theory, prohibit a pattern of "matching" of the owner's quotation, such restrictions could deter "unhealthy" competition from cream-skimming market makers.

To ensure that healthy competition to primary market centers—such as formulaic price improvement or independent price discovery—is not deterred, "derivation" of a quote from another market, but with minimum improvement, might be viewed as sufficiently "transformative" to avoid being perceived as infringement. Meanwhile, a trading system that in fact attracts a substantial number of customer orders would not be perceived as infringing upon another market's quote, even if their quotations occasionally matched. Of course, each market center would be free to license its quote for automatic execution—as many exchanges do today—on specified terms as necessary to promote liquidity.

A similar case could be made for market indices, or even financial products generally. The ability to assert rights beyond the limited protection conferred by trademark law could give index providers greater comfort that the fruits of their work product will not be siphoned off by competing providers absent a licensing agreement. In particular, to the extent that many index-based products today tinker with the weighting and stock-selection components of such indices,[329] the need to ensure that index providers have some control over the direct and derivative uses of their products—if only to monitor usage and require express disclaimers of liability—may be desirable.[330]

One way to implement this approach would be to require new indices or financial products either to demonstrate no substantial overlap with comparable instruments or to obtain a license from the prior index.[331]

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329. *See, e.g.*, John C. Bogle & Burton G. Malkiel, *Turn on a Paradigm?*, WALL ST. J., June 27, 2006, at A14.

330. Tom Lauricella & Diya Gullapalli, *Not All Index ETFs Are What They Seem to Be*, WALL ST. J., July 21, 2006, at C1 (describing active management strategies—and the risks created thereby—used by some ostensibly index-based exchange traded funds).

331. The investor protection concerns justifying such a rule would be substantially similar to those justifying the requirement that the SEC approve the soundness of an index prior to listing a derivative product thereon. *See supra* note 83.

Exceptions might be made if the range of eligible component securities in a particular securities industry classification is small enough that the "idea" of a sector-index merges with its implementation.[332] A more restrictive approach might add a requirement that indices licensed for use in connection with listed financial products be subject to multiple licensing on nondiscriminatory terms, so that competing markets have less incentive to test the boundaries of comparability.

E. *Promote Creation of Competitive Information Goods*

If the Commission were to consider such mechanisms for broadening the rights of existing market participants, it would also have to ensure that there is a real opportunity for the development of substitute goods. Thus, regulations or regulatory policies that have the effect of inhibiting investor choice must be relaxed so that more information goods have an opportunity to find a niche in the marketplace. At a minimum, the Commission should consider revising rules that refer to specific information products to permit uses of all comparable products unless an exclusive standard is intended.[333] For example, trade-through rules may constrain the decisionmaking of broker-dealers routing orders by favoring primary exchanges at the expense of encouraging the development of competing markets. These might, as the Commission had alternatively considered, be replaced by rules that free broker choice but require post-trade reporting of execution quality on a trade-by-trade basis.

In the area of indices and product design, greater opportunities for substitute goods may be created by relaxing rules that require specific offsetting of products. The Commission has largely relaxed such requirements for broker-dealer net capital purposes, by permitting more favorable net capital treatment for offsetting long and short positions in different index options that fall into one of several portfolio types.[334] Similarly, the Commission, with

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332. *See supra* note 68.

333. *See supra* note 240.

334. 17 C.F.R. § 240.15c3-1a(a)(6) to -1a(b)(1)(ii) (2006) (identifying index "product groups" including "high-capitalized diversified market index options,"

the encouragement of the Federal Reserve Board, has explored the possibility of permitting customers to reduce minimum margin requirements for their accounts based on the risk inherent in a "portfolio" of securities, rather than matching individual offsetting products or underlying indices.[335]

CONCLUSION

The Commission's role in regulating information is one that has arguably been thrust upon it with little legislative guidance and buffeted with considerable political pressure over the past seven decades. Yet the Commission has dutifully explored ways to balance the interests of producers and consumers of information that will result in more efficient markets. A core statement of principles—such as those suggested herein—together with concrete efforts to experiment and to collaborate with emerging market participants, may go a long way toward clarifying expectations and encouraging the development of new information products.

"non-high-capitalization diversified market index options" and "narrow-based index options" for purposes of determining offsets among index options). Thus, for example, a broker-dealer might be permitted, under this rule, to use ninety percent of the gain on a long Wilshire 5000 index option to offset the loss on a short Russell 2000 index option. § 240.15c3-1a(b)(v)(B)(2)(i).

335. *See* 12 C.F.R. § 220.1(b)(3)(i) (2006).