

## Democracy and the SEC

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Originally Published in *Traders Magazine* on June 26, 2008

<http://www.tradersmagazine.com/news/101219-1.html>

In a previous article published on March 7, 2008 (“Regulatory Schizophrenia”), we discussed the reluctance of the SEC’s Division of Corporation Finance to permit the dissemination of real-time trade reporting on foreign securities that are not registered under the Securities Exchange Act of 1934. We are happy to report that the SEC has done the right thing and published a rule proposal by FINRA this week that would provide for the dissemination of real-time trade reports for all foreign securities. The SEC is soliciting public comments on this proposal.

Traders generally only interact with the SEC under difficult circumstances. The SEC is, among other things, a law enforcement agency charged with protecting the public from securities fraud. In its law enforcement role, the SEC from time to time investigates activities on trading desks that appear to involve fraud or market manipulation. The SEC also has a legislative role. It has been authorized by Congress to make rules to further implement the intent of Congress expressed in the federal securities laws. In recent years, many of the rules promulgated by the SEC have changed market structure in ways that have reduced the profitability of trading. In turn, traders over the last several years have seen their income reduced, and many traders no longer are employed in the industry.

It is only natural that traders tend to view the SEC with a mixture of dread and antagonism. That said, most of us only interact with the police when they are issuing a speeding ticket. But, we still recognize that the police do other things. Keeping the streets safe makes for a better way of life. We would all be a lot worse off without the work of the SEC to keep our securities markets safe.

Through all of this, it is important to understand that we still live in a democracy. Under our system of laws, this essentially boils down to a right of due process. The SEC cannot simply sanction traders by fiat. Traders can insist that their case be heard by a neutral tribunal and reviewed by a federal court. This right of due process provides a check on the arbitrary exercise of power; the SEC must defend its actions and is therefore careful to avoid actions that will be reversed in court.

Similarly, in the rule-making process, the SEC is required, as a matter of due process, to provide an opportunity for interested members of the public to make comments on proposed rules. A fair amount of the business of The Nelson Law Firm involves helping our clients provide comments on SEC rule proposals. We

also petition the SEC to change rules when they are not seeking comments. Lawyers can help clients make their case persuasively, but you don't need to use a law firm to make comments on SEC rule proposals.

The current rule proposal by FINRA is a good example. You can read FINRA's proposed rule on the SEC's website ([www.sec.gov](http://www.sec.gov)) under the headline SRO Rulemaking. Any trader interested in the topic of real-time trade reporting can use the SEC's Internet comment form (<http://www.sec.gov/rules/sro.shtml>) or send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov) to comment on the FINRA's proposed rule change. In the subject line, you will need to include the File Number SR-FINRA-2008-016 so that the SEC will know which of the many rules out for comments you are addressing.

The SEC is required by law to read all of the comments received and consider whether to change the rule, or approve the rule, in light of these comments. My experience is that the SEC actually does read and consider the comments it receives. The SEC cannot carry out its regulatory function well unless the persons it regulates provide it with good information.

Of course, since this is a democracy, everyone does not agree on proposed rules. This also means that the SEC will not always act as commentators think they should. For example, the market structure rules drew hundreds of comments representing many opposing points of view. The rules that eventually were adopted disappointed many of the commentators.

That said, if you don't make a comment, your voice cannot be heard.

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