Testimony of Joseph Mecane
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Chairman Schapiro and Commissioners, my name is Joseph Mecane. I am Executive Vice President and Chief Administrative Officer of NYSE Euronext.

NYSE Euronext operates the largest and most liquid exchange group in the world, consisting of seven cash equities exchanges and seven derivatives exchanges spread across multiple jurisdictions around the globe. In the United States, we operate the New York Stock Exchange, NYSE Arca, and NYSE Amex, which are regulated by the Securities and Exchange Commission (SEC). In Europe, we operate four equity exchanges that comprise Euronext — the Paris, Amsterdam, Brussels and Lisbon stock exchanges—as well as the NYSE Liffe derivatives markets in London, Paris, Amsterdam, Brussels and Lisbon. We also provide technology to more than a dozen cash and derivatives exchanges throughout the world.

With respect to short sale regulation generally, NYSE Euronext shares the Commission's goal of restoring public confidence in the markets, and we believe some restrictions on short selling may advance that goal. As we noted in our comment letters to the Commission on this subject, NYSE Euronext believes strongly that an always-on bid test would best achieve the Commission's goal. In our comment letters, we noted, among other things, our belief that an always-on bid test is more predictable for market participants and issuers alike, would raise fewer implementation complexities, and is less likely to have a "magnet effect" on the pricing of a security as it approaches a circuit breaker trigger point.[1]

I appreciate the opportunity to offer our views today on another aspect of short sale regulation: reporting and disclosure.

The NYSE believes that short sales are an important tool in the maintenance of an orderly market. We also believe that some information about short sales can be a useful tool for market participants. For example, The NYSE, NYSE Amex and NYSE Arca offer daily short sale transaction summaries. NYSE, NYSE Amex and NYSE Arca also offer a monthly report of all trades indicating those trades containing a short sale component. In addition, NYSE and NYSE Amex offer customers a semi-monthly file that contains the reported uncovered short positions of securities listed on NYSE, NYSE Amex and NYSE Arca. The data for this is obtained from the reports provided by member firms under FINRA Rule 4560.

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[1] See letter from Janet M. Kissane, Senior Vice President – Legal & Corporate Secretary, NYSE Euronext, dated June 19, 2009 (available at http://www.sec.gov/comments/s7-08-09/s70809-3786.pdf); see also letter from Janet M. Kissane, Senior Vice President – Legal & Corporate Secretary, NYSE Euronext, dated September 21, 2009 (available at http://www.sec.gov/comments/s7-08-09/s70809-4638.pdf).

Separate from these publicly available reports are regulations requiring audit trails and the marking of orders to identify whether a sale of an equity security is a "long" or "short" sale. These requirements assist the Commission and self-regulatory organizations in determining whether market participants are complying with regulations such as Reg SHO.

These two types of short sale reporting illustrate different policy objectives. The short interest (i.e., position) report and the Exchanges' proprietary short sale transaction reports respond to investor interest. The audit trail information, on the other hand, is needed, broadly speaking, to prevent and detect fraud and manipulation in the market. Short interest position reporting may also serve a limited regulatory purpose, and would likely be a useful data source in the event that a short sale price test is adopted, but since this represents gross positions it would not appear useful for monitoring compliance with Reg. SHO. We believe it is essential to keep these different policy objectives in mind when considering enhanced short sale disclosure.

We believe the Commission should also bear in mind that there is a conflict between the potential benefit to investors from disclosure of trading information and the proprietary interests of investors seeking to execute a particular trading strategy in the market. Issues relating to confidentiality have already had a significant effect on our markets, leading to greater use of dark pools and reserve orders.

The questions thus are: (1) will any change in disclosure mandated by the Commission (as opposed to disclosure by market centers in response to customer demand) serve to materially enhance the market generally by providing investors information they need without encroaching on other investors legitimate need for confidentiality; and (2) will the disclosure enhance a regulatory oversight objective. Other factors to be considered in this analysis include whether the costs of providing the information outweigh the benefits, and whether the information may have unintended consequences – such as by changing behavior in a manner that harms market quality.

We can apply this analysis to the questions you have asked us to address. With respect to whether a short sale indicator should be added to the consolidated tape, our view is, first, there appears to be little regulatory benefit from this disclosure because the information is already captured by market centers and is available to the Commission. Second, we do not believe investors would materially benefit from this information to the extent that the benefit outweighs other customers need for confidentiality. Indeed, based on discussions with several of our market participants who are primary liquidity providers to the market, such disclosure would change their willingness to commit capital to the market and may have a deleterious affect on market quality. In any case, unless this information becomes core data, to the extent that the NYSE, or any SRO, determines to produce and market these types of information products, it would do so only after careful consultation with its constituents. To date there has been no demand for such information.

Increased reporting of short interest may be of some benefit to investors. However, since this information is provided by market intermediaries, their increased cost of collecting and providing this information should be taken into account in the cost/benefit analysis and may be a relevant factor in determining to what extent the current semi-monthly reporting should be increased.

Disclosure of short sales that may publicly identify market participants as short sellers raises directly the conflict between the benefit to the public to know that information, weighed against existing policies that protect proprietary information. It is our view that public disclosure of an individual investor's short positions should be based on a policy determination that the benefits to the public of disclosure outweigh the principle of protection of otherwise confidential information.

We appreciate that the Federal Securities Laws have resolved this conflict with respect to long positions in favor of public disclosure of an investor's position in voting securities of an issuer in excess of 5% in the case of Section 13 of the Securities Exchange Act and Rule 13D. The policy requiring disclosure was that the public should be informed about the intentions of a party that acquired a significant voting stake in an issuer that might lead to a change of control. Similarly, disclosure is required of all purchases and sales by a "control person" (including persons holding 10% or more of the voting interest of an issuer), to assure compliance with the short-swing profit recapture rule of Section 16 of the Securities Exchange Act and related rules. In fact, Section 16 is significant because it requires disclosure not just of the sale or purchase of an equity security but of the establishment or unwinding of so-called "call (or put) equivalent positions" that include exposures to the equity security taken through derivatives. The policy in favor of controlling the trading behavior of "insiders" trumped the insider's privacy interest.

Neither of these policy reasons appears to justify public disclosure of an investor's short positions. If the Commission concludes that there is a public benefit to such disclosure, it would seem logical that it should be applied to long as well as short positions.

The NYSE's primary interest in increased short sale disclosure by individual investors is whether it will enhance the ability of regulators to detect and prevent fraud and manipulation of stocks traded in our market. On that basis, there are compelling reasons for considering increased *confidential* disclosure of concentrated proprietary short positions for regulatory purposes.

Detection of manipulation is made more difficult today not only because the market for trading stocks is fragmented, but also because of the increase in derivative products and transactions. It is beyond the capability of any one market center to effectively police trading across all venues. We think the solution is to consolidate responsibility for market surveillance and to be sure that the designated regulatory body is equipped with the tools needed to perform that surveillance. In considering the information such a body needs to do its job, the Commission should address not only what information is needed but also who will be required to provide it.

For example, the options markets require broker-dealers to report option positions of each customer that exceed a specified size based on the underlying instrument (200 contracts for stock options). The options exchanges have established a cooperative group that uses these reports for market surveillance. But this effort does not include surveillance information regarding trading in the underlying security by the same customer. Moreover, the reporting requirement is via SRO rule rather than by statutory or SEC mandate.

We therefore believe that the issues related to short sale position disclosure by investors should be examined in the broader context of market-wide surveillance for manipulation and fraud relating to an issuer's securities.

To be effective, the regulatory body designated for market-wide surveillance must be able to identify suspicious behavior promptly. This means that the data should broadly encompass trading activity in the security in whatever form and to identify the party engaging in the suspicious activity. For example, it may be appropriate to require position reporting directly from investors, not just from intermediaries. This is the approach that exists in the futures markets, where traders have had to file so-called "large trader" reports for many years. Only by requiring reports directly from investors can a regulatory body obtain a clear picture of activity that may be problematic. Because any such requirement will be burdensome, position reporting threshold levels should be fixed at a sufficiently high level. In addition, exemptions should be considered for entities that are directly regulated by the Commission and are therefore subject to examination, including the requirement to report any and all trading activity in a particular security.

Consideration should also be given to the quality of the data collected. For example, given the increased use of securities futures and OTC derivatives to take a long or short position in a security, manipulation may be harder to detect if such trading is done through multiple intermediaries. In those cases, actual short sales in the marketplace relate only indirectly to the party initiating the transaction. Thus, consideration should be given to borrowing the definition of "put equivalent" or "call equivalent" positions in determining any threshold position level.

Following the path we suggest will require a significant commitment of initial resources, but may in the end be more efficient from an operating perspective and is certainly likely to be more effective to police the markets.

I look forward to your questions.