February 6, 2012

Via Electronic Mail (rule-comments@sec.gov)

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

COMMENT LETTER AND PETITION FOR SUSPENSION AND DISAPPROVAL

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish an Enhanced Display Distributor Fee, File No. SR-Nasdaq-2012-005, Exchange Act Release No. 66165 (Jan. 5, 2012) (the "Notice")

Dear Ms. Murphy:

SIFMA[1] and NetCoalition[2] appreciate the opportunity to comment on the above-captioned notice, under which The NASDAQ Stock Market LLC (the "Exchange") proposed a rule change to establish an enhanced display distributor fee.[3] The proposed rule change purports to become effective upon filing with the U.S. Securities and Exchange Commission (the "Commission") under Section 19(b)(3)(A) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").[4] For the reasons set forth below, and because the Exchange's actions are inconsistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*,[5] we

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1 The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

2 NetCoalition is the public policy voice for some of the world's most innovative companies on the Internet. NetCoalition represents the interests of Internet and technology companies, including Amazon.com, eBay, Google, Bloomberg L.P., IAC/Interactive, and Yahoo!.

3 *Self-Regulatory Organizations; the NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish an Enhanced Display Distributor Fee*, Exchange Act Release No. 66165; File No. SR-NASDAQ-2012-005; 77 Fed. Reg. 3313 (Jan. 17, 2012).

4 15 U.S.C. § 78s(b)(3)(A).

5 615 F.3d 525 (D.C. Cir. 2010).

respectfully petition the Commission to temporarily suspend this rule change under Section 19(b)(3)(C) of the Exchange Act[6] and institute proceedings to disapprove the rule change under Section 19(b)(2)(B) of the Exchange Act.[7]

Market Data Fees Must Be "Fair And Reasonable."

Under the Exchange Act, the Commission has a duty to ensure that market data fees are, among other things, "fair and reasonable."[8] SIFMA and NetCoalition disagree with any notion that the amendment to Section 19(b)(3)(A) of the Exchange Act in Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the "Dodd-Frank Act")[9] reflects a presumption that "all fees are constrained by competitive forces"[10] and that the Commission is therefore relieved of its obligation to ensure that data fees are "fair and reasonable" within the meaning of Section 11A(c)(1)(C).[11] Neither the plain language of the recent amendment to Section 19(b)(3)(A), nor the available legislative history of that amendment, supports the Exchange's contention that the amendment reflects such a presumption.[12]

The Exchange Has Not Shown That These Market Data Fees Are Constrained By Competitive Forces.

The Commission has not required the Exchange to show, and the Exchange has not shown, that it is subject to significant competitive forces that would limit it to charging reasonable fees for this market data. *NetCoalition* made it clear that the costs incurred in providing market data are relevant in assessing the reasonableness of the fees because "in a competitive market, the price of a product is supposed to approach its marginal cost, *i.e.*, the seller's cost of producing one additional unit . . . . the costs of collecting and distributing market data can indicate whether an exchange is taking 'excessive profits' or subsidizing its service with another source of revenue . . . ."[13] Thus, the cost of producing market data would be direct evidence of whether competition constrains the ability to impose supracompetitive fees.[14] The Notice, however, does not contain any evidence of the Exchange's costs of collecting and distributing the market data. Nor does it provide the Commission with the type of substantial evidence the *NetCoalition* Court found to be necessary to sustain an exchange rule seeking to impose a market data fee.

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6 15 U.S.C. § 78s(b)(3)(C).

7 15 U.S.C. § 78s(b)(2)(B).

8 Section 11A(c)(1)(C) of the Exchange Act provides that fees must be "fair and reasonable" and not "unreasonably discriminatory" while Section 6(b)(4) provides that an exchange must "provide for the equitable allocation of reasonable dues, fees, and other charges among . . . persons using its facilities."

9 Pub. L. No. 111-203, H.R. 4173 (June 29, 2010).

10 77 Fed. Reg. at 3315.

11 15 U.S.C. § 78k-1(c)(1)(C); 77 Fed. Reg. at 3315.

12 For a fulsome discussion of these arguments, please see Letter from Ira D. Hammerman to Florence Harmon re: Release No. 34-62887 and Release No. 34-62908 (Oct. 8, 2010).

13 615 F.3d at 537.

14 615 F.3d. at 537-38.

1. The "platform competition" approach does not support the Exchange's contention that the proposed data prices are constrained by competition.

The Exchange's "platform competition" approach to pricing data products is inconsistent with the Exchange Act, contradicts economic reality, and is unsupported by substantial evidence.

The "platform competition" approach is inconsistent with the "fair and reasonable" requirement of Section 11A(c)(1)(C) of the Exchange Act because under the platform approach to pricing, the Exchange may set market data prices at supracompetitive levels as long as they charge less for other services,[15] even though some users of the data may consume only data services, but not other services such as trade execution. This approach to pricing would therefore immunize data fees from review by wrapping them together with fees for other services and would thus nullify the "fair and reasonable" standard.

In addition, the "platform competition" theory is flawed because market data is bought and sold separately from execution services, as evidenced by the fact that SIFMA member firms' customers often buy market data on its own, and NetCoalition members do not purchase the exchanges' order execution services. In fact, the price of two products that are bought and sold separately is the result of the distinct competitive conditions confronting each product.[16]

In any event, there is no substantial evidence here to support the Exchange's "platform competition" theory, only the same type of conclusory statements dismissed by the D.C. Circuit in *NetCoalition*.[17]

2. The Exchange does not support its argument that order flow competition constrains market data fees.

The Exchange concludes the fees here must be competitive because the market for order flow is subject to competitive forces.[18] The Court in *NetCoalition* rejected this "order flow" argument because, like here, there was no support for the assertion that order flow competition constrained an exchange's ability to charge supracompetitive prices for its data.[19] In rejecting the argument, the Court discounted the statements made by various exchanges to the effect that they consider the impact on order flow in setting data prices: "The self-serving views of the regulated entities . . . provide little support to establish that

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15 *See* 77. Fed. Reg. at 3316.

16 *See Gartenberg v. Merrill Lynch Asset Mgmt., Inc*., 694 F.2d 923, 929 (2d Cir. 1982). For further discussion of the flawed economic basis for the "platform competition" theory, please see *Response to Ordover and Bamberger's Statement Regarding Nasdaq's Proposed Rule Change Concerning The Pricing of Depth-of-Book Market Data* (March 21, 2011) (attached hereto as Exhibit 1).

17 *See* 615 F.3d at 541 (noting the "lack of support in the record" and characterizing proffered support as "conclusion[s], not evidence").

18 77 Fed. Reg. at 3316.

19 615 F.3d at 539-42.

significant competitive forces affect their pricing decisions."[20]

3. The Exchange does not support its contention that there are reasonable substitutes for the market data.

The Exchange also asserts that several alternatives to the data product at issue here are available, but does not provide any evidence that the alternatives are reasonable substitutes such that price is constrained by competitive forces.[21] Under the Court's holding in *NetCoalition*, a market data provider must provide "evidence of trader behavior" – such as the number of potential users of its data and how those users might react to changes in the price of that data – to support its conclusion that competition constrains its ability to charge supracompetitive fees for market data.[22] Yet the Exchange provides no evidence, only theories, as to how users might react to changes in the price of its data products.

Conclusion

We believe *NetCoalition* requires the Commission to review cost data as an essential element of considering whether there is substantial evidence of "competitive forces." Indeed, the need for cost data is heightened when, as is the case here, an exchange provides no evidence to support its various theories of competition. Furthermore, neither the Commission nor the Exchange should circumvent the D.C. Circuit's findings in *NetCoalition* through the procedural mechanism of Section 19(b)(3)(A). For the foregoing reasons, the Commission should suspend this unenforceable rule change[23] under Section 19(b)(3)(C) because suspension is necessary or appropriate in the public interest, for the protection of investors, and in furtherance of the purposes of the Exchange Act.[24]

Finally, SIFMA and NetCoalition have repeatedly raised with the Commission important issues regarding market data fees. The Commission should not permit unsubstantiated fee filings to remain effective while the follow-up *NetCoalition* matter remains pending before the D.C. Circuit. The Commission should suspend the Notice and future similar rule changes until the D.C. Circuit renders a final opinion in that case.

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If you have any questions or you would like to discuss these matters further, please call Melissa MacGregor, Managing Director and Associate General Counsel at SIFMA, at 202-962-7385.

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20 615 F.3d at 541.

21 77 Fed. Reg. at 3316.

22 615 F.3d at 542-43.

23 As noted above, Section 19(b)(3)(C) provides: "Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this subparagraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable federal and state law."

24 15 U.S.C. § 78s(b)(3)(C).

Respectfully submitted,

Ira D. Hammerman
Senior Managing Director & General Counsel
SIFMA

Markham Erickson
Executive Director & General Counsel
NetCoalition

Exhibit 1