August 9, 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 DISAPPROVAL

Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing a Fee for Television Distribution of the NYSE MKT Trades Data Product, File No. SR-NYSEMKT-2012-19, Securities Exchange Act Release No. 34-67438 (July 13, 2012).

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] and NetCoalition[2] appreciate the opportunity to comment on the above-captioned notice (the "Notice"), under which NYSE MKT LLC ("NYSE MKT") proposed a rule change that establishes a fee for television distribution of the NYSE MKT Trades data product. The proposed rule change is purported 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").[3]

For the reasons set forth below, and because NYSE MKT's actions relate to what the Commission refers to as "core" data, and are inconsistent with the findings of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. Securities and Exchange*

---

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 15 U.S.C. § 78s(b)(3)(A) (2010).

Commission,[4] we respectfully petition the Commission to temporarily suspend this rule change under Section 19(b)(3)(C) of the Exchange Act[5] and institute proceedings to disapprove (or properly approve) the change under Section 19(b)(2)(B) of the Exchange Act.[6]

Time is of the essence in the need for the Commission to suspend the effect of this rule change. The Commission may not accept such a rule change as complete, and such a rule change cannot become effective upon filing, if on its face it is unlawful. The rule change is unlawful because it is based on invalid grounds omitting cost data and otherwise fails to comport with the Exchange Act as previously interpreted by the Commission and the D.C. Circuit in *NetCoalition*. We therefore urge the Commission to act immediately to suspend this rule change until the Commission and the public have had ample time to determine whether it should be approved.

A. The Proposed Fees Are Subject To A Cost-Based Standard.

Under the Exchange Act, fees imposed by an exclusive processor of data must be "fair and reasonable."[7] The fees here concern "core" data – last sale and best bid and offer data – and the Commission has previously recognized that the determination of whether core data fees are "fair and reasonable" should account for the cost of collecting and producing the data. For example, in the 1999 SEC "Market Information Concept Release" (the "Concept Release") the Commission noted that:

> [T]he fees charged by a monopolistic provider of a service (such as the exclusive processors of market information) need to be tied to some type of cost-based standard in order to preclude excessive profits if fees are too high or underfunding or subsidization fees are too low.[8]

The Concept Release, therefore, found that "the total amount of market information revenues should remain reasonably related to the cost of market information."[9]

This view was confirmed in *NetCoalition*, where the D.C. Circuit distinguished between "core" data and "non-core" data such as depth-of-market data.[10] Referring to the legislative history of the Securities Acts Amendments of 1975, the Court found that the Commission has special

---

4 615 F.3d 525 (D.C. Cir. 2010) ("*NetCoalition*").

5 15 U.S.C. § 78s(b)(3)(C) (2010).

6 15 U.S.C. § 78s(b)(2)(B) (2010).

7 15 U.S.C. § 78k-1(c)(1)(C).

8 Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613, 70,627 (Dec. 17, 1999).

9 *Id.*

10 615 F.3d at 534-35.

oversight duties with respect to core data that require the Commission to conduct a cost analysis typical of public utility ratemaking in determining whether data fees are "fair and reasonable" within the meaning of the Exchange Act:

> The petitioners rely on portions of the legislative history suggesting the Commission was supposed to "assume a special oversight and regulatory role" over exclusive processors by treating them as public utilities, a role inconsistent with allowing market forces to determine market data prices. S.Rep. No. 94-75, at 12 (1975), as reprinted in 1975 U.S.C.C.A.N. 179, 190 (Senate Report); *see id*. at 11, 1975 U.S.C.C.A.N. at 189 ("Any exclusive processor is, in effect, a public utility, and thus it must function in a manner which is absolutely neutral...."); Conference Report at 93, 1975 U.S.C.C.A.N. at 324 535*535 ("[W]here a self-regulatory organization or organizations utilize an exclusive processor, that processor takes on certain of the characteristics of a public utility and should be regulated accordingly."). These statements, however, refer to an "exclusive central processor for the composite [i.e., consolidated core data] tape or any other element of the national market system," not to an exchange acting as the processor of its proprietary non-core data. Senate Report at 11, 1975 U.S.C.C.A.N. at 189 (emphases added); *see also* Conference Report at 93, 1975 U.S.C.C.A.N. at 324. In fact, the legislative history indicates that the Congress intended . . . that the SEC wield its regulatory power "in those situations where competition may not be sufficient," such as in the creation of a "consolidated transactional reporting system." Conference Report at 92, 1975 U.S.C.C.A.N. at 323; *see* Senate Report at 12, 1975 U.S.C.C.A.N. at 190 ("[I]n situations in which natural competitive forces cannot, for whatever reason, be relied upon, the SEC must assume a special oversight and regulatory role.").[11]

The Commission's responsibility with respect to the rule change is thus clear. It must require NYSE MKT to provide cost data to justify the fees proposed by the rule change.

B. The Amendment Does Not Provide Cost Information.

NYSE MKT has failed to demonstrate that its proposed new fee is "fair and reasonable," as it has not offered any cost information that could justify its proposed new fee. The submission is devoid of any information regarding how the proposed fee was determined, let alone information regarding the cost of collecting and distributing the data. In the absence of cost information, NYSE MKT relies on the bare assertion that "its pricing is reasonable in light of other similar products" such as the television ticker display fees for CTA Network A market data and

[11] 615 F. 3d 534-45.

NASDAQ securities.[12] Its filing is therefore legally insufficient and the Commission should exercise its power to disapprove the proposed rule change.

Further, the comparison between the NYSE MKT fee and the fees charged for other core data products is not helpful. Comparing the prices of several products does not speak to whether the price of any one of the products is "fair and reasonable." As a matter of law, economics, or real-world business, one monopoly rent is not competitive simply because it is comparable to another monopoly rent. Only by rigorously examining cost data can the Commission meaningfully assess these fees.

C. The Exchange Has Not Shown That The Market Data Fee Is Constrained By Competitive Forces.

The Notice simply reiterates the related theories that order flow competition and platform competition purportedly result in the selling of market data at a "fair and reasonable" rate. But the United States Court of Appeals for the District of Columbia Circuit rejected "order flow" theory of competition in *NetCoalition*[13] and the Commission has never found that "platform competition" in fact precludes the Exchange from charging supracompetitive fees for its market data. At bottom, these theories are fundamentally flawed and thus inappropriate grounds for NYSE MKT to rely upon in submitting the Notice, or for the Commission to rely upon in allowing the Notice to remain effective.[14]

The reliance on the platform competition theory, particularly in this instance, does not make sense. The basis for the platform competition theory is that investors will choose where to place orders based on the total cost of using a particular platform – including "execution fees, data quality, and price and distribution of its data products."[15] Yet, the purchasers of the NYSE MKT data, television broadcasters, do not place trades and the investors who place the trades do not purchase the NYSE MKT data.[16] The premise on which the platform competition theory is based is not present here and, thus, the theory cannot be the basis for these fees.

NYSE MKT also asserts that several alternatives to the data product at issue are available,[17] but does not provide any evidence that the alternatives are reasonable substitutes for the market data at issue here, such that pricing of the data is constrained by competitive forces. Under the

---

12 77 Fed Reg. at 42536.

13 615 F.3d at 539-41.

14 *See generally* Final Brief of Petitioners NetCoalition and Securities Industry and Financial Markets Association at 45-49, *NetCoalition v. Securities and Exchange Commission*, Case Nos. 10-1421, 10-1422, 11-1001, 11-1065 (D.C. Cir.).

15 77 Fed. Reg. at 42537.

16 NYSE MKT admits as much when it states that "alternative data products may allow the end-user to download and analyze last sale data in order to make trading decisions." 77 Fed. Reg. at 42536.

17 77 Fed. Reg. at 42536.

Court's holding in *NetCoalition*, a market data provider must evaluate the number of potential users of its data and assess how those users might react to changes in the price of that data.[18] NYSE MKT provides no evidence, only theories, as to how its users might react to changes in the prices of its data product.

Conclusion

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.

For the reasons set forth above, and given the absence of cost data or other evidence supporting the fees proposed in the rule change, we respectfully request that the Commission temporarily suspend this rule change under Section 19(b)(3)(C) of the Exchange Act and institute proceedings to disapprove (or properly approve) the change under Section 19(b)(2)(B) of the Exchange Act.

* * *

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 or Markham Erickson, Executive Director & General Counsel of NetCoalition at 202-624-1462.

Respectfully submitted,

Ira D. Hammerman
Senior Managing Director & General Counsel
SIFMA

Markham Erickson
Executive Director & General Counsel
NetCoalition

8192689.2

[18] 615 F.3d at 542.