NetCoalition.com

January 17, 2007

By Email to rule-comments@sec.gov

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F. St. N.E.
Washington, D.C. 20549-0609

Re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21

Dear Chairman Cox and Commissioners:

On behalf of NetCoalition,[1] I write to applaud the Commission for its December 27, 2006 order granting NetCoalition's petition for review of the Division of Market Regulation's action in approving by delegated authority file No. SR-NYSEArca-2006-21. It is our understanding that the Commission has rarely—if ever—approved such a petition for review. We believe this step underscores the Commission's appreciation of the critical importance to the investing public of addressing the issues raised in the NetCoalition petition.

We urge the Commission to set aside the staff action and institute proceedings to determine whether the NYSEArca proposed rule change should be disapproved.[2] Such action

---

[1] NetCoalition represents some of the Internet's most innovative companies, including Bloomberg LP, CNET Networks, Google, IAC/Interactive Corp., Yahoo! and various local and State ISPs.

[2] The NYSE has filed with the Commission a proposed rule change to establish, as a one-year pilot program, a market data service that allows vendors to redistribute on a real-time basis last sale prices of transactions that take place on the NYSE and to establish a flat monthly fee for that service. Clearly, the discussions that resulted in this step would not have occurred without the Commission's intervention. We are very appreciative of the Commission's initiative. The proposed rule, however, does not lessen the need to address the critical, underlying issues regarding the cost and availability of monopoly market data that are the subjects of the NetCoalition petition. While the discussions that led to this proposal are a positive development, it does not lessen the need to address the critical underlying issues regarding the cost and availability of monopoly market data.

400 North Capitol Street, N.W. ▪ Suite 585 ▪ Washington, D.C. 20001
Telephone 202-624-1460 ▪ Fax 202-393-5218 ▪ www.netcoalition.com

would permit a stay until such time as the Commission is able to consider and articulate principles guiding consideration of this and other pending proposals. Such an action will ensure that the Commission's process of considering and reviewing exchange proposals is deliberate and widely understood. Further, such transparency will ensure that the investing public is confident that this review process has integrity, and that decisions are not a result of ad-hoc decision-making by staff based on closely guarded criteria.

The Internet is one of the most dynamic forces in our economy, creating new ways of doing business and providing unprecedented convenience, choice and access to information for hundreds of millions of users worldwide. As the collective public policy voice of many of the world's leading Internet companies, NetCoalition is committed to building user confidence in the Internet through responsible market-driven policies; preserving the open and competitive environment that has allowed the Internet to flourish; and ensuring the continued vitality of the Internet through active dialogue with policymakers.

NetCoalition is appreciative that the Commission has rejected NYSEArca's assertions that a trade association lacks standing to represent its members in this matter, as well as NYSEArca's assertion that product and fee approvals rendered by staff under delegated authority are not reviewable by the Commission.[3] It is well established at law that trade associations have standing to represent their members in cases and controversies brought to protect and vindicate their members' rights.[4] NYSEArca's novel interpretation of standing would further immunize from public scrutiny a process that is already lacking in accountability and transparency.

Moreover, if approvals under delegated authority were tantamount to approval by the Commissioners, there would not be a Rule 430 process. The existence of the Rule 430 process makes clear that there might be occasions where Commissioners on reflection believe a decision is of sufficient import to merit full Commission review similar to a motion for reconsideration or rehearing *en banc* in the federal courts. An occasion like this—where a series of decisions based on a record devoid of empirical support may reduce transparency, have anti-competitive consequences, or transfer large sums of money from investors to for-profit exchanges—is such an instance.

NetCoalition's legal and policy concerns with the NYSEArca rule filing are, of course, set forth in extensive detail in NetCoalition's November 14, 2006 Petition for Commission Review, and in our November 6, 2006 notice of intention to file the Petition. NetCoalition's August 9, 2006 letter – commenting on the NYSEArca fee proposal, as well as the Nasdaq Market Analytics and Nasdaq Trading and Compliance Proposals – underscore our broad

---

[3] Response to NetCoalition Notice of Intention to Petition for Review of SR-NYSEArca-2006-21, November 8, 2006, Mary Yaeger, Corporate Secretary, NYSEArca.

[4] *Securities Industry Ass'n v. Bd. of Governors of the Federal Reserve System,* 468 U.S. 207; *Investment Co. Inst. v. Camp, Comptroller of the Currency,* 401 U.S. 617; *Business Roundtable v. Securities and Exchange Comm'n,* 905 F.2d 406 (D.C. Cir 1990); *Chamber of Commerce of the United States v. Securities and Exchange Comm'n,* 443 F.3d 890 (D.C. Cir 2006).

concerns regarding both the cost of market data and the importance of ensuring the availability of monopoly data on equal and non-discriminatory terms.

We need not review our submissions in depth. In summary, the Petition argues that the staff's action pursuant to delegated authority be set aside for two principal reasons: (1) in approving the rule change by delegated authority, the staff misapplied the legal standards under the Securities Exchange Act of 1934 applicable to NYSEArca rule filings; and (2) the staff's action in approving NYSEArca's filing was arbitrary, capricious, and an abuse of discretion and otherwise not in accordance with law since NYSEArca did not provide any cost analysis or justification for the level of proposed data fees, and the staff did not provide any economic analysis to support its decision to approve the rule change.

The Commission has extensively articulated the importance of a cost-based review in Securities Exchange Act Release No. 42208 (Dec. 14, 1999)[5] (the "Market Data Concept Release") and has provided further affirmation on this important issue in Securities Exchange Act Release No. 50700 (Nov. 18, 2004),[6] the Concept Release Concerning Self Regulation. The Commission's position as elaborated in the Market Data Concept Release unambiguously underscores the fundamental role that a rigorous cost-based analysis must play in reviewing market data fee filings:

> Congress did not include a strict, cost-of-service standard in Section 11A of the Exchange Act, opting instead to allow the Commission some flexibility in assessing the fairness and reasonableness of fees. Nevertheless, the 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 if fees are too low. The Commission therefore believes that the total amount of market information revenues should remain reasonably related to the cost of market information. . . .[7]

This Commission's policy is grounded upon the Congressional concern regarding the dangers of exclusive processors, in the context of either single-exchange market data or consolidated market data. In enacting the Securities Acts Amendments of 1975 (the "1975 Act") Congress indicated that exclusive processors should be regulated as public utilities and urged the Commission to guard aggressively against anti-competitive behavior and abuse:

> [S]erious antitrust questions would be posed if access to this facility and its services were not available on reasonable and nondiscriminatory terms to all in

---

[5] Regulation of Market Information Fees and Revenues, 64 Fed. Reg. 70,627 (Dec. 19, 1999) (to be codified at 17 C.F.R. pt. 240).

[6] Concept Release Concerning Self-Regulation, 69 Fed. Reg. 71,256 at 71,273 (Dec. 8, 2004) (to be codified at 17 C.F.R. pt. 240).

[7] Market Data Concept Release in text accompanying n. 119 [footnote omitted].

> the trade *or if its charges were not reasonable.* Therefore, in order to foster efficient market development and operation and to provide a first line of defense against anti-competitive practices, Sections 11A(b) and (c)(1) would grant the SEC broad powers over any exclusive processor and impose on that agency a responsibility to assure the processor's neutrality and the reasonableness of its charges in practice as well as in concept.[8]

Congress expressed these concerns in a world of not-for-profit, member controlled exchanges. Now that exchanges are for-profit entities, the incentives to abuse their government sponsored monopoly powers are far greater than existed in 1975. Now that exchanges are no longer controlled by members who purchased market data, the restraints on the exchanges are far less than existed in 1975. In short, at the moment when scrutiny of the exchanges should be dramatically increasing, the staff has articulated standards that provide less protection for the public than the Act commands.

This is true not only of market data fees themselves, but also as to critical structural and competitiveness issues like those raised by the Nasdaq Analytics and Nasdaq Trading and Compliance Proposals. With their new for-profit motives and without effective SEC staff control, exchanges are being allowed to bypass and flout the statutory protections the Congress built into the Exchange Act. The staff has endorsed exchange rule proposals even in the face of vigorous and well-reasoned objections by significant commenters that go to the heart of whether a rule change is consistent with federal law. The NASD designated for immediate effectiveness as a "non-controversial" rule change the Nasdaq Analytics and Trading/Compliance Proposals—even though that package directly contravened an express policy determination the Commission made just a few months earlier in approving Nasdaq's registration as an exchange. At that time — January 2006 — the Commission ruled that Nasdaq should not be allowed to use for non-regulatory purposes information obtained from its members through the use of Nasdaq's regulatory power unless the underlying data were available to all on the same terms. Within six months the NASD/Nasdaq was dictating rules to immediately overturn the Commission's finding. The staff made no objection and did not target the rule filing for summary abrogation even though NetCoalition, SIFMA and Bloomberg objected.[9] It is our belief that exchanges should not be permitted to leverage their market data monopoly downstream into the value-added market.[10] We hope the Commission will make this structural issue part of its

---

[8] *Securities Acts Amendments of 1975,* Report of the Senate Comm. on Banking, Housing and Urban Affairs to Accompany S.249, S. Rep. No. 94-75, 94th Cong., 1st Sess. 11-12 (1975).

[9] *Compare* Securities Exchange Act Release No. 54128 (Jan. 13, 2006) in text following n. 136 (approval of Nasdaq exchange registration) *with* Securities Exchange Act Release No. 54003 (Jun. 16, 2006), File No. SR-NASD-2006-56 (Nasdaq analytics package).

[10] For example, *The Wall Street Journal* has reported that NASDAQ plans to raise its fees for companies listing on the exchange by "bundling" a new fee structure with certain information dissemination and market analysis services currently offered by third-party providers. Aaron Lucchetti and Kara Scannell, *Profit in Mind, Nasdaq is Raising Fees—and Brows*, The Wall Street Journal, December 8, 2006, at C1. This NASDAQ proposal is before the Commission currently. *See* Notice of Filing of Proposed Rule Change and Amendment Nos. 1 and 2 Thereto, to Modify Certain Fees for Listing on The Nasdaq Stock Market and to Make Available Products and Services

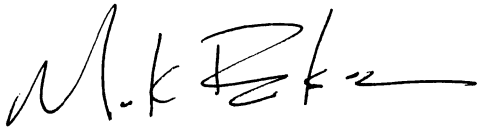
comprehensive review, and that the Commission will request that these proposals be re-filed in accordance with the principles the Commission ultimately articulates. The rules should not be enforced in the interim.

Internet companies excel at organizing and leveraging existing information to create innovative, value-added products. As the Commission explores ways to facilitate the broader distribution of market data, more and more innovation is likely to occur, which will benefit consumers and provide greater liquidity to the markets. In addition, as market data information is amortized over a wider and wider worldwide audience, there should be a downward pressure on market data fees. The Internet creates nearly limitless possibilities for innovative ways to provide investors with the tools that eventually should result in the elimination of a two-tiered market data structure, where there is one class of data available for Wall Street and a second class for everyday investors.

NetCoalition encourages the Commission to adopt polices that result in meaningful criteria for the exchanges and their customers to determine if market data fee proposals from the exchanges represent "an equitable allocation of overall costs" and are "fair and reasonable." Such an outcome will ensure that the securities laws' commitment to investor protection is implemented and enforced.

Our members look forward to working with the Commission to explore ways in which the Internet can facilitate the dissemination of better market data information so that our users can make increasingly more informed decisions about their financial futures. We look forward to working with the Commission to promote policies consistent with the Act that will ensure that monopoly data is reasonably priced and that exchanges cannot leverage their control over monopoly data downstream to thwart the development of innovation and better tools for the investing public.

Sincerely,



Markham C. Erickson
Executive Director and General Counsel

Intended to Assist Companies With Their Disclosure and Regulatory Obligations, Shareholder Communications, and Other Corporate Objectives, Release No. 34-54752, File No. SR-NASDAQ-2006-040 (November 14, 2006).