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Bloomberg L.P. 731 Lexington Avenue Tel +1 212 318-2000
New York, NY 10022 Fax +1 917 369 5000
bloomberg.com

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

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

Re: File Nos. SR-NASD-2006-056; SEC Release No. 34-54003 (June 16, 2006) — Proposed Rule Change to Establish a Package of Real-Time and Near-Real-Time Data Products Called the Market Analytics Data Package; and SR-NASD-2006-072; SEC Release No. 34-54002 (June 16, 2006) — Proposed Rule Change to Modify the Fees for Trading and Compliance Data and the Data Package Available to NASD Member Firms via Nasdaq Trader.com

Ladies and gentlemen:

We appreciate the opportunity to provide further comment, in response to the Commission's request in Securities Exchange Act Release Nos. 54003 (June 16, 2006) (the "Market Analytics Package Release") and 54002 (June 16, 2006) (the "Trading and Compliance Data Package Release").

Nasdaq Trade and Compliance Data Package. Nasdaq's Trade and Compliance Data Package proposal to add an OATS report card to the data package raises the question of the suitability of Nasdaq's use of OATS data for commercial purposes. The Commission expressly prohibited such use in its order approving Nasdaq's exchange registration.[1] The Commission observed that OATS data is obtained from members through the

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[1] The Commission noted in Securities Exchange Act Release No. 53128 (January 13, 2006):

> Nasdaq responded to commenters' concerns [that Nasdaq should not be permitted to use OATS data for non-regulatory purposes] by reaffirming its commitment not to use OATS data for commercial purposes. Nasdaq, however, believes that its use of OATS data by Nasdaq's Department of Economic Research to study public policy issues, such as subpenny

(Footnote continued)

use of the Exchange's regulatory powers. For that reason, the Commission insisted that OATS data should not be used for non-regulatory purposes unless the NASD makes available such OATS data to other market participants on the same terms. The principle articulated by the Commission is an important one. We respectfully recommend that the Commission enforce its previously articulated prohibition on the use of regulatory data for commercial purposes. To be consistent with that principle, if Nasdaq is to use OATS data for commercial purposes, it should be permitted to do so only if the NASD makes available such OATS data to other market participants, including developers of data software applications, data vendors and broker-dealers, on the same terms as it is provided to the Exchange.

Nasdaq Market Analytics Package. With respect to Nasdaq's Market Analytics Package, we note Nasdaq's statement in its filing with the Commission that both Market Velocity and Market Forces may include shares not visible in existing quote and order data feeds or in its quote montage.[2] Nasdaq's Market Analytics Package places Nasdaq in direct competition with data vendors and others who now or in the future might provide analytics, but it does so on an un-level playing field. As an SRO, Nasdaq has exclusive and primary access to the data needed to create the components of the Market Analytics Package as well as other data and analytics packages. As with OATS data under the Exchange's OATS rules, Nasdaq's members are required to provide Nasdaq with those data and Nasdaq obtains them free of charge. Data vendors wishing to compete with Nasdaq by offering comparable data and analytics packages would first have to license the component data from Nasdaq.

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> trading and decimalization, does not constitute commercial use of the data. The Commission believes that any non-regulatory use of the data would have a commercial benefit. . . .

Id. at n. 136. In text following n. 136, the Commission then stated:

> The Commission shares commenters' concerns about the use by the Nasdaq Exchange of OATS information for non-regulatory purposes, particularly since it includes information about members' trading activities on competitors of the Exchange. The Nasdaq Exchange's OATS rules would require Exchange members to report, on a daily basis, extensive information with respect to the handling of orders for Nasdaq securities, including when all or portions of orders are executed on markets other than the Nasdaq Exchange. A member's failure to provide this information could give rise to disciplinary action by the Exchange pursuant to its authority as a self-regulatory organization under the Exchange Act. Because this information is obtained from members through the exercise of the Exchange's regulatory powers, the Commission does not believe it should be used for non-regulatory purposes, unless the NASD makes available such OATS data to other market participants on the same terms as it is provided to the Exchange.

[2] *See* Securities Exchange Act Release No. 54003 (File No. SR-NASD-2006-056) (June 16, 2006), in text after n. 4 (Section 1. Purpose, *Market Velocity*).

Nasdaq's FSI Exemption. The Commission addressed these issues of competition and access to market data in its FSI exemption order. On March 7, 2000, Nasdaq purchased Financial Systemware, Inc., a manufacturer of software products, and formed a wholly owned subsidiary named Nasdaq Tools, Inc. ("Nasdaq Tools"). Nasdaq Tools introduced "Tools Plus", an order-management system using Nasdaq data in the compilation of analytics that competed with those provided by independent market-data vendors. On April 24, 2000, the Commission granted Nasdaq and NASD a one-year, temporary, conditional exemption from various filing and rule-making procedures relating to Nasdaq's acquisition and operation of FSI, subject to a variety of conditions designed to preserve competition, and solicited public comment prior to considering a permanent exemption.[3] At the expiration of that temporary exemption, the Commission granted Nasdaq and NASD a permanent exemption from the same filing and rulemaking procedures, subject to the continued imposition of conditions designed to preserve competition (the "FSI Exemption").[4]

In granting the FSI Exemption, the Commission recognized the danger of Nasdaq's leveraging its trading monopoly into a competitive adjacent market. To control that problem, the Commission conditioned the exemption on the presence of effective competition in the provision of order-management system services and software to market makers, and it required the NASD to encourage the development of software by NASD members and competing software vendors. To maintain the opportunity for what it called fair competition, the Commission also required NASD and Nasdaq to continue to provide open-architecture systems that would enable full public access to NASD's facilities.

The Commission stipulated that use of the software marketed by FSI must not be, currently or in the future, necessary to access Nasdaq or any other NASD market-related facility and that full and fair public access to Nasdaq be available. Thus, brokers and dealers that wished to access Nasdaq would not be forced to purchase or use FSI products or services. The NASD and Nasdaq also agreed to treat FSI like any other third-party vendor with respect to the provision of information regarding planned or actual changes to Nasdaq. Specifically, FSI would not be given any advance or private knowledge of such changes. In addition, to enforce and emphasize the separation of Nasdaq and FSI, the Commission required the two companies to have separate and distinct office space and prohibited them from sharing employees. The Commission also specifically noted that NASD and Nasdaq proposed that Nasdaq would operate FSI as a stand-alone business, capitalized separately and not subsidized by NASD members or other revenues of NASD or Nasdaq.[5]

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3 Securities Exchange Act Release No. 42713 (April 24, 2000).

4 Securities Exchange Act Release No. 44201 (April 18, 2001).

5 *Id.*

The FSI Exemption stands for the proposition that, when an exchange competes in the market for financial information by selling trading data or products based on those data that can be obtained only from that exchange, the exchange must do so in a way that does not have an anticompetitive effect on the market for financial information and that does not take advantage of the exchange's position as a government-protected monopoly. In the specific case of the FSI Exemption, the Commission ensured competition by requiring that Nasdaq engage in the data business through an entity separate from the exchange, an independent and separately capitalized corporate structure with strict firewalls providing for independent operation and an arm's-length relationship with the exchange. The affiliated but operationally independent and separately capitalized entity would gain access to data and information, including notice that Nasdaq would make new data available to market-data vendors, at the same time, for the same price, and on the same terms as its competitors. The FSI case thus provides a useful model for ensuring that for-profit self-regulatory organizations ("SROs") do not leverage their government-conferred monopoly over data into competitive markets. In the specific case of the FSI Exemption, the Commission encouraged competition by requiring the structural separation of the exchange from a downstream affiliate.

Equally effective protection based on the principles underlying the FSI Exemption can be applied to SROs. For example, in the case of Nasdaq's Market Analytics Package, the Commission can require that Nasdaq provide equal access at the same time and on the same terms to software developers and data vendors to the data required for the Market Analytics Package, in particular those data not visible in Nasdaq's existing quote and order data feeds or in its quote montage. Such measures were necessary and appropriate in 2001 when the Commission granted the FSI Exemption. With the emergence of for-profit SROs, they are even more urgently needed.

For-Profit Exchanges and the SRO Concept Release. These proposals must be considered within the context of Nasdaq and the New York Stock Exchange (the "NYSE") becoming for-profit exchanges. Well before the advent of for-profit exchanges, market data revenues represented significant percentages of the income derived from their overall operations. Despite the dramatic increase in cost-effective communication technologies and continuous growth in usage of market data, market data fees have remained substantially unchanged, making the cost of those data an increasingly burdensome cost for investors and other market participants.[6] That trend is a clear indication that market-data fees are not being set in an open and competitive market. We note that at a time when one would expect the amount of market-date revenues to be going down, in absolute terms market data revenue for the exchanges have in fact increased substantially. Market data filings, whether by NYSE, Nasdaq or, more recently, NYSE Arca, consistently fail to provide data on the costs of gathering, formatting and

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[6] *See* SIA/Arthur Andersen Report on Market Data Pricing, June 1999, p.1. Available at: http://www.sia.com/research/pdf/marketdata.pdf.

disseminating their data, information that is essential to informed comment and evaluation by market participants and a legally sufficient approval proceeding pursuant to the congressionally mandated standards in Sections 6(b),11A and 19(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

The instant filings also fail to provide an adequate statement of burdens on competition. Formulaic responses do not satisfy the requirements in the Commission's own Form 19b-4 that such burdens be explained and justified in detail.[7] For that reason alone, they are and continue to be deficient as a matter of law[8].

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[7] As the Commission is aware, the General Instructions to Form 19b-4, 5 Fed. Sec. L. Rep. (CCH) ¶ 32,356, are explicit on the point. They provide, with respect to "information to be Included in the Completed Form," as follows:

> 4. *Self-Regulatory Organization's Statement on Burden on Competition*
>
> State whether the proposed rule change will have an impact on competition and, if so, (i) state whether the proposed rule change will impose any burden on competition or whether it will relieve any burden on, or otherwise promote, competition and (ii) specify the particular categories of persons and kinds of businesses on which any burden will be imposed and the ways in which the proposed rule change will affect them. If the proposed rule change amends an existing rule, state whether that existing rule, as amended by the proposed rule change, will impose any burden on competition. If any impact on competition is not believed to be a significant burden on competition, explain why. Explain why any burden on competition is necessary or appropriate in furtherance of the purposes of the [Exchange] Act. In providing those explanations, set forth and respond in detail to written comments as to any significant impact or burden on competition perceived by any person who has made comments on the proposed rule change to the self-regulatory organization. *The statement concerning burdens on competition should be sufficiently detailed and specific to support a Commission finding that the proposed rule change does not impose any unnecessary or inappropriate burden on competition* [emphasis added].

Id. at p. 22,318.

[8] The rigorous approach built into the Commission's Rule 19b-4 and Form 19b-4 responds to a direct, specific and unequivocal congressional mandate. *See* 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. 29-30 (1975):

> In order to facilitate expeditious Commission review and evaluation of [proposed rule changes] and to assure informed public comment on them, Section 19(b)(1) would require all self-regulatory organizations to file with the SEC in connection with any proposed rule change a "concise general statement of the basis and purpose" of the proposed rule change. *It is the Committee's intention in adopting this standard to hold the self-regulatory organizations to the same standards of policy justification that the Administrative Procedure Act imposes on the SEC.*

(Footnote continued)

In 1999, in response to rising concern within the securities industry regarding the costs of market data, the Commission issued a concept release on market data, which focused in detail on a proposal for a flexible cost-based approach to market data fee regulation.[9] Subsequently, the Advisory Committee on Market Information published its report in 2001.[10] In 2004, as part of its original Regulation NMS proposal, the Commission offered initial steps in reforming the rules governing the dissemination of market data and the formula under which market data revenue is allocated.[11] The Commission thereafter received numerous comments from market participants requesting the Commission to broaden its consideration of market data to include market data fees and related issues. In response, the Commission opened the larger market data issues to fuller discussion and debate with the publication of its concept release concerning self-regulation by self-regulatory organization (the "SRO Concept Release") and asked a number of pertinent questions.[12]

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> . . . [T]he Committee believes interested persons should have a meaningful opportunity to obtain accurate information about proposed changes in self-regulatory rules and to comment on the need or justification for these changes. Section 19(b)(1) would require the SEC to give notice and provide an opportunity for interested persons to participate in the process of reviewing a proposed change in a self-regulatory organization's rules. *In addition, this section would require that all comment and all correspondence between the SEC and the self-regulatory agency concerning the proposal be available for public inspection. . . .*
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> . . . The Committee believes the Commission has a responsibility to see that self-regulatory rules are fully responsive to regulatory needs. By explicitly providing that the Commission's oversight authority encompasses major self-regulatory policies, the bill would make this responsibility clear and substantially decrease the possibility of slippage between regulatory need and self-regulatory performance [emphasis added]. . . .

9 *Regulation of Market Information Fees and Revenues*, Securities Exchange Act Release No. 42208 (December 9, 1999).

10 Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (September 14, 2001).

11 Securities Exchange Act Release No. 49325 (February 26, 2004).

12 Among the critical questions with respect to market data the Commission raised in its SRO Concept Release are the following:

> Question 23: Should market data revenue be used to cross subsidize SRO regulatory operations?
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> Question 24: Are current market data fees significantly limiting access of market participants, investors, or other users of market data? Why are certain market data fees more problematic than others, such as those associated with SRO data products that are not part of the consolidated quote stream? If so, which fees and why?

(Footnote continued)

The questions posed by the Commission are the right questions. They provide a basis on which the Nasdaq, NYSE and NYSE Arca market data filings should be considered. Thoughtful responses to those questions could help the Commission in meeting the statutory requirement in Exchange Act Sections 6(b) and 11A to assess the fairness and reasonableness of market data fees. The SRO Concept Release provides the Commission an opportunity to address this issue. The for-profit status of the exchanges makes it necessary that the Commission do so.

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> Question 25: Should the Commission reconsider the flexible, cost-based approach?
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> Question 26: Should the Commission consider a narrow cost-based approach that takes into account only limited costs, such as consolidation costs?
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> Question 27: On a conceptual basis, what should be included in the cost of generating market data?
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> Question 28: Are there other, better cost-based approaches? What are their potential benefits and drawbacks?
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> Question 29: Should the Commission require a more detailed explanation of how SROs spend the revenue generated from market data fees? Would the requirements proposed in the SRO Governance and Transparency Proposal that SROs detail their sources and uses of revenues add sufficient transparency in this area, or should more detailed reporting be mandated?
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> Question 30: If the Commission were to implement a revised approach to market data fees that substantially reduced this element of SRO funding, would SROs be able to raise the level of other revenue sources to remain adequately funded to comply with their statutory obligations?
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> Question 31: What SRO fees or other charges presently are under priced? What SRO fees or charges are over priced? On balance, are SROs over funded or under funded? What would be the impact on smaller SRO members of funding regulatory costs exclusively through regulatory fees?
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> Question 32: If market data fees were substantially reduced and SROs were unable to replace these revenues from other sources, would SROs be able to adequately fund their regulatory operations? If an SRO's funding were to become insufficient because of such a decline in revenue, should that SRO lose its status as a registered SRO?
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> Question 33: If market data fees were substantially reduced, would this exacerbate the conflicts inherent in the SRO system – in particular, the incentive to fund business functions at the expense of regulation?
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> Question 34: To what extent would the enhancements proposed in the SRO Governance and Transparency Proposal mitigate these concerns about inherent conflicts? Are there other measures that could mitigate these conflicts?
>
> Question 35: Should the Commission require that all SRO fees and charges be closely related to the cost of the SRO providing the service in questions? What would be the benefits and risks of doing so?

Securities Exchange Act Release No. 50700 (November 19, 2004), in text following n. 264.

In the absence of this comprehensive review, we've seen a flurry of separate market data filings typically subject to 21-day comment periods, the effect of which is to impede effective comment. The process threatens to render moot many of the important questions regarding market data and the exchanges the Commission has wisely raised.

Standard of Review. The exchanges have proposed a standard of review for market-data fee proposals that is inconsistent with the Exchange Act. Judging the reasonableness of the proposed fees of one exchange — a government-granted monopoly as an exclusive processor in terms of sourcing market data for its members — with the fees of another exchange, also a monopoly and an exclusive information processor, is clearly not what the Congress had in mind when it required the Commission to determine the fairness and reasonableness of fees.

The Exchange Act requires the Commission to disapprove an exchange fee proposal if the Commission cannot affirmatively find that it is reasonable and fairly allocated.[13] How can the Commission ascertain reasonableness in the absence of market forces or data? How can the public make informed judgments in the absence of market forces or data? The Congress warned the Commission of the dangers of monopolies and made it clear that the Commission would have special oversight responsibilities with respect to the imposition of fees:

> The Committee believes that if economies and sound regulation dictate the establishment of an exclusive central processor for the composite tape or any other element of the national market system, provision must be made to insure that this central processor is not under the control or domination of any particular market center. Any exclusive processor is, in effect, *a public utility*. . . . Although the existence of a monopolistic processing facility does not necessarily raise antitrust problems, serious

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[13] *See* Exchange Act Sections 6(b)(4), 11A(b) and (c) and 19(b). Section 6(b) sets forth both affirmative requirements for an exchange's rules and negative injunctions against Nasdaq rules that would have improper purposes or effects. Not every NASD rule need promote each affirmative purpose so long as the Nasdaq's rules as a group promote those purposes. At the same time, however, the Nasdaq's proposed rule change would not be consistent with the Exchange Act if it violated even one of the negative injunctions (e.g., the provisions of Section 6(b)(4) and Section 6(b)(8) referred to above). *See Matter of Nat'l Ass'n of Securities Dealers, Inc., Order Approving Proposed Rule Change*, Securities Exchange Act Release No. 17371 (December 12, 1980), in text following n.71. *See also Matter of New York Stock Exch., Notice of Proceeding to Consider Disapproval of Proposed Rule Change*, Securities Exchange Act Release No. 12249 (SR-NYSE-76-5) (March 23, 1976):

> > In the view of the Commission, a proposed rule change would not be consistent with the Act and the rules and regulations thereunder if, among other things, the Commission could not make the determinations required under Section 6(b) of the [Exchange] Act with respect to the rules of an exchange which included the proposed rule change prior to registration of an exchange.

> antitrust questions would be posed . . . *if its charges were not reasonable*. Therefore, in order 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 reasonableness of [an exclusive processor's] charges in practice as well as in concept.[14]

Simply comparing the market data fees of one monopoly to those of another does not meet the standard. Is the Act intended to protect one monopoly from another, or is it intended to protect investors and markets?

To fulfill the responsibility entrusted to it by the Congress, the Commission should consider the following steps not only in its review of the Nasdaq's Market Analytics and Trading and Compliance Data Packages, but in its review of all exchange market data fee filings:

- Require exchange market data filings to comply fully with Rule 19b-4 filing requirements by providing full descriptions of and justifications for the potential burdens on competition of their market data proposals;[15]

- Require the exchanges to fully disclose the costs they incur in gathering and disseminating their market data products and services, including full disclosure of the precise allocation of the proposed market data fees to exchange operations, including the use of those revenues to cross subsidize exchange activities;

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

[15] The Commission often has had to take action to curb the anti-competitive tendencies of the NASD and other self-regulatory organizations. *See*, e.g., the *Ætna* proceeding, Securities Exchange Act Release No. 9632 (June 7, 1972) (Commission partially abrogated, as in excess of NASD authority and anti-competitive, part of former Art. III, Sec. 25 of NASD Rules of Fair Practice [now NASD Conduct Rule 2420]); *Plaza Securities Corporation*, Securities Exchange Act Release No. 10643 (February 14, 1974) (NASD disciplinary order under former section 25 set aside); Securities & Exch. Comm'n, Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the Nasdaq Market, 1996 SEC LEXIS 2123 (August 8, 1996); the "Multiple Trading Case", *Matter of The Rules of the New York Stock Exch.*, 10 SEC 270 (October 4, 1941) (NYSE rule prohibiting dealings on other markets declared to be against public interest and illegal); Securities Exchange Act Release No. 12737 (August 25, 1976), 1976 SEC LEXIS 984 (order disapproving proposed NYSE rules 309 and 310); Securities Exchange Act Release No. 12249 (SR-NYSE-76-5) (March 23, 1976), 1976 SEC LEXIS 2116 (entry of order to disapprove NYSE Public Limit Order Protection Rule); and *Matter of Applications of William J. Higgins and Michael D. Robbins*, Securities Exchange Act Release No. 24429 (May 6, 1987), 1987 SEC LEXIS 1879 (NYSE action denying access on basis of policy not reasonably and fairly implied by existing rule set aside). *See also* Securities Exchange Act Release No. 12994 (November 18, 1976) in text accompanying nn. 14-23, and authorities cited therein. *Cf. Silver v. New York Stock Exch., Inc.*, 373 U.S. 341 (1963).

- Allow at least 60 days for public comment on market data filings at least until the Commission has completed deliberations on the SRO Concept Release, including the proposal and adoption of new rules governing market data.

- In publishing individual exchange market data filings, require the exchanges to detail the interrelation between those filings and related filings and invite and facilitate comment not only on individual filings but also on the interrelated structure of market data filings.[16]

- Conclude and inform the exchanges and the public that the Commission does not consider it an appropriate standard of review of market data filings consistent with its responsibilities under the Exchange Act to compare the pricing of one market data monopoly to that of another market data monopoly.

- Accelerate consideration of the SRO Concept Release and full discussion and debate of the fundamental questions the Commission has raised in that release regarding the issues raised by SROs and market data revenue and the more fundamental issue of identifying the principles under which the competing claims of SROs as for-profit entities and quasi-governmental organizations with regulatory responsibilities are to be monitored and balanced.

- Apply the principles of the FSI Exemption to the production and dissemination by SROs of market data and products derived from those data by (i) fashioning appropriate relief from SRO filing requirements for their new data products coupled with (ii) requiring equal access at the same time and on the same terms to the constituent data elements of the

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[16] While a self-regulatory organization may have some concerns that disclosure of the particulars about a new system may put at some competitive disadvantage a private, speculative commercial venture in which it has an interest, such as its market data products, those concerns must be subordinated to the needs of the Commission to understand the terms of substance of a proposed rule change if it is to determine whether the proposed rule change is consistent with the provisions of the Exchange Act applicable to the self-regulatory organization. Also, and equally important, the information must be made available to interested members of the public if the Commission is to provide the opportunity for submission of data, views and arguments the Congress envisioned under Section 19(b) of the Exchange Act. That is all the more important in a case such as this, where the Nasdaq is attempting through the rule filing to use its quasi-governmental regulatory power and its monopoly market power to bestow on its private venture unique and inappropriate commercial advantages.

new SRO data products to potential competitors, including software developers, data vendors and broker-dealers.

- Require that the exchanges insert "sunset" provisions in any new market data fee rules so that the Commission can require that they be refiled for *de novo* consideration once the Commission has completed its deliberation of the issues posed in the Market Data Concept Release.

We believe these are essential steps for the Commission to take to comply with its statutory obligations and perform its functions under Exchange Act Sections 6(b), 11A and 19(b), to afford market participants an opportunity to offer fully informed comment on market data proposals and to adequately and expeditiously address the fundamental policy issues these filings raise.

Respectfully submitted,

Sanjiv Gupta by R.D.B.

cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette L. Nazareth, Commissioner
The Hon. Kathlene L. Casey, Commissioner
Dr. Erik R. Sirri, Incoming Director
Division of Market Regulation
Robert L. D. Colby, Esq., Acting Director,
Division of Market Regulation
Jo Anne Swindler, Esq., Assistant Director
Division of Market Regulation
Mr. Stephen L. Williams, Economist,
Division of Market Regulation
Dr. Chester Spatt, Chief Economist
Brian G. Cartwright, Esq., General Counsel