Bloomberg
TRADEBOOK LLC
Member NASD/SIPC

June 23, 2006

Via e-mail: rule-comments@sec.gov

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

Re: Commission File Nos. SR-NASDAQ-2006-001 and SR-NASD-2006-048

Ladies and Gentlemen:

We appreciate the opportunity to provide still further comment, in response to the request by the Securities and Exchange Commission (the "Commission"), on two releases containing rule proposals relating to the Nasdaq Market Center (the "Nasdaq Proposals"). We commented earlier in letters dated May 5 and May 30, 2006. We also commented on the subject in a joint letter with Direct Edge LLC, BATS Trading, Inc. and Track ECN on March 21, 2006.

We welcome the letter of June 8, 2006 filed by the United States Chamber of Commerce, which is the largest business federation in the world.[1] In commenting on these Nasdaq proposals, the Chamber observes that the proposed rules could have a significant impact on independent ECNs, competition and on investors. If the Commission does decide to approve Nasdaq's proposed rules, we concur with the Chamber's observation that, as a matter of good process, the need to provide stability and predictability of regulation and market structure and to promote innovation and competition argue for an appropriate transition period. Nonetheless, as we discuss more fully below, we believe Nasdaq has failed in its filings to provide the Commission a basis on which it can lawfully conclude that the Nasdaq Proposals are consistent with the Securities Exchange Act of 1934 (the "Exchange Act") and the rules thereunder. Accordingly, we respectfully advise that a Commission order approving the Nasdaq Proposals

1 Letter dated June 8, 2006 of David C. Chavern, Vice President, Capital Markets Program, U.S. Chamber of Commerce, in Commission File No. SR-NASDAQ-2006-001.

for effectiveness at any time would be reversible as a matter of law by the United States Court of Appeals.

In its letters dated June 8[2] and 9[3], 2006, Nasdaq makes a number of misleading statements, as well as a number of false assertions. We comment on the most important of these below.

Technological Meltdown?

In its June 8 letter, and consistently in its previous communications, Nasdaq argued that Single Book should be immediately approved because there is *plenty* of capacity at the existing NSX platform for the independent ECNs. Indeed, Nasdaq asserted that the current inhabitants of the NSX "seem to be cohabitating in NSX with little disruption."[4] By its June 9 letter, however, Nasdaq reports that on June 8 senior officers of the NSX asked Nasdaq to have INET stop sending quotations to the NSX because the NSX "was experiencing severe capacity overages and delays in its core systems." On the basis of these events, Nasdaq issued the dire warning that "the possibility of future technology failures is increasing" and urged on the Commission that the only prudent way to avoid an impending market meltdown would be to approve Nasdaq's Single Book because there is *no* capacity at the existing NSX platform.

This argument, and Nasdaq's attempt to have it both ways in the course of a 24-hour period, should elicit skepticism. It should also raise a question: if Nasdaq has been watching the growing INET message traffic at the NSX with alarm, why have they been arguing to the Commission that the independent ECNs should march there?

Volume has been very high the past several weeks. All market participants are dealing with it. Shifting quotation traffic in periods of high volume is the norm. We expect this discomfort will be mitigated, as volume normally plummets in the summer. If in the meantime Nasdaq needs to remove some quotations from the NSX and place them back onto Nasdaq systems, that is not a crisis. It is the kind of accommodation that market participants regularly make and to which the markets readily adjust. Rather than scream "fire" where there is none, Nasdaq would do better to follow its own advice. In its letter of June 8, Nasdaq argued that, unlike the pessimists at Bloomberg who see only obstacles, "Nasdaq's own INET ECN, see[s]

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2 Letter dated June 8, 2006 of Jeffrey S. Davis, Senior Associate General Counsel of the Nasdaq Stock Market, to the Securities and Exchange Commission re: Third Response to Comments, Commission File No. SR-NASD-2006-001 ("June 8 Nasdaq Letter ").

3 Letter dated June 9, 2006 of Edward S. Knight, Executive Vice President and General Counsel of the Nasdaq Stock Market, to the Honorable Christopher Cox, Chairman, Securities and Exchange Commission, re: SR-NASD-2006-001 ("June 9 Nasdaq Letter ").

4 June 8 Nasdaq Letter at p. 3.

quoting opportunity in the NASD ADF." That is, of course, an unrealistic alternative, probably not one to which Nasdaq is giving any serious consideration since, as we and others have noted before, the ADF is just a quotation facility, has inadequate quotation identification, and lacks a link to an execution facility.

Has the Commission Ordered INET to Cease Quoting on NSX by September 1?

Nasdaq's claim in its letter of June 9 that "the Commission ordered that INET cease quoting on the NSX by September 1, 2006" is untrue. The INET Order[5] expressly states that Nasdaq itself has undertaken to integrate all of its systems into a single integrated book before the end of the third quarter of 2006, that is, before September 30, 2006.[6] Indeed, Nasdaq Exchange Rule 4720 sets the same deadline for systems integration.[7] In addition, the Commission's order approving Nasdaq's exchange registration[8] states, "Nasdaq represents that until September 30, 2006, INET will report its trading activity to the National Stock Exchange ("NSX") . . . ."[9]

The difference between September 1 and September 30 is crucial. As independent ECNs and non-primary exchanges are scrambling to accommodate — if possible — Nasdaq's accelerated timetable, every day counts. Given the ample public record regarding the September 30 target date for integration, it is difficult to believe that Nasdaq's misstatement was not deliberate and calculated.

The Commission understood that additional time beyond September 30, 2006 might be prudent and necessary. In the INET Order, the Commission noted that INET is now subject to Section 19 of the Exchange Act.[10] If the date for completing integration must be changed, the simple remedy is for Nasdaq to file a change to its Rule 4720 with the Commission. In its Approval Order, the Commission permitted Nasdaq as an exchange to run three separate trading systems before their full integration. As the Commission noted in its order, that decision was based upon the public interest.[11] It is difficult to imagine that it would not also be in the public interest to extend, if necessary, the time needed for Nasdaq to successfully complete integration of its trading systems.

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5 Securities Exchange Act Release No. 52902 (File No. SR-NASD-2005-128) (Dec. 7, 2005) (the "INET Order").

6 *Id*. in text after note 8.

7 Available at: http://nasdaq.complinet.com/nasdaq/display/display.html?rbid=1705&element_id=18.

8 Securities Exchange Act Release No. 53128 (File No. 10-131) (Jan. 13, 2006) (the "Approval Order").

9 *Id*. note 130.

10 INET Order in text at note 17.

11 Approval Order in text after note 146.

Business Certainty and Meaningful Public Comment

In its letter of June 9, Nasdaq states that, in December of 2005, "Nasdaq announced that the INET system would become the backbone of . . . NASDAQ's Single Book."[12] That is true, but the letter omits that Nasdaq also announced at the same time that "our integration plan will ensure that all the attributes of the Nasdaq market are maintained . . . ."[13] Clearly, order-delivery functionality should fall within the universe of "all the attributes of the Nasdaq market." Nasdaq also informed analysts that the Single Book rollout would take place in December 2006, meaning that — presuming the Commission approved and there were no legal challenges — independent ECNs had a year to find a new venue.[14]

Those reasonable expectations were dashed in mid-March, when Nasdaq moved the implementation up from year-end 2006 to July 17. The July 17 date, we expect, was predicated on a conclusion by Nasdaq that the comment period is meaningless and the Commission is prepared to act as a rubber stamp. That clearly is not the case. Putting aside the substantial technological impediments to making a rapid move to another trading venue, market participants should not be expected to divine the outcome of these public policy debates and embark on major and expensive systems development in advance of a definitive outcome. In view of the uncertainty and confusion Nasdaq has engendered, Bloomberg Tradebook and other independent ECNs have had to explore a number of alternatives. To serve our clients and to continue to empower them to seek superior executions, we have had to explore and develop, at substantial cost, several competing scenarios: (i) an interim, stop-gap period of migration to a different platform, (ii) a potential interim period of adapting to the Single Book environment while trying to prevent double execution, and (iii) an ultimate migration to an exchange platform that offers order delivery as well as quotation display. The very lack of certainty has impeded sound business planning and threatens to constrict investor choice and the development of sound market alternatives.

Broad Market Concerns About Disruption and the Inadequacies of Other Venues

Nasdaq asserts that Bloomberg Tradebook is in a "lonely predicament" and that we are uniquely vulnerable by virtue of the fact that we are not participating in another venue. This is part of Nasdaq's odd, ongoing effort to argue that Bloomberg Tradebook is the only entity with serious concerns regarding Nasdaq's proposal. The concerns we have raised, however, with the inadequacies of other venues and the need for transition time are not unique to

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12 *See* June 9 Nasdaq Letter.

13 Nasdaq, Head Trader Alert No. 2005-140 (December 8, 2005), available at: http://www.nasdaqtrader.com/Trader/News/2005/headtraderalerts/hta2005-140.stm.

14 "Nasdaq Speeds Up U.S. Platform Integration", Traders Magazine, April 1, 2006, available at http://www.tradersmagazine.com/articles.cfm?id=1&aid=2492&searchTerm=april%201,%202006.

Bloomberg. As noted above, the U.S. Chamber of Commerce has urged transition time for the independent ECNs. Citigroup, after chronicling at length the ADF's shortcomings, observed that "the Proposals should not be approved until a viable alternative to the Nasdaq Market Center is in place."[15] Direct Edge ECN, Track ECN, BATS Trading, and Bloomberg Tradebook jointly filed a letter on March 21, 2006 opposing these proposals as illegal. Senior management from all four entities met with the Commission's Division of Market Regulation on March 28, 2006 to convey their concerns regarding these legal infirmities in person. Knight Capital Group, Track ECN and BATS followed with additional separate letters on May 5, 2006. To characterize these objections as non-substantive is inaccurate.

Misstatements Regarding Bloomberg and the Opening and Closing Crosses

Nasdaq asserts that Bloomberg is already technologically capable of participating in Nasdaq via automatic execution, noting that Bloomberg currently participates in Nasdaq's Opening and Closing Crosses via automatic execution while still managing its double-execution risk. Nasdaq states that "During the first week of May 2006, Bloomberg executed almost two million shares via automatic executions in the Opening and Closing Crosses . . . . If Bloomberg can accept automatic executions in the Crosses, it can do so throughout the trading day." (June 8 Nasdaq Letter, page 2.)

This point is fallacious. In fact, Bloomberg Tradebook has had to develop special facilities to integrate with Nasdaq in order to assist our clients who wish to participate in the official open an close. At those limited times, Bloomberg Tradebook simply operates as an order-routing system. Those orders are sent to Nasdaq and never represented in our book, hence there is never a risk of multiple executions.

Nasdaq has taken umbrage at the assertion of many that Nasdaq's goal is to simply eliminate the independent ECNs. By stating that Bloomberg Tradebook should simply act for all clients throughout the day as we do for some clients at open and close, Nasdaq is saying that the solution for the independent ECNs is to (a) stop being ECNs , and (b) surrender order matching to Nasdaq. Once again, Nasdaq is making clear that its objective is to use its regulatory power to confiscate the independent ECNs' order flow.

NSX Existing Platform

Nasdaq asserts that "Bloomberg also attacks the NSX because it offers attribution to only one participant. Bloomberg calls the NSX 'a lifeboat with one seat' and then complains that NSX is not a viable option because BATS has already taken that seat. Yet again, Bloomberg is just wrong. There are currently two ECNs operating within the NSX, BATS and INET,

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15 Letter of C. Thomas Richardson dated May 17, 2006 on behalf of Citigroup Global Markets. Inc. and its affiliate, OnTrade, Inc., in Commission File No. SR-NASDAQ-2006-001.

Nasdaq's ECN. These two ECNs seem to be cohabitating in NSX with little disruption." (June 8 Nasdaq Letter , page 3.)

Actually, Bloomberg did not say that BATS had "already taken that seat." We said that Nasdaq's ECN INET has already taken that seat. More significantly, as discussed at length in our May 30 letter, NSX does not currently provide any way for order-entry firms to know whose quotations are being published. That has no doubt contributed to the fact that BATS has suffered a substantial reduction in volume as it moved to the NSX. This attribution problem precludes additional participants on the NSX platform, regardless of whether you subscribe to the Nasdaq position of June 8 (i.e., there is no capacity problem); the Nasdaq position of June 9 (i.e., there is a substantial capacity problem); or neither position.

Impact on Nasdaq Order Flow

In an effort to suggest that order delivery is an insignificant part of the Nasdaq market, Nasdaq asserts that "for the month of April 2006, the market participants that use order delivery functionality accounted for just four (4.12) percent of total execution volume in Nasdaq securities." (June 8 Nasdaq Letter , page 3). Nasdaq then asserts that "Bloomberg's total reported activity in Nasdaq stocks — including orders delivered to Bloomberg and orders executed within Bloomberg's system — accounted for just 1.6 percent of consolidated trades and 1.4 percent of consolidated volume [citation omitted]. For the first week of May 2006, orders that Nasdaq delivered to Bloomberg and that Bloomberg actually executed accounted for just nine-tenths of one percent of consolidated trades and just seven-tenths of one percent of consolidated volume in Nasdaq stocks." (June 8 Nasdaq Letter , page 4.)[16]

As Nasdaq knows, Bloomberg Tradebook never claimed that it accounts for 15 percent of the Nasdaq market. Nonetheless, Nasdaq apparently is calculating Bloomberg Tradebook's volume in Nasdaq trading by simply looking at internal matches and Nasdaq Market Center deliveries. A more accurate measure of trading volume must include how many Nasdaq shares we trade in total, which includes one-sided executions from routing to other ECNs. By that standard, Bloomberg Tradebook consistently represents more than 4 percent of the Nasdaq market. We understand that the calculation of all order-delivery volume is in the neighborhood of 15 percent of total volume in Nasdaq securities.

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[16] In footnote 6 of its letter of June 8, Nasdaq states further that "Bloomberg's claim that it represents 15 percent of the Nasdaq market is patently misleading." What is patently misleading is Nasdaq's inaccurate quotation. What Bloomberg Tradebook said in its letter or May 5 is that order-delivery ECNs represent approximately 15% of the Nasdaq market, that Bloomberg Tradebook represents 15% of the Nasdaq market.

Nasdaq's Misrepresentation of Data

Nasdaq asserts, "Bloomberg does have an impact on Nasdaq's competitiveness, and that impact is negative. For the first week of May 2006, during the critical trading period prior to 9:30:15 a.m., Bloomberg's mean response time to delivered orders is over 5 seconds per order. This harms both the investors whose orders are being delivered and the orders with which they would match if Bloomberg could execute them in a timely fashion." (June 8 Nasdaq Letter, page 4.)

Bloomberg has access to the data for the first week of May, 2006. Those data clearly demonstrate that the slowest Bloomberg response — not the mean, but a few outliers — was 600 milliseconds. The data we have compiled, which are summarized in the charts attached to this letter as Exhibits A and B, show the following:

(i) Exhibit A: Bloomberg Tradebook's mean time to notify Nasdaq that it had rejected a delivered order for the measuring period (May 1 through May 5, 9:29:15 to 9:30:59 A.M.) was 48.4 milliseconds.

(ii) Exhibit B: Nasdaq's mean time to acknowledge receipt of order rejections for the measuring period (May 1 through May 5, 9:29:15 to 9:30:59 A.M.) was 80.3 milliseconds.

Far from confirming Nasdaq's statement that Bloomberg Tradebook's system slowed down Nasdaq, they show that Nasdaq's systems are slower than Bloomberg Tradebook's. It is also quite extraordinary that Nasdaq's assessment of a members' response time seems to be off by a factor of one hundred.

Nasdaq Five-Second Rule

Nasdaq has argued that ECN response times of over five seconds justify ejecting ECN competitors from the Nasdaq Market System. Bloomberg has observed that — if speed were truly the issue — Nasdaq could actually enforce its existing five-second rule instead of ejecting ECNs that respond in tens of milliseconds. Nasdaq has responded to this key point with an inaccurate diversion.[17] The question that Nasdaq did not answer is that, if their concern is speed, why does Nasdaq neither enforce its existing speed rules nor propose a rule to enhance speed — for example, a rule requiring response times in 50 milliseconds rather than the current Nasdaq five-second (that is, 5,000 millisecond rule)? A reasonable proposal directed at speed

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[17] Specifically, Nasdaq's "response" is to state that "Mr. Blanc, Bloomberg's counsel, represented Brut ECN (prior to Nasdaq acquisition) and threatened suit against Nasdaq when Nasdaq tried to enforce its 5 second response time. (Nasdaq June 8 letter, footnote 7.) The statement is wrong. Of course, if Bloomberg's counsel, Mr. Blanc, had threatened to sue Nasdaq, that would be irrelevant to the matter at hand. Mr. Blanc has confirmed, nonetheless, that neither he nor his firm has ever represented Brut.

would likely comport with the Exchange Act, unlike the present proposals. But, of course, the issue isn't speed.

Nasdaq's Misstatements as to Comment Deadlines

Nasdaq's letter of June 8 states: "Nasdaq notes, yet again, that Bloomberg's comment was filed long after the official notice and comment period for this proposal expired. Under the Commission's own rules and the Administrative Procedures [sic] Act, it is improper for that letter to receive consideration or to be included in the official record in this matter. . . ." (June 8 Nasdaq Letter , footnote 10.)

As a matter of law, that is incorrect. This is an informal adjudication not required by statute to be determined "on-the-record" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 554. Accordingly, it is to be conducted in accordance with Commission rules adopted under Exchange Act Section 23(c), which authorizes the Commission to adopt rules governing the conduct of adjudications not required to be determined on the record. Rule 191 of the Commission's Rules of Practice, 17 C.F.R. § 201.191, pertains to "Adjudications not required to be determined on the record after notice and opportunity for hearing." It provides in paragraph (c), "The Commission, in its discretion, may accept and include in the record written comments filed with the Commission after the closing date." The Commission has long established official comment deadlines and then continued to receive and consider comments filed after the deadlines, including in this case comments filed by Nasdaq itself, in an effort to inform itself as completely as possible before making decisions.[18]

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We hope our letter is helpful to the Commission and the staff in its review of the Nasdaq's proposed rule changes. If members of the Commission or of the staff believe we may be of further assistance in these matters, please let us know.

Respectfully submitted,

Kim Bang by R.D.B.

cc: The Hon. Christopher Cox, Chairman

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[18] Nasdaq argues that "Putting aside Bloomberg's hyperbole, the facts are simply…the comment period ended on May 5, 2006". June 8 Nasdaq letter, page 5. Of course, Nasdaq submitted its comments on May 8, 2006. We certainly believe the Commission should consider Nasdaq's comments, as well as those of the Chamber of Commerce, Citigroup, Bloomberg Tradebook, Knight Capital Markets and other market participants.

The Hon. Paul S. Atkins, Commissioner
The Hon. Cynthia A. Glassman, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette L. Nazareth, Commissioner
Robert L. D. Colby, Esq., Acting Director,
Division of Market Regulation
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Dr. Chester Spatt, Chief Economist
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<u>**EXHIBIT A**</u>

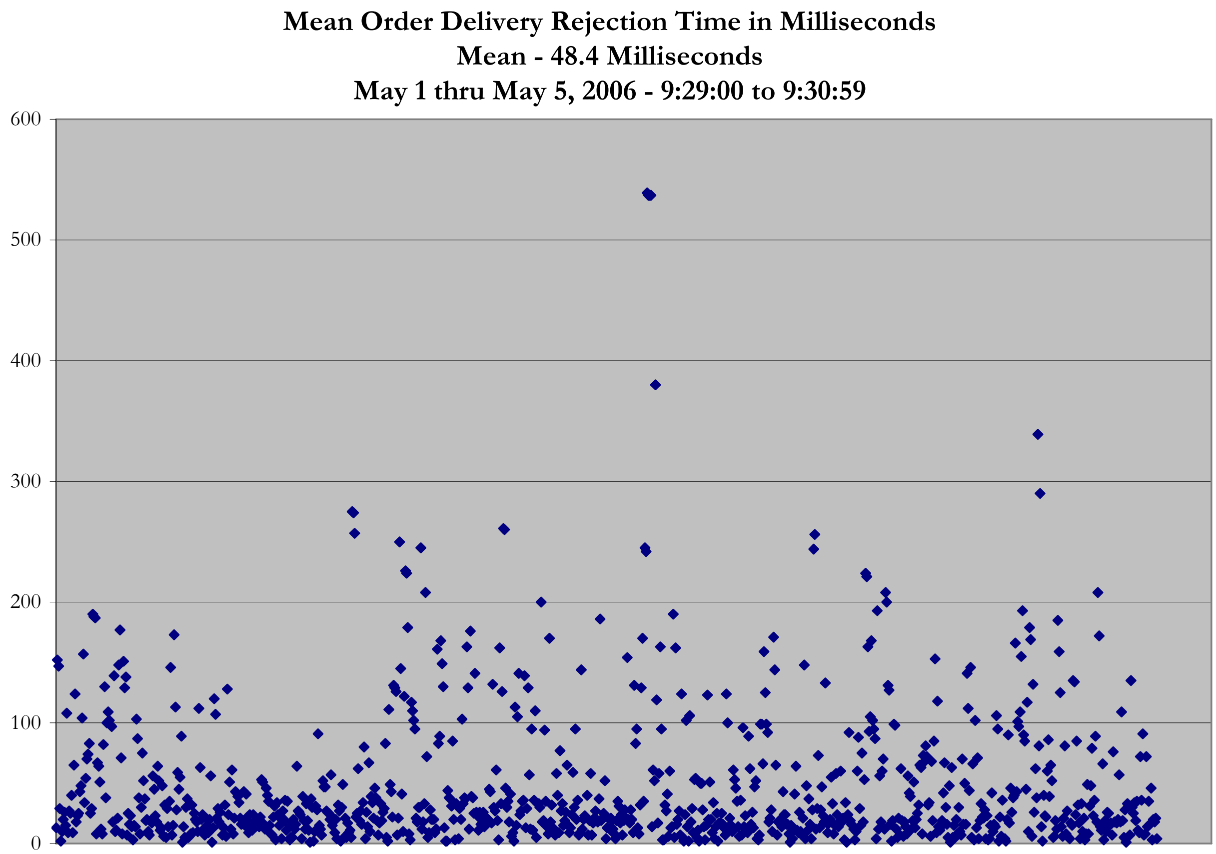
Mean Order Delivery Rejection Time in Milliseconds
Mean - 48.4 Milliseconds
May 1 thru May 5, 2006 - 9:29:00 to 9:30:59
600
500
400
300
200
100
0

EXHIBIT B

Mean Order Delivery Rejection - Nasdaq Ack Times in Milliseconds
Mean 80.3 Milliseconds
May 1 thru May 5 - 9:29:00 to 9:30:59