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**March 8, 2011**

**Via Electronic Mail ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))**

U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090  
Attention: Florence E. Harmon, Deputy Secretary

**COMMENT LETTER AND PETITION FOR DISAPPROVAL**

**Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and Nasdaq Data Add-On, File No. SR-Nasdaq-2011-024, Exchange Act Release No. 63906 (Feb. 14, 2011);**

**Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and BX Data Add-On, File No. SR-BX-2011-008, Exchange Act Release No. 63907 (Feb. 14, 2011)**

**Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and PSX Data Add-On, File No. SR-Phlx-2011-17, Exchange Act Release No. 63905 (Feb. 14, 2011)**

Dear Ms. Harmon:

SIFMA<sup>1</sup> and NetCoalition appreciate the opportunity to comment on the above-captioned notices (together, the “Notices”), under which The Nasdaq Stock Market, Nasdaq OMX BX, and Nasdaq OMX Phlx (together, the “Exchange”) each proposed a rule change to amend its fee schedule to establish fees for New Short Sale Monitor Service and Nasdaq, BX, and PSX Data Add-Ons.<sup>2</sup> The proposed rule changes purported to become effective

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<sup>1</sup> 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).

<sup>2</sup> *Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and Nasdaq Data Add-On*, Exchange Act Release No. 63906; File No. SR-NASDAQ-2011-024; 76 Fed. Reg. 9620 (Feb.

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”).<sup>3</sup> For the reasons set out below, and because the Exchange’s actions are inconsistent with the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. Securities and Exchange Commission*,<sup>4</sup> we respectfully petition the Commission to temporarily suspend this rule change under recently amended Section 19(b)(3)(C) of the Exchange Act<sup>5</sup> and institute proceedings to disapprove (or properly approve) those changes under Section 19(b)(2)(B) of the Exchange Act.<sup>6</sup>

Time is of the essence in the need for the Commission to suspend the effect of these and other similar unlawful market data fee rule changes proposed by self-regulatory organizations. The Commission staff should not be accepting rule change filings as complete, and those rule changes cannot become effective upon filing, if on their face they are unlawful. The rule changes at issue here are unlawful because they were based on invalid grounds omitted cost data and otherwise failed to comport with the Exchange Act as interpreted by the Court in *NetCoalition*. We therefore urge the Commission to act immediately to suspend these and other similar fee rule changes until the Commission and the public have had ample time to determine whether they should be disapproved.

We believe *NetCoalition* requires the Commission to review cost data as an essential element of considering whether there is substantial evidence of any kind to meet the Commission’s “competitive forces” test, before approving these or any other future market data fee filings. Neither the Commission nor the exchanges should circumvent the court’s findings in *NetCoalition* through the procedural mechanism of Section 19(b)(3)(A). The failure to address the court’s concerns regarding the market forces test renders these market data rule filings unenforceable under Section 19(b)(3)(C).<sup>7</sup>

For the reasons set out above, and given the absence of cost data or any other evidence supporting the Exchange’s contention that these data fees are constrained by competitive forces, we respectfully request that the Commission temporarily suspend the proposed rules establishing these market data fees under Section 19(b)(3)(C) of the Exchange Act, and institute proceedings to disapprove the proposed rule under Section 19(b)(2)(B) of the

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18, 2011); *Self-Regulatory Organizations; NASDAQ OMX BX; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and BX Data Add-On*, Exchange Act Release No. 663907; File No. SR-BX-2011-008; 76 Fed. Reg. 9623 (Feb. 18, 2011); *Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and PSX Data Add-On*, Exchange Act Release No. 63905; File No. SR-Phlx-2011-17; 76 Fed. Reg. 9618 (Feb. 18, 2011).

<sup>3</sup> 15 U.S.C. § 78s(b)(3)(A) (2010).

<sup>4</sup> 2010 U.S. App. LEXIS 16303 (D.C. Cir. Aug. 6, 2010).

<sup>5</sup> 15 U.S.C. § 78s(b)(3)(C) (2010).

<sup>6</sup> 15 U.S.C. § 78s(b)(2)(B) (2010).

<sup>7</sup> 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.”

Exchange Act. We respectfully point out in that regard that it likely would be better to evaluate these rule filings in the context of a normal notice-and-comment proceeding under Section 19(b) than to let the 60-day period pass without action which would prompt consideration of further action by SIFMA, NetCoalition, and our members.

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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.

Respectfully submitted,

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Executive Director & General Counsel  
NetCoalition