



March 6, 2007

U.S. Securities and Exchange Commission
100 F. St., N.E.
Washington, DC 20549-0609

Attention: Ms. Nancy M. Morris, Secretary

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

Dear Chairman Cox and Commissioners:

The NetCoalition Petition has engendered a great deal of public comment. We are gratified by the supportive calls for comprehensive review that have come from an extremely broad cross-section of the market and the public.¹ We also appreciate the opportunity to address briefly some of the issues raised in letters from NYSEArca and members of the newly-formed "Exchange Market Data Coalition."²

We will not summarize our Petition or restate our comment letters.³ We will try to address a few of the themes that emerge from these exchange submissions, though it appears that much of the focus of these letters is on matters that are not related in any demonstrable way to the concerns underlying NetCoalition's petition for review of the Commission Staff's approval of NYSEArca's data fee filing, and indeed the exchange letters address few of the legal arguments of NetCoalition or other commenters.

We acknowledge that the national securities exchanges play an important role in the United States economy and the National Market System, and we acknowledge also the critical role market data plays for investors. The exchanges' government-sponsored

¹ See, letters of the Securities Industry and Financial Markets Association, National Stock Exchange, Financial Services Roundtable, American Bar Association, Citigroup, Charles Schwab and Co., and Bloomberg LP.

² See, letters of NYSEArca, the "Exchange Market Data Coalition", PHILX, ISE, and the AMEX.

³ NetCoalition Petition of October 12, 2006, NetCoalition letter of August 9, 2006 regarding NYSEArca proposal, Nasdaq Analytics Package/ Proposal, and Nasdaq Trading and Compliance Package Proposal, letter of January 17, 2007 regarding NetCoalition Petition.

control of market data — data that broker dealers are required by law to provide exchanges immediately and without compensation — is the focus of our Petition.⁴ Competition in the listing or execution markets is irrelevant to the consideration of whether there is competition in the market data sector.

The members of the Exchange Market Data Coalition dwell on competition among markets. Our Petition, however, addresses an area where there is *no* competition, namely the sale of market data that is exclusive to each exchange. There is no way for competitive forces to produce market-driven or “fair and reasonable prices” required by the Exchange Act for that data. Indeed, the Petition is centered on competition — or the *absence* of competition due to the exchanges’ use of *monopoly power* over market data. There is no source of ArcaBook data, other than Arca. Likewise, for example, there is no way to replicate the Nasdaq Analytics or Nasdaq Compliance package, as the underlying data that market participants are required to provide the exchanges is not available to potential competitors.

Does an Advisory Committee Trump a Statute?

The Exchange Act requires that exchange rules provide for the “equitable allocation of reasonable dues, fees and other charges,” and that the fees and terms be “fair and reasonable” and “not “unreasonably discriminatory.”⁵ As the Commission itself observed:

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* [emphasis added].⁶

The Exchange Coalition argues that “The [NetCoalition] Petition ignores the 2001 blue-ribbon panel that considered and flatly rejected the “cost based” standard”⁷ We did not ignore it. We simply point out that an advisory panel’s conclusions do not trump

⁴ The Exchange Coalition letter states that the NetCoalition Petition asserts that the exchanges exercise monopoly control over transactional order flow. Exchange Coalition letter at 4. That is a mischaracterization. The NetCoalition petition instead addresses the exchanges’ monopoly control of *market data*.

⁵ Exchange Act Sections 6(b)(4) and 11A(c)(1)(C)&(D), 15 U.S.C. §§ 78f(b)(4) and 78k-1(c)(1)(C)&(D), and Rule 603(a)(2) & (3) of Regulation NMS, 17 C.F.R. § 242.603(a)(2) & (3).

⁶ *SEC Concept Release: Regulation of Market Information Fees and Revenues*, Securities Exchange Act Release No. 42208 (Dec. 9, 1999) in text preceding n. 119.

⁷ Exchange Coalition letter at 2.

a statute passed by the Congress and signed by the President.⁸ If the Exchange Coalition wishes to change the statute, they should make that case to the Congress.

Indeed, one primary defect in the Staff's approval of the NYSEArca filing is that it does not contain *any* cost-based justification for the proposed fees. As we noted in the Petition, the closest that the approval order comes to evaluating cost is to compare the fees charged by one monopolist to the fees charged by another monopolist. That manifestly does not satisfy the statutory and regulatory standards that data be distributed by SROs on terms that are fair and reasonable, are not unreasonably discriminatory, and do not place any unnecessary burdens on competition.⁹

Issues of "Profound" Importance

The Exchange Market Data Coalition asserts that the economic and regulatory implications of NetCoalition's Petition are "profound." We agree. That is why, as a matter of law and policy, we believe the Commissioners must establish principles that comport with the Exchange Act to guide decisions on both cost of data (ArcaBook, Totalview, etc.) and access to data (Nasdaq Analytics Package, etc., Nasdaq Trading and Compliance Data Package, etc.).

At present, as regards cost of data, decisions are made by the Staff under delegated authority without empirical evidence and according to a standard that many believe falls far short of the Exchange Act standards. As to access and use of data, these extraordinarily contentious decisions are being filed as immediately effective rule changes — thus precluding meaningful public comment or Commission input — abusing a process that is expressly intended to be reserved for non-controversial matters.¹⁰ Both decisions of cost and access are "profound." Cost decisions should not be made under delegated authority without Commission guidance. Worse yet, enormously controversial access decisions should not be made unilaterally by for-profit exchanges under a process

⁸ We note that the Seligman Committee, while having ample exchange membership, did not include representation from outside of Wall Street.

⁹ Exchange Act Sections 6(a)(5), (8) and 11A(c)(1); Rule 603(a) of Regulation NMS.

¹⁰ Rule 19b-4(f)(6), 17 C.F.R. § 240.19b-4(f)(6). In providing for immediate effectiveness of rules properly designated as "non-controversial", the Commission intended not to have that fast-track procedure apply to controversial rules:

The Commission would like to make clear that although it intends to expedite the rule filing process, it is doing so only with respect to the universe of proposed rule changes that are not likely to engender adverse comments or otherwise warrant the type of review required by Section 19(b)(2) of the Act.

designed for proposals which do not “significantly affect the protection of investors or the public interest” and do not impose undue burdens on competition.¹¹

The Rule-Making Process

The Market Data Exchange Coalition letter states: “The Commission Rule-making Process is Critical.”¹² Of course it is. However, the letter mischaracterizes the Commission’s rule-making process regarding market data, and it ignores the self-regulatory organization rule filing and approval process that is the focus of our Petition.

The Market Data Exchange Coalition letter states: “The current rules regarding market data dissemination [apparently referring to Regulation NMS] are the culmination of seven years of nearly continuous Commission-sponsored debate on market data policy,”¹³ implying that the Commission has made final decisions on the ways in which SROs may charge for data. This is false. As the exchanges know, the Commission has made it clear that Regulation NMS is *not* the “culmination” of its consideration of market data.¹⁴ In adopting Regulation NMS, the Commission stated:

Many commenters recommended that the level of market data fees should be reviewed and that, in particular, greater transparency concerning the costs of market data and the fee-setting process is needed. The Commission agrees. To respond to commenters’ concerns, it has sought comment on market data fees in its concept release relating to SRO structure.¹⁵

The Commission’s examination of the costs of data and the fee-setting process is continuing. And that underlies one of the main themes in our Petition: the time is more than ripe for the Commission to articulate clear statutory and investor-based principles for the sale of market data.

¹¹ Before the exchanges de-mutualized and became for-profit, these questions of cost, access, and control of data would have been vetted by data consumers. That is no longer the case.

¹² Securities Exchange Act Release No. 42208 (Dec. 9, 1999) in text preceding n. 119.

¹² Exchange Coalition letter at 5.

¹³ *Id.*

¹⁴ Regulation NMS is concerned with the allocation among self-regulatory organizations (“SROs”) of market data revenue from consolidated data. The Commission did not make any determination regarding the level of fees SROs should be permitted to charge for market data. *See*, Securities Exchange Act Release No. 51808 (June 9, 2005) (the “Regulation NMS Release”), in text accompanying nn. 46-49 and 580-593.

¹⁵ Regulation NMS Release, in text accompanying nn. 580 & 581 [footnotes omitted].

Regulation NMS

The exchanges' concentration on Regulation NMS is misplaced. Regulation NMS deals almost entirely with *consolidated* market data distributed through Networks.¹⁶ The exchanges selectively quote from the Regulation NMS Release that the Commission "believes that markets should have considerable leeway in determining whether, and on what terms, they provide additional non-core data to a Network processor."¹⁷ We note that this statement is limited to additional data that exchanges may determine to provide to systems that consolidate data; it does not address the sale of data by exchanges in commercial ventures, such as the proposal set forth in the NYSEArca rule filing. Even though the exchanges can determine to publish or not publish the depth-of-market data, if they do decide to publish and sell the data, their fees are subject to the same statutory standards as are fees for so-called core data.

In adopting Rule 603 of Regulation NMS, however, the Commission also said that it considered it appropriate to "allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors."¹⁸ Rule 603 incorporates the "more stringent" standard of "fair and reasonable" found in Exchange Act Section 11A(c)(1)(C) for the sale of exclusive data by exchanges.¹⁹ We believe that not only market forces, but also regulatory requirements such as the duty to obtain best execution of investor trades, are creating demand — and depriving purchasers of market data of the choice to say "no," for market data beyond the NBBO and last sale information.²⁰ Accordingly, the Commission must establish the standards and the procedures for the exchanges to demonstrate that their market data fee filings satisfy the Exchange Act and Rule 603.

In this connection, it is instructive to recall the Commission's comments about the "hybrid" model of data dissemination that it declined to employ in adopting Regulation NMS. That model would have provided a consolidated display of only the NBBO. All trade reports and all quotations other than the NBBO would be deconsolidated and

¹⁶ At the time Regulation NMS was adopted, the Commission was of the view that limiting consolidated market quotations to the NBBO was sufficient information for investors, particularly retail investors. Market developments have overtaken that view, and that quotations beyond the NBBO are necessary for investor to obtain and assess quality executions of their trades. *See, e.g.,* letter dated January 17, 2007 by Securities Industry and Financial Markets Association (the "SIFMA letter") in File No. SR-NYSEArca-2006-21. Those quotations, of course, relate directly to the market data that is the subject of the NYSEArca filing in this matter.

¹⁷ Exchange Coalition letter at 6.

¹⁸ Regulation NMS Release, in text following n.644.

¹⁹ Regulation NMS Release, in text following n.638.

²⁰ SIFMA letter at 13-14.

individual SROs would distribute their own trade and quotation data separately and establish fees for such information. In rejecting this approach, the Commission stated:

[C]omprehensive trade and quotation information, even beyond the NBBO, is vital to investors. The Commission remains concerned that an SRO with a significant share of trading in NMS stocks could exercise market power in setting fees for its data. Few investors could afford to do without the best quotations and trades of such an SRO that is dominant in a significant number of stocks.²¹

Net Coalition shares these concerns. As the exchanges consolidate, their market power increases. Moreover, with regard to their sole source data, they have absolute market power. Market forces are insufficient to address these concerns. What is needed is clear and rigorous Commission oversight of market data fees.

The National Stock Exchange speaks eloquently to the relationship of market data to Regulation NMS in its thoughtful submission in support of NetCoalition's Petition. The letter states that "NSX believes that the goals of Regulation NMS ultimately will be frustrated unless the market data issue is fully and fairly addressed . . . market participants who do not purchase the exchange's depth of book data will suffer the types of information disadvantages that Regulation NMS seeks to eradicate."²²

"Exchanges Compete and Innovate to Produce Market Data?"

The Exchange Market Data Coalition asserts that "Exchanges Compete and Innovate to Produce Market Data."²³ Again, to an investor who needs NYSEArca data, the availability of Nasdaq data provides no competition. Each exchange is a sole-source monopoly as it relates to its data. We are told "market data is the totality of the information assets that each Exchange creates by attracting order flow."²⁴ We are not told, at any point, that this data is actually created by the public and brought to broker-dealers who are compelled by law to provide it to the exchanges — immediately and without compensation — in furtherance of public goals articulated in the Exchange Act.

It is worth noting that the members of the Exchange Market Data Coalition are the beneficiaries of a government sponsored monopoly and partial antitrust exemption. The Commission has a statutory obligation to insure that these government protections have a

²¹ Regulation NMS Release, in text following n.575.

²² Comment letter from National Stock Exchange re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (Feb. 27, 2007) ("NSX Response").

²³ Exchange Coalition letter at 3.

²⁴ *Id.*

purpose beyond facilitating massive transfers of income from investors to for-profit exchanges or simply facilitating for-profit exchanges leveraging their monopolies downstream into other markets.

The Exchange Market Data Coalition states that "each Exchange certainly considers market data to be a significant product of their core business and an appropriate means to fund operations, including key regulatory activities....revenue fosters innovation."²⁵ We think the National Stock Exchange is entirely correct in voicing its objections to the Exchange Market Coalition's claims. "NSX disagrees with these statements. In our view, it is competition, or the opportunity for competition, that fosters innovation -- not revenue."²⁶

We wholeheartedly agree with the NSX that competition is the key to innovation. As the NSX has observed ". . . other businesses, such as technology companies could be invited to compete and innovate. This competition would be premised on non-discriminatory access to data . . . By allowing more potential participants to deliver innovation to the industry, fair and free access to basic market information will provide the entire U.S. securities market a competitive advantage globally."²⁷

This is a powerful message, and one that is consistent with our experience. Competition, not monopoly revenues, generates innovation. Competition here in the United States prepares industries for global competition. The current Staff approach on both fees and access to data is incompatible with competition and innovation. Where is the competition and innovation if monopoly rents are extracted without reference to cost? Where is the competition and innovation if exchanges are permitted to file for immediate effectiveness proposals – like the Nasdaq Analytics and Nasdaq Compliance Packages – which leverage exchange monopolies downstream under a regulatory umbrella that protects them from competition? We concur with the NSX's call for fundamental change to promote competition and innovation.

The Commission should consider NSX's constructive proposal to require exchanges to distribute real-time top and depth of book data with the associated costs imposed only on those who act on the information.

²⁵ Exchange Market Data Coalition at 5.

²⁶ NSX at 2.

²⁷ NSX at 3 and 4.

NetCoalition Has Standing to File the Petition

Rule 430 of the Commission's Rules of Practice permit a "person aggrieved" by an action taken pursuant to authority delegated to the Commission staff to file a petition for review of such action. NYSEArca claims that the NetCoalition does not have "standing" to file its Petition, because it is not a "person aggrieved" by the Staff's action.²⁸ NYSEArca had made the same claim earlier.²⁹ The claim is false. If potential buyers of the data that NYSEArca wants to sell for arbitrary prices are not "aggrieved persons," then who would be? NetCoalition's members would have standing to file the petition in their own right and as representatives of the many millions of Americans who access their websites. For that reason, and also given that the securities industry, represented by SIFMA, has supported the Petition and has strongly criticized the pricing of market data, the Petition was appropriately granted by the Commission.³⁰

The NYSE Internet Proposal Does Not Moot the Petition

The February 6 NYSEArca letter mentions the NYSE's recent proposal to make NYSE last sale data available to Internet portals for a fixed monthly fee.³¹ The letter declares that "the NYSE Internet Proposal moots the Petition."³² That is false. As Ron Jordan observed while comparing these two very different products, they are "apples and oranges."³³ While the NYSE Internet Proposal may be a step in the right direction of making market data widely available, the data the NYSE would make available is only a small portion of the data covered by the NYSEArca rule that is in question here. Moreover, the NYSE Internet Proposal does not provide any cost justification for its proposed fee level — \$100,000 per month — in terms of the costs of collecting, consolidation and distributing the data.³⁴

²⁸ NYSEArca letter at 6-9.

²⁹ Letter to the Honorable Christopher Cox, Chairman, SEC, from Mary Yeager, Corporate Secretary, NYSEArca, dated Nov. 8, 2006 ("November 8 letter") at 1-2.

³⁰ Order Granting Petition for Review and Scheduling Filing of Statements, Securities Exchange Act Release No. 55011 (Dec. 27, 2006). Even in the absence of a petition for review, the Commission sua sponte may order review of Staff action taken by delegated authority. See Rule 431(c) of the Commission's Rules of Practice. The importance of the issues associated with market data fees would warrant review by the Commission on that basis as well.

³¹ File No. SR-NYSE-2007-04 (filed Jan. 12, 2007) ("NYSE Internet Proposal").

³² NYSEArca letter at 5-6.

³³ Ron Jordan, presentation to Securities Traders Association, Feb. 14, 2007.

³⁴ We do note, however, that the February 6 letter and the NYSE Internet Proposal mischaracterize Rule 603(c)(1) of Regulation NMS in an apparent attempt to justify the narrow scope of the

The NYSE filing and the NYSEArca filing are not interconnected. One is a proposed fee by the NYSE, and the other is an approved fee for NYSEArca. The NYSE Internet Proposal relates to NYSE real-time last sale information only “for reference purposes, rather than as a basis for making trading decisions . . . by casual market data consumers.”³⁵ In contrast, the NYSEArca fee relates to a real-time compilation of all limit orders resident in the NYSEArca limit order book and real-time information relating to transactions and limit orders in debt securities traded through NYSEArca facilities for use by professional and nonprofessional traders.³⁶

The February 6 letter refers to “proprietary market data products” as “products that individual exchanges make available outside of NMS Plans and that are not essential to making trading decisions.”³⁷ That characterization may apply to the last sale data to which the NYSE Internet Proposal relates, but it is false to the extent it is meant to apply to the data covered by the NYSEArca fee. The suggestion that “the laws of supply and demand provide an appropriate basis for determining whether the fees are fair and reasonable”³⁸ is disingenuous. As Securities Industry and Financial Markets Association (“SIFMA”) and others have pointed out, given the Commission’s emphasis on best execution obligations, many market participants consider it necessary to acquire sole-source market data like the data covered by the NYSEArca filing.

There are no market forces setting the price of that data. This is worth stressing in light of NYSEArca’s characterization of how the last sale data offer came about. Under the heading of “Market Forces and Industry Dynamism,” NYSEArca explains that the last sales data offer proves “market forces, not regulation, will best respond to changing market needs.”³⁹ We suppose market forces, like beauty, are in the eye of the beholder. Prior to filing the Petition, NetCoalition’s members were being given an ultimatum by a government-sponsored monopoly. After filing the petition — and demonstrating the potential of exercising our legal rights to hold the exchanges to the standards in the statute — we have seen modest progress. A fair conclusion to draw from this experience

proposal. The February 6 letter states: “Rule 603 . . . allow[s] markets to vend their own last sale price information outside of the national market system plans, so long as the single-market prices are not made available in the context of trading or order-routing functionality” February 6 letter at 4; see also NYSE Internet Proposal at 8. The rule, however, permits the display of single-market quotation or trade data for an NMS security in a context in which a trading or order-routing decision can be implemented if a consolidated display of such data for the security is also provided.

³⁵ NYSE Internet Proposal at 4.

³⁶ Release 34-54597 (Oct. 12, 2006) (“NYSEArca Staff Approval Order”).

³⁷ February 6 letter at 5 & n.9.

³⁸ February 6 letter at 5.

³⁹ NYSEArca at 4.

is that monopolies need rigorous oversight and supervision. We see no evidence of market forces.

The Commission is Reviewing a Staff Action

NYSEArca argues that NetCoalition's Petition claims that the approval of NYSEArca's fee filing is "only" a staff action, and not a decision by the Commission. That is not so. The Petition notes throughout that the approval of the NYSEArca fee was an action by the Staff pursuant to delegated authority. Moreover, Section 4A(c) of the Securities Exchange Act of 1934 states that, absent review by the Commission of delegated action by the Staff, such action "shall, for all purposes, including appear or review thereof, be deemed the action of the Commission."⁴⁰

It is precisely because action taken pursuant to delegated authority is deemed Commission action that parties to an action and persons aggrieved by such action may petition for review by the Commission *qua* Commission pursuant to Rule 430 of the Rules of Practice.⁴¹ Indeed, if the Commission were immediately bound by Staff actions pursuant to delegated authority, Rules 430 and 431 of its Rules of Practice would have no meaning.⁴² Instead, the Commission's delegation of authority to the Staff enables the Staff to act on behalf of the Commission and, in the absence of subsequent Commission review, the action by the Staff is final agency action.

Oddly, NYSEArca states that "the statutory delegation of authority does not delegate to the Division of Market Regulation the authority to make findings and conclusions on behalf of the Commission."⁴³ Of course, implicit in the Staff's delegated authority to approve exchange rule filings is the power to make a legal determination that an exchange rule change is consistent with the provisions of the Exchange Act and the Commission's rules thereunder applicable to the exchange, which is the legal standard for approval under Exchange Act Section 19(b). NYSEArca's arguments in this connection may prove more than NYSEArca intended, however. The Commission's delegation of authority to the Staff to approve exchange rule changes does not include any explicit authority to issue policy pronouncements, but we understand that the Commission

⁴⁰ 15 U.S.C 78d-1(c).

⁴¹ This process is similar to a petition for reconsideration or for rehearing en banc in the Federal courts.

⁴² NYSEArca asserts that the Commission did "play[] a role" in the approval of its fee filing. February 6 letter at 10. In support, it refers to "reports to NYSEArca staff of conversations between Commission staff and Commissioners." *Id.* at 11. NetCoalition has no knowledge of the substance of any such conversations. While discussions between individual Commissioners and the Staff may inform decisions by delegated authority, the views of individual Commissioners are not the type of deliberative Commission action contemplated by Rules 430 and 431.

⁴³ February 6 letter at 10.

originally granted that authority to the Division of Market Regulation on the understanding that the Division would use it only to approve self-regulatory organization rule changes that were not controversial and did not raise significant policy issues.⁴⁴ That understanding, which was not memorialized in the published delegation rule, seems not to have guided the Division in recent years, for the Division has issued long orders, disputing public comment and reaching policy judgments, such as those at issue here, that have not been blessed by the Commissioners themselves. In light of this history, the Commission may wish to narrow the delegation to exclude proposed rule changes on which there has been significant public comment.

NetCoalition fully appreciates the importance to the Commission's processes of the delegation of functions to the Staff, and its significance for investors and the securities industry in general. We also appreciate the demands placed on the Staff in exercising its delegated responsibilities. However, as we and others have stated in connection with the Petition, we do not believe that the delegated authority was exercised by the Staff in this instance in accordance with the demands of the law or Commission Rule 19b-4.⁴⁵ Indeed, we and others believe that the process for setting the level of market data fees is fundamentally flawed and requires immediate Commission attention.

Cost-Based Fees Are the Proper Standard

NYSEArca criticizes the Petition's position that market data fees should be subjected to a "rigorous cost-based analysis,"⁴⁶ and claims that we have scant support for that position. We will not repeat the authority for our position here except to say that our authority is the most directly relevant and contemporaneous congressional statement on the issue and repeated expressions of Commission policy that market data fees, especially for data generated by exclusive sources, should be cost-based.⁴⁷ And the analysis of the application of cost-based standards to such fees should be rigorous and well-documented.

⁴⁴ It may be that the Division's memorandum recommending approval of the delegated authority soon after enactment of the Securities Acts Amendments of 1975 contained that understanding. We do not have access to that memorandum.

⁴⁵ Contrary to NYSEArca's claim, see February 6 letter at 12, our Petition did not suggest that NYSEArca acted arbitrarily or capriciously in setting the level of its fee. While we believe that NYSEArca's fee proposal did not meet the standards of the Exchange Act and Rule 19b-4, our position is that the Staff's delegated action was arbitrary and capricious because it is not based on required standards or evidence.

⁴⁶ February 6 letter at 13.

⁴⁷ NYSEArca claims that that our Petition erred in claiming that the Commission concluded in the Self-Regulation Concept Release ("SRO Concept Release") that a cost-based fee is required to justify a market data fee. February 6 letter at 13 n.31. The Petition, however, did not quote from that release, but from the Commission's Concept Release on Regulation of Market Data Fees. See Petition at 10. Nevertheless, in the SRO Concept Release the Commission quoted the Market Data Concept Release with approval: "[T]he total amount of market information revenues should

We will not repeat here our views that monopoly-to-monopoly comparisons are not an acceptable way to assess market data fee levels, and that when an exchange sets a price for its sole-source data, it is acting with monopoly power.⁴⁸

NetCoalition's Motivation

The Exchange Coalition suggests that NetCoalition has a nefarious commercial motive in seeking to obtain low prices for market data on behalf of its tens of millions of users. It is true that we believe that the prices that NYSEArca proposes to charge are exorbitant and they are not the product of a competitive environment. We do not know what the right fee is. But we do know that the Exchange Act says that when an exchange sells market data, especially market data over which it has exclusive control, the fees it charges must be fair and reasonable and not discriminatory, and we know also that the Commission has said that the fees should be cost-based. Our Petition simply seeks to have the Commission hold NYSEArca to those standards.⁴⁹

Conclusion

At a meeting of the Advisory Committee on Market Information back in 2000, Gerald Putnam, then Chief Executive Officer of Archipelago (NYSE Arca's predecessor), charged that "the New York Stock Exchange is the first one at the table complaining when a handful of ECNs decide to give away their quotes to Yahoo Finance." Robert G. Britz, Group Executive Vice President of NYSE, responded that, to the contrary, "*we applaud Archipelago giving out its limit order book to Yahoo and any other distribution means it cares to.*"⁵⁰ The Commission also praised Archipelago's offering in its approval of ArcaEX as a facility of the Pacific exchange: "The Commission also believes that the real-time dissemination of the Arca Book to the public via the internet will provide

remain reasonably related to the cost of market information." Release 34-50700 (Nov. 18, 2004), 69 FR 71256, 71273. The Commission then discussed a variety of ways and asked a variety of questions about how fees should be related to costs. *Id.* at 71273-71275. As we and others have noted, this is a critical unfinished matter in need of immediate Commission attention.

⁴⁸ See, Petition at 8-11.

⁴⁹ The Exchange Market Data Coalition letter additionally suggests that NetCoalition's members stand to gain from use of the exchanges' quotation information to internalize investors' order flow. This is false. None of the NetCoalition members is a broker-dealer. One of our Members, Bloomberg LP, is affiliated with a broker-dealer, Bloomberg Tradebook, but Tradebook does not make markets or otherwise "internalize" order flow. The exchanges understand their assertion is false, or they wouldn't be making their novel standing argument – which is predicated on the idea that NetCoalition lacks standing precisely because our members *are not* broker dealers or other market professionals. NYSEArca Response at 8.

⁵⁰ United States Securities and Exchange Commission, Advisory Committee On Market Information, transcript of meeting (Oct. 10, 2000) at p. 26, prepared by Diversified Reporting Services, Inc. ("Advisory Committee Transcript"), available at: www.fisd.net/mdregulation/111000_sectrans.pdf

valuable information to all market participants and is reasonably designed to promote price discovery.”⁵¹

NetCoalition appreciates the Commission granting our Petition. We continue to respectfully suggest that the Commission should set aside the staff action and institute proceedings to determine whether the NYSEArca proposed rule change should be disapproved. Such action would permit a stay until such time as the Commission is able to consider and articulate principles guiding consideration of proposals governing both cost and access to monopoly market data.

It is compelling when the NSX, which is a beneficiary of market data revenue, is willing to sacrifice short-term revenue to help place the markets on a sustainable footing. It is compelling when SIFMA members are willing to pay a dedicated regulatory fee rather than endure the continued threat to competitiveness poised by the current system.

NetCoalition looks forward to working with the Commission to promote policies consistent with the Exchange 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.

Respectfully submitted,



Markham C. Erickson
Executive Director and General Counsel

⁵¹ Securities Exchange Act Release No. 44983; File No. SR-PCX-00-25 (Oct. 25, 2001), available at: <http://www.sec.gov/rules/sro/34-44983.htm>