



January 11, 2008

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: In the Matter of NetCoalition etc., Order Granting Petition for Review
of File No. SR-NYSEArca-2006-21**

Ladies and Gentlemen:

We appreciate the opportunity to respond further to the Commission's invitation in its order granting the petition of NetCoalition for review of the action of the Division of Market Regulation in approving by delegated authority File No. SR-NYSEArca-2006-21,¹ a rule change proposed by NYSEArca, Inc. ("NYSEArca") to establish fees for the receipt and use of certain market data that Arca formerly made available free of charge.

We note with interest that there has been little in the public record to reflect any data, views and arguments NYSEArca and Nasdaq may have been submitting privately to the Commission or its staff since last May. Yet, we have heard that the Division of Trading and Markets has delivered a proposed order some 80 pages long with 250 footnotes to the Commission for *seriatim* approval. Further, we expect that draft document contains data and related analyses that have not previously been part of the public record.

Because the proposed order would have the effect of law if approved, we urge the Commission to make the proposed order available on the Commission's website for public comment. Likewise, those materials that are supporting the proposed order, including any emails between the exchanges and the Staff or Commissioners, should be made available on the website for public review.

The need for transparency is as compelling, and as legally mandatory, for the Commission's processes as it is for the securities markets. The Congress made it unambiguously clear in the legislative history of the Securities Acts Amendments of 1975 that the Commission

¹ Securities Exchange Act Release No. 55011 (December 27, 2006).

must publish all correspondence with NYSEArca concerning the instant rule proposal.² The U.S. Court of Appeals for the District of Columbia Circuit has emphasized that administrative agencies have an affirmative obligation to promote transparency in their proceedings.³

Furthermore, if NYSEArca has filed any amendments to its rule filing that have not yet been published, those filings should be published for comment before the Commission takes action in this matter. In particular, the public comment process envisioned by the Congress in Exchange Act Section 19(b) would be significantly frustrated if the Commission were to reach a private understanding with NYSEArca resulting in a filing the Commission then approved without publishing it for comment.

² See, e.g., 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.*

. . . [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. . . .*

³ If the SEC were to produce an analysis of cost data that have not previously been introduced into the record of this proceeding without first exposing those data to public comment that would deny the Commission the ability to evaluate external analyses of those data and would improperly frustrate the purpose of the comment process. See *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982):

The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule making process. If the notice of proposed rule making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.

As we have noted in our previous filings with the Commission, we believe that an open, fair and transparent process is consistent with the 1975 Amendments' emphasis on investor protection:

The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.

Exchange Act Section 6(b)(5), 15 U.S.C. § 6(b)(5).

We appreciate the Commission's consideration.

Respectfully submitted,



Markham C. Erickson
Executive Director and General Counsel

cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Annette L. Nazareth, Commissioner
The Hon. Kathlene L. Casey, Commissioner
Dr. Erik R. Sirri, Director
Division of Market Regulation
Robert L. D. Colby, Esq., Deputy Director,
Division of Market Regulation
David Shillman, Associate Director
Division of Market Regulation
Mr. Stephen L. Williams, Economist,
Division of Market Regulation
Dr. James A. Overdahl Chief Economist
Brian G. Cartwright, Esq., General Counsel