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December 22, 2011

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

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

COMMENT LETTER AND PETITION FOR ABROGATION

Re: Notice of Filing and Immediate Effectiveness of Notice of Filing and Immediate Effectiveness of Amendment No. 26 to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis Submitted by the BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE Amex, Inc., and NYSE Arca, Inc., File No. S7-24-89, Securities Exchange Act Release No. 65866 (December 2, 2011).

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association ("SIFMA")[1] and NetCoalition[2] appreciate the opportunity to comment on the above-captioned notice (the "Notice"), under which the operating committee ("Operating Committee") of the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for NASDAQ-Listed Securities

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1 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).

2 NetCoalition is the public policy voice for some of the world's most innovative companies on the Internet. NetCoalition represents the interests of Internet and technology companies, including Amazon.com, eBay, Google, Bloomberg L.P., IAC/Interactive, and Yahoo!.

Traded on Exchanges on an Unlisted Trading Privilege Basis (the "Plan") proposed an amendment (the "Amendment") replacing the annual administrative fees that the Participants impose with respect to real-time data with monthly access fees.[3] The proposed amendment purported to be put into effect upon filing with the U.S. Securities and Exchange Commission (the "Commission") under Rule 608(b)(3)(i) of the Securities Exchange Act of 1934, as amended (the "Act").[4] For the reasons set forth below, and because the Operating Committee's actions relate to what the Commission refers to as "core" data, and are inconsistent with the findings of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. Securities and Exchange Commission*,[5] we respectfully petition the Commission to summarily abrogate the Amendment and require that the Amendment be refiled in accordance with paragraph (a)(1) of Rule 608 and reviewed in accordance with paragraph (b)(2).

The Commission should not be accepting amendment filings as complete, and those amendments cannot become effective upon filing, if on their face they are unlawful. The Amendment at issue here is unlawful because it has not complied with Rule 608(a)(5)(ii) and otherwise fails to comport with the Act as previously interpreted by the Commission and the D.C. Circuit in *NetCoalition*. We therefore urge the Commission to act immediately to summarily abrogate the Amendment and require refiling under Rule 608.

A. The Proposed Fees Are Subject To A Cost-Based Standard.

At any time within 60 days of the filing of an amendment to a national market system plan, the Commission may summarily abrogate the amendment and require that it be refiled in accordance with the requirements of Rule 608(a)(1) "if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Act."[6]

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3 *See Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Notice of Filing and Immediate Effectiveness of Amendment No. 26 to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis Submitted by the BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE Amex, Inc., and NYSE Arca, Inc.*, Exchange Act Release No. 65866; File No. S7-24-89; 76 Fed. Reg. 76455 (December 2, 2011).

4 17 CFR 242.608.

5 615 F.3d 525 (D.C. Cir. 2010) ("*NetCoalition*").

6 17 CFR 242.608(b)(3)(iii).

Under the Act, fees imposed by an exclusive processor of data must be "fair and reasonable."[7] The fees here concern "core" data – last sale and best bid and offer data – and the Commission has previously recognized that the determination of whether core data fees are "fair and reasonable" should account for the cost of collecting and producing the data. For example, in the 1999 SEC "Market Information Concept Release" (the "Concept Release") the Commission noted that:

> [T]he 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 in order to preclude excessive profits if fees are too high or underfunding or subsidization fees are too low.[8]

The Concept Release, therefore, found that "the total amount of market information revenues should remain reasonably related to the cost of market information."[9]

This view was confirmed in *NetCoalition*, where the D.C. Circuit distinguished between "core" data and "non-core" data such as depth-of-market data.[10] Referring to the legislative history of the Securities Acts Amendments of 1975, the Court found that the Commission has special oversight duties with respect to core data that require it to conduct a cost analysis typical of public utility ratemaking in determining whether data fees are "fair and reasonable" within the meaning of the Act:

> The petitioners rely on portions of the legislative history suggesting the Commission was supposed to "assume a special oversight and regulatory role" over exclusive processors by treating them as public utilities, a role inconsistent with allowing market forces to determine market data prices. S.Rep. No. 94-75, at 12 (1975), as reprinted in 1975 U.S.C.C.A.N. 179, 190 (Senate Report); *see id.* at 11, 1975 U.S.C.C.A.N. at 189 ("Any exclusive processor is, in effect, a public utility, and thus it must function in a manner which is absolutely neutral...."); Conference Report at 93, 1975 U.S.C.C.A.N. at 324 535*535 ("[W]here a self-regulatory organization or organizations utilize an exclusive processor, that processor takes on certain of the characteristics of a public utility and should be regulated accordingly."). These statements,

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7 15 U.S.C. § 78k-1(c)(1)(C).

8 Regulation of Market Information Fees and Revenues, Release No. 34-42208, 64 Fed. Reg. 70,613, 70,627 (Dec. 17, 1999).

9 *Id.*

10 615 F.3d at 534-35.

> however, refer to an "exclusive central processor for the composite [i.e., consolidated core data] tape or any other element of the national market system," not to an exchange acting as the processor of its proprietary non-core data. Senate Report at 11, 1975 U.S.C.C.A.N. at 189 (emphases added); *see also* Conference Report at 93, 1975 U.S.C.C.A.N. at 324. In fact, the legislative history indicates that the Congress intended . . . that the SEC wield its regulatory power "in those situations where competition may not be sufficient," such as in the creation of a "consolidated transactional reporting system." Conference Report at 92, 1975 U.S.C.C.A.N. at 323; *see* Senate Report at 12, 1975 U.S.C.C.A.N. at 190 ("[I]n situations in which natural competitive forces cannot, for whatever reason, be relied upon, the SEC must assume a special oversight and regulatory role.").[11]

The Commission's responsibility with respect to the Amendment is thus clear. It must require the Operating Committee to provide detailed cost data to justify the fees proposed by the Amendment.

B. The Amendment Does Not Provide Cost Information.

Rule 608(a)(1) requires any amendment to a national market system plan to state, among other things, "[t]he method by which any fees or charges . . . will be determined and imposed."[12] The Operating Committee failed to comply with these requirements when they submitted the Amendment to the Commission.

The Operating Committee's submission is devoid of any information regarding how the proposed fees were determined, let alone information regarding the cost of collecting and producing the data. In fact, the only explanation of how the fees were determined is the bald conclusion that the fees are an "appropriate amount" and "a competitive response" to the CTA, CQ, and OPRA Plans' fees.[13] Its filing is therefore legally insufficient and the Commission should exercise its power to abrogate the filing.

Without any supporting data, the Operating Committee also asserts that the new fee structure would result in a 5% increase in annual revenues received under the Plan. This conclusion is impossible to reach when looking at the actual numbers. The Amendment replaces the *annual* administrative fee, ranging from $500 to $3,750 depending on how many real-time terminals a firm has, with a *monthly* access fee of $1,500 for "direct" access or $500 for "indirect" access. Therefore, a firm with just one real-time terminal

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11 615 F. 3d 534-45.

12 *Id.* at 242.608(a)(5)(ii).

13 76 Fed. Reg. at 76456.

receiving indirect access will have its current fee increase from $500 a year to $6,000 a year. This is a *1,200%* increase in fees. Aggregated across the industry, this amounts to a major fee increase without any supporting cost information.

C. Comparisons to Other Core Data Products are Irrelevant

In the absence of cost information, the Operating Committee relies on the assertion that the fees "amount to a competitive response" and "compare favorably" to fees imposed by the CTA, CQ, and OPRA Plans.[14] This comparison is irrelevant. Comparing the prices of several products does not speak to whether the price of any one of the products is "fair and reasonable." As a matter of law, economics, or real-world business, one monopoly rent is not competitive simply because it is comparable to another monopoly rent. Only by rigorously examining cost data can the Commission meaningfully assess these fees.

Conclusion

For the reasons set forth above, and given the absence of cost data or other evidence supporting the fees proposed in the Amendment, we respectfully request that the Commission summarily abrogate the Amendment and require that the Amendment be refiled in accordance with paragraph (a)(1) of Rule 608 and reviewed in accordance with paragraph (b)(2).

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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,

Ira D. Hammerman
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[14] 76 Fed Reg. at 76455-76456.