Bloomberg
TRADEBOOK LLC
Member NASD/SIPC

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<u>Via e-mail: rule-comments@sec.gov</u>

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Attention: Ms. Nancy M. Morris, Secretary

Re: <u>Commission File Nos. SR-NASDAQ-2006-001 and SR-NASD-2006-048</u>

Ladies and Gentlemen:

We appreciate the opportunity to provide 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 a letter dated May 5, 2006 (the "May 5 letter").

We endorse the main thrust of Citicorp's arguments in its May 17, 2006 letter,[1] particularly its demonstration that the Alternative Display Facility does not currently offer a viable alternative to Nasdaq, that Nasdaq's assertion that participation in the Nasdaq Market Center is voluntary is not correct and that the Nasdaq proposals should not be approved until a viable alternative to the Nasdaq Market Center is in place.

In the balance of this letter, we respond to relevant points raised in a comment filed by the Nasdaq Stock Market LLC ("Nasdaq") dated May 8, 2006 (the "Nasdaq letter").

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1 Letter dated May 17, 2006 to the Commission from C. Thomas Richardson, Managing Director, on behalf of Citigroup Global Markets Inc. and its affiliate OnTrade, Inc. ("Citigroup letter"), available at: http://www.sec.gov/comments/sr-nasdaq-2006-001/citigroup051706.pdf .

Speed is Not the Issue

The general thrust of Nasdaq's presentation, that retaining order delivery to accommodate the ECNs would slow down Nasdaq's fast, new "Single Book" system, is false. The slowest element in Nasdaq's system remains its difficulty in publishing quotation revisions in less than 30 milliseconds. Often, those revisions take as much as 500 milliseconds. As Nasdaq knows, Bloomberg Tradebook's response time is typically 5-20 milliseconds, well faster than Nasdaq's own quotation update speed. If the issue truly were speed, rather than the use of regulatory power to obtain commercial advantage, Nasdaq could have proposed a series of rules to enhance speed — for example, a rule requiring response times in, say, 50 milliseconds rather than the current Nasdaq five-second (that is, 5,000 milliseconds) rule, as discussed below. A reasonable proposal directed at speed would likely comport with the Exchange Act, unlike the present proposals. But, of course, the issue is not speed.

Broad Market Concern

Nasdaq suggests (Nasdaq letter, page 1) that Bloomberg Tradebook is the only party objecting to Nasdaq's new system. As Nasdaq knows, on March 21, 2006, Direct Edge ECN, Track ECN, BATS Trading, and Bloomberg Tradebook filed a joint letter with the Commission, opposing the impending proposals as illegal. This was followed, on March 28, 2006, by a joint meeting of senior management of Direct Edge, Track, BATS and Bloomberg Tradebook with Market Regulation raising the same concerns regarding the legal infirmities of the Nasdaq proposal. Bloomberg Tradebook, Knight Capital Group, Track ECN, and BATS, filed letters separately on May 5, 2006 elaborating on the objections presented at the earlier meeting. Contrary to Nasdaq's characterization of Bloomberg Tradebook's position as solitary, each of the letters submitted on May 5, 2006 by the other ECNs explicitly incorporated Bloomberg Tradebook's letter by reference or otherwise associated itself with the contents. This was followed by Citigroup's letter of May 17, 2006, which asserts "both from the perspective of an ECN and a broker-dealer, Citigroup believes that the Proposals reduce liquidity to the detriment of the market, and are directly inconsistent with the goal of increasing competition the Commission sought when promulgating Regulation NMS." Bloomberg Tradebook is demonstrably not the only party opposing Nasdaq's proposals.

NSX Existing Platform and ADF Are Not Viable Venues for Multiple Participants

Nasdaq makes much of the fact that BATS Trading, Inc. has begun quoting on NSX, and says that this "provides concrete evidence that Bloomberg's assertions regarding the impact of Single Book on competition are unfounded." (Nasdaq letter, footnote 1 and page 4.) Far from providing "concrete evidence that Bloomberg's assertions regarding the impact of Single Book on competition are unfounded," the BATS experience hints at the market dislocation that is in store if the Nasdaq proposals are approved.

The existing NSX platform has limited capacity for multiple participants. Indeed, even the presence of BATS's relatively light volume (approximately four million shares daily) has resulted in increases in locking and crossing quotations. Adding to this mix four more ECNs, or even Bloomberg Tradebook alone, with substantially greater volume would, in all likelihood, be technologically infeasible. Indeed, the limitations of the old platform are precisely why the NSX has undertaken the substantial task, at considerable cost, of designing and constructing a new platform with many times the capacity of the existing platform.

As noted, the existing NSX platform is not structured to provide attribution for multiple participants. In recent years, market participants have known that liquidity at NSX was attributable to its sole participant for Nasdaq stocks, INET. Now, market participants are in a quandary because the quotation that is disseminated is in the name of NSX and could be either INET or BATS. Most play the percentages and presume it is INET.

Thus, the current NSX platform is effectively a life-boat with one seat. Nasdaq's INET ECN currently occupies that seat, with BATS attempting to squeeze in. There are attributes of BATS that make this squeeze more feasible as a short-term floatation device for BATS than it would have been for other ECNs. BATS has the systems flexibility born of being only a few weeks old when Nasdaq announced in April that its Single Book roll-out would be accelerated by five months. With many times more liquidity and ten years of integration on Nasdaq's platform, Bloomberg Tradebook is not a feasible candidate for a quick move to the old NSX platform. Even for BATS and its customers, the transition has not been smooth — because of the disruption, BATS's volume is down from a daily range of from ten to twelve million shares to a daily range of from three to four million shares.[2]

What should broker-dealers and other market participants do if there are to be five ECNs on the existing NSX platform? Should they guess at which of the five ECNs actually is responsible for the displayed liquidity? More likely, to satisfy its best-execution obligations, every market participant would need to build connectivity to the five ECNs for the few weeks or months that these independent ECNs would be temporarily housed at the existing NSX platform. This would involve an enormous market dislocation, and an unnecessary diversion of industry-wide programming resources at a time when Regulation NMS implementation and the ramifications of the existing mergers are stretching programming capacity to the limits.

Citigroup does a thorough job of chronicling why the ADF is not a viable venue. Among the most intractable problems is the lack of connectivity. Again, as with the suggestion of the independent ECNs simply migrating to the current NSX platform, every market participant would find itself required to create connectivity to each ECN — even though the ECNs might be there for only a matter of weeks. Market participants should instead focus on implementing Regulation NMS and adapting to the long-term ramifications of the recent exchange mergers. We would note in passing that Direct Edge did not become an ADF participant in the past few weeks. Rather, Knight Capital Markets purchased Attain, an existing ECN whose value in part

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[2] *See*, BATS Daily Volume Reports, available at: http://www.batstrading.com/data/daily_volume.php.

derived from the fact that it had spent years building connectivity both to the ADF and with the Street. As Citicorp noted in its May 17 letter, moreover, the ADF does not provide an aggregate top-of-the-book quotation that would be protected in accordance with the Order Protection Rule. As a result, individual ECNs are therefore disadvantaged because they are not part of an aggregate top-of-the book, as they would be in any other market center.[3]

Nasdaq Misstates the Commission's Duties Under the Exchange Act

Nasdaq notes that the Securities Exchange Act of 1934 (the "Exchange Act") does not expressly require Nasdaq to offer order delivery and that, at present, no other exchange offers it. Nasdaq argues that (a) a Commission requirement that Nasdaq offer order delivery, unless imposed on the other exchanges, would be inconsistent with the goal of equal regulation and would be arbitrary and capricious, and (b) the Commission must approve a Nasdaq rule unless the Commission concludes that it is not in the best interest of investors or the public or is otherwise inconsistent with the Exchange Act (Nasdaq letter, page 2 and footnote 2).

Nasdaq misstates the Commission's duties under the Exchange Act. Exchange Act Section 19(b) requires the Commission to approve a Nasdaq rule proposal only if it finds the proposal to be consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to Nasdaq.[4] If the Commission does not make that finding, after the conclusion of disapproval proceedings, it must disapprove the rule proposal.[5] That is to say, in a doubtful case where the Commission cannot affirmatively find a Nasdaq rule proposal to be consistent with the Exchange Act and rules applicable to Nasdaq, it must disapprove the proposal. Nasdaq's assertion that "the proposal must be approved unless the Commission concludes that it is not in the best interests of investors or the public or is otherwise inconsistent with the Act" is flatly wrong.

The Exchange Act puts a special burden on self-regulatory organizations such as Nasdaq if they have an existing rule or system they wish to change. Nasdaq must demonstrate to

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3 *Citigroup letter* at 3.

4 As we noted in our May 5 letter, in reviewing Nasdaq's filing, the Commission also must consider whether approval will promote efficiency and competition. *See*, Exchange Act Section 3(f).

5 There have been relatively few instances in which Commission has had to go all the way through a disapproval proceeding. In most cases, the affected self-regulatory organizations have withdrawn rule proposals before the Commission began such proceedings. *But see*, Securities Exchange Act Release Nos. 17038 (August 1, 1980), 1980 LEXIS 976 (proposed New York Stock Exchange constitutional amendment disapproved); 13912 (August 31, 1977), 1977 LEXIS 953 (proposed American Stock Exchange rule amending listing requirements disapproved); 12737 (August 25, 1976), 1976 LEXIS 984 (proposed New York Stock Exchange Rules 309 and 310 disapproved).

the Commission's satisfaction that the rule proposal is lawful, including in this case a showing that any resulting discrimination among members is not unfair and that any resulting burden on competition is necessary or appropriate in furtherance of the purposes of the Act — as distinguished, for example, from Nasdaq's own commercial purposes. The fact that other exchanges do not have similar systems or rules that they are simultaneously trying to delete (or have never adopted) is irrelevant. The Commission would not be acting arbitrarily or capriciously in disapproving a proposed Nasdaq rule on the basis that it could not find, e.g., the discrimination to be fair or the competitive burdens necessary or appropriate. The Commission need not look to other exchanges, which have other systems and other rules, in making that finding. In particular, if the Commission declines to allow Nasdaq to delete order delivery because it does not find that Nasdaq's rule proposal is consistent with the Exchange Act, that would not imply a need to commence proceedings under Exchange Act Section 19(c) (which empowers the Commission to abrogate, add to or delete from an exchange's rules) to compel other exchanges to allow order delivery.

The Exchange Act does not require the Commission to approve a Nasdaq rule proposal on the basis that the rule being changed is unique to Nasdaq. Instead, the Exchange Act requires that there not be any change in Nasdaq's rules unless the change is demonstrably consistent with the Exchange Act and the rules thereunder.

Interrelated Abuses of Rulemaking Power

Bloomberg Tradebook — as well as Citigroup, Knight, Knight's ECN Direct Edge, BATS Trading and Track ECN — have all observed that Nasdaq's decision, to simultaneously ban and discriminatorily tax independent order-delivery ECNs, suggests a clear goal: to remove these liquidity providers. Nasdaq characterizes these assertions as "obfuscation" and an attempt to "fashion a fantastic conspiracy by Nasdaq" against ECNs (Nasdaq letter, page 3). As the same entity that issues regulations is also a for-profit entity, there is no need for a conspiracy. Our point is straightforward, not fantastic. These two proposals have the same objective as Nasdaq's previous effort to ban independent ECNs from charging any access fees. Nasdaq is deliberately trying to use its regulatory power to eliminate ECNs. These two rule filings, combined with the preceding filing trying to eliminate ECN access fees,[6] are interrelated and demonstrate Nasdaq's anticompetitive intent.

Nasdaq argues that its trading platform system is voluntary and that Bloomberg Tradebook and the other independent ECNs do not have to participate, by law or in practice. It adds that other ECNs have moved away from Nasdaq — BRUT, Instinet, Island, Archipelago

6 SR-NASD-2005-013 published for comment in Securities Exchange Act Release No. 51609 (April 26, 2005), available at: http://www.sec.gov/rules/sro/nasd/34-51609.pdf.

and Attain (Nasdaq letter, page 4). As the Citigroup letter convincingly argues, however, "participation in the Nasdaq Market Center is, in effect *not* voluntary for ECNs wishing to offer their customers liquidity from one of only two remaining significant liquidity pools."

That said, Bloomberg Tradebook has not alleged, and does not need to prove, that it is legally compelled to participate in Nasdaq, just that Nasdaq's repeated efforts to exclude it and the other independent ECNs are improper and illegal. The Commission cannot lawfully approve Nasdaq's rule proposals unless it affirmatively finds that they are consistent with the Exchange Act and rules, findings that cannot lawfully be made on the basis of the record in this proceeding.

Data Without Context

On page 5 of the Nasdaq letter, Nasdaq offers six bullet points of data which are apparently intended to illustrate the technological deficiencies of order-delivery ECNs. The brief bullet points raise more questions than they answer.

After spending the five pages preceding these bullet points in asserting that Bloomberg Tradebook is alone in opposing these proposals, Nasdaq then notes that "Bloomberg is not the only order-delivery participant in Nasdaq and the damage of slow response times and high rejections rates is clear." Nasdaq then provides a series of statistics which apparently have little to do with Bloomberg Tradebook. Indeed, it may be that the critical numbers offered by Nasdaq are actually attributable in part to Nasdaq's own Brut ECN. Regardless of whose data is reflected in the bullet points, there is insufficient context from which to draw much guidance.

Nasdaq's first bullet notes that "100 percent of automatic execution orders that Nasdaq attempted to execute actually executed." Of course, 100 percent of automatic execution orders that *anyone* attempts to execute will actually execute. The only reason a program would attempt to execute an order is that it has already exhausted all reject conditions. While we suspect this is intended to attest to Nasdaq's capabilities, it is meaningless.

The other bullets allege failures to execute by order-delivery firms, particularly during the opening of one of the most predictably chaotic trading periods of the year, namely a week leading up to expiration Friday. The bullets fail to specify what the percentages actually reference. Are we talking about shares or orders delivered? If a 100,000-share order is filled with only 99,900 shares — because only 99,900 shares are available — is that chalked up as a failure under this methodology? The fact that there are not 100,000 shares available is not a systems problem.

Active markets have more orders chasing quotations than quotations to be executed, particularly at the open and close. Failures to execute often result from "race conditions", that is, multiple orders trying to reach the same liquidity nearly simultaneously: if there are three orders chasing a single quotation, there will be rejections. To provide any meaningful guidance to policy makers, the statistics must be able to separate with certainty rejections that are attributable to systems failures from rejections that are an inevitable byproduct of a healthy market. Nasdaq's statistics do not provide that meaningful guidance.

The single largest technological vulnerability in any market at opening or closing is the slowness of quotation updates. Nasdaq's quotation updates can slow down to 500 milliseconds at precisely this time and are a major technological contributor to order failure at openings and closings. As volume spikes, the delay runs on the order of seconds rather than milliseconds. This reflects Nasdaq's inability to process and disseminate quotations faster than that and it affects the order-rejection rate because all market participants find themselves routing orders against a picture of the market that no longer exists. Indeed, an illuminating data point to help understand what, if anything, all these rejection and response numbers mean would be knowing the speed of quotation updates at these high volume openings and closings. Unfortunately, Nasdaq has not provided that information. If Nasdaq were genuinely concerned about failure rates at openings and closings, the logical step would be to mandate quotation updates at faster than 500 milliseconds, not to eject market participants that are responding to orders in tens of milliseconds.

While our statistics do not permit us to extract data going back to the week of March 13-17, 2006, we are able to access data from May 23, which was a normal trading day. On that day, we find that Nasdaq failed to fill 14.12 percent of Bloomberg Tradebook's orders that were sent to Nasdaq. Was this because of technological infirmities in the Nasdaq system, or because of absolutely normal market conditions? While normal market conditions may have contributed, surely Nasdaq's slowness in updating quotations must have caused many of the rejections. If we were able to examine fill rates on the week leading up to expiration Friday, the failure rate would almost certainly be much greater.

Nasdaq asserts that, during the first 15 seconds of trading "three order delivery participants had during that week mean response times over four, nine, and twenty seconds per order." In this regard we note that Nasdaq's rules state:

> If a Nasdaq ECN fails to meet a 5-second response time (as measured by the ECN's Service Delivery Platform) over a period of orders, such that the failure endangers the maintenance of a fair and orderly market, Nasdaq will place that ECN's quote in a closed-quote state. Nasdaq will lift the closed-quote state when the Nasdaq ECN certifies that it can meet the 5-second response time requirement with regularity sufficient to maintain a fair and orderly market.[7]

If Nasdaq is facing outliers that are not complying with its 5-second rule, the remedy is to enforce the 5-second rule. The remedy is not to eject ECNs that are capable of responding in tens of milliseconds. Indeed, if Nasdaq's concern is that some order-delivery

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[7] NASD and Nasdaq Rule 4710(b)(1)(C)(iv), available at http://nasdaq.complinet.com/nasdaq/display/display.html?rbid=1705&element_id=18.

firms are slowing its systems, Nasdaq could propose a one-second rule or a 500-millisecond rule or a 50-millisecond rule. But, of course, that is not Nasdaq's true objective. Nasdaq has not taken those steps because its true objective is to use its regulatory power to eliminate ECNs.

Business Certainty

The question of whether Nasdaq could eliminate order-delivery functionality is not a case of first impression for the Commission. Several years ago, the Commission thoroughly vetted Nasdaq's efforts to impose auto-execution delivery on ECNs in its SuperMontage proposal, and then through its order-priority algorithm. The Commission wisely rejected these Nasdaq proposals, deciding instead in favor of order delivery to promote greater competition and innovation.

In its Head Trader Alert of December 8, 2005,[8] Nasdaq articulated the goal of rolling out Single Book in a year. The Alert expressly asserted that "Our integration plan will ensure that all the attributes of the Nasdaq Market Center are maintained . . . ." In light of this statement, it is hard to imagine "attributes" not including order-delivery functionality. In its January 13, 2006 order approving Nasdaq's exchange registration, the Commission made clear that Nasdaq's operation as an exchange could commence before the roll-out of Single Book, indeed that Nasdaq as a registered exchange could, if necessary, continue to operate BRUT, INET and the Nasdaq Market Center as three separate trading facilities that do not interact with each other.[9] While the Commission's approval order reports that Nasdaq proposed a late September 2006 roll-out of Single Book, the order did not discuss and certainly did not approve Nasdaq's intention to eliminate the order-delivery functionality essential to the independent ECNs.

The Commission lent further support to the continued viability of the order-delivery ECN model in its Division of Market Regulation's "Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS" dated January 27, 2006,[10] where the Division made clear that under appropriate conditions, an SRO can continue to display quotations delivered by an order-delivery ECN.

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

9 *See* Securities Exchange Act Release No. 53128 (January 13, 2006) in text preceding n.145.

10 Division of Market Regulation, Responses to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS under the Act, dated January 27, 2006 ("Market Regulation NMS Q&A"), at Question 5, available at: http://www.sec.gov/divisions/marketreg/rule611faq.pdf .

Given the statements in Nasdaq's Head Trader Alert of December 2005, the Commission's approval order and its Responses to Frequently Asked Questions of January 2006, as of early March 2006, an independent order-delivery ECN would have reasonably believed: (a) it would be welcome to continue bringing its liquidity to the Nasdaq system indefinitely; or (b) if there were ultimately an order-delivery ban, and the independent ECN decided not to challenge the legality of the ban, the independent ECN would certainly have until at least December 7, 2006 (that is, one year from the date of the Head Trader Alert of December 2005) if Nasdaq's public statements were to be believed, or late September, if Nasdaq's statements to the Commission were to be believed. Neither date would have provided much time to find another venue, negotiate terms, conduct necessary programming and testing, and help facilitate necessary rules changes.

Nasdaq's Mid-March discriminatory pricing proposal, which would have immediately put independent order-delivery ECNs out of business, indicated that these reasonable and settled expectations were about to be obliterated. The April 1, 2006 "Traders Magazine" article entitled "Nasdaq Speeds Up U.S. Platform Integration" noted:

> Nasdaq, which operates three different trading platforms, plans to consolidate all trading onto its newly acquired INET platform as early as July…. A July roll-out would come five months earlier than expected. Nasdaq chief executive Bob Greifeld told analysts last December that the integration would be complete a year after the closing on the INET acquisition, on December 7.[11]

In view of Nasdaq's statutory obligations, it must not be permitted to accelerate market changes if the result would be market disruption and a diminution in investor choice. For a regulator/business entity to not only unilaterally attempt to reverse settled law and practice, but also announce in April that markets have *half as much time* as they had been promised to make these adjustments is both fundamentally unfair and illegal. Nasdaq in recent years welcomed ECN participants onto its trading platform. The ECN participants then conducted extensive programming and incurred considerable cost to integrate with Nasdaq's systems. As a regulated market and a self-regulatory organization, it must not now be allowed to take precipitate, unilateral action to eject the ECNs upon deciding they are no longer needed to serve Nasdaq's commercial purposes.

We have heard it said that no one should be slowing up Nasdaq's movement to a Single Book. No one is slowing up that movement — Nasdaq is speeding it up. We have heard no reason offered as to how the markets benefit from this accelerated roll-out. Indeed, Nasdaq

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[11] Available at http://www.tradersmagazine.com/articles.cfm?id=1&aid=2492&searchTerm=april%201,%202006.

itself as recently as May 23, 2006 kept open the possibility that it would become operational as an exchange in two phases and would establish Single Book in the second phase, after Nasdaq was already operating as an exchange.[12] The roll-out of Single Book is not necessary to the commencement of Nadaq's operation as an exchange and accelerating Single Book would visit needless disruption and dislocation not only on the independent ECNs but on the market as a whole. Indeed, one must conclude the very purpose of the acceleration is to unfairly disadvantage independent ECNs and regional exchange competitors, such as NSX.

Burdens on Competition

Nasdaq asserts that, in describing "burdens on competition", Bloomberg Tradebook is referring instead to burdens on itself and that Nasdaq has no obligation to avoid imposing burdens on Bloomberg Tradebook.

To be sure, Nasdaq's proposals would burden the independent ECNs, including Bloomberg Tradebook. In doing so, however, they also burden competition for order flow in Nasdaq-listed securities. The investor opportunities Nasdaq proposes to foreclose by forcing the independent ECNs to abandon their competitive business models raise serious questions about the impact of Nasdaq's proposal on investors and the market generally. As noted above, Nasdaq previously acquired INET and BRUT, two of its largest competitors, with a view to curtailing competition for order flow in Nasdaq securities. It now is attempting to perfect its monopoly by crushing the remaining independent ECNs. The Commission should not allow itself to be used as a shield for anticompetitive behavior of this sort.

Nasdaq Misstates the Commission's Authority Under the Exchange Act

Nasdaq states that the Commission lacks the statutory authority to give Bloomberg Tradebook a delay while it negotiates an arrangement to post quotations in another venue. Nasdaq's assertion misses the point. Nasdaq's failure to provide a transition period for the independent ECNs in its rule filing demonstrates the discriminatory and anticompetitive nature of its proposals and, therefore, they are also contrary to investor protection and the public interest, and should be disapproved. As discussed below, moreover, Nasdaq is wrong: the Commission has clear authority to require Nasdaq to provide an adequate transition period in its rule.

As noted above, Exchange Act Section 19(b) requires the Commission to approve a Nasdaq rule proposal only if the Commission finds that it is consistent with the Exchange Act and the rules thereunder. If the Commission cannot make that finding, and we believe the

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[12] *See Nasdaq Exchange Registration, Operational Issues, Frequently Asked Questions (FAQs),* updated May 23, 2006¸ available at: http://www.nasdaqtrader.com/trader/er/erop_faqs.pdf.

Commission in this instance cannot lawfully approve Nasdaq's rule proposals, the Commission can request Nasdaq to amend its rule proposal to build in a sufficient delay and, if Nasdaq refuses, the Commission can institute proceedings under Exchange Act Section 19(b)(2)(B) to determine whether the Nasdaq rule proposals should be disapproved on any of the Section 6(b) grounds discussed above (unfair discrimination and competitive burdens) or, indeed, on the ground that Nasdaq's failure to provide for an orderly transition of ECNs to another venue is itself a sufficient ground under Exchange Act Section 6(b)(5) since it would be inconsistent with a free and open market and a national market system. Under Section 19(b)(2)(B), the Commission is required to conclude those proceedings within 180 days of the publication of notice of the rule filing.[13]

The Commission clearly has the legal authority to grant independent ECNs adequate time to move to new venues. While this would not address the legal infirmities of the Nasdaq proposals, it is certainly a pragmatic step that, contrary to Nasdaq's assertion, is well within the Commission's authority.

Balancing Act

Nasdaq has argued to the Commission that it should be allowed to pursue its "business plan" without Commission interference. Exchange Act Section 6(b), however, does not countenance such an approach. It does not say, for example, "except to the extent a national securities exchange's business plan shall otherwise provide . . . [an exchange's rules shall not] be designed to permit unfair discrimination between brokers [or] dealers . . . and [shall] not impose any burden on competition that is not necessary or appropriate in furtherance of the [Exchange Act]." Instead, those prohibitions are absolute and are not capable of being varied by Nasdaq or by the Commission.

Allowing national securities exchanges to go public and become for-profit entities created tensions and risks under the Exchange Act. The Exchange Act remains unchanged and immutable, however, except by further act of Congress. It does not make exceptions for exchange managements that wish to use their regulatory powers to achieve private commercial ends without regard to the statutory standards or the public interest.

The independent ECNs have offered a reasonable and pragmatic path to resolve this issue in a manner that comports with the Exchange Act, minimizes market dislocation and

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[13] The rule filing was published in Securities Exchange Act Release No. 53583 (March 31, 2006), 71 Fed. Reg. 19573 (April 14, 2006). The date of official publication in the Federal Register would suggest that disapproval proceedings should be concluded by the middle of October. Section 19(b)(2)(B) permits the Commission to extend the 180-day deadline by an additional 60 days (e.g., to the middle of December) for good cause.

promotes the competition visualized in Regulation NMS. We urge the Commission to grant sufficient time for the independent ECNs to make an orderly transition to a new market venue.

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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
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
David Shillman, Esq., Associate Director,
Division of Market Regulation
Mr. Stephen L. Williams, Economist
Division of Market Regulation
Michael J. Gaw, Esq.
Division of Market Regulation
Dr. Chester Spatt, Chief Economist
Brian G. Cartwright, Esq., General Counsel