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December 11, 2006

Filed Electronically

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
Station Place
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File Number SR-NASDAQ-2006-040

Dear Ms. Morris:

We write on behalf of PR Newswire and in response to the Securities and Exchange Commission's ("SEC") solicitation of comments regarding the above-captioned proposed rule, SR-NASDAQ-2006-040, as amended (the "Proposed Rule"). PR Newswire strongly opposes the implementation of the Proposed Rule, as previously expressed in two letters to Mr. Arnold Golub, Associate General Counsel of the NASDAQ Stock Market LLC ("NASDAQ"), and asks that the SEC not approve the Proposed Rule as filed. See Letters dated October 13, 2006 and November 3, 2006, from PR Newswire Chief Operating Officer David B. Armon (attached hereto as Exhibit "A").

The Proposed Rule would implement substantial increases in NASDAQ's entry, additional share and annual fees ("listing fees") for its listed companies. NASDAQ attempts to justify these increases, in part, by including within the new listing fees certain products and services of NASDAQ's wholly owned subsidiaries, including commercial news wire and communications services, that are entirely unrelated to NASDAQ's regulated exchange services. NASDAQ's attempt to obtain SEC approval of this non-exchange-related activity is especially inappropriate. Although the SEC has broad authority to regulate NASDAQ's fees for exchange services, that authority does not include the ability to approve the compulsory non-exchange-related services proposed here. Furthermore, NASDAQ's rule-making ability is statutorily limited to rules related to its exchange services. The SEC therefore lacks authority to approve and establish a rule that incorporates fees for NASDAQ's unregulated, non-exchange-related, commercial enterprises, or to require those companies that list with NASDAQ to purchase or pay for such services from NASDAQ's commercial entities.

Even if the SEC had authority and jurisdiction over the proposed compulsory news wire services, NASDAQ's attempt to require its captive audience of listed companies to purchase news wire services constitutes an unlawful tying arrangement that the SEC should not endorse. Indeed, the impropriety of seeking SEC endorsement of NASDAQ's commercial,

non-exchange-related activities is demonstrated by this proposed rulemaking proceeding, in which the SEC would be required to resolve matters outside of its jurisdiction and that involve substantial antitrust issues that are not within the SEC's area of expertise. Such issues should be resolved by the government agencies and judicial authorities that have been given the authority and the responsibility to monitor and enforce U.S. antitrust laws.

I. BACKGROUND: THE PROPOSED RULE ATTEMPTS TO REQUIRE THE MANDATORY PURCHASE OF UNREGULATED COMMERCIAL NEWS WIRE SERVICES.

PR Newswire opposes NASDAQ's proposal to increase substantially the amount of the listing fees paid by domestic and foreign issuers listed on the NASDAQ Global Market or the NASDAQ Capital Market,¹ in exchange, in part, for providing listing companies certain "products and services intended to assist companies with their disclosure and regulatory obligations, shareholder communications, and other corporate objectives." See Proposed Rule at p. 6. Only after receiving objections from concerned companies like PR Newswire did NASDAQ amend the Proposed Rule to elaborate upon the nature of these "products and services," which it now explains will include news wire services. Amendment 2 to the Proposed Rule explains that NASDAQ believes its substantial fee increases are warranted, in part, because listed companies will now receive, among other things, a package of services including four audio webcasts, four press releases and four Form 8-K filings. Regardless of whether listed companies actually use these services, they are required to pay for them as part of the increased listing fees.

It is no coincidence that NASDAQ's proposal to begin charging its listed companies for these news distribution services comes on the heels of its September 2006 acquisition of PrimeZone Media Network ("PrimeZone"), a news wire services provider.² By filing the Proposed Rule, NASDAQ clearly intends to build its new subsidiary's market share in the news wire services industry on the backs of the companies that list with NASDAQ. If the Proposed Rule is approved, these companies will have no choice but to pay for these services as part of their newly increased listing fees. Tellingly, NASDAQ initially attempted

¹ Specifically, NASDAQ proposes to increase annual fees for the NASDAQ Global Market by 22-27%, and for the NASDAQ Capital Market by 31-57%. See Proposed Rule at p. 4. These proposed fee increases follow NASDAQ's significant 2005 fee increases, which generally increased the annual fees paid by listed companies by 15-25%. See Exchange Act Release No. 50838 (December 10, 2004), 69 FR 75578 (December 17, 2004) (approving SR-NASD-2004-128).

² Following its filing of the Proposed Rule with the SEC, NASDAQ changed the name of its subsidiary company from PrimeZone to "PRIMENEWSWIRE." NASDAQ's choice of a name so similar to that of the most significant brand in the newswire industry – PR NEWSWIRE – further reflects its anti-competitive tactics. In fact, PR Newswire has recently issued a cease-and-desist letter to NASDAQ demanding that it stop its infringement of the distinctive trademark "PR NEWSWIRE."

to hide its plans in the original version of the Proposed Rule, by providing only vague reference to “products and services” it intended to include in the increased listing fees. Now that NASDAQ has been forced to reveal its true intentions via amendments to the Proposed Rule, the unlawful nature of its actions is manifest.

Although NASDAQ emphasizes the limited nature of the compulsory services it currently intends to require listed companies to pay for, it reserves the right to expand and modify those services in the future.³ In our view, the SEC should reconsider before opening this particular Pandora’s box. NASDAQ’s proposed suite of bundled services would create an unavoidable conflict of interest between NASDAQ’s role as a regulator of listed companies and as the for-profit owner of a news distribution service provider. That conflict of interest is likely to grow more significant and more untenable over time, as NASDAQ naturally progresses the expansion of its bundled services. When the SEC approved NASDAQ’s proposal to become an exchange, it did not intend for NASDAQ to abuse its role as a self-regulatory organization (“SRO”) in order to benefit its for-profit status. Indeed, when approving NASDAQ’s exchange status, the SEC noted the need to “insulate [NASDAQ’s] regulatory functions from its market and other commercial interests so that it could carry out its regulatory obligations.”⁴

We do not believe that the Proposed Rule represents a good faith effort by NASDAQ to properly manage this inherent conflict of interest.

³ See Proposed Rule at p. 7, n. 8 (“The services described are what Nasdaq intends to offer during 2007. Nasdaq also plans to offer these or similar services on an ongoing basis, but will evaluate companies’ usage of the services and explore other opportunities for services for listed companies, and may adjust the mix of products and services accordingly.”).

⁴ See *In the Matter of the Application of The Nasdaq Stock Market LLC for Registration as a National Securities Exchange*, Exchange Act Release No. 34-53128 at p. 26 (January 13, 2006). See also, *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASDAQ Stock Market, Inc., as Overseen by its Parent, The National Association of Securities Dealers, Inc.*, Exchange Act Release No. 51163 (February 9, 2005) (where the SEC expressed concern over the inherent conflict by noting, “SROs must ensure that they effectively manage the inherent conflicts between their role as a market and their role as a regulator. If they fail in these responsibilities, the damage done far exceeds the harm to one SRO. Rather, it directly affects the integrity of U.S. markets.”); and *Concept Release Concerning Self-Regulation*, Exchange Act Release No. 34-50700 (November 18, 2004) (discussing “the inherent conflicts of interest between an SRO’s regulatory obligations, and the interests of its members, its market operations, its listed issuers, and, in the case of a demutualized SRO, its shareholders. . .”).

II. THE SEC'S AUTHORITY TO REGULATE SROs AND NATIONAL EXCHANGES DOES NOT EXTEND TO THE REGULATION OF NASDAQ'S FOR-PROFIT COMMERCIAL BUSINESS SERVICE SUBSIDIARIES.

In this rulemaking proceeding, NASDAQ has proposed a rule whereby it would increase its listing fees, but also require that those listing with NASDAQ pay for other, separate non-exchange-related products and services of its wholly owned subsidiaries. In this particular instance, NASDAQ is proposing to have the SEC endorse fees for bundled exchange and non-exchange-related services. Although the SEC has broad authorization to regulate national securities exchanges, its authority does not extend to the oversight of separate, non-exchange-related business activities of an exchange.

The Securities Exchange Act of 1934 ("Exchange Act") authorizes the SEC to establish a national market system for securities in order to carry out objectives related to, *inter alia*, the economically efficient execution of securities transactions, fair competition, and the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. See Exchange Act Section 11A, 15 U.S.C. §78k-1. These objectives are to be met with "due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets. . . ." Section 11A(a)(2). This statutory mandate contains no reference to the regulation and oversight of separate, non-exchange or non-securities market related commercial services.⁵

The rules of a national securities exchange cannot be used to regulate matters beyond the regulation of the securities market and the administration of the exchange. The SEC's authority to create and oversee national securities exchanges stems from Section 6 of the Exchange Act, which mandates the terms and conditions under which such exchanges can be registered. 15 U.S.C. § 78f. Section 6 makes clear that the rules of an exchange cannot be used "to regulate by virtue of any authority conferred by this Act *matters not related to the purposes of this Act or the administration of the exchange.*" See Exchange Act Section 6(b)(5), 78f(b)(5) (emphasis added). The overall purpose of the Exchange Act is to provide regulation and control of securities transactions and prevent market manipulation. See, e.g., Exchange Act Section 2, 15 U.S.C. §78b; Graphic Sciences, Inc. v. International Mogul Mines, Ltd., 397 F. Supp. 112 (D. D.C. 1974) (intent of Exchange Act is protection of investors, markets and general public); Securities & Exchange Comm'n. v. Scott Taylor & Co., 183 F. Supp. 904 (S.D.N.Y. 1959) (purpose of Exchange Act is to prevent manipulation

⁵ Although Section 11A does address the SEC's ability to oversee an SRO's handling of information with respect to quotations for and transactions in securities (see, e.g., Section 11A(c)(1)), the news wire services at issue do not relate to such "quotations" or securities transactions. Moreover, even if the news wire services at issue did fall within the scope of Section 11A, that statutory authority was not intended to enable the SEC to sanction NASDAQ's attempt to require that listed companies pay for news wire services from its wholly owned subsidiary.

of markets); *Rogers v. Crown Stove Works*, 236 F. Supp. 572 (N.D. Ill. 1964) (Exchange Act intended to prevent fiduciary relationship abuses).

In the Proposed Rule, NASDAQ proposes to require listed companies to pay for the news wire services of its subsidiary as a purported value-added service to those companies. In reality, the purpose of the proposed arrangement is to boost the revenues and market share of NASDAQ's subsidiary. Neither the stated nor intended goal of mandating these bundled news wire services is to serve the purpose behind the Exchange Act – that is, the protection of the investing public and regulation of the securities market. Nor do these news wire services in any way relate to the “administration of the exchange.” Rather, these services represent separate, commercial services that NASDAQ seeks to impose upon its listed companies, for the benefit of its for-profit subsidiary. There is no suggestion by NASDAQ that requiring listed companies to pay for PrimeZone's news wire services in any way advances any legitimate regulatory objective underlying the Exchange Act or is somehow tied to the administration of NASDAQ.⁶

If adopted, the Proposed Rule would require the SEC to regulate the activities of a commercial enterprise engaged in business activities not connected to the regulatory function of NASDAQ or the administration of markets. Thus, the Proposed Rule falls far outside the scope of the SEC's mission “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”⁷

It appears that some Commissioners have already begun considering the dilemma that demutualized exchanges present to SEC regulatory authority. Specifically, in a recent speech, Commissioner Roel Campos acknowledged the serious conflicts of interest that exist when SROs operate for-profit exchanges, and as a result, warned that “the SEC must exercise heightened sensitivity to the rule changes proposed by the exchanges.” *Remarks by Commissioner Campos Before the Security Traders Association's Annual Washington Conference*, Washington, DC (May 3, 2006). According to Commissioner Campos,

⁶ Nor do these news wire services constitute the “processing [of] information with respect to, and facilitating transactions in securities,” which fall within the scope of Section 6. See Section 6(b)(5). The news wire services at issue are publications and releases issued by listed companies – for example, quarterly earnings reports. They do not constitute information regarding “transactions in securities.” Such information would, instead, be information like that provided by securities information processors, which provide stock price quotations and transaction-related information. See Exchange Act Section 3(22). Moreover, even if the news wire services at issue in the Proposed Rule were exchange-related, that would not authorize or justify an exchange rule mandating that listed companies use or pay for a particular news wire service provider.

⁷ *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, Securities and Exchange Commission website, <http://www.sec.gov/about/whatwedo.html>.

“[a]ggressive competition to increase market share may result in increased use of incentive schemes that may run counter to the integrity of pricing and investor protection. Outsourcing of functions and expanding from core exchange business raise issues with respect to self-regulatory responsibilities and regulated activities.” *Id.* He emphasized that “we at the Commission are acutely aware of the problems presented by for-profit SROs operating under an outdated regulatory regime. We are closely monitoring the SRO rule filings to ensure that investor interests are not eclipsed in favor of business interests.”

Analogous case law discussing SRO immunity supports the argument that the SEC does not have authority to address NASDAQ's non-regulatory, non-exchange-related functions, such as the news wire services at issue here. When an SRO acts as a regulatory body under the Exchange Act and pursuant to SEC supervision, it is entitled to absolute immunity from civil damages. When, as here, it engages in private commercial activity, it is neither immune nor subject to SEC jurisdiction.

As the Eleventh Circuit explained in Weissman v. NASD, Inc., NASDAQ, as an SRO, enjoys immunity with respect to its regulatory functions under the Exchange Act, but not with respect to its “private commercial conduct not mandated by the [Exchange Act].” 2006 U.S. App. LEXIS 27091 at *1-2 (11th Cir. 2006). In Weissman, NASDAQ was sued under Florida law by an investor for its advertising activities in connection with WorldCom, Inc. (“WorldCom”), the stock in which the investor invested and lost a great deal of money. NASDAQ claimed that it was immune from suit. The Court rejected that argument, upholding the lower court’s determination that NASDAQ’s “enjoyment of absolute immunity for quasi-governmental activity does not insulate them from suit for activity related to private business, their alleged advertisement and promotion of WorldCom.” *Id.* at *9-10. Thus, only “when an SRO is ‘acting under the aegis of the Exchange Act’s delegated authority’ does it enjoy that privilege.” *Id.* at *12 (quoting Sparta Surgical Corp. v. NASD, Inc., 159 F.3d 1209, 1213 (9th Cir. 1998)).

The connection between the scope of the SEC’s oversight authority and the parameters of SRO immunity is repeatedly reiterated in case law.⁸ Only when an SRO is acting under the

⁸ See, e.g., Partnership Exchange Securities Co. v. NASD, Inc., 169 F.3d 606, 608 (noting that SRO absolute immunity applies only when the SRO exercises the authority delegated to it by the Exchange Act); Dexter v. Depository Trust & Clearing Corp., 406 F.Supp.2d 260, 263 (S.D.N.Y. 2005) (NASD has immunity when it “stands in the shoes” of the SEC); Barbara v. NYSE, Inc., 99 F.3d 49, 59 (2nd Cir. 1996) (an SRO has immunity where it “performs a variety of regulatory functions that would, in other circumstances, be performed by [the SEC].”); D’Alessio Securities, Inc. v. New York Stock Exchange, Inc., 258 F. 3d 93, 105 (2d Cir. 2001) (“SRO . . . may be entitled to immunity from suit for conduct falling within the scope of the SRO’s regulatory and general oversight functions.”); see also Sparta Surgical Corp., 159 F. 3d at 1214 (noting that SROs “are intended to be subject to the SEC’s control and have no governmentally derived authority to act independently of SEC oversight”) (citing H.R. Rep. No. 123, 94th Cong., 1st Sess., 48-49 (1975)).

aegis of the Exchange Act's delegated authority is SEC oversight authorized.⁹ Thus, when, as here, NASDAQ engages in "for-profit commercial activity" it is not subject to SEC oversight and enjoys no immunity. Weissman, 2006 U.S. App. LEXIS 27091 at *14; see also Sparta Surgical Corp., 159 F. 3d at 1214 (finding NASDAQ to be immune from suit for suspending plaintiff from trading because this action was "quintessentially regulatory," but reiterating that "[w]hen conducting private business, [SROs] remain subject to liability"). This line of SRO immunity cases establishes that the SEC's authority does not extend to regulation or approval of NASDAQ's non-exchange services.

We believe the inevitable conclusion is that the SEC should not, and cannot, be used by SROs to rubber stamp their non-exchange activities. To be properly considered and approved by the SEC, the Proposed Rule at issue here should relate only to fees for regulated exchange services, over which the SEC has jurisdiction. In its current form, the Proposed Rule includes non-exchange-related commercial services that fall outside of the SEC's authority and jurisdiction.

III. THE PROPOSED RULE CONSTITUTES AN UNLAWFUL TYING ARRANGEMENT VIOLATIVE OF U.S. ANTITRUST LAWS AND REQUIRES THE SEC TO EVALUATE AND RULE UPON SUBSTANTIAL, COMPLEX ANTITRUST ISSUES FALLING OUTSIDE ITS AREA OF EXPERTISE.

The SEC should not, and cannot, approve an exchange rule that mandates non-exchange-related services in violation of U.S. antitrust laws.¹⁰ The evaluation and assessment of whether NASDAQ's proposal to tie the purchase of its listing services to the purchase of

⁹ This delegated authority includes disciplinary authority (Austin Municipal Securities, Inc., 757 F. 2d 676, 692 (5th Cir. 1985)) as well as authority related to "development and promulgation of interpretations of statutory requirements, the dissemination and implementation of those provisions, and the provision of information to government agencies," (D'Alessio Securities, Inc., 258 F. 3d 93 at 106, but not actions in a private business capacity (Weissman at *9-10)). The dichotomy between regulatory and private actions also has been explicitly recognized in the antitrust context. See, e.g., Austin Municipal Securities, Inc. v. NASD, Inc., 757 F.2d 676, 696 (5th Cir. 1985) (finding that an SRO is not immune from antitrust prosecution for alleged anticompetitive activities falling outside of its official duties).

¹⁰ Congress has charged the SEC with the obligation to "remove existing burdens on competition and to refrain from imposing, or permitting to be imposed, any new regulatory burden on competition 'not necessary or appropriate in furtherance of the purposes' of the Exchange Act." Publ. L. No. 94-29, 1975 U.S.C.C.A.N. (89 Stat.) 191. Thus, even if the bundled non-exchange-related services included in the Proposed Rule did fall within the SEC's authority and jurisdiction, the SEC could not endorse the Proposed Rule, given its unlawful restraint on free competition in the news wire services industry, as described herein.

non-listing services violates U.S. antitrust laws falls outside the SEC's area of expertise. The danger of such a "tying" arrangement is that it represents an attempt by NASDAQ to use its strong market power in the exchange market to force its clients to purchase its other non-exchange-related services. This kind of tying arrangement raises very substantial antitrust issues. Thus, the SEC would have to evaluate this tying arrangement for compliance with the antitrust laws, which is an issue the SEC cannot resolve.

A tying arrangement is one in which a party agrees to sell one product or service (the tying product), but only if the buyer also purchases a different product/service (the tied product). See e.g., Northern Pacific Railway v. United States, 356 U.S. 1, 5-6 (1958). Here, the Proposed Rule clearly would create such an arrangement – companies desiring to be listed on NASDAQ's exchange will be required to also purchase other, unrelated news wire services, the charge for which will be part of the company's annual listing fee. As the United States Supreme Court has emphasized, such arrangements give rise to substantial competitive harm:

[Tying arrangements] deny competitors free access to the market for the tied product, not because the party imposing the tying requirement has a better product or lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products.

Id. at 6. Here, as the numerous listed companies objecting to the Proposed Rule have commented, listed companies will be required to pay for the news wire services of NASDAQ's subsidiary – an untested, unfamiliar company whose services they would not have freely purchased – as part of the NASDAQ listing fees, whether they want those services or not.¹¹ NASDAQ argues that because listed companies will receive a limited

¹¹ See, e.g., letters from: XILINX (October 25, 2006); ADC (November 22, 2006); Arkansas Best Corporation (November 22, 2006); Utah Medical Products, Inc. (November 22); Brooklyn Federal Bancorp, Inc. (November 22); Abatix Corp., (November 24, 2006); Shore Financial Corporation (November 24, 2006); Independent Bank Corporation (November 26, 2006); Cheviot Financial Corp. (November 27, 2006); Endo Pharmaceuticals Inc. (November 27, 2006); Incyte Corporation (November 27, 2006); Edgewater Technology, Inc. (November 27, 2006); International Speedway Corporation (November 27, 2006); Socket Communications (November 27, 2006); Hiland Partners, LP & Holdings GP, LP (November 27, 2006); American River Bankshares (November 27, 2006); Biosite Incorporated (November 27, 2006); ARRIS Group, Inc. (November 28, 2006); SumTotal Systems (November 28, 2006); Kentucky First Federal Bancorp (November 28, 2006); FARO Technologies (November 29, 2006); First Federal Bankshares, Inc. (November 29, 2006); K-Tron International, Inc. (November 30, 2006); Cellegy Pharmaceuticals (November 30, 2006); Gander Mountain Company (December 1, 2006); Eschelon Telecom, Inc. (December 4, 2006); American Physicians Capital, Inc. (December 4, 2006); Edgar Online, Inc. (December 6, 2006); Bancshares of Florida, Inc. (December 6, 2006); Quality Distribution (December 7, 2006); Shenandoah Telecommunication Company (December 7, 2006).

array of news wire services with their annual fee, they are free to take the remainder of their business elsewhere. See Proposed Rule at p. 12. This assertion is disingenuous, however, because the cost and inconvenience of using multiple companies for such services (including the de facto requirement that listed companies pay twice for the same services if they wish to use the news wire of their choice) will lead many companies to use NASDAQ's services even if they would prefer another service provider, thus creating an unfair impediment to competition. This is the very reason why U.S. courts have repeatedly rejected such tying arrangements as unlawful under Section 1 of the Sherman Act¹² and Section 5 of the Federal Trade Commission Act.¹³ Northern Pacific Railway, 356 U.S. at 6.

The Tying Arrangement Created by the Proposed Rule is Per Se Unlawful

Many courts, and the Department of Justice, take the position that tying arrangements like that created by the Proposed Rule are *per se* illegal. More specifically, courts will declare a tying arrangement *per se* unlawful "if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied product." Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 461-62 (1992) (quoting Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969)). Thus, a *per se* unlawful tying agreement exists where the following four elements are satisfied:

- (1) two separate products or services are involved;
- (2) the sale of one product or service is conditioned upon the purchase of another;
- (3) the seller has appreciable economic power in the market (*i.e.*, market power) for the tying product or service; and
- (4) a substantial amount of interstate commerce (measured by dollar amount) in the market for the tied product is affected.

See, e.g., Fortner, 394 U.S. at 498-99. Each of these elements is easily satisfied here.

First, there is no question that the Proposed Rule affects two separate services – listing on the NASDAQ exchange and commercial news wire services. These two services "have been sold separately in the past and still are sold separately," (Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 463 (2002)), and there is no basis for finding these services to represent a single market.

¹² 15 U.S.C. § 1.

¹³ 15 U.S.C. § 45(a)(1).

Second, the Proposed Rule makes listing on the NASDAQ exchange conditional upon payment for NASDAQ's news wire services. These news wire services will be part and parcel of the NASDAQ listing fees. This is not a case "where the buyer is free to take either product by itself." Northern Pacific Railway, 356 U.S. at 6, n. 4. The tying service – a listing on the NASDAQ exchange – will not be separately available without the accompanying news wire services. *Id.* It is already clear from the many objections the SEC has received from listed companies that the Proposed Rule would coerce such companies to purchase bundled services against their will. By conditioning an exchange listing on the additional purchase of these news wire services, NASDAQ "coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market." Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 614 (1953). When such "forcing" occurs and customers find themselves required to purchase a service they did not want at all, or might have preferred to purchase elsewhere on different terms, competition on the merits in the marketplace is constrained, and the antitrust laws are violated. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984).

Third, NASDAQ clearly has the required market power in the "tying" product market, whether that market is defined as listing on the NASDAQ exchange or more broadly as the general market for listings on any U.S. stock market exchange. Indeed, NASDAQ touts itself as "the largest electronic screen-based equity securities market in the United States, both in terms of number of listed companies and traded share volume."¹⁴ Moreover, the very reason why SEC oversight of NASDAQ's listing activities is required is that NASDAQ is either a monopolist or an oligopolist in the market for exchange-related services, depending on how the market for such services is defined. NASDAQ therefore has sufficient economic power to produce an appreciable restraint in the market for the tied services it seeks to make mandatory via the Proposed Rule. "Market power is the power 'to force a purchaser to do something that he would not do in a competitive market . . . The existence of such power ordinarily is inferred from the seller's possession of a predominate share of the market.'" Eastman Kodak, 504 U.S. at 464 (citations omitted).

Finally, the Proposed Rule would affect a substantial amount of interstate commerce in the market for commercial news wire services. The Supreme Court has held that this requirement is satisfied by a showing that the tying arrangement affects a "not insubstantial" dollar volume of sales in the tied product. This fourth element is a largely technical requirement and typically is satisfied with a minimal evidentiary showing. *See, e.g., DataGate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1424 (9th Cir. 1995) (finding sales of \$100,000 per year to be sufficient). Here, there is no question that if the country's largest electronic screen-based equity securities market is enabled to make mandatory the purchase

¹⁴ See NASDAQ web site at <http://ir.nasdaq.com>.

of news wire services of its wholly-owned subsidiary the affected sales volume of these services will be material.

Even if Not “Per Se” Illegal, the Proposed Rule Is Unlawful

Moreover, even if NASDAQ’s scheme as reflected in the Proposed Rule did not meet the above test for *per se* illegality (which it certainly does), the tying arrangement it creates would still be unlawful pursuant to the “rule of reason” standard applied as an alternative to a *per se* illegal standard. In general, this analysis requires an inquiry into the actual anticompetitive effect of the tying arrangement on competition in the market for the tied service. Jefferson Parish, 466 U.S. at 29. For all of the reasons previously set forth in this letter, the anticompetitive result of the Proposed Rule’s forced imposition of mandatory news wire services upon those companies wishing merely to be listed on the NASDAQ exchange unquestionably will have a deleterious effect on competition in the market for those services.

There is no question that the Proposed Rule will harm consumers. As explained above and in PR Newswire’s prior letters, listed companies will be forced to pay for services they may not want, they will lose their freedom of choice and face the difficult decision of whether to sacrifice the efficiency and cost savings that result from using a single news wire provider. Being insulated from competition, NASDAQ and PrimeZone will have little incentive to improve the news dissemination services being offered or to respond to the demands of customers. Consumers also will suffer from likely additional fee increases, because NASDAQ will be unencumbered by normal market pressures.

The various arguments NASDAQ sets forth as to why the Proposed Rule will not negatively affect competition have no weight. See Proposed Rule at p. 12-13. First, NASDAQ asserts that the specific services included with its annual fee will not satisfy all of the listed companies’ news wire needs, so that competitors in the news wire services industry will be free to compete for the residual business of these customers. This assertion turns a blind eye to the fact that the listed companies – if they wish to continue using the service provider of their choice for all of their news wire business – will have to pay double for some services. Typically, publicly traded companies use a single provider for their distribution of press releases and commercial news wire services. Thus, being required to purchase even a portion of these services from one company makes it more likely that listed companies will feel constrained to turn to that company exclusively.¹⁵ Although the current proposal

¹⁵ See, e.g., letters from: Quality Distribution, Inc. (December 7, 2006)(stating, “Further, since this is not an optional program, but rather a mandatory directive by NASDAQ, there would be no benefit in such a comparison. If we do not use NASDAQ’s bundled service, we will in essence pay twice to use the wire service, webcasting vendor and Edgar disseminator of our choice.”); and Abatix Corp. (November 24, 2006)(stating, “While I am not opposed to Nasdaq using the connections with issuers to provide additional services, I am totally opposed to being forced to use the bundled services.”).

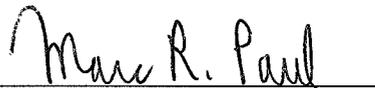
provides for a limited number of news wire services, there is nothing preventing NASDAQ from later increasing the number or scope of the bundled services it will provide.

NASDAQ also argues that creating a significant market presence for its for-profit subsidiary, PrimeZone, is a positive step, because it will promote a small competitor in the marketplace. This does not change the fact that NASDAQ proposes to compete unlawfully by using its market power over listed companies to force those companies to pay for PrimeZone's services. This unlawful restraint on the freedom of choice of listed companies likely will increase PrimeZone's market share, as NASDAQ predicts. Unlawful competition, however, does not become lawful just because it serves to benefit a smaller competitor over others. PrimeZone certainly is free to compete in the marketplace, but it must do so on equal footing with other competitors. It should not be permitted to do so on the coat tails of its parent's market power over a captive audience of listed companies, and particularly not with the imprimatur of the SEC, the agency charged with regulating that parent.

In sum, the Proposed Rule cannot, and should not, be approved by the SEC. The SEC lacks the statutory authority to endorse a rule that imposes mandatory fees for the non-exchange-related commercial services of NASDAQ's wholly owned subsidiaries. Moreover, even if it were within the SEC's authority to review such a rule, its inevitable conclusion must be that NASDAQ's attempt to require listed companies to pay for these non-exchange-related services must be analyzed carefully to determine whether it represents an unlawful tying arrangement. These difficult antitrust issues fall outside the SEC's area of expertise, and it should not endorse an unlawful Proposed Rule, in any event.

Thank you for the opportunity to express our views. If you have questions, please contact the undersigned.

Sincerely,



Marc R. Paul



Margaret R. Blake

cc: David B. Armon
 Sherri Felt Dratfield, Esq.
 Carl Hampe, Esq.
 David J. Laing, Esq.

Attachments



PR Newswire

United Business Media

VIA E-MAIL & DHL

David B. Armon
Chief Operating Officer

October 13, 2006

Arnold Golub
Associate General Counsel
NASDAQ Stock Market
9600 Blackwell Road
Rockville, MD 20850

Re: File No. SR-NASDAQ-2006-040 and the Bundling of Services

Dear Mr. Golub:

We are writing to object to the above-captioned proposed rule, SR-NASDAQ-2006-040 (the "Proposed Rule"). The stated purpose of the Proposed Rule filing is to modify annual listing fees and provide a "suite of products and services" for assisting issuers with "compliance functions, shareholder communications, and other corporate objectives." Though the specific services included in the suite are not identified in the Proposed Rule, it is our understanding that the services NASDAQ intends to provide will include, among others, the newswire services of NASDAQ's wholly owned subsidiary, PrimeZone Media Network ("PrimeZone").

By bundling newswire reporting into a "suite of services" for which NASDAQ will charge one fee, NASDAQ: (1) is providing an unfair advantage to its wholly owned news dissemination subsidiary, jeopardizing the free flow of material information to investors who currently enjoy an open, competitive market for such services, (2) will place itself in a conflict of interest between its role as a regulator and its commercial interests in its own information service provider, and (3) cannot comply with the statutory requirement that the fees it charges be "reasonable" and "equitably allocated." As a result, the Proposed Rule, if approved, will operate to the detriment of issuers in need of robust information dissemination services and investors - particularly individual investors - seeking immediate issuer information. We strongly suggest that the Proposed Rule be withdrawn, or substantially revised to address these concerns, as we discuss in detail herein.

I. Background and Introduction

As a pioneer and leader in corporate news dissemination, PR Newswire provides newswire services to public company issuers, including many of those listed on a

NASDAQ market. PR Newswire has been active in the newswire business for more than 50 years, with an ever-expanding and evolving distribution network resulting from its robust and enhanced service offerings. PR Newswire strongly objects to the Proposed Rule in its current form and to NASDAQ's attempt to compel the use of its captive news dissemination subsidiary by including it in the bundled suite of services tied to NASDAQ's listing fee increase.

II. Objections to the Proposed Rule Change

- **NASDAQ's proposed rule change is anticompetitive.**

Competition in the newswire industry is necessary to ensure issuers, large and small, are receiving the best products and services and that such issuers have a choice about the service provider they use for a given product or service. By bundling its subsidiary newswire service into the "suite of products" provided to issuers with the increased listing fees, NASDAQ is effectively foreclosing competing newswire service providers, such as PR Newswire, from selling their services to NASDAQ-listed companies.¹ The bundled services force issuers to pre-pay for and use NASDAQ's captive newswire service provider – or pay *an additional fee* to use an independent service provider such as PR Newswire. Many issuers cannot be expected to pay the additional fee – especially in light of the fee increase NASDAQ intends to impose. Smaller issuers will be especially vulnerable in light of their limited resources, while larger issuers will feel the financial impact of paying for an outside source in addition to the increased listing fee imposed by NASDAQ.

The proposed rule change will effectively stifle competition and remove a NASDAQ issuer's independence to select its preferred newswire service provider based upon relative merits of the competing providers in the marketplace. NASDAQ issuers – because they need the exchange as a vehicle to market their securities – will be coerced into surrendering their freedom to choose their own newswire service, accepting the absence of competition, and utilizing PrimeZone.

A substantial amount of innovation and investment is needed to stay on the cutting edge of the technology necessary to expand the distribution of news dissemination services and

¹ In addition, as the predominant source of disclosure for its listed companies, NASDAQ would become the sole provider of its listed companies' material news to the major market disclosure points (e.g., Bloomberg, Reuters). As a result, NASDAQ will be in a unique position to charge for access to material news - holding key financial services and media hostage for the data.

keep pace with the evolving channels of investor information delivery. Being insulated from competition, NASDAQ and PrimeZone will have little incentive to improve the news dissemination services being offered or respond to the demands of the issuers relying on those services – ultimately threatening the integrity of the information available to investors. In addition, in the absence of competition, one can expect that a fee increase would soon follow – leaving NASDAQ issuers to suffer the consequences.

- **NASDAQ’s proposed rule change presents an inherent conflict of interest, potentially disruptive to the integrity of the capital markets.**

As an exchange, NASDAQ oversees the listing of its issuers and the compliance by such issuers with its rules, including those related to shareholder communications. PR Newswire believes there is an inherent conflict of interest in NASDAQ positioning itself as both the enforcer of an issuer’s compliance with NASDAQ’s communication requirements and the owner of the service through which such communications must be made. In this dual role, NASDAQ essentially determines the amount of business its captive subsidiary will receive, while reaping the direct benefits of these requirements as the owner of the service provider. And, having charged its issuers a flat annual fee for PrimeZone’s services, NASDAQ may be moved to restrict the incremental dissemination of information through PrimeZone in order to control its costs. This will compromise the ability of the underlying investors, especially individual investors, to obtain material information immediately through ubiquitous distribution.

If the proposed rule change is approved, other exchanges can be expected to follow suit by creating captive newswire service providers and bundling their services and fees. The regulators will essentially be in the position to control the information flow from issuer to shareholder while charging the issuer for the benefit of using the captive service. Thus, investors receiving information through bundled service arrangements cannot be confident that they are receiving broad-based, timely disclosures of corporate financial information.

- **The fees charged for the bundled services are not reasonable, nor are they equitably allocated as required under the Securities Exchange Act of 1934 (“Act”).**

Section 6(b)(4) of the Act requires that the NASDAQ’s rules “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” Without knowing precisely what one is paying for, it is difficult to conclude that the standard established by the Act is being upheld. In our view, the fees being charged are not reasonable as they cover a host of services that may

not provide any value to the issuer in question. In the Proposed Rule, NASDAQ should provide a breakdown of the fees being charged and how such fees are allotted among the services being provided. In addition, NASDAQ should disclose what fee arrangements will exist between NASDAQ and its captive service providers – for example, will NASDAQ pay PrimeZone a fixed annual fee for each listed issuer, or will PrimeZone receive a fee for each product or service rendered to a listed issuer? Such transparency will provide issuers with the information needed to fully understand and evaluate the Proposed Rule on the merits of the services offered and determine the impact it may have on their company's relationship with its media and investor audiences, and ultimately, their desire to obtain and pay for services from an outside provider.

PR Newswire also believes that the allocation of the proposed fees is not equitable because it forces an issuer to pre-pay for a suite of bundled services as part of the increased listing fee. The issuer is then compelled to either switch to NASDAQ's newswire provider or pay an additional fee to use an outside service provider of its choice. The structure of the fees coupled with the bundled services will cause smaller issuers to be forced into using NASDAQ's captive service provider, while causing larger issuers to consider the financial implications of remaining with their preferred newswire provider.

While the fees charged by NASDAQ apply to all issuers, the impact of those fees as they are tied to underlying services being provided creates inequities in the market. For example, smaller issuers will lose visibility with investors and the media due to the less expansive and robust distribution provided by PrimeZone.

III. Conclusion

As noted above, PR Newswire strongly objects to the Proposed Rule in its current form. Issuers should have the opportunity to choose the services for which they are paying, as well as the service providers from whom they receive those services. NASDAQ's proposal undermines this basic concept and impairs competition for newswire providers. The co-dependent relationship between NASDAQ and PrimeZone creates an inherent conflict of interest between NASDAQ and the issuers relying on NASDAQ's wholly owned subsidiary to meet NASDAQ compliance requirements. Finally, we believe the fees being charged are not reasonable, nor are they being allocated in an equitable manner due to the nature of the bundled services tied thereto. A clear understanding of how the fees are allocated among the various services, and how PrimeZone will be compensated by NASDAQ for providing the newswire service in particular, is essential in understanding completely the proposal at hand.

Arnold Golub
Associate General Counsel
NASDAQ Stock Market
October 13, 2006
Page 5



As we understand the Proposed Rule has not yet been published by the Commission for comment, we remind you of your obligation under Rule 19b-4 to file this letter as an exhibit to the Proposed Rule. In addition, if information in our letter makes your Proposed Rule filing inaccurate, NASDAQ is obligated to amend the filing to address and correct the inaccuracy.²

If you have comments or if you would like to discuss our concerns, please contact the undersigned at 212/282-1930.

Sincerely,



David B. Armon
Chief Operating Officer
PR Newswire

Cc: Katherine England
Assistant Director
Office of Market Supervision
Division of Market Regulation
US Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

² According to Exchange Act Release No. 34-50486, Proposed Rule Changes of Self-Regulatory Organizations,

If, after the rule change is filed but before the Commission takes final action on it, the self-regulatory organization receives or prepares any correspondence or other communications reduced to writing (including comment letters) to and from such self-regulatory organization concerning the proposed rule change, the communications shall be filed as Exhibit 2. If information in the communication makes the rule change filing inaccurate, the filing shall be amended to correct the inaccuracy.

VIA FACSIMILE & DHL



November 3, 2006

David B. Armon
Chief Operating Officer

Arnold Golub
Associate General Counsel
NASDAQ Stock Market
9600 Blackwell Road
Rockville, MD 20850

Re: Amended File No. SR-NASDAQ-2006-040

Dear Mr. Golub:

We have read the amended proposed rule filing, SR-NASDAQ-2006-040, dated October 31, 2006, (the "Amended Proposed Rule" or "Amended Filing")¹ and anticipate providing additional comments thereon shortly under separate cover.

We are writing in this instance to voice concern over the failure of NASDAQ to provide information necessary to make an initial assessment of the Amended Proposed Rule's validity under the relevant sections of the Securities Exchange Act of 1934 ("Act").² As a result, we believe further amendments are needed before the Division of Market Regulation proceeds with publication of the Amended Proposed Rule.

I. Introduction

A. Cost Allocation

We previously set out our numerous objections to the Proposed Rule in a letter dated October 13, 2006 ("Letter").³ However, the issue of immediate concern, and the focus of this letter, is the failure on NASDAQ's part to address the specific allocation of the

¹ We understand Amendment #1, dated October 30, 2006, is superseded in its entirety by Amendment #2, dated October 31, 2006. Our comments, therefore, pertain only to the Proposed Rule as amended by Amendment #2.

² See Exchange Act Sections 6(b)(4) and 6(b)(5); 15 U.S.C. 78f(b)(4) and (b)(5), setting out NASDAQ's obligation to establish and maintain rules that, among other things, provide for the equitable allocation of reasonable fees among its users, and promote just and equitable principles of trade, respectively.

³ See Letter, dated October 13, 2006, to Arnold Golub, Associate General Counsel, NASDAQ Stock Market, from David Armon, Chief Operating Officer, PR Newswire.

Arnold Golub
Associate General Counsel
NASDAQ Stock Market
November 3, 2006
Page 2



listing fees that are proposed to be charged among the bundled services to be provided. Our Letter noted that this information is imperative for issuers to fully understand the impact of the Proposed Rule. We believe that this is still the case. That is, it is impossible for NASDAQ to “provide for the equitable allocation of reasonable dues, fees and other charges” among users of its facilities when there is absolutely no indication of how those fees are being allocated among the services being provided.⁴ As we noted in our letter, “without knowing precisely what one is paying for, it is difficult to conclude that the standard established by the Act is being upheld.”⁵

As a self-regulatory organization (“SRO”), NASDAQ has an implicit obligation to be transparent regarding its operations and fee structure – particularly with how those fees are allocated to members and issuers.⁶ Yet when PR Newswire requested information about the allocation of the new listing fees among the suite of services being provided, NASDAQ used its position as a public company to refuse such information. Specifically, NASDAQ referred interested persons to their periodic reports, indicating that such reports “will identify the sources of Nasdaq’s revenues consistent with the requirements for those reports and U.S. generally accepted accounting practice.”⁷ This evasive response is especially unacceptable from an SRO tasked with overseeing the disclosure obligations of its underlying issuers.

As anyone familiar with public company financial statements knows, detailed information regarding the allocation of fees among bundled services is typically not included in a public company’s financial statements. U.S. generally accepted accounting principles do not require that level of detail, and NASDAQ is being disingenuous in trying to imply otherwise. In addition, even if such information were included in NASDAQ’s financial statements, it clearly would not be available in time for the Division’s consideration of the Amended Proposed Rule. NASDAQ’s deliberate

⁴ Exchange Act Section 6(b)(4); 15 U.S.C. 78f(b)(4).

⁵ See PR Newswire Letter at p. 3.

⁶ As an SRO, NASDAQ is obligated to file with the Commission all proposed rule changes with respect to changes in its operations and fees. The Division of Market Regulation (“Division”), on behalf of the Commission, is tasked with conducting a public comment process to determine whether the proposed rule changes are consistent with NASDAQ’s obligations under, among others, Exchange Act Sections 6(b)(4) and 6(b)(5); see footnote 2, supra.

⁷ See Amended Proposed Rule at footnote 21.

Arnold Golub
Associate General Counsel
NASDAQ Stock Market
November 3, 2006
Page 3



avoidance of providing the information most relevant to considering the Amended Proposed Rule should raise a red flag to issuers and Division staff in their review.

B. Ongoing and Additional Issues of Concern

As noted above, we are reviewing the Amended Filing in order to provide additional comments on a number of issues that remain unaddressed or on which we believe further information is needed. In our earlier Letter, our comments focused on a number of issues related to the bundling of services and the provision of those services as part of an overall package to issuers as part of their listing fees. We continue to assert the points raised in the Letter -- for example,

- that the Amended Proposed Rule is anticompetitive and places NASDAQ's wholly owned subsidiary, PrimeZone Media Network ("PrimeZone"), at an unfair advantage with respect to news dissemination services provided to NASDAQ issuers;⁸ and
- that the Amended Proposed Rule places NASDAQ in a conflict of interest between its role as a regulator of NASDAQ issuers and its role as the for-profit owner of a news distribution provider through which NASDAQ issuers must pay to obtain disclosure services.

In addition, we believe issues related to the inefficiencies and impracticalities of the proposed services must be clarified. Specifically, further clarification is needed to understand

- precisely how NASDAQ plans to offer the "incidental" services in a way that will fairly enhance competition in the news dissemination arena;⁹ and

⁸ We believe the Amended Proposed Rule does not uphold NASDAQ's obligation under Exchange Act Section 6(b)(5), to establish rules that "promote just and equitable principles of trade" and "to foster cooperation and coordination with persons engaged in . . . processing information with respect to . . . transactions in securities." We will address this issue further in a separate letter.

⁹ At page 19-20 of the Amended Proposed Rule, NASDAQ suggests that in the current market, where all players freely compete, PR Newswire and BusinessWire "own" the marketplace and are, in effect, a monopoly. NASDAQ further claims that the forced use of PrimeZone for news dissemination will enhance competition among the current providers, which already include PrimeZone. We disagree with these statements. PR Newswire and BusinessWire are completely *separate* entities that compete aggressively with each other (and with other parties such as Market Wire), thereby forcing a healthy competitive

Arnold Golub
Associate General Counsel
NASDAQ Stock Market
November 3, 2006
Page 4



- what, if any, fees will apply when, for example, an issuer exceeds the 500-word limit in a press release issued through PrimeZone or an issuer wishes to send a press release beyond the initial four press releases provided, or how an investor will access vital financial tables of an issuer (and at what cost) when receiving a press release through PrimeZone.

As noted above, we will further address these and other issues in a separate letter.

II. Request

We believe that, procedurally, this Amended Proposed Filing is deficient based on the lack of information needed to make an initial assessment under the relevant section of the Act. In order to determine if the fees in question are reasonable and equitably allocated among NASDAQ market issuers, NASDAQ must make those fees apparent. In its Amended Proposed Filing, NASDAQ avoids providing such information leaving issuers to guess at the actual impact of the fees in light of the services being provided. We ask that NASDAQ provide the relevant, *and necessary*, information regarding the allocation of fees among the bundled services in order that interested parties may review the Amended Proposed Rule in a transparent context.

III. Conclusion

As noted above, PR Newswire continues to object to the Amended Proposed Rule in its current form. While PR Newswire anticipates providing an additional comment letter on a number of issues, some of which are set out above, our current and most urgent concern focuses on the lack of necessary information provided with respect to the fees being charged in the Amended Proposed Rule. In our view, the Amended Filing fails to provide adequate, basic information, regarding the fees to be allocated among the bundled services, leaving issuers to speculate at the overall impact of the Amended Proposed Rule on their operations. It should be returned to NASDAQ as inconsistent with applicable requirements of the Exchange Act.¹⁰

environment. Significantly, in today's openly competitive marketplace, PrimeZone enjoys a less than 5% share of NASDAQ listed companies, which provides a compelling indication of why it must rely on NASDAQ's anticompetitive and compulsory suite of services to increase its market share.

¹⁰ Exchange Act Section 19(b)(2)(b).

Arnold Golub
Associate General Counsel
NASDAQ Stock Market
November 3, 2006
Page 5



If you have comments or if you would like to discuss our concerns, please contact the undersigned at 212/282-1930.

Sincerely,



David B. Armon

Cc: Katherine England
Assistant Director
Office of Market Supervision
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US Securities and Exchange Commission
100 F Street NE
Washington, DC 20549