SIFMA

Securities Industry and Financial Markets Association

March 7, 2007

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

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

Re: File No. SR-NASDAQ-2006-060

Dear Ms. Morris:

The Market Data Subcommittee of the Securities Industry and Financial Markets Association ("SIFMA")[1] Technology and Regulation Committee appreciates the opportunity to comment on SR-NASDAQ-2006-060. In the submission, Nasdaq proposes to create two new data feeds, "Nasdaq Last Sale for Nasdaq" and "Nasdaq Last Sale for NYSE/Amex." At the outset we note that these new feeds are for post-sale trade data, which is very different from pre-sale quote data that investors and professionals need to make informed trading decisions. Accordingly, this proposal does not diminish the need for the Commission to determine the outstanding issues at stake in the pending Nasdaq depth-of-book quotation proposals relating to the integration of the former INET book with the assessment of the TotalView fee,[2] and for NYSE Arca relating to assessing a new fee for distribution of the Arca Book.[3]

SIFMA members will review the potential benefit of the proposed last sale data feeds compared to continuing to receive the last sale data through the consolidated quote

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[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests locally and globally. It has offices in New York, Washington D.C., and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

[2] Comment Letter from SIFMA re: File Nos. SR-NASDAQ-2006-053, and SR-NASDAQ-2006-013 (Feb. 12, 2007); Comment Letter from SIFMA re: File No. SR-NASDAQ-2006-013 (Aug. 18, 2007).

[3] Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (March 7, 2007); Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (Jan. 17, 2007); Comment Letter from SIFMA re: File Nos. SR-NYSEArca-2006-21 and SR-NYSEArca 2006-23 (Aug. 18, 2006); Comment Letter from SIFMA re: File Nos. SR-NYSEArca-2006-21 and SR-NYSEArca 2006-23 (June 30, 2006).

feed from the UTP Plan (for Nasdaq listings) or CTA (for NYSE/Amex listings), respectively. This is primarily a cost analysis, both in terms of comparing fee schedules as well as additional technological implementation costs and administrative burdens. A real-time last sale price, for example, could replace balance and position information on a client's online account page. It could not be used for trading quote purposes. However, it is not clear whether the Nasdaq Last Sale for NYSE/Amex data captures sufficient volume and percentage of the market to be a viable alternative to the CTA in the absence of also purchasing the newly proposed NYSE last sale data feed [4] (and any future Amex last sale feed). To assure sufficient coverage, SIFMA members may also need to purchase last sale feeds from the other exchanges and then attempt to integrate them, multiplying costs and complexity. All this because the consolidated feeds are priced so high that each individual exchange can undercut them when it comes to last sale data. For our professional employees, the new Nasdaq last sale feeds likely will be of little use because work stations already receive the consolidated quote feeds including last sale data.

As Nasdaq's filing observes, in adopting Regulation NMS, the Commission allowed SROs and broker-dealers to distribute data in the hope that it "would expand the amount of market data available to consumers, and also spur innovation and competition for the provision of market data." This proposal, however, does not achieve that goal in that this proposal uses the same data available today from the consolidated tapes - simply facts created by broker-dealers and their customers, not an "innovative" product.

In some respect, Nasdaq's new last sale feeds would compete with the consolidated tape feeds – the portion that includes last sale information - as well as with the NYSE's newly proposed last sale feed when it comes to NYSE listings sales data.[5] SIFMA's general view is that any competition in the exchange market data field can be constructive, but the competition must be real based on a normal functioning market and not an artificial market based on advantages stemming from regulatory status as an exchange. A logical competitive response with normal market forces operating would be for the CTA and UTP Plans to segregate last sale data from quotation data, and price last sale data lower and more competitively. But this is not a regular market, and Nasdaq (and NYSE) each effectively have a veto in the Plans that they may exercise in self-interest.

Congress anticipated these potential conflicts, which is why the Securities Exchange Act of 1934 ("Exchange Act") requires that market data fees be "fair and reasonable," "not unreasonably discriminatory," and based on an "equitable allocation" of costs. Nasdaq fails to show how its proposal meets those requirements. There is no cost information to assess fairness or reasonableness. Is it a 10 percent mark-up? Is it a

[4] *Notice of Proposed Rule Change Relating to Approval of Fee for NYSE Real-Time Trade Prices,* Release No. 34-55354, File No. SR-NYSE-2007-04 (Feb. 26, 2007). SIFMA will comment separately on NYSE's proposal.

[5] Notably, not even this type of limited competition occurs today with the more important pre-sale quotation data.

50 percent mark-up? Is it a 200 percent mark-up? We are unable to tell because this information was not made publicly available. If the price for the data was based on cost, then there would not be any opportunity for Nasdaq to undercut the consolidated quote and create its own revenue-generating feed. Nasdaq's rationale that "the revenue generated will offset Nasdaq's high fixed costs of operating and regulating a highly efficient and reliable platform for the trading of U.S. equities," and will help it "recapture the significant costs it incurred in developing that platform," is inconsistent with the Exchange Act's requirements. There is nothing in the Exchange Act that allows a for-profit exchange to cross-subsidize its competitive activities in this manner. As SIFMA has made clear before, the users of the trading platform should pay fees that support that trading platform. New or inflated market data fees should not.

Nasdaq's proposal also does not provide enough data or analysis to meet the "not unreasonably discriminatory" and "equitable allocation" requirements. The proposal uses the standard of whether a vendor or other distributor is "able to maintain username/password entitlement systems and/or quote counting mechanisms to account for usage." Those that can, such as broker-dealers because they have been subject to those entitlement and quote counting burdens for years, would end up paying at least 10 times more for the same data depending on the number of users.

For illustrative purposes, if a firm has 500,000 market data site users per month:

- Under Table (b)(1)(A), which applies to firms that "have the ability to maintain either a username/ password entitlement system or a quote counting mechanism," that firm would pay on a user basis: **$150,000** per month [$0.30 x 500,000];

- Under Table (b)(2)(A) which applies to firms that also distribute through a website but "lack the ability to maintain either a username/ password entitlement system or quote counting mechanism," a firm would pay on a user basis: **$15,000** per month [$0.03 x 500,000].

The type of investor receiving the data under each fee plan would be the same – generally non-professionals who want a price update. As a result, there is insufficient basis or rationale for this price discrimination or for concluding that it is an equitable allocation of costs.[6] In the absence of sufficient cost justification, this rule proposal cannot be lawfully approved.

As SIFMA has requested in numerous other market data filings in recent months, we ask that the Commission Staff not approve this or any other market data rule filings on delegated authority until the Commission itself establishes clear standards for

[6] SIFMA would also like a clearer explanation whether the per query and per user options under Table (b)(1)(A) may be elected by a firm on a per user basis, on a monthly basis, and whether there is a per query cap for a given user.

evaluating market data proposals and determines the related issues presented *In the Matter of NetCoalition*.[7]

Thank you for your time and consideration of these views. If you have any questions regarding this letter, please contact Melissa MacGregor, Assistant Vice President and Assistant General Counsel at SIFMA at 202-434-8447.

Respectfully submitted,

Christopher Gilkerson and Gregory Babyak

Co-Chairs, Market Data Subcommittee of the SIFMA Technology and Regulation Committee

cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette L. Nazareth, Commissioner
The Hon. Kathleen L. Casey, Commissioner
Dr. Erik R. Sirri, Director Division of Market Regulation
Robert L.D. Colby, Deputy Director Division of Market Regulation
Dr. Chester Spatt, Chief Economist
Brian G. Cartwright, Esq., General Counsel

[7] File No. SR-NYSEArca-2006-21; *see* SIFMA Comment Letters cited in notes 2 and 3 above.