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SAN FRANCISCO

November 24, 2009

SUBMITTED VIA ELECTRONIC MAIL

BOULDER

Elizabeth M. Murphy, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

COLORADO SPRINGS

Re: SR-NASDAQ-2009-081
Business Wire's Comments on Nasdaq's Proposed Rule Change
To Modify Fees for Listing on the Nasdaq Stock Market

DENVER

Dear Ms. Murphy:

DUBLIN

We represent Business Wire, Inc., a wholly owned subsidiary of Berkshire Hathaway and a leading transmitter of full-text news releases, regulatory filings and multimedia content to journalists, financial professionals, investor services, regulatory authorities and the public ("Information Dissemination Services").

LONDON

SR-NASDAQ-2009-081 seeks to increase NASDAQ's fee structure to cover unspecified cost increases at the same time it is attempting to attract new listings by offering millions of dollars in "free" Information Dissemination Services bundled into the listing fee. This can hardly be coincidental. To the contrary, it appears to be a *sub rosa* attempt to do what Nasdaq tried in SR-NASDAQ-2006-040, when it proposed bundling Information Dissemination Services with its listing service. When that proposal was challenged as anti-competitive and inconsistent with transparency standards, it was purportedly withdrawn to obtain Commission approval of the listing fee increase. But Nasdaq continued to bundle, and is including years of free Information Dissemination Services as part of its listing fee for companies that switch.

LOS ANGELES

MUNICH

PHOENIX

Although it does not explicitly say this, SR-NASDAQ-2009-081 effectively seeks to ratify Nasdaq's bundling by allowing it to raise listing fees to cover the costs of the bundled free Information Dissemination Services. Business Wire respectfully submits that not only should the proposal be rejected, but the Commission should restrict, or at least investigate, Nasdaq's ownership of these auxiliary services that it is now calling "Core Services," its very operation of which creates apparent conflicts of interest.

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I. BACKGROUND

Nasdaq's website describes it as "the largest US electronic stock market. ... [I]t lists more companies and, on average, trades more shares per day than any other U.S. market. It is home to companies that are leaders across all areas of business, including technology, retail, communications, financial services, transportation, media and biotechnology."

Federal and state laws require that companies listed by Nasdaq and other exchanges make substantial amounts of corporate information available to the public in a timely and complete manner, and those companies often wish to disseminate additional information for various reasons. This dissemination of information has historically been handled by a third-party provider with the experience and facilities to ensure rapid, broad and accurate distribution. Over the last several years, the principal companies providing such services within the United States have been Business Wire, PR Newswire, MarketWire and GlobeNewswire. In 2006, Nasdaq acquired GlobeNewswire (then known as "PrimeZone") and operates it as a wholly-owned subsidiary.

On October 6, Nasdaq filed a Proposed Rule Change pursuant to Rule 196(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 19b-4 thereunder, seeking "to modify the fees for listing on the Nasdaq Stock Market."¹ Pertinent here are provisions increasing application, entry and annual fees. Nasdaq proposes to (1) raise application fees **500%** – from \$5,000 to \$25,000 – for all new companies joining the exchange, (2) increase the amounts companies issuing between 50 to 100 million shares must pay in entry fees, while creating a new tier for issuers with more than 100 million shares, and (3) revise the tiers and pricing for its annual fees so that **approximately 75%** of Nasdaq-listed companies will be hit with up to an additional \$5,000 charge each year. *See* 74 Fed. Reg. at 57212.

Nasdaq claims the fee hikes are justified because its costs have increased, but also says the increases "take into account a number of new initiatives by

¹ SR-NASDAQ-2009-081, 74 Fed. Reg. 57212, 57212 (Nov. 4, 2009).

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Nasdaq” in recent years. *Id.* The only “initiatives” Nasdaq identifies are improvements to parts of its website and the creation of the “IPO cross” which is “an open auction process” designed to “maximize[] transparency” during the opening trades of an initial public offering. *See id.* at 57212-13.

What Nasdaq does *not* disclose is that these fee increases are not being sought merely to cover increased operating costs. Rather, it is also apparently intended to help subsidize the discriminatory and undisclosed provisioning of “free” Information Dissemination Services to certain current or potential listed companies through its wholly-owned subsidiary, GlobeNewswire, and other providers of Information Dissemination Services such as webcasting, web hosting and EDGAR filings (all of which Nasdaq calls its “Core Services”).²

In the past several months, Nasdaq has offered companies who switch their listing years of free Information Dissemination Services bundled with (and included in) the listing fee, the cost of which Nasdaq is no doubt attempting to cover through its proposed fee increase. In one case, a Nasdaq Executive Vice President offered a major Business Wire client up to \$1 million of free Information Dissemination Services for five years, including enough free annual dissemination via GlobalNewswire to more than cover all the company’s wire distribution, if the company would switch its listing from the New York Stock Exchange to Nasdaq. Business Wire does not know how widespread Nasdaq’s bundling is – and whether it is being offered or provided to companies that currently list on Nasdaq – but has been informed that Nasdaq has offered several other major companies a similar bundle of free auxiliary services included in the listing price to switch.

Nasdaq is thus asking the Commission to approve a fee increase to cover the cost of doing exactly what it told the Commission it would not do in order to get its last proposed listing fee increase approved in 2007.

² Nasdaq offers webcasting and hosting through another third party it acquired – which it now calls Global Shareholder Communications and Shareholder.com – and offers EDGAR filing through GlobeNewswire.

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Nasdaq's 2006 Effort To Bundle Services Was Widely Criticized

In October 2006, Nasdaq filed SR-NASDAQ-2006-040, a proposal to significantly increase its fees, which it justified in substantial part by tying to its listing services certain ancillary services, including Information Dissemination Services provided by its then-recently acquired subsidiary PrimeZone, which Nasdaq initially renamed PrimeNewsWire and then GlobeNewswire.³

As it described the proposal to its listed companies, Nasdaq intended to:

“[R]edefin[e] the listing product to include a package of issuer benefits, previously not included as part of the annual listing fees. These products assist our listed companies with compliance, shareholder communications and visibility objectives. To support this initiative, Nasdaq has proposed a new pricing structure reflecting the addition of these products and services at a significant price advantage for Nasdaq-listed companies.”

The Nasdaq Stock Market, FORM 8-K, Exh. 99.1 (Oct. 2, 2006) (quoting Nasdaq's October 2, 2006 Notice to Listed Companies under the Subject line “Changes to NASDAQ pricing structure add value to your listing”).⁴

³ “The change in fees largely reflects the costs of providing issuer services and will allow enhancement to the services offered to Nasdaq listed companies. Issuers listed on Nasdaq will receive a suite of products and services” not previously part of the listing service. SR NASDAQ 2006-040 at 24.

⁴ Since that justification created an obvious tying arrangement in violation of the antitrust laws, Nasdaq tried to soften the connection in an amendment filed October 30, 2006 by telling the Commission something else (a second amendment, filed the next day, was substantially the same as the first). Instead of arguing that the fee increases were justified by the Information Dissemination Services, the amended proposal mentioned PrimeZone only briefly, near the end of the three pages devoted to justifying the increases.

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On December 11, 2006, Business Wire became one of 117 entities and individuals to submit comments concerning Nasdaq's proposal. While some letters supported Nasdaq's proposal to "bundle ... products and services,"⁵ "most of the remainder ... objected to the proposal, citing issues that included alleged illegal tying arrangements and other antitrust violations, and potential conflicts of interest." SEC Release No. 34-55202 at 2 n.5, 7-8 (Jan. 30, 2007).

As Business Wire (and other opponents) explained at length, Nasdaq's proposal would (1) clearly violate federal antitrust laws, (2) substantially undermine the movement for greater transparency and accountability, and (3) create, through Nasdaq's very provision of Information Dissemination Services to its largely captive listed audience, actual and apparent conflicts of interest inimical to ensuring the fair operation of national exchanges.

Even before Business Wire submitted its December 11 comment, the concerns raised by Nasdaq's acquisition of PrimeZone and its proposal to bundle Information Dissemination Services into its listing fees had drawn the attention of the late Congresswoman Stephanie Tubbs Jones, who, in a letter dated November 2, 2006, asked the Antitrust Division of the Department of Justice to review Nasdaq's proposed rule for possible violation of the antitrust laws.⁶

⁵ Some supporting comments were orchestrated by NASDAQ, which not only encouraged listed companies to submit supportive comments but distributed an email with scripted pro-NASDAQ comments, which was copied by at least six of the supposedly supportive comments. Business Wire Letter of December 11, 2006 from Robert Stolebarger, Roger Myers, Richard Mooney, Holme Roberts & Owen LLP, and James Doty, Brad Bennett, Baker Botts LLP, at 5 & n.4.

⁶ Media reports about the proposal also noted the anti-competitive concerns. See J. Keehner, *Nasdaq Press Release Push Raises Antitrust Queries*, Reuters, Dec. 7, 2006; A. Lucchetti & K. Scannell, *Profit in Mind, Nasdaq is Raising Fees – and Brows*, Wall St. J., Dec. 8, 2006; E. Ortega, *Movers: Nasdaq Plan to Raise Fees Riles Some Firms*, Int'l Herald Trib., Dec. 11, 2006.

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**Business Wire's Concerns Over Nasdaq's Proposed Bundling
Resulted In A Meeting With The Division Of Trading And Markets**

In a December 2006 meeting with Business Wire and its counsel, top staff of the Division of Market Regulation (now the Division of Trading and Markets) acknowledged that Nasdaq had not sought Commission approval of, or input into, its acquisition of PrimeZone. As Business Wire pointed out, Nasdaq had continued to ignore the proper relationship between a Self-Regulatory Organization ("SRO") and the Commission by treating as a *fait accompli* Nasdaq's bundling of PrimeZone and other Information Dissemination Services with the listing product and then seeking to increase the listing fees.

Business Wire also explained that Nasdaq should not have unilateral discretion to transform itself from a regulated entity in the narrow market for listing services into any form of diversified company it chooses, regardless of any resulting conflicts of interest or opportunities to exercise undue influence. More specifically, Business Wire noted, Nasdaq's operation of PrimeZone would (1) create conflicts of interest that would undermine the transparent, efficient and fair functioning of the securities markets (for example, Nasdaq would have the ability and the incentive to skew its decisions regarding the level and adequacy of disclosures and the allocation of its resources in ways designed to maximize its own profit rather than to ensure proper functioning of the securities markets); (2) significantly distort competition in the market for Information Dissemination Services (through the substantial pressure Nasdaq can impose on its listed companies), an unfair advantage that, combined with Nasdaq willingness to price at or below cost, created a significant danger of Nasdaq accumulating market or even monopoly power in that market over time; and (3) contradict the statutory mandate for equitable allocation of fees because Nasdaq intended to "fund" its below cost offerings through subsidies from the proposed increase in listing fees.⁷

⁷ See Section 6(b)(4) of the Exchange Act, which requires that Nasdaq "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."

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**Nasdaq Then Said It Would Not Use Bundling To Justify The Fee Hike,
And The Commission Granted The Increase Without Addressing Bundling**

Apparently aware that its proposal, even as amended, violated antitrust laws, Nasdaq filed a third amendment on January 16, 2007, that purported to eliminate the tie between its listing service and Information Dissemination Services. In that amendment, Nasdaq completed its *volte-face* from the justifications offered in its original proposal, asserting that “[t]hese services do not serve as a justification for the proposed fee increase.” Jan. 16, 2007 Amendment to SR NASDAQ 2006-040 at 3. In a tacit concession that its initial proposals burdened competition, Nasdaq attempted to assure the Commission that its third amendment eliminated that burden. Nasdaq Response of January 16, 2007, to Comments on SR NASDAQ 2006-040 at 3.

While purporting to unbundle PrimeNewsWire from the listing service, the third amendment acknowledged that Nasdaq intended to provide Information Dissemination Services, including PrimeNewsWire, for “free” for an unspecified period. Jan. 16, 2007 Amendment to SR NASDAQ 2006-040 at 3 n.2, 6 n.7. In view of the lack of specificity in its amended proposal as to the exact nature of the “free” offering, Business Wire remained suspicious of the claim that tying has been completely eliminated and on January 25, 2007, submitted a supplemental comment to address Nasdaq’s third amendment.

As Business Wire explained, Nasdaq’s disclosures in its third rule amendment and sales pitches to Business Wire clients continued to tie the “free” or discounted pricing of PrimeNewsWire to Nasdaq listing, or at least to meeting with Nasdaq and completion of the registration process. Equally important, the third amendment failed to deal with the even more fundamental issue – to wit, that allowing Nasdaq to sell such ancillary services creates an insuperable conflict of interest between its role in regulating listed companies and its role in selling them ancillary services subject to that same regulation.

Two weeks after the third amendment was filed, the Commission granted accelerated approval. Noting that a “large number of comment letters focused on Nasdaq’s offer of a bundle of products and services,” the Commission

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determined those “issues are now moot,” and did not address them, “[b]ecause Nasdaq filed Amendment No. 3 to remove the bundle of services from the proposed rule change.” SEC Release No. 34-55202 at 7-8 (Jan. 30, 2007).

Following Commission approval, Nasdaq’s press release announcing the increase in listing fees also said its “core services” for listed companies would now include Information Dissemination Services “available to all Nasdaq companies ... free of charge” and to others for free “on a trial basis.”⁸ Not only did this press release lead the media to report that the fee increase approved by the Commission *included* the cost of free Information Dissemination Services,⁹ the examples cited above indicate Nasdaq is in fact bundling “free” Information Distribution Services into the price of its listing fee, contrary to the Commission’s reasonable expectations based on Nasdaq’s prior representations.

II. NASDAQ’S NEW PROPOSAL SHOULD BE REJECTED

As the Commission is aware, the rules of a national exchange such as Nasdaq require that it must, among other things, both “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities” and “promote just and equitable principles of trade”¹⁰ Furthermore, fee proposals must “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act], taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this

⁸ “NASDAQ New Listing Fees Approved,” Press Release (Feb. 5, 2007).

⁹ *See, e.g.*, E. Ortega, Bloomberg (Feb. 5, 2007) (“Nasdaq ... won regulatory approval to raise fees. ... The decision by the US Securities and Exchange Commission also lets ... Nasdaq provide press-release distribution and Internet broadcasts of company presentations at no additional charge.”).

¹⁰ Exchange Act § 6(b)(4).

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title.”¹¹ Finally, the rules of an exchange must be designed to “remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest” and must not “permit unfair discrimination between customers, issuers, brokers, or dealers.”¹²

Business Wire respectfully submits that Nasdaq’s proposal fails all these tests for the reasons set forth below and therefore should be rejected.¹³

A. Nasdaq’s Proposal Should Be Rejected Because It Will Be Used To Fund Illegitimate Cross-Subsidies and Will Reduce Transparency

Most obviously, Nasdaq’s proposal violates the provisions of Section 6(b)(4) of the Exchange Act, which requires that Nasdaq “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” Nasdaq’s proposal fails to meet this standard because companies that use its “free” Information Dissemination Services pay the same fees to the exchange as companies who choose instead to purchase such services from third parties. The second set of companies is simply subsidizing the first by paying a portion of the costs that are incurred by Nasdaq to provide “free” services, which the second set of companies have elected not to use. Under no reasonable definition is such an arrangement an “equitable allocation.”

¹¹ Exchange Act § 6(e)(1)(B)(ii); *see also id.* § 6(b)(8) (exchange rules may “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]”).

¹² *Id.* § 6(b)(5).

¹³ *See* Exchange Act § 19(b)(2)(B) (“The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of [the Exchange Act] and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding.”).

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The Commission has previously rejected fee proposals by the FINRA f/k/a the NASD which would have had the effect of cross-subsidizing other parts of its operations for an unfair competitive advantage, based on the rationale that the FINRA was functioning in a capacity similar to a public utility. *See Order Announcing Commission Findings, Modifying Interim Relief, and Instituting Proceedings*, Release No. 20874, File No. 4-256, 49 Fed. Reg. 17640, 17646-48 (1984) (“allocation of NASDAQ system costs is absolutely necessary to ensure that NQDS charges are derived solely from those NASDAQ functions relevant to the service provided to Instinet and its subscribers”); *see also NASD v. SEC*, 801 F.2d 1415, 1420-21 (D.C. Cir. 1986) (affirming the Commission’s ruling). The proposal here should meet the same fate.

Furthermore, one of the Commission’s significant goals over the last several years has been to increase transparency in connection with the listing and trading of securities. Transparency is a central component in efforts to ensure both that all investors and listed companies enjoy a level playing field when making investment and capital decisions, and that U.S. stock exchanges retain the confidence of investors and companies alike.¹⁴

Nasdaq’s proposal is part of a larger strategy to reduce transparency in the securities listing/trading field. Historically, listed companies pay a fee for the core service offered by Nasdaq – listing on a securities exchange. They paid a separate fee for Information Dissemination Services, both those required by law and optional services. By seeking to cross-subsidize its Information Dissemination Services’ subsidiaries’ “free” services, Nasdaq is blurring the

¹⁴ For example, in Remarks before the ICI Equity Markets Conference, the then-Director of the Division of Market Regulation said in connection with a related subject (the pricing and provision of market data): “In this era of for-profit, publicly traded exchanges, we believe the historical constraints on individual members exercising control over SROs should be made explicit. Furthermore, comments on the Commission’s market data proposal called for greater transparency of SRO revenues and expenses. The staff concurs and will recommend expanded public reporting by SROs of their financial and ownership structure.” [Http://www.sec.gov/news/speech/spch092304aln.htm](http://www.sec.gov/news/speech/spch092304aln.htm).

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lines between mandatory and elective services. The lack of transparency makes it more difficult for listed companies to evaluate alternatives available to them.

The importance of transparency contributed substantially to the outcome of the very similar case of the Vancouver Stock Exchange (“VSE”). In particular, the VSE in 1998 proposed to implement a similar strategy to Nasdaq’s agenda here. Traditionally, the VSE had allowed information dissemination by any qualified party. In 1998, the VSE proposed to give Canada NewsWire Ltd. a monopoly on news distribution for VSE- listed companies (this is effectively what Nasdaq is seeking to do through its subsidiary by offering “free” services to listed companies, since although the companies could choose a third party provider, they would have to pay twice in order to do so). VSE received enormous criticism of its proposal; a lawsuit was filed alleging that the proposed rule was an unlawful restraint of trade; and the British Columbia Securities Commission put the new policy on hold pending further review. Eventually, the VSE changed course and agreed that news distribution should be open to competition.

B. Nasdaq’s Proposal Should Be Rejected Because It Will Help Fund Conduct That Violates The Just and Equitable Principles of Trade

As noted above, Section 6(b)(5) of the Exchange Act requires any Nasdaq rule such as the current fee proposal to “promote just and equitable principles of trade.” The Commission has interpreted this phrase to implicate antitrust considerations. In one matter, for example, several exchanges consented to entry of an order finding that they had, among other things, hindered the multiple listing of certain options listed on a single exchange that were available for such listing, and failed to enforce compliance both with certain of their rules that promoted competition, and certain other rules prohibiting anti-competitive conduct, such as refusals to deal. *In the Matter of Certain Activities of Options Exchanges*, Administrative Proceeding No. 3-10282 (Sept. 11, 2000). The exchanges consented to the imposition of an order in which they agreed, *inter alia*, to adopt rules or codes of conduct prohibiting anti-competitive behavior by exchange members or persons affiliated with the exchanges themselves. In another, the Commission noted, in approving a

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proposed antitrust compliance policy submitted by one of the exchanges, that the exchange's establishment of such a policy "should help to promote just and equitable principles of trade." *Order Granting Approval to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. to Institute an Antitrust Compliance Policy*, Exch. Act. Rel. No. 34-44527 (July 9, 2001). The antitrust concerns discussed herein, including Nasdaq's attempted use of tying and cross-subsidization, illustrate that the fee proposal is being sought to help fund activity inconsistent with just and equitable principles of trade, and for that reason should be rejected.

C. Nasdaq's Proposal Should Be Rejected Because It Will Be Used To Help Burden Competition In Apparent Violation Of Antitrust Laws

As the Supreme Court has held, "the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations." *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 283 (2007). As shown below, Nasdaq's proposal would have inevitable anticompetitive effects of the sort made unlawful under Sections 1 and 2 of the Sherman Act, as well as analogous state laws.

1. Nasdaq Is Tying Its Information Dissemination Services To Its Listing Service In Violation Of Section 1 Of The Sherman Act

"A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product . . ." ¹⁵
A tying arrangement violates Section 1 of the Sherman Act "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 market."¹⁶ Absent extremely rare circumstances, a tying arrangement is a *per se* violation of Section 1 – that is, a tying arrangement is illegal, regardless of whether further

¹⁵ *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992) (internal quotation omitted).

¹⁶ *Id.*; see also *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re: Am. Express Merchants' Litig.)*, 554 F.3d 300, 308 n.6 (2d Cir. 2009).

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investigation might reveal that the arrangement is “reasonable.”¹⁷ Thus, an antitrust violation is established if three requisites are met:

- (1) Defendant tied together the sale of two distinct products or services;
- (2) Defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and
- (3) The tying arrangement affects a “not insubstantial volume of commerce” in the tied product market.¹⁸

All three elements are present here.

First, it cannot be disputed that the listing service Nasdaq and exchanges have historically provided is separate from the Information Dissemination Services that Business Wire, GlobeNewswire and others have historically provided. Two products are considered separate if there is “sufficient consumer demand so that it is efficient for a firm to provide [one] separately from [the other].”¹⁹ Such separate demand is shown here by the fact the two products have been sold separately.²⁰ Until recently, companies purchased listing services from Nasdaq and Information Dissemination Services from third parties.

By offering “free” Information Dissemination Services to listing customers through its subsidiaries (while planning to raise the cost of listing services), Nasdaq is tying the two services in a manner analogous to the “bundling” it proposed in 2006 and then purportedly withdrew. Customers for listing services, while having the nominal right to choose their own provider of

¹⁷ *Eastman Kodak*, 504 U.S. at 461-62.

¹⁸ *Cascade Health Solutions, Inc. v. PeaceHealth, Inc.*, 515 F.3d 883, 913 (9th Cir. 2008) (citations omitted).

¹⁹ *Eastman Kodak*, 504 U.S. at 462.

²⁰ *Jefferson Parish Hos. Dist. No. 2 v. Hyde*, 466 U.S. 2, 22 (1984); *United States v. Microsoft*, 253 F.3d 34, 86-87 (D.C. Cir. 2001) (*en banc*)(*per curiam*).

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Information Dissemination Services, will inevitably treat Nasdaq's listing service and its "free" Information Dissemination Services as a single unit and direct their wire distribution business to GlobeNewswire since they are already incurring the cost. Once listed with Nasdaq and provided continuing "free" Information Dissemination Services, a company is effectively precluded from switching to another source of those services since it pays for GlobeNewswire and other Information Dissemination Service either way through the elevated listing fees. This is precisely the sort of conduct the antitrust laws prohibit.

The mere fact that Nasdaq and its subsidiaries characterize the offer as being "free" does not alter the analysis (particularly where, as here, the "free" service is accompanied by a price increase in the other service). As the Courts of Appeals have explained: "Of course, in a tying case if the evidence shows that the price of a bundled product reflects any of the cost of the tied product, 'customers are purchasing the tied product, even if it is touted as being free.'"²¹ That a customer could purchase *additional* Information Dissemination Services from a third party such as Business Wire is irrelevant to the tying analysis, which focuses on the forced purchase of an additional product from the antitrust violator, not on any other additional purchases a party might make.

Second, Nasdaq clearly has sufficient market power to coerce purchase of the tied product.²² Nasdaq's increase in fees will affect all new companies joining

²¹ *U.S. Philips Corp. v. International Trade Comm.*, 424 F.3d 1179, 1191 n.4 (Fed. Cir. 2005) (quoting *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Prof. Pubs*, 63 F.3d 1540, 1548 (10th Cir. 1995)); accord *Areeda & Hovenkamp*, ANTITRUST LAW Vol. IIIA ¶ 760b at 49 (2002) ("the tie may be obvious, as in the classic form, or somewhat more subtle, as when a machine is sold or leased at a price that covers 'free' servicing").

²² Notably, "market power" sufficient to establish a tying violation is a substantially lower threshold than the "monopoly power" necessary to establish a monopolization claim under Sherman Act § 2. See, e.g., *Eastman Kodak*, 504 U.S. at 462 (tying arrangement "violates § 1 of the Sherman Act if the seller has 'appreciable economic power' in the tying product market").

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its exchange and the vast majority of companies already listed on it. The cost of providing the tied services is thus foisted on a broad group, while the tied product is provided to a subset of that group. The only way to avoid the cost of the “free” tied services is not to join Nasdaq or suffer the heavy costs attendant upon moving to a different exchange (or de-listing entirely). Those costs are particularly significant for smaller public companies, which disproportionately tend to be listed on Nasdaq. Given this almost complete lack of choice available to Nasdaq-listed companies, the second requirement is easily met.²³

Third, the amount of commerce affected in the Information Dissemination Services market is far above the “not insubstantial” requirement. The threshold for meeting this requirement is modest (indeed, so modest it is virtually always conceded by defendants in tying cases). For example, the Supreme Court held in the leading case on this issue that the “not insubstantial” requirement is met if the amount of business foreclosed to competition is “substantial enough in terms of dollar-volume so as not to be merely *de minimis*.” *Fortner Enters.*, 394 U.S. at 504; *see also Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1426 (9th Cir. 1995) (potential impact on \$100,000 per year of sales sufficient to meet test); *Tic-X-Press, Inc. v. The Omni Promotions Co.*, 815 F.2d 1407, 1420 (11th Cir. 1987) (“While \$10,091.07 is not an overwhelmingly large amount, particularly compared with the 9-13.5 million in total ticket sales over the relevant period, it is certainly more than *de minimis*”).

Further, although a violation of the antitrust laws is surely enough reason to reject Nasdaq’s proposal to raise fees in a naked attempt at cross-subsidizing GlobeNewswire, the concrete damage the proposal would cause should not be overlooked. In the short run, Nasdaq’s proposal, combined with the offer of

²³ *See, e.g., Fortner Enters.*, 394 U.S. at 502 (“Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. . . . [E]ven absent a showing of market dominance, the crucial economic power may be inferred from the tying product’s desirability to consumers or from uniqueness in its attributes.”) (internal citations and quotations omitted).

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“free” Information Dissemination Services through its subsidiaries, would effectively coerce companies into either using an inferior service provided by GlobeNewswire or paying twice to obtain services from a higher caliber competitor such as Business Wire. In the long run, competition in Information Dissemination – as in other industries – is necessary to ensure innovation, efficiency and delivery of the best products and services at the minimum cost and price. Nasdaq’s fee hike proposal would leave companies listing on Nasdaq without the very real benefits of competition for an essential service.

When viewed in the context of its larger strategy, Nasdaq’s proposal would undoubtedly impose a “burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].”²⁴ The suggestion that Nasdaq needs to raise fees dramatically to cover an unspecified “overall rise in costs” is absurd, since its wholly-owned subsidiary apparently plans to give away millions of dollars in free services to attract new customers. Such naked cross-subsidization provides no significant benefit to investors, listed companies, or the exchange system that might make such a significant impact on competition necessary or appropriate. Indeed, to the extent the proposal affects those stakeholders at all, it is most likely to impact them negatively – by raising prices and funneling listed companies to a less efficient supplier of Information Dissemination Services.

Nasdaq cannot cure this problem merely by proposing to reduce the amount of “free” services GlobeNewswire provides or styling it as a “discount” from normal rates. Any such proposal would be an attempt to hide substance behind form. It would remain an illegal tie between the listing services and the improperly discounted Information Dissemination Services.²⁵ In sum, the anti-

²⁴ Exchange Act §§ 6(b)(8) and 15A(b)(9).

²⁵ *See, e.g., Microsoft*, 253 F.3d at 87 (“Direct competition on the merits of the tied product is foreclosed when the tying product is sold only in a bundle with the tied product or, though offered separately, is sold at a bundled price, so that the buyer pays the same price whether he takes the tied product or not. In both cases, a consumer buying the tying product becomes entitled to the tied

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competitive impact of Nasdaq's proposal, and the lack of any valid justification in terms of the Act's purposes, compels its rejection.

2. Offering Free Information Dissemination Services For Years Evinces An Attempt To Monopolize In Violation Of Section 2 Of The Act

The offense of attempted monopolization under Section 2 is established if the party "(1) engage[s] in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."²⁶ Again, when viewed as part of its larger strategy, Nasdaq's proposal appears to meet each requirement.

First, there is no question that pricing a product or service below marginal cost is predatory/anticompetitive conduct that can support an attempted monopolization claim.²⁷ Here, to the extent one accepts Nasdaq's own representations that it will be offering GlobeNewswire services for "free," that price is obviously below any reasonable measure of marginal cost.

Second, the intent to monopolize is easily inferred from the circumstances. Nasdaq enjoys a unique advantage as both a national securities exchange/regulator and owner of a subsidiary that provides Information Dissemination Services. By offering "free" services to listed companies through its subsidiary, while covering that loss through the fees it is allowed to charge in its position as an exchange (a field in which there are far fewer competitors), Nasdaq is clearly acting not just to have GlobeNewswire compete on even terms with Business Wire and others, but instead to drive those competitors out

product; he will therefore likely be unwilling to buy a competitor's version of the tied product even if, making his own price/quality assessment, that is what he would prefer.").

²⁶ *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

²⁷ *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

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of the market for Information Dissemination Services for Nasdaq listed companies.²⁸ Predatory pricing is unlawful where there is a dangerous likelihood of recoupment of the investment in the below-cost pricing strategy. Here, due to the lock-in effect on Nasdaq-listed companies, who cannot switch to other exchanges without incurring substantial transaction costs, recoupment is assured from the proposed fee increases.

Third, there is little question that the relevant market to consider in this analysis is the market for Information Dissemination Services for Nasdaq-listed companies. Business Wire is informed that Nasdaq is offering to bundle free services for certain companies that are currently listed on the New York Stock Exchange to induce them to switch. However, there is ample reason to believe that Nasdaq intends to abuse the proposed fee increase to capture the market for Information Dissemination Services for Nasdaq-listed companies, and that these offers are not short-term inducements. The offers have been made to numerous companies and extend for as long as five years. The amount of the fee increase is sufficient to subsidize its “free” service offer more broadly to Nasdaq listees. Nasdaq’s intentions are not merely a matter of speculation, in light of its prior proposal to increase listing fees to cover the cost of providing a bundle of Information Dissemination Services to its listed companies, and its announcement that it would continue to offer bundled service after obtaining Commission approval of the listing fee increase.

With Business Wire and other competitors effectively eliminated from the market, Nasdaq’s GlobeNewswire would have an unfettered ability to raise prices and/or compromise service levels to the detriment of listed companies and the investing public. Of course, a company can have a high market share without enjoying monopoly power if there are actual or potential rivals available to enter the market if the company seeks to extract monopoly rents. Here, however, there likely would be no such constraint. Eliminating the

²⁸ The potential impact on competition is obvious. A significant share of Business Wire’s revenue comes from Nasdaq-listed companies (including 57 of the Nasdaq 100), as well as NYSE-listed companies to which Nasdaq has offered to bundle “free” Information Dissemination Services.

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ability of Business Wire and other competitors to sell to Nasdaq-listed companies might itself bankrupt them. In the absence of actual or plausible competitors, Nasdaq's efforts to obtain monopoly power would be complete.

Nasdaq's plea for increased fees, then, reflects an apparent attempt to obtain the Commission's unknowing approval of and assistance for Nasdaq's monopolization scheme by giving Nasdaq the means to coerce listed companies into using its subsidiary for Information Dissemination Services.

D. Nasdaq's Proposal Should Be Rejected Because It Will Foster A Conflict Of Interest In Nasdaq Providing Services It Mandates

When viewed in the context of its larger strategy, Nasdaq's proposal also presents substantial risk of creating conflicts of interest and incentives for abuse of Nasdaq's privileged position as a regulator.

Although enforcing compliance with disclosure requirements is ultimately within the bailiwick of the Commission, Nasdaq has substantial oversight of its listed companies' compliance with federal law, and directly regulates them pursuant to its own rules. As Nasdaq's Rule 5101 states in pertinent part:

Nasdaq ... has broad discretionary authority over the initial and continued listing of securities in Nasdaq Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.²⁹

²⁹ See Nasdaq Listing Rules, Rule 5101, "Preamble to the Rule 5100 Series," available at <http://Nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2&manual=%2FNasdaq%2Fmain%2FNasdaq%2Dequityrules%2F>.

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Specifically, a significant area of Nasdaq oversight is in the area of reporting “material news.” Nasdaq requires that listed companies provide it with advance notice of certain news events.³⁰ Failure to follow Nasdaq’s prescribed procedures for reporting “material news” can result in delisting.³¹

Given Nasdaq’s status as a securities regulator, there is an insuperable conflict of interest in it also selling (or “giving away”) the very services whose adequacy it has authority to regulate. At least three issues immediately present themselves:

First, Nasdaq’s authority to rule on the adequacy of the disclosures makes it inappropriate for Nasdaq itself (even if through a wholly owned subsidiary) to be effectively be the “preferred provider” making the disclosures. In essence, Nasdaq is in the position that it will be allowed to rule upon its own work. If companies choose not to use GlobeNewswire for Information Dissemination Services, it will lead to a situation rife with the possibility that certain companies (using Nasdaq’s provider) will receive or appear to receive more favorable treatment from Nasdaq than other companies (using Business Wire, PR Newswire, or another competitor).

Second, Nasdaq is in a position, quite apart from its regulatory role regarding the adequacy of listed companies’ disclosures, to determine how much disclosure is required in the first place, which creates the opportunity for Nasdaq to manipulate the quantity of disclosures to its advantage. As long as

³⁰ See Nasdaq Listing Rules, Rule 4120(c), “Procedure for Initiating a Trading Halt,” available at <http://Nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2&manual=%2FNasdaq%2Fmain%2FNasdaq%2Dequityrules%2F>.

³¹ See Nasdaq Listing Rules, Rule IM-5250-1, “Notification to Nasdaq MarketWatch Department,” available at <http://Nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2&manual=%2FNasdaq%2Fmain%2FNasdaq%2Dequityrules%2F>.

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Nasdaq is offering “free” Information Dissemination Services, it would have an incentive to reduce the amount of disclosure required of listed companies in order to save costs – which could impact the ability of investors to make appropriate and fully informed decisions. Once Nasdaq has “locked in” a satisfactory number of customers, it can let the “discount” expire and then would have an incentive to increase the amount of disclosure required, being able to imposing additional and unnecessary burdens on listed companies so as to reap supracompetitive profits from its captive customer base.

Third, Nasdaq’s decision to enter into ancillary businesses not directly relevant to its primary function of listing and facilitating trading of securities necessarily puts it in a position of having to determine which aspect(s) of its business should be provided the capital, management experience, and other tools necessary to function as well as possible. As the Commission put it in a related context: “Given the inherent tension between an SRO’s role as a business and as a regulator, there undoubtedly is a temptation for an SRO to fund the business side of its operations at the expense of regulation.”³²

Notably, each of these conflicts are inherent not just in the facts underlying the current proposal, but in the very concept of Nasdaq’s ownership of GlobeNewswire and other Information Dissemination Services. The risk of such conflicts are particularly high given that GlobeNewswire no longer has independent sales representatives; instead, Nasdaq now sells Globe’s services through Nasdaq’s own representatives. For these reasons, Business Wire strongly believes that not only should Nasdaq’s current proposal be rejected, but Nasdaq can and should be required to sell its Information Dissemination Services to an independent third party or parties so that, for example, GlobeNewswire is required to compete with Business Wire, PR Newswire,

³² See SEC, “Concept Release Concerning Self-Regulation” dated March 8, 2005, *available at* <http://www.sec.gov/rules/concept/34-50700.htm>) at text accompanying note 198; *see also id.* at text accompanying notes 272-73 (proposing that SROs “be required to effectively separate their regulatory function from their market operations and other commercial interests”).

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Market Wire and others on a fair, stand-alone basis.³³

Alternatively, if the Commission believes that divestiture is too intrusive a remedy at this juncture, Business Wire believes that Nasdaq should at a minimum be ordered to operate GlobeNewswire on a strict arms-length basis. The specific restrictions likely should be determined after an opportunity for comment by the public generally (including Nasdaq), but might well include complete separation of Nasdaq's regulatory functions and governance from GlobeNewswire, as well as stringent prohibitions on (1) cross-selling by Nasdaq of GlobeNewswire products and services; (2) cross-marketing of Nasdaq and GlobeNewswire products and services; (3) coordination of pricing of Nasdaq and GlobeNewswire products and services; and (4) leveraging of the actual and perceived authority and market power of Nasdaq in connection with ancillary products and services.³⁴

³³ The Commission clearly has the authority to order such a divestiture. In particular, the Commission's mandate to protect "competition" under Exchange Act §§ 6(b)(8) and 15A(b)(9) is not limited to "competition" among various exchanges, but rather encompasses competition in other areas, such as in the market for Information Dissemination Services. This conclusion flows from the plain language of the Exchange Act, which places no limitation on the types of competition meant to be protected. It is confirmed by the Supreme Court's decision in *Credit Suisse Securities*, which recognized that "the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations." 551 U.S. at 283. Since the competition at issue in *Credit Suisse* was not competition among exchanges, it necessarily means the Commission's responsibilities include protecting other forms of competition.

³⁴ Useful analogs in fashioning the restrictions might include the Euronext approach and/or Federal Energy Regulatory Commission regulations regarding regulated energy transmission and distribution companies entering into more traditional for-profit power generation markets.

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III. CONCLUSION

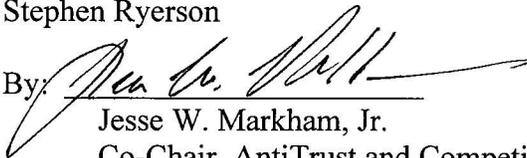
Business Wire appreciates your consideration of these important issues. Based on the preceding analysis, Business Wire believes the Commission should: (1) deny Nasdaq's proposal to increase its fees absent assurances that Nasdaq is not engaged in cross-subsidization of its information dissemination services subsidiary through application, entry, and annual fees for listings; (2) require transparency in all future pricing proposals from Nasdaq; and (3) restrict Nasdaq's ownership of and/or involvement in business outside its core function that create actual or apparent conflicts of interest.

Precisely because Nasdaq is not transparent, Business Wire is not privy to all the evidence of Nasdaq's bundling of Information Dissemination Services as part of the cost of the listing service. At a minimum, the Commission should defer approval of the proposed rule until it has had an opportunity to fully investigate whether Nasdaq's provision of Information Dissemination Services such as GlobeNewswire – and bundling those services for free with the listing service for companies that switch listings – unduly burdens competition and inequitably allocates fees in a manner inconsistent with federal antitrust and securities laws and the imperative of heightened transparency.

If the Commission is amenable, we would be pleased to meet with the Commission to explain our concerns in greater detail.

Respectfully Submitted,

Jesse W. Markham, Jr.
Roger Myers
Stephen Ryerson

By: 
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Co-Chair, AntiTrust and Competition Group

cc: U.S. Department of Justice, Antitrust Division