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December 23, 2009

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

Re: SR-NASDAQ-2009-081

Dear Ms. Murphy:

The NASDAQ Stock Market LLC ("Nasdaq") appreciates this opportunity to respond to the comment letter submitted on the above captioned proposed rule change by Jesse W. Markham of Holmes Roberts & Owen LLP on behalf of Business Wire, Inc. ("Business Wire"). The proposed rule filing would modify the application, entry and annual fees currently charged to issuers listed on the Nasdaq Global and Global Select Markets and the fee for a written interpretation of Nasdaq listing rules.[1]

It is important to note that not a single company that would be subject to the proposed fee changes submitted a comment objecting to them. Instead, the only comment submitted was from Business Wire, a dominant player in the corporate news dissemination business and a competitor to GlobeNewswire, Inc. ("GlobeNewswire"), which is a separate subsidiary of Nasdaq's parent company, The NASDAQ OMX Group, Inc. ("NASDAQ OMX").[2] The Business Wire comment is an attempt by Business Wire to misuse the regulatory process in order to maintain its dominant market position in a business unregulated by the Securities and Exchange Commission ("SEC" or "Commission").

The issues raised by Business Wire arise from its unhappiness over having to compete with GlobeNewswire in the marketplace for news dissemination – a function that is not regulated by the Commission. Business Wire is misusing the Commission's rulemaking process in an attempt to suppress that competition. The Commission's rulemaking process is not the

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1 Business Wire has not challenged Nasdaq's proposed changes to the fee for written interpretations of Nasdaq rules. As such, this response deals only with the proposed changes to Nasdaq's initial and annual fees.

2 Business Wire mischaracterizes the relationship between Nasdaq, GlobeNewswire and Shareholder.com, Inc. GlobeNewswire and Shareholder.com are not subsidiaries of Nasdaq, as Business Wire maintains. Rather, GlobeNewswire and Sharheolder.com are each a subsidiary of Nasdaq Corporate Services, Inc., which is itself a subsidiary of NASDAQ OMX. Nasdaq is a separate subsidiary of NASDAQ OMX.

appropriate venue to litigate specious antitrust complaints between entities not regulated by the Commission.[3]

In an effort to dress its complaint in the language of the Securities Exchange Act of 1934 (the "Act"), Business Wire points to the provisions of Section 6(b)(8)[4] that provide that the rules of a securities exchange not unduly burden competition. That effort is misplaced. In assessing competition under Section 6(b)(8), the Commission is properly concerned with competition among the entities it regulates: exchanges, brokers, dealers and issuers. Effective competition among such entities promotes the Commission's core investor protection mission. Competitive issues in other areas of the economy do not, and are properly the province of other regulators.

Indeed, when the Commission has considered competitive concerns in the context of the entities it regulates, it previously has determined not to reach conclusions about the application of antitrust law. In one matter cited by Business Wire,[5] the Commission instituted proceedings against the exchanges that listed options. While the underlying facts related to competition between the options exchanges, the Commission's action in the matter was based on the failure of those options exchanges to enforce their own rules, including specific rules which prohibited harassment and intimidation of members who competed or sought to compete, and to comply with SEC Rule 19c-5. As such, the Commission found that the option exchanges failed to fulfill their obligations as self-regulatory organizations.[6] It was the Antitrust Division of the Department of Justice, in a parallel action, that considered the application of the Sherman Act[7] to these activities.[8]

[3] As the Commission is aware, Nasdaq is a subsidiary of NASDAQ OMX, which owns and operates 22 markets and 10 clearing houses around the world, and numerous unregulated businesses, including global businesses that provide services to public and private companies and that provide technology services to regulated and unregulated markets in more than 50 countries around the world. Each of these entities is operated as a for-profit business and the revenues and income from each are reported by the parent holding company. Other Self Regulatory Organizations are set up in a similar manner. Nowhere does the Act suggest that the Commission should consider the fees for each of these businesses that it does not regulate when it considers Nasdaq's fees. If competitors from each of these multiple entities were allowed to use the Commission's rulemaking process for commercial advantage and delay then the Commission's rulemaking process would be overrun by such comments and would grind to a halt.

[4] 15 U.S.C. 78f(b)(8).

[5] In the Matter of Certain Activities of Options Exchanges, Securities Exchange Act Release No. 43268 (September 11, 2000), 65 FR 57837 (September 26, 2000).

[6] Id. at 57839 ("Based upon the foregoing, the Commission finds that during the relevant period the AMEX, CBOE, PCX and PHLX failed to comply with certain of their rules, including, among others, Rule 19c–5 promulgated under the Exchange Act, and, without reasonable justification or excuse, failed to enforce compliance with certain of their own rules, in violation of Section 19(g) of the Exchange Act.")

[7] 15 U.S.C. 1.

[8] U.S. v. American Stock Exchange, LLC, et al., Proposed Order, Stipulation and Competitive Impact Statement, 65 FR 57829 (September 26, 2000).

Further, Business Wire incorrectly relies on Supreme Court precedent for its assertion that the Commission should consider the competition between Business Wire and GlobeNewswire in approving Nasdaq's fees. In Credit Suisse Securities (USA) LLC v. Billing,[9] the Supreme Court addresses when the securities laws preclude the application of the antitrust laws and sets forth several factors that the Court considers in making that determination. The decision does not require, as Business Wire would like, that the Commission be the adjudicator of antitrust claims. Since the activities of Business Wire and GlobeNewswire do not lie squarely within an area regulated by the securities laws, there is no conflict between the securities laws and the antitrust laws. If Business Wire would like to pursue its highly questionable antitrust claims, there are appropriate venues for it to do so.[10] Its complaints are simply irrelevant to Nasdaq's request for the Commission's approval of Nasdaq's fees.

While the Commission need not consider the competition between Business Wire and GlobeNewswire in approving Nasdaq's fees, Nasdaq has asked Arnold & Porter LLP, a prominent antitrust counsel, to examine Business Wire's antitrust theories. This analysis is included in a separate letter. As viewed under Section 6(b)(8) of the Act,[11] the only competitive impact of the proposed fee change will be to appropriately allow Nasdaq to recover the costs of, and continue to make, improvements to its market and regulatory process, and therefore to continue to compete with other listing markets, to the benefit of listed companies, companies seeking to obtain a listing, and the investors and prospective investors in these companies.

Business Wire's claims that the proposed rule change also does not meet the requirements of Sections 6(b)(4) and 6(b)(5) of the Act[12] are equally without merit. Nasdaq's proposed fee change is an equitable allocation of reasonable fees, as required by Section 6(b)(4) and does not permit unfair discrimination between customers, issuers, brokers, or dealers, as required by Section 6(b)(5).[13]

Business Wire does not claim that Nasdaq's proposed fees are unreasonable. In fact, as described in the rule filing, Nasdaq's proposed fees are in all cases equal to, or less than, the fees charged by other exchanges. Therefore, in its efforts to support its anti-competitive campaign against GlobeNewswire, and attach any relevance to its comment to the Commission, Business Wire must invent a justification for Nasdaq's proposed fee change – namely that Nasdaq is proposing the fee change to subsidize the activities of GlobeNewswire – and then claim that this invented justification results in an inequitable allocation of fees that results in discrimination between issuers.

[9] 551 U.S. 264 (2007).

[10] For example, Sections 4 and 16 of the Clayton Act allow Business Wire to pursue private claims of action. 15 U.S.C. 15(a) and 26.

[11] 15 U.S.C. 78f(b)(8).

[12] 15 U.S.C. 78f(b)(4) and (5).

[13] Business Wire's references to Section 6(e) of the Act, 15 U.S.C. 78(f)(e), are not applicable, as that section applies to an exchange's ability to set rates that may be charged by members of the exchange. Nasdaq's proposal does not seek to set rates that may be charged by its members.

Those assertions have no basis in fact. GlobeNewswire makes promotional and partnership offers to current and prospective customers as part of its marketing efforts. These offers are for the mutual benefit of GlobeNewswire and its customers, and companies receiving such offers have the choice of whether to use those services. The benefits to GlobeNewswire include the customary marketing objectives of demonstrating the quality of GlobeNewswire's services, developing a larger customer relationship, and having the company serve as a reference account to other customers, thereby fostering GlobeNewswire's growth. Importantly, Nasdaq's proposed fee changes are not designed to recoup GlobeNewswire's costs of these promotional and partnership offers.

In the rule filing, Nasdaq does not rely on anything to support the fee changes other than the improvements made to the market and the regulatory process. These improvements include the adoption of new technology to support the initial trade for an initial public offering (the "IPO cross"), the creation and support of an online listing application tool, and significant enhancements to the regulatory information provided on Nasdaq's websites to facilitate compliance by listed companies, each of which was described in the proposed rule filing. Furthermore, while not discussed in the rule filing, the proposed increase in fees also reflects the changes in the marketplace since Nasdaq's last fee increases. Nasdaq must now spread its fixed costs, including the costs for regulation, across fewer listed companies and applicants than in the past.[14]

The proposed fee change also does not permit unfair discrimination between customers, issuers, brokers, or dealers. The proposed fees are allocated based on shares outstanding, as are Nasdaq's current fees and the fees for other exchanges, and similarly situated companies will be charged the same fees. As such, the fee will not permit unfair discrimination between issuers and Business Wire's invented justification cannot form the basis for a contrary conclusion.

Business Wire also advances an ill informed assertion that the mere fact that Nasdaq and GlobeNewswire have a common corporate parent results in a fatal conflict of interest in respect of Nasdaq's self-regulatory functions. Business Wire's assertion that the existence of varying corporate interests creates a debilitating conflict flies in the face of the Commission's longstanding approach of recognizing that, even within a market center, business and regulatory conflicts may exist and are to be addressed by appropriately distinguishing the regulatory functions from the influence of business considerations.[15] Nasdaq achieves that separation by housing its regulatory functions, including the listing department, in a regulation group that is organizationally and institutionally separate from its business lines. That structure, its effectiveness in managing conflicts, and the effectiveness of the regulatory program in practice, are of course subject to periodic Commission examination. In addition, any change to Nasdaq's rules to increase or decrease the amount of information that a company must publicly disclose (either of which Business Wire seems to claim would pose a conflict and have an anti-competitive intent), or the manner of doing so, would require Commission approval. Considered

[14] The number of companies listed on Nasdaq has declined from over 3600 in December 2002 to under 2900 in November 2009. The number of applications to list on Nasdaq has seen a similar decline.

[15] See, e.g., Report Pursuant to Section 21(a) of the Securities Exchange Act of 1934 Regarding the NASD and the NASDAQ Market (August 8, 1996).

within that structure, Business Wire's fanciful assertions of conflicts are without any basis in reality.

Finally, to illustrate the absurdity of Business Wire's complaint, we note that Business Wire's parent, Berkshire Hathaway, also owns several insurance subsidiaries, including GEICO Auto Insurance and United States Liability Insurance Group, whose rates are regulated by state insurance commissioners, and several utilities, such as MidAmerican Energy Company and PacifiCorp, whose rates and businesses are regulated by state energy commissions and the Federal Energy Regulatory Commission. Business Wire's raising complaints about how GlobeNewswire competes with it in the context of Nasdaq's rule filing with the Commission makes no more sense, and is no less an abuse of the regulatory process, than if GlobeNewswire were to complain to state insurance regulators about Business Wire in connection with a filing by GEICO or to state and federal energy regulators in connection with PacifiCorp's filings, given the common ownership by Berkshire Hathaway of GEICO, PacifiCorp and Business Wire.

It appears that Business Wire has little faith in its product and feels it can maintain its significant market share only by excluding competitors through regulatory action. However, this is a misuse of the regulatory process. As demonstrated above, and in the original filing, Nasdaq's proposed fees meet the requirements of Section 6 of the Act. Accordingly, the proposed rule change should be approved.

If the SEC staff has any questions concerning this submission, please feel free to contact me at (301) 978-8075.

Very truly yours,