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SAN FRANCISCO

January 14, 2010

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 Reply to Comments of Nasdaq and Its Attorneys

Dear Ms. Murphy:

DENVER

As counsel for Business Wire, Inc., we appreciate this opportunity to reply to the comments submitted by NASDAQ Stock Market LLC ("Nasdaq") and its antitrust counsel, Arnold & Porter LLP, in response to Business Wire's comment of November 24, 2009, concerning SR-NASDAQ-2009-081.

DUBLIN

In its prior comment, Business Wire raised serious concerns over the lack of transparency in Nasdaq's proposal and the operation of its affiliate providing Information Dissemination Services ("IDS"), which together strongly suggest that at least part of the proposed fee increase would be used to cross-subsidize Nasdaq's bundling of IDS into the listing service at no or a heavily discounted cost (despite Nasdaq's assurance to the Commission, to get its last listing fee increase approved, that it would not bundle IDS with the listing service). This in turn implicates the antitrust laws and highlights the conflicts of interest inherent in Nasdaq's business arrangements with its affiliated companies

LONDON

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In its responses, Nasdaq failed to address these concerns. Instead, it seeks to evade scrutiny by claiming the Commission has no authority to review these issues and should simply trust Nasdaq's assurances that Globe Newswire and other IDS are offered separate from the listing service and the "limited amount of free or discounted" wire distribution it offers present no antitrust issues.

PHOENIX

SALT LAKE CITY

If all Nasdaq was doing was what it claims, that might be true. But that is not all Nasdaq is doing. By failing to acknowledge or address its actual conduct, Nasdaq's responses illustrate the opaque nature of its proposal and operations, and underscore the need for further inquiry by the Commission before it considers approving the proposed Nasdaq rule change.

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**I. Nasdaq Failed To Acknowledge That It Is Not Only Offering The Limited Promotions It Makes Publicly Available, But Is Also Tying Free Or Heavily Discounted Wire Distribution To Its Listing Service**

Read together, the letters from Nasdaq's in-house and outside counsel attempt to paint a picture of Globe Newswire as an entity operated at arms length from the regulated entity, despite the fact that both Globe and Nasdaq are under common control. Nasdaq contends it is not Nasdaq but "Globe Newswire [that] makes promotional and partnership offers to current and prospective customers as part of *its* marketing efforts," separate and apart from listing marketing by Nasdaq,<sup>1</sup> and that any "free or discounted" distribution offered by Globe is not tied to a Nasdaq listing, is "limited" to what is reflected in Attachment B to the letter from its outside counsel and is made available to all companies on the same terms whether they are listed on Nasdaq or not.<sup>2</sup>

But what Nasdaq neglects to inform the Commission paints a very different picture. Globe itself is not a "separate subsidiary" of Nasdaq's parent company,<sup>3</sup> but, along with Shareholder.com and other IDS, is part of what Nasdaq calls its "NASDAQ OMX Corporate Services" and/or "Core Services" – a telling description in light of its unpersuasive attempt to distance itself from the services offered by Globe. While NASDAQ OMX Corporate Services may be a separate "sister" company of the regulated entity, it is not presented to listed companies or the public as such. To the contrary, Nasdaq's website touts these IDS providers, including the services offered by Globe and Shareholder.com, as a key component of a Nasdaq listing:

NASDAQ OMX *offers the companies that list on its exchanges* capital raising solutions and value-added products and services that

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<sup>1</sup> Letter from Arnold Golub, Nasdaq Vice President & Associate General Counsel at 4 (Dec. 23, 2009) (emphasis added).

<sup>2</sup> Letter from Michael Sohn and Donna Patterson of Arnold & Porter LLP ("A&P Letter") at 2 & n.6, and Attachment B (Dec. 23, 2009).

<sup>3</sup> Letter from Arnold Golub, *supra*, at 1.

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public companies require. Through **NASDAQ OMX Corporate Services**, companies gain access to innovative products and services that facilitate transparency, mitigate risk, maximize board efficiency and inspire better investor relations.<sup>4</sup>

Nasdaq also neglects to note that it fired the sales representatives who worked for Globe Newswire. Sales pitches for Globe are now made not by Globe, as Nasdaq claims, but by Nasdaq sales representatives and high-ranking Nasdaq executives as part of pitch to get companies listed on other exchanges to switch listings or to reduce the cost of a company's existing listing on Nasdaq.

Nor are the sales pitches restricted to the "limited amount of free or discounted" IDS available to all companies, as Nasdaq also claims.<sup>5</sup> While Nasdaq may offer limited free or discounted IDS to companies not listed on its exchange, Nasdaq fails to mention that it provides much more extensive free or discounted IDS to some listed companies. This is reflected in the release Nasdaq issued about the Commission's approval of Nasdaq's last proposed rate hike, in which:

NASDAQ announced that its companies may enroll through NASDAQ Online ([www.nasdaq.net](http://www.nasdaq.net)) for a sampling of core services designed to support public companies. These services include news release distribution and EDGAR filings through PrimeNewswire, a news wire distribution service; audio casting and dynamic annual reports through Shareholder.com; and D&O Insurance Benchmarking .... The core services are *available to all NASDAQ companies that choose to use them free of charge*. These services are *also available to companies listed on other domestic exchanges on a trial basis*.<sup>6</sup>

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<sup>4</sup> <https://www.nasdaq.net/PublicPages/Products-Services.aspx>.

<sup>5</sup> A&P Letter, *supra*, at 2 & n.6, and Attachment B.

<sup>6</sup> <http://www.nasdaq.com/newsroom/news/newsroomnewsStory.aspx?textpath=pr2007%5CACQPMZ200702051608PRIMZONEFULLFEED113145.htm>.

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In fact, Business Wire has been informed that Nasdaq officials are offering ***up to five years of free or heavily discounted wire distribution*** – “in addition to the 1 per quarter free release” offered to all on Nasdaq’s website<sup>7</sup> – to certain companies either as an inducement to switch listings or as part of a package deal to reduce the cost of the company’s existing listing on Nasdaq.

To prevent some of its largest companies from switching listings to take advantage of the free bundled wire distribution offered by Nasdaq, the New York Stock Exchange had been compelled to agree to pay for certain companies’ wire distribution up to certain amounts (in one case, up to \$50,000 in one year) or for a certain period (in another case, for several years).

But this has not stopped some companies from switching their listing to Nasdaq to take advantage of the free or heavily discounted wire distribution tied to the listing. Contrary to the assertion by Nasdaq’s outside counsel, some companies that switched listings have also switched wire distribution for that reason. One company that recently switched listings informed Business Wire that the company decided to switch its wire distribution to Globe when it switched listings in order to save a considerable amount of money on five years of wire distribution that was bundled with the listing package at rates that, to the client, “seem[ed] to good to be true,” despite some concerns within the company over the quality of Globe’s distribution services.<sup>8</sup>

In another instance, a company listed on Nasdaq recently switched its wire distribution to Globe, apparently as part of a package deal that included a reduction in the company’s listing fee if it switched wire distribution.

Business Wire is reluctant to identify in this letter the companies involved, but would be pleased to provide that information upon request by the Commission staff. Of course, with its investigative powers, the Commission could obtain further details about Nasdaq’s conduct that its responses failed to provide.

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<sup>7</sup> Statement by a client representative to Business Wire.

<sup>8</sup> Statement by a different client’s representative to Business Wire.

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**II. There Is No Merit In Nasdaq's Attack On The Commission's Authority To Examine Whether The Proposed Listing Fee Increase Will Subsidize Other Services Being Tied To The Listing**

In an effort to shield its conduct from Commission review, Nasdaq contends the Commission lacks authority to consider the anticompetitive effects of the bundled wire distribution and other IDS provided by its affiliate in the context of Nasdaq's proposed rule change. That contention is without merit. The Commission indisputably has authority to review the entire proposed rule pursuant to Section 19(b) of the Securities Exchange Act of 1934. Indeed, the core concerns raised by Business Wire do not substantially differ from those the Commission considered in connection with Nasdaq's 2006 proposed rule change (as Nasdaq essentially concedes by submitting, as Attachment A to its outside counsel's letter, the response its antitrust counsel prepared in 2006).

In Nasdaq's view, the Commission should not be concerned about the potential anticompetitive impact of any cross-subsidization conduct because its affiliate, Globe, is not subject to direct regulation by the Commission. But Section 6(b)(8) of the Exchange Act plainly states that an exchange's rules, including the proposed Nasdaq rule at issue, cannot "impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title."

The term "competition" is not specifically defined by the Exchange Act, but it strains credulity to believe that its drafters intended the Commission to turn a blind eye to anticompetitive impacts in indirectly regulated markets which flow from conduct that is explicitly and directly subject to the Commission's regulatory authority. The Commission's antifraud and disclosure rules regulate the press releases of issuers listed on Nasdaq and other exchanges, if not IDS providers themselves. If Nasdaq's narrow reading of the Commission's authority were accepted, review of Nasdaq's proposed 500% listing fee increase would be outside the reach of the regulatory agency even if it is part of a broader anticompetitive scheme encompassing Nasdaq's unregulated affiliates, and despite the fact that its affiliate issues press releases that are the subject of regulation by both Nasdaq and the Commission. The Exchange Act cannot plausibly be read so narrowly.

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This is particularly clear from language in the definitions section of the Act, which states: “Whenever pursuant to this title the Commission is engaged ... in the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, ***in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.***” Exchange Act § 3(f) (emphasis added).

As the Commission has recognized in ruling on the anticompetitive effect of a fee increase and a threat of cross-subsidization, it serves as “a first line of defense against anti-competitive practices” by regulated entities. *Order Announcing Commission Findings, Modifying Interim Relief, and Instituting Proceedings*, Release No. 20874, File No. 4-256, 49 Fed. Reg. 17640, 17641 (1984) (“*Quotation Order*”); see also *In re National Ass’n Of Securities Dealers, Inc.*, 19 S.E.C. 424, 436 (S.E.C. 1945) (“[T]he application of the Sherman Act has been properly raised as a problem to be considered in the course of our special administrative functions under the Securities Exchange Act. In these circumstances it is no anomaly for an administrative tribunal to express its views on anti-trust questions otherwise triable in the courts.”).

The facts described in Section I indicate that Nasdaq’s cross-subsidization is at least part of the reason why Nasdaq proposes a significant listing fee increase. Reviewing the anticompetitive effect of this increase thus clearly falls within the Commission’s mandate on several counts since it could adversely affect efficiency, competition and capital formation. And nothing in the statute limits the meaning of “competition” as Nasdaq argues without citation or support.

Indeed, despite its insistence that the Commission should not concern itself with questions of whether regulated conduct is calculated to have anti-competitive effects on unregulated entities, Nasdaq does ***not*** assert that the Commission actually lacks jurisdiction to consider the question. Business Wire has presented evidence indicating that Nasdaq’s proposed rule change is part of a larger anticompetitive scheme and Nasdaq cannot escape review of its conduct by asserting the Commission must allow the scheme to unfold rather than stopping it in its tracks, or at least conducting further inquiry.

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As Nasdaq concedes, the Commission has the power to investigate Nasdaq's operations to evaluate its "effectiveness in managing conflicts,"<sup>9</sup> such as those inherent in the conduct described above. Notwithstanding Nasdaq's meritless argument that the Commission lacks authority to consider competitive issues, clearly the Commission can and should examine Nasdaq's structure and operations to determine if it is acting in a transparent manner free from conflicts of interest. Business Wire submits that the Commission should do so now, prior to ruling on the proposed fee increase. Given Nasdaq's prior attempt to increase fees as part of an unlawful tying scheme – which it previously assured the Commission it was abandoning – and its failure to address in a candid fashion the relationship between itself and its commonly controlled affiliate, the Commission should take steps to ensure, at the least, that no part of that increase is used to subsidize the under-pricing or giving away of wire distribution service tied in any way to the listing product.

**III. By Failing To Adequately Support The Proposed Listing Fee Increase Or Explain Publicly The Action It Is Taking In Private, Nasdaq's Responses Failed To Address The Concerns Regarding Transparency And Conflicts Of Interest Raised By Its Proposal**

A fundamental problem with Nasdaq's proposed rule change lies in its failure to provide any meaningful justification for such a monumental increase in its fee structure. This suggests another motivation for the increase is to cross-subsidize the under-pricing – indeed, giving away – of years worth of wire distribution and other IDS. Rather than ameliorating those concerns, Nasdaq's responses exacerbate them. Indeed, Nasdaq tacitly admits Business Wire's concerns are well-founded *if* Nasdaq is engaged in the conduct described in Section I. For example, it does not even attempt to explain how the rule containing the fee increase is "consistent with the requirements" of the Exchange Act – as required for Commission approval – in light of the anticompetitive effect of giving away IDS in the manner described in Section I, which clearly contravenes the pro-competition mandate of Section 6(b)(8) of the Exchange Act.

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<sup>9</sup> Letter from Arnold Golub, *supra*, at 4.

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**A. Nasdaq Again Failed To Provide Details Justifying The Fee Increase**

Nasdaq's proposed rule change seeks, among other things, to raise application fees by 500% – from \$5,000 to \$25,000 – for all new companies joining the exchange, increase entry fees and revise the 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.<sup>10</sup> These changes would generate a substantial increase in Nasdaq's revenues collected through the affected fees. Yet the proposed rule change does not adequately explain why this additional revenue is required. It simply pleads certain unspecified increased costs, basic improvements to Nasdaq's website and the development of the "IPO cross" which is "an open auction process" to "maximize[] transparency" during the opening trades of an initial public offering.<sup>11</sup> The proposed rule change does not set forth any analysis establishing a relationship between the increased fees and the costs of Nasdaq's services used to justify that increase.

Nasdaq's response adds little to this, except to admit there are reasons undisclosed in the proposed rule change – to wit, "changes in the marketplace since Nasdaq's last fee increase" – that motivated the proposed fee increase.<sup>12</sup> The only "change" Nasdaq identifies is the declining number of companies listed on its exchange,<sup>13</sup> which seemingly would result in decreased operating costs, weighing against the need for an fee increase. It takes no great leap of logic to deduce that declining listings also prompted Nasdaq to propose the tying arrangements described above to induce companies to switch listings, and that Nasdaq intends to use at least part of the proposed increase to cross-subsidize this under-pricing of its wire distribution and other IDS – especially since the 500% increase in application fees would nicely cover the cost of the free or discounted IDS companies are being offered to switch listings.

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<sup>10</sup> SR-NASDAQ-2009-081, 74 Fed. Reg. 57212, 57212 (Nov. 4, 2009).

<sup>11</sup> *See id.* at 57212-13.

<sup>12</sup> Letter from Arnold Golub, *supra*, at 4.

<sup>13</sup> *Id.* at 4 n.14.



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Unlike its express proposal in 2006 to bundle wire distribution and other services with the listing product and use that to justify a fee increase – which created a significant amount of protest and ultimately led Nasdaq to publicly withdraw the proposal – Nasdaq’s current proposal is much more coy. It says nothing about using any part of the proposed fee increase for the regulated listing service to cross-subsidize the unregulated services.

It is therefore not surprising that, as Nasdaq points out, its current proposal has prompted no public outcry like the proposal in 2006. But that hardly means the concerns over transparency and conflicts of interest raised in Business Wire’s November 24 letter were “invented,” as Nasdaq’s in-house counsel claims.<sup>14</sup> Rather, the lack of other opposition no doubt stems, at least in part, from the very lack of transparency – in Nasdaq’s proposal, in its pricing of its listing product (which for some companies apparently includes the cost of the wire distribution but for others does not), and in its pricing of the wire distribution service as well as other Corporate or Core Services.

**B. Nasdaq Failed To Address The Transparency, Cross-Subsidization And Conflict Of Interest Concerns Raised By Its Conduct**

Nothing in Nasdaq’s responses genuinely addresses the concerns presented by Business Wire about how Nasdaq is actually operating and promoting Globe and its likely adverse impact on transparency, cross-subsidization or potential conflicts of interest. Nasdaq merely pleads that it can be trusted to minimize conflicts of interest, and that its conduct will remain subject to future oversight by the Commission.<sup>15</sup> But given the incomplete nature of its proposed rule change and responses, Nasdaq’s promises that its parent has sufficient controls in place between its subsidiaries to allay Business Wire’s concerns should be given little credence. The ability of the Commission to police effectively Nasdaq’s future conduct is also premised on Nasdaq providing complete and accurate information in a forthright manner, which it has thus far failed to do.

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<sup>14</sup> Letter from Arnold Golub, *supra*, at 3.

<sup>15</sup> *Id.* at 4.

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The Commission has already noted the potential transparency problems and conflicts of interest that are presented by SROs and their affiliates:

In view of the trend toward demutualization of SROs, and the increased competitive pressures under which all SROs operate, the Commission believes that the disclosures . . . should provide relevant information to the public and the Commission about the relationships among exchanges, associations, their facilities and their respective affiliates, so that the public and Commission might better evaluate how exchanges and associations fulfill their statutory responsibilities .... In today's rapidly evolving marketplace, the disclosures ... should provide greater transparency regarding the relationships among SROs, their facilities, and their affiliates, and whether those entities have the ability to control the SRO, thus enabling members, market participants, investors, and the Commission to more readily monitor the effectiveness and performance of SROs and promote greater accountability by SROs with respect to their Exchange Act obligations to comply with, and enforce compliance by their members with, their rules and the federal securities laws.

*Fair Administration and Governance of Self-Regulatory Organizations*, 69 Fed. Reg. 71126, 71162 (S.E.C. 2004).

Nasdaq's simultaneous operation as a self-regulatory organization and close affiliation with for-profit IDS providers such as Globe raises the precise control concerns previously identified by the Commission – that these providers may cause Nasdaq's listing and regulatory functions to be viewed as mere “loss leaders” intended to sell more profitable services. Further, by intertwining its listings services with Globe's Information Dissemination Services, Nasdaq is circumventing any controls between its regulatory function and the non-regulated services provided by its affiliated entities. Therefore, Nasdaq undoubtedly will have the opportunity to exert subtle pressures on its customers through contact with them in its capacity as their regulator, not just through rule changes such as this one that would require express Commission approval.

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Nasdaq is undoubtedly sophisticated enough to craft proposed changes to rules in a manner calculated to benefit its unregulated affiliates without raising obvious red flags. The threat of this sort of insidious conduct is one reason why administrative agencies have typically required regulated entities and their unregulated affiliates to maintain an arms' length distance from each other. *See In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, 462, 464 at ¶¶ 205, 210 (F.C.C. 1980) (Separation requirement "reduces the ability of dominant firms to engage in predation or to do so without detection. The principal mechanisms employed are the reduction in the extent of joint and common costs between affiliated firms [and] the requirement that transactions move from one set of corporate books to another .... Where a [regulated entity] has the incentive and ability to engage in sustained cross-subsidization [of an unregulated entity], or predatory pricing, accounting may be employed to assist in the identification of such practices, but it cannot prevent the misallocation of joint and common costs associated with the provision of ... services if provided by the same entity."). While Nasdaq claims its unregulated affiliate providing IDS is operated at arms length, the evidence summarized in Section I strongly suggests otherwise.

**IV. Nasdaq Also Failed To Address The Competitive Concerns Raised By Evidence Of Nasdaq Tying Free IDS To The Listing Service**

Since it starts from the faulty premise that Nasdaq is a mere innocent bystander with regard to the offers of free IDS by its affiliate, the analysis by Nasdaq's antitrust counsel of the threat of tying quickly goes astray. As Business Wire explained in its original Comment, the threat of an unlawful tying arrangement flows primarily from Nasdaq's status as a regulated entity. It is this status that creates dangerous tying power.

Nasdaq's antitrust counsel does not dispute that the three elements of unlawful tying are (1) tying conduct involving two separate products or services, (2) defendant's economic power in the tying product market sufficient to coerce its customers into purchasing the tied product; and (3) an effect upon a "not insubstantial volume of commerce" in the tied product market. They also do

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not dispute the first element<sup>16</sup> instead focusing on the second and third.

Regarding the second, Nasdaq's outside counsel appears to interpret the requirement that the monopolist "coerce" the purchase of a tied product as requiring some dramatic use of force. That is not what the law requires and a consumer may be "coerced" even when its purchase of the tying product is completely voluntary. This is well-illustrated by *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Prof. Pubs.*, 63 F.3d 1540 (10th Cir. 1995). In that case, the Court of Appeals found a company offering both "full service" and "supplemental" bar examination prep courses was unlawfully conditioning the purchase of the "full service" prep course on purchase of the "supplemental" prep course where evidence established that the defendant stopped offering the prep courses separately and instead began offering them only as a combined package at a greater price (despite advertising that the "supplemental" prep course was offered for "free"). As the Tenth Circuit observed, "Where 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*." *Id.* at 1548 (emphasis added) (citing, *inter alia*, 3 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 733a (1978) for the proposition that 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*").

Obviously, law students in the *Multistate* case could have chosen to forego buying any sort of bar prep course from the defendant and instead used a competing prep course provider, just as Nasdaq's customers can decline to use the "free" IDS provided by Globe.<sup>17</sup> However, both the law students in *Multistate* and Nasdaq's customers for listing services would be subject to a more pernicious form of "coercion" than brute force: They are offered Service A ("full service" prep course/listing services), with the purported opportunity to use Service B ("supplemental" prep course/Information

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<sup>16</sup> A&P Letter at 4 (acknowledging that listing product and Information Dissemination Services are separate).

<sup>17</sup> *Id.* at 2-3.

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Dissemination Services) for “free,” but at a price that secretly incorporates some or all of the cost of offering Service B.

Moreover, as one of a small number of regulated entities providing listing services, Nasdaq is in even better position to exploit its customers than the *Multistate* defendant. In *Multistate*, law students not only had the choice of other bar prep course providers, they also could simply skip taking a prep course altogether and still sit for the bar exam (which would be the only purpose of taking a bar prep course). But companies that want to be publicly traded have no choice but to join an exchange and, unlike the students who are transient users of the service, they are subject to substantial lock-in effects.

Regarding the third element, Nasdaq’s outside counsel does not explicitly argue that Nasdaq’s conduct would impact an insubstantial volume of commerce, but it does assert that Nasdaq lacks market power because it must compete “vigorously” with both the New York Stock Exchange (“NYSE”) and the American Stock Exchange (“Amex”).<sup>18</sup> Of course, this allegedly competitive marketplace is in fact an oligopoly, as demonstrated by NYSE’s acquisition of the Amex in 2008. Moreover, as Business Wire explained in its original comment, 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*.”<sup>19</sup> The evidence summarized above of Nasdaq offering what, in combination, amounts to millions of dollars of free wire distribution and other IDS easily exceeds this threshold.

Nasdaq’s counsel’s defense of its client’s conduct with regard to the threat of predatory pricing in violation of Section 2 of the Sherman Act also operates from a fundamentally erroneous premise – that Nasdaq is subject to the same market constraints as a normal private enterprise. Nasdaq’s status as a regulated entity makes it more akin to a public utility, a point the Commission has previously recognized. See *Quotation Order*, 49 Fed. Reg. at 17647.

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<sup>18</sup> A&P Letter at 5.

<sup>19</sup> *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 504 (1969).

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A regulated industry, with a limited number of market participants, high barriers to entry, and rate structures established through regulatory procedures is subject to unique structural traits that make interconnected unregulated markets particularly vulnerable to predatory pricing through cross-subsidization, which in turn supports restricting the ability of a regulated entity to collaborate with an unregulated affiliate:

In regulated markets characterized by dominant firms, there may be an incentive ... to use bundling as an anti-competitive marketing strategy, *e.g.*, to cross-subsidize competitive by monopoly services, that restricts both consumer freedom of choice as well as the evolution of a competitive marketplace. Restricting bundling practices in such markets reduces these impediments to improve consumer welfare.

*In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384, 443 at ¶ 149 n.52 (F.C.C. 1980).

In the telecommunications industry, this led the FCC to require that dominant firms could only provide certain services through legally separate subsidiaries and to prohibit such dominant firms from marketing or providing certain services in conjunction with their unregulated affiliates. As the FCC explained, "These steps are taken to protect the monopoly ratepayer from the potential evils of cross-subsidization and anti-competitive conduct. ... Given the ineffectiveness of accounting measures standing alone to monitor anti-competitive practices, the need for a separate subsidiary, in addition to accounting requirements, is obvious." *Id* at 520.

If the information Business Wire has been provided about how Nasdaq is marketing IDS with its listing services is accurate, the need for a similar prohibition on regulated exchanges marketing IDS in conjunction with its listing service is equally obvious. At the least, the Commission should inquire regarding this issue before approving a proposed listing fee increase that may be used to further "the potential evils of cross-subsidization and anti-competitive conduct."

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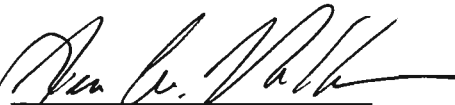
**V. Conclusion**

As Business Wire has shown, nothing in Nasdaq's two responses changes Business Wire's original position that 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.

At a minimum, further review and inquiry appears warranted before the Commission approves the proposed rule. Business Wire would be pleased to meet with Commission staff to provide more of the details underlying its concerns if the Commission believes that would assist in resolving this matter.

Respectfully Submitted,  
Jesse W. Markham, Jr.  
Roger Myers  
Stephen Ryerson

By:



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Co-Chair  
Anti-Trust and Competition Group