



January 13, 2011

Florence E. Harmon
Deputy Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-NASDAQ-2010-174

Dear Ms. Harmon:

Direct Edge Holdings (“Direct Edge”)¹ welcomes the opportunity to submit its thoughts to the Securities and Exchange Commission (“Commission”) on the above-referenced rule filing (the “Filing”) of the NASDAQ Stock Market LLC (“NASDAQ”) to tie discounts on the non-professional fees charged for its depth of book market data products (“DOB products”) to liquidity provided on its transaction platform. The proposed rule change became effective on filing with the Commission under Section 19(b)(3)(A) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”) For the reasons set forth below, we respectfully petition the Commission to temporarily suspend the proposed rule change under recently-amended Section 19(b)(3)(C) of the Exchange Act and institute proceedings to disapprove (or properly approve) those changes under Section 19(b)(2)(B) of the Exchange Act.

Direct Edge believes that the Filing should be suspended because it does not comply with NASDAQ’s obligations under the Exchange Act for market data fee filings, as articulated in the recent decision of the United States Court of Appeals for the District of Columbia in *NetCoalition v. Securities and Exchange Commission*, (“*NetCoalition*”).² Specifically, in seeking to offer discounts on its DOB products only to customers: (i) providing such data to non-professional users; and (ii) who satisfy NASDAQ’s order- flow minimums, NASDAQ does not comply with the D.C. Circuit’s order that exchanges assess market data that are “fair and reasonable”, as determined on the basis of a substantive justification of the costs of producing such data.

NASDAQ’s arguments about the intermingled nature of the data- and transaction-services costs of operating an exchange platform are insufficient to satisfy its cost-justification obligations as articulated by the D.C. Circuit in *NetCoalition*. Even if one

¹ Direct Edge operates EDGX Exchange, Inc. and EDGA Exchange, Inc., two entities operating as national securities exchanges pursuant to Commission approval under Section 6 of the Exchange Act. For more on Direct Edge, see www.directedge.com.

² 615 F.3d 525 (D.C. Cir. 2010).

stipulates to NASDAQ's general assertion that certain platform costs are shared across data and transaction product creation, there remain distinct costs to both product suites. NASDAQ incurs marketing costs, employee costs, connectivity costs and administrative costs that are all unique to its market data business generally and DOB products in particular. These costs could easily be highlighted in an attempt to justify fees for DOB products as modified by the filing. In addition, NASDAQ could provide an assessment of any shared costs between data and transaction products, and any internal methodology for allocated shared costs between these businesses. Instead, NASDAQ summarily states these costs are "inseparable."³ Despite continued assertions of the competition between exchanges for transaction volume, NASDAQ has not complied with its obligations under the Exchange Act with respect to the Filing.

The time has come for a comprehensive review of the pricing and distribution of exchange DOB products within our market structure. The Filing, and those of other exchanges, highlights the need to bring fiscal and procedural sanity to this often-overlooked but critically important part of the investor experience. Direct Edge plans to shortly offer its own vision for broader, fairer and cheaper dissemination of these products industry-wide consistent with the Congressional mandate to ensure "the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities."⁴ In the interim, the Commission should temporarily suspend the rule changes embodied in the Filing given NASDAQ's failure to fulfill its statutory obligations.

Direct Edge would like to thank the Commission again for providing us with the opportunity to comment on these rule proposals, and we would welcome the opportunity to discuss our comments with the Staff.

Sincerely yours,



William O'Brien
Chief Executive Officer

cc: Robert Cook, Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Market

³ See Filing.

⁴ Exchange Act §11A(a)(1)(C)(iii).