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August 1, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Suspension of Proposed "Platform Pricing" Proposal
Release No. 34-63796, File No. SR-NASDAQ-2011-10

Dear Ms. Murphy:

I am counsel for The NASDAQ Stock Market LLC ("NASDAQ") in the above-titled matter. I submit this brief letter to clarify the record in light of a statement by the Division of Trading and Markets in its July 19 notice extending by 60 days the period to approve or disapprove NASDAQ's proposal to lower prices for depth-of-book market data and for execution services ("the Proposed Rule"). Specifically, in a passing statement the Division characterized the Proposed Rule as a "tying arrangement."

If the Division's intention is to employ "tying arrangement" as a term of art borrowed from antitrust law, the term simply does not apply to NASDAQ's proposal. As NASDAQ explained in its submission of April 4, 2011, under NASDAQ's proposal there is no requirement that any customer purchase a product that is tied to another product. *See* April 4, 2011 Letter from Joan Conley to Elizabeth M. Murphy ("NASDAQ Comment") at 9-10. To the contrary, NASDAQ is continuing to offer its products separately, at prices approved by the Commission as fair and reasonable. Accordingly, the Proposed Rule is not a tying arrangement, as a matter of well-established Supreme Court precedent. *See, e.g., N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 6 n.4 (1958) ("where the buyer is free to take either product by itself, there is no tying problem even though the seller may also offer the two items as a unit at a single price").

Moreover, even if the Proposed Rule could fairly be characterized as a tying arrangement (it cannot), the competitive concerns that are associated with certain tying arrangements do not apply here. *See* NASDAQ Comment at 10. As the Supreme Court has explained, even conduct that can be characterized as a "tying arrangement" can have procompetitive effects that can enhance competition and benefit consumers. *Id.* Accordingly, the Supreme Court

has held that tying arrangements should not be condemned in the absence of a foreclosure of competition in the "tied" product market. *Id.* There is no evidence of any such foreclosure here.

The Proposed Rule is designed to lower prices as a result of competition. This will enhance competition in the marketplace and benefit consumers. This is conduct that should be encouraged by the Commission, not blocked. And it would turn the principles of antitrust law on their head to use the terminology of antitrust to prevent NASDAQ from engaging in this strongly pro-competitive and pro-consumer conduct.

Respectfully submitted,

Eugene Scalia

ES/bmr

cc: The Hon. Mary L. Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner
Robert W. Cook, Director, Division of Trading and Markets
James A. Brigagliano, Deputy Director, Division of Trading and Markets

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