



**April 28, 2011**

**Via Electronic Mail ([rule-comments@sec.gov](mailto:rule-comments@sec.gov))**

U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090  
Attention: Elizabeth M. Murphy, Secretary

**COMMENT LETTER AND PETITION FOR DISAPPROVAL**

**Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Fee Pilot Program for NASDAQ Last Sale, File No. SR-Nasdaq-2011-044, Exchange Act Release No. 64188 (April 5, 2011).**

Dear Ms. Murphy:

SIFMA<sup>1</sup> and NetCoalition appreciate the opportunity to comment on the above-captioned notice (the "Notice"), under which The Nasdaq Stock Market (the "Exchange") proposed a rule change to extend the pilot program pursuant to which the Exchange distributes last sale market data products.<sup>2</sup> The proposed rule change purported to become effective upon filing with the U.S. Securities and Exchange Commission (the "Commission") under Section 19(b)(3)(A) of the Securities Exchange Act of 1934, as amended (the "Exchange Act").<sup>3</sup> For the reasons set forth below, and because the Exchange's actions are inconsistent with the decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. Securities and Exchange Commission*,<sup>4</sup> we respectfully petition the Commission to temporarily suspend this rule change under

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<sup>1</sup> The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to develop policies and practices which strengthen financial markets and which encourage capital availability, job creation and economic growth while building trust and confidence in the financial industry. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

<sup>2</sup> *See Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Extend Fee Pilot Program for NASDAQ Last Sale*, Exchange Act Release No. 64188; File No. SR-NASDAQ-2011-044; 76 Fed. Reg. 20054 (April 11, 2011).

<sup>3</sup> 15 U.S.C. § 78s(b)(3)(A) (2010).

<sup>4</sup> 615 F.3d 525 (D.C. Cir. 2010).

Section 19(b)(3)(C) of the Exchange Act<sup>5</sup> and institute proceedings to disapprove (or properly approve) the change under Section 19(b)(2)(B) of the Exchange Act.<sup>6</sup>

The Commission should not be accepting rule change filings as complete, and those rule changes cannot become effective upon filing, if on their face they are unlawful. The rule change at issue here is unlawful because it is based on invalid grounds, omits cost data to substantiate the Exchange's claims of competition, and otherwise fails to comport with the Exchange Act as interpreted by the Court in *NetCoalition*. We therefore urge the Commission to act immediately to suspend the rule change until the Commission and the public have had ample time to determine whether they should be disapproved.

In this rule filing, the Exchange relies on the same theories of competition that the D.C. Circuit rejected in *NetCoalition*, arguing that competition for order flow and the availability of alternative sources of market data constrain the prices it can charge for market data.<sup>7</sup> Yet the Exchange does not include the relevant market forces tests the Court held were required to substantiate such theories.<sup>8</sup> The Exchange also argues that "platform competition" acts as a further constraint on the prices it change charge for market data.<sup>9</sup> But as explained more fully in *NetCoalition* and SIFMA's March 21, 2011 Comment Letter and Petition for Disapproval of Nasdaq's *Proposed Rule Change To Link Market Data Fees and Transaction Execution Fees*, and the report of Dr. David Evans annexed thereto,<sup>10</sup> Nasdaq's contentions in this regard are without economic or factual basis. Moreover, we believe that before approving these or any other future market data fee filings, *NetCoalition* requires the Commission to review cost data in order to substantiate whether "competitive forces" actually constrain the price of market data.<sup>11</sup> The Commission and the Exchange should not circumvent the Court's findings in *NetCoalition* through the procedural mechanism afforded by Section 19(b)(3)(A).

For the reasons set forth above, and given the absence of cost data or other evidence supporting the Exchange's contention that these data fees are constrained by competitive forces, we respectfully request that the Commission temporarily suspend the proposed rule under Section 19(b)(3)(C) of the Exchange Act, and institute proceedings to disapprove the proposed rule under Section 19(b)(2)(B) of the Exchange Act.

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<sup>5</sup> 15 U.S.C. § 78s(b)(3)(C) (2010).

<sup>6</sup> 15 U.S.C. § 78s(b)(2)(B) (2010).

<sup>7</sup> See 76 Fed. Reg. at 20056-57.

<sup>8</sup> See *NetCoalition*, 615 F.3d at 539-45.

<sup>9</sup> See 76 Fed. Reg. at 20056.

<sup>10</sup> See Comment Letter and Petition for Disapproval, *NetCoalition* and SIFMA (March 21, 2011) (the "March 21 Comment Letter"), available at <http://www.sec.gov/comments/sr-nasdaq-2011-010/nasdaq2011010-3.pdf>. Relevant arguments set forth in the March 21, 2011 Comment Letter and report of Dr. Evans are incorporated herein by reference.

<sup>11</sup> See *NetCoalition*, 615 F.3d at 537-39.

If you have any questions or you would like to discuss these matters further, please call Melissa MacGregor, Managing Director and Associate General Counsel at SIFMA at 202-962-7385.

Respectfully submitted,

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