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Neil Hershberg
Senior Vice President, Global Media

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

Re: SEC File Number SR-NASDAQ-2011-122

Dear Ms. Murphy:

Business Wire appreciates this opportunity to register its strong opposition to the NASDAQ Stock Market's proposed rule change to offer complimentary services to select issuers.

Apparently emboldened by the SEC's recent approval of a change in the NYSE's Listed Company Manual related to IR service providers, NASDAQ's filing is its latest gambit to accomplish the same result that the SEC has declined to approve in the past. The effect of NASDAQ's rule, if approved, would be an inequitable allocation of listing fees, coupled with a corrosive effect on competition in the distribution of investor relations ("IR") information – a critical lubricant of capital markets.

Specifically, NASDAQ's proposal is (once again) to bundle "free" IR service with listings. That this is simply a form of tying is by now beyond dispute. A listing company has no economically rational choice other than to take NASDAQ's services, which it pays for in the listing price, rather than allowing the market to decide which service it prefers. While NASDAQ purports to justify its proposal on the theory that "NASDAQ believes that these companies receive comparable services from the NYSE," Release No. 34-65324 at 4-5, in fact there is nothing comparable between the NASDAQ proposal and the NYSE initiative. The change in the NYSE Listing Manual does nothing economically coercive. Instead, the NYSE offers complimentary IR services through a variety of ***independent IR service providers***. The NASDAQ proposal only covers the cost if NASDAQ's affiliate provides the IR services, effectively penalizing any company that opts on the merits to use a NASDAQ rival (and thereby leveraging its subsidiary holdings to gain an unfair competitive advantage).

Any comparison to the NYSE's arrangement is belied by two salient points.

First, NASDAQ's proposal merits special scrutiny given its similarity to NASDAQ's previous attempts to gain regulatory clearance to engage in anticompetitive and otherwise unlawful tying. NASDAQ has been improperly tying "free" IR services to a new listing on NASDAQ for years, and has twice unsuccessfully sought SEC approval for its unlawful practice. NASDAQ is using the NYSE's attempt to meet what NASDAQ was doing – without regulatory approval—as an excuse to obtain that very approval.

Second, NASDAQ's proposal should not be approved on any basis that equates it with the NYSE arrangement, which does nothing to tie the provision of listing and IR services from a single economic player. The key difference between the SEC's newly approved Section 907.00 in the Big Board rule book and NASDAQ's rule change request is that the NYSE is recommending independent vendors to its listed companies. Conversely, NASDAQ's proposal is entirely predicated on its sibling subsidiary's wholly-owned service offerings, which collectively operate under the "Corporate Solutions" banner. Once the complimentary period expires, all future profits from its vertically-integrated affiliate will go straight to NASDAQ's parent company's bottom line.

A core concern of the SEC is the equitable allocation of listing fees. A company that lists with NASDAQ and succumbs to its tying practices effectively pays a lower listing fee than a similarly-situated company that opts instead for IR services from Business Wire or any other NASDAQ competitor. Since the NASDAQ listing fee would bundle the IR services cost, an inequitable result would necessarily follow, distorting the net listing fees paid by otherwise indistinguishable companies. NASDAQ's proposal on its face would create a significant disparity between what companies pay and receive for their listing fees – with the fees for new listing supposedly providing up to $169,000 more in services than the same fees paid by existing listings and by newly listing companies that for any reason opted to use a competing IR service provider.

NASDAQ trumpets that issuers are not obligated to take advantage of its complimentary services; the clear implication is that competition won't be compromised. But it is unavoidable that such tying practices adversely affect competition.

In fact, NASDAQ itself says it is compelled to offer complimentary services because the Big Board offers to credit the cost of comparable services. This is a tacit acknowledgment of what is obvious as a matter of economics: that companies are reluctant to forfeit these free services. The effect of NASDAQ's proposal would be to interfere with competition in the market for IR services. There is no avoiding this: a NASDAQ IR services rival could not possibly offer IR services for "free" because it would have no possibility of cross-subsidy from listing fees.

NASDAQ also attempts to rationalize its rule change request by claiming that a comparatively small number of issuers will be eligible to participate in the program. This is a vacuous argument. The IPO numbers in the time period it cites were extremely depressed by the global financial crisis. The proposal would, of course, continue in effect past current conditions, and so normal listing numbers are relevant and NASDAQ's failure to address this is troubling. The number of companies affected would normally be substantially higher.

Furthermore, the SEC should anticipate that NASDAQ will return to the SEC to try to accomplish its true goal of locking all NASDAQ-listed companies into using NASDAQ's IR services by contending that its existing listings are complaining about the very inequitable allocation of listing fees that NASDAQ seeks to create. The SEC should not allow NASDAQ to create this very inequity and then reward it for having done so.

NASDAQ'S rule change request needs to be seen for what it is – NASDAQ's latest ploy to "tie" its corporate services to listings. The SEC has repeatedly rebuffed NASDAQ's past efforts at bundling its services. NASDAQ's recycled proposal seeks to provide a cloak of legitimacy to an anti-competitive practice that has failed to survive previous SEC scrutiny.

Thus, the SEC's decision should not be influenced by the understated number of affected companies; rather, its decision should be solely based on the merits and consequences of NASDAQ's proposal. And if market and listing fairness are two criteria – to say nothing of preserving broad disclosure of material information about listed companies through independent means – then the evidence clearly dictates that NASDAQ's rule change should be rejected.

Business Wire again thanks the SEC for providing a platform to articulate its concerns regarding the NASDAQ's proposed rule change.

Sincerely,

Neil Hershberg
Senior Vice President, Global Media