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October 7, 2011

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

Re: SEC File Number SR-NASDAQ-2011-122
<u>Business Wire's Further Comments on NASDAQ Proposal To Ratify Tying</u>

Dear Ms. Murphy:

We represent Business Wire, Inc., a wholly owned subsidiary of Berkshire Hathaway and a leading transmitter of full-text news releases, regulatory filings and multimedia content to journalists, financial planners, investor services, regulatory authorities and the public ("Information Dissemination Services").

On September 28, Business Wire submitted a comment explaining why the statement by NASDAQ Stock Market LLC ("NASDAQ") that it would only "implement the proposed rule" in SR-NASDAQ-2011-122 "upon approval" by the Commission was inaccurate. Rather, NASDAQ is using the Commission's approval of a change in the New York Stock Exchange's Listed Company Manual – to provide complimentary Information Dissemination Services ("IDS") and other Investor Relations services (collectively, "IR") through independent third-party vendors – as an excuse to seek Commission approval of NASDAQ's existing practice of tying "free" IR services provided by NASDAQ OMX Group Corporate Solutions ("NASDAQ CS") to a listing on NASDAQ.

The Commission apparently recognized as much when, in approving the NYSE initiative, it acknowledged that the NYSE "is offering complimentary products and services to attract new listings, retain currently-listed issuers, and respond to competitive pressures." 76 Fed. Reg. 51449, 51452 (Aug. 18, 2011).

What NASDAQ also fails to tell the Commission is that – to avoid the inequitable allocation of listing fees that Staff recognized would otherwise result – NASDAQ twice promised the Commission it would not do what it now seeks approval to do (and what it has nonetheless continued to do). As Staff no doubt realized, when NASDAQ ties its own affiliate's "free" IR services to fees for its listing services, the result is economically coercive in that listing companies have no real choice to use competitive IR services unless they are willing to pay twice for them.

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I. Background

This is the second time in five years that NASDAQ OMX Group, Inc. has sought Commission approval to compel companies that list on one of its subsidiaries (NASDAQ) to use IR services provided by another of its subsidiaries (NASDAQ CS) through tying the two together.

It is the third time in five years that NASDAQ OMX has sought to use the fees paid by companies to list on its NASDAQ Exchange to cross-subsidize purportedly "free" IR services provided by its NASDAQ CS, which NASDAQ OMX is attempting to compel listed companies to use.

On both prior occasions, the Commission declined to approve the tying and cross-subsidization. Instead, Commission approval of proposed increases in listing fees was contingent on NASDAQ's assurances it would not do exactly what NASDAQ is now asking the Commission to approve (after the fact) – tie the provision of free IR services by NASDAQ CS to a listing on NASDAQ.

A. In 2007, NASDAQ Promised Not To Tie The Provision Of IR Services By NASDAQ CS To A Listing On NASDAQ's Exchange

In October 2006, NASDAQ sought in SR-NASDAQ-2006-040 to justify a proposed fee increase on the ground that it would bundle with its listing service certain IR services, including IDS provided by its then-recently acquired wire service, PrimeZone (which NASDAQ CS later renamed Globe Newswire). [1]

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[1] As NASDAQ described its proposal, NASDAQ planned to:

> "[R]edefin[e] the listing product to include a package of issuer benefits, previously not included as part of the annual listing fees. ... To support this initiative, Nasdaq has proposed a new pricing structure reflecting the addition to these products and services at a significant price advantage for Nasdaq-listed companies."

The NASDAQ Stock Market, FORM 8-K, Exh. 99.1 (Oct. 2, 2006) (citation omitted).

Business Wire was one of 117 parties to comment on NASDAQ's proposal.[2] While some supported the proposal – including letters scripted by NASDAQ for its listed companies – "most" of the comments objected to NASDAQ's proposal to "bundle" products and services, "citing issues that included alleged illegal tying arrangements and other antitrust violations, and potential conflicts of interest." SEC Release No. 34-55202 at 1-5 n.5, 7-8 (Jan. 30, 2007).[3]

In December 2006, Business Wire representatives met with Erik Sirri, then Director of the Division of Trading and Markets (the "Division"), and top Staff to discuss these concerns. The following month, NASDAQ sought to salvage its proposed fee increase by amending its proposal to justify the requested fee increase on grounds other than the proposed bundling of IR services with the listing. NASDAQ expressly assured the Commission that it was abandoning its plan to bundle wire distribution and other IR with the listing and therefore "[t]hese services do not serve as justification for the proposed fee increase." Amendment 3 to SR NASDAQ 2006-040 at 3 (Jan. 16, 2007).

Two weeks later, the Commission granted accelerated approval based in significant part on NASDAQ's assurances. Although a "large number of comment letters focused on NASDAQ's offer of a bundle of products and services," the Commission viewed these concerns as "moot," and hence did not address them, "because Nasdaq filed Amendment No. 3 to ***remove the bundle of services*** from the proposed rule change." Release No. 34-55202, *supra*, at 7-8.[4]

NASDAQ's assurance that it was unbundling IR from the listing fee turned out not to be true. As Business Wire explained in 2009, NASDAQ had continued to bundle "free" wire distribution and other IR – which it now called its "Core Services" –

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[2] *See, e.g.,* Business Wire Ltr. of Dec. 11, 2006 from James Doty, Brad Bennett, Robert Stolebarger, Roger Myers and Richard Mooney (Exh.E).

[3] Media reports about the proposal also noted these anti-competitive concerns. *See, e.g.,* J. Keehner, *Nasdaq Press Release Push Raises Antitrust Concerns*, Reuters, Dec. 7, 2006; A. Lucchetti & K. Scannell, *Profit in Mind, Nasdaq is Raising Fees – and Brows*, Wall St. J., Dec. 8, 2006.

[4] Throughout this Comment, all emphases are added unless otherwise noted.

into the price of a listing. Business Wire Ltr. of Nov. 24, 2009 from Jesse Markham, Jr., Roger Myers and Stephen Rynerson at 3.[5]

B. In 2010, NASDAQ Again Promised Not To Tie The Provision Of IR Services By NASDAQ CS To A Listing On NASDAQ's Exchange

In SR-NASDAQ-2009-081, NASDAQ again sought substantial increases in its fees to cover the cost of largely undefined "new initiatives." 74 Fed. Reg. 57512-13 (Nov. 4, 2009). In light of the bundling that was still occurring, Business Wire urged the Commission to "deny Nasdaq's proposal to increase its fees absent assurances that Nasdaq is not engaged in cross-subsidization of its information dissemination services subsidiary [what is now NASDAQ CS] through application, entry, and annual fees for listing." Business Wire Ltr. of Jan. 14, 2010 from Jesse Markham, Jr., Roger Myers and Stephen Rynerson at 15.

In reply, NASDAQ conceded its offers of free IR "typically occur in meetings and discussions about the company's choice of listing market," and that Commission "Staff may have concerns about whether, under the circumstances, ***such offers could be viewed as leading to an inequitable allocation of listing fees***." NASDAQ Ltr. of Feb. 5, 2010 from Arnold P. Golub at 1.

To address Staff's concerns, NASDAQ vowed that, "effective immediately," it would no longer tie free or discounted IR services to a company's listing and would "not offer any customized packages of free or discounted services to any company." *Id.* at 1-2. While NASDAQ CS – which NASDAQ was then calling Nasdaq OMX

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[5] Indeed, following the Commission's approval of its fee increase, NASDAQ issued a press release about the increase that also announced that its "core services" would now include IDS "available to all Nasdaq companies ... free of charge." *NASDAQ New Listing Fees Approved*, Press Release (Feb. 5, 2007). This (mis)led the media to report that the fee increase approved by the Commission ***included*** the cost of the "free" IDS – *i.e.*, that the Commission had essentially approved Nasdaq's original, purportedly abandoned proposal. E. Ortega, Bloomberg (Feb. 5, 2007) ("Nasdaq ... won regulatory approval to raise fees. ... The decision by the U.S. Securities and Exchange Commission also lets ... Nasdaq provide press-release distribution ... at no additional charge.").

Corporate Services (or "NOCS") – "may determine to offer other packages of complimentary or discounted services," NASDAQ promised that any such offers would be "***without regard to where the company is listed or determines to list***." *Id.* at 2. Although NASDAQ's initial representation was somewhat conditional ("pending further discussions with Commission Staff"), its final assurance was unequivocal: "Any future offer of free or discounted services by NOCS will explicitly and expressly provide that companies will be free to accept the offer and test NOCS's services ***whether or not they choose to list on Nasdaq***."

Moreover, NASDAQ promised that if an offer of free or discounted wire distribution or other IR was made in writing, "the offer will state in writing that it is ***not conditioned on the company's choice of listing markets***." *Id.* at 2 n.4.

In approving NASDAQ's proposed fee increase, the Commission explained that it was doing so precisely because of the "assurances it has received from Nasdaq in response to Business Wire's comments." SEC Release No. 34-6-61669 at 12 (March 5, 2010). "***Based on Nasdaq's representations that offers of IDSs by NOCS will be made independent of the listing status of NOCS customers or potential customers***," the Commission said that it did "not believe that the proposed increase in listing fees cross-subsidize NOCS services in any way that constitutes an inappropriate burden on competition or an inequitable allocation of fees ...." *Id.* at 13.

In reaching this decision, the Commission underscored that "it is ***important*** that any communications, irrespective of the method, on permitted ***free or discounted services*** make it expressly and explicitly clear that such services ***are available whether or not the company lists on Nasdaq***." *Id.* at 13 n.56.

C. Notwithstanding Its Prior Promises, NASDAQ Continued To Tie "Free" IDS And Other IR Services To A Listing On NASDAQ

Earlier this year, the Wall Street Journal reported that, long after it had assured the Commission it would not tie free IR services to a listing, NASDAQ continued to "package [IR] services for companies aiming to list on its exchange. In one such offer in December, Directors Desk was included alongside newswire, webcasting and market surveillance services in a package valued at a total cost of around $150,000 a year, according to documents reviewed by Dow Jones Newswires." *Breach Spotlights Pitfalls of Nasdaq's Diversification*, Wall. St. J., Feb. 8, 2011.[6]

The Journal's report is consistent with what Business Wire has learned. In every circumstance of which Business Wire is aware, NASDAQ's offers of free IR services – or the functional equivalent of a credit for a certain dollar value of NASDAQ CS-provided IR services over a certain number of years, including wire distribution via the NASDAQ CS-owned Globe Newswire – were tied to the company's agreement to become listed on the NASDAQ Exchange.

Specifically, NASDAQ's offers of free IDS and other IR services provided by NASDAQ CS were conditioned on a company switching its listing from another exchange to NASDAQ, retaining its listing on NASDAQ rather than switching to another exchange, or listing on NASDAQ as part of an initial public offering.[7]

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[6] According to the Journal, NASDAQ purchased Directors Desk in 2007 to provide companies what NASDAQ touts as a secure way to share sensitive documents and materials among corporate board members and officers. As the Commission knows, Directors Desk suffered a security breach in December that was not publicly disclosed until the Journal reported it in February.

[7] Having fired virtually all the sales representatives formerly employed by or assigned to Globe Newswire and its other IR service providers, NASDAQ CS' IR services are now sold by NASDAQ listing representatives (which underscores that lack of separation between NASDAQ OMX's two subsidiaries). The combined marketing of the listing product and IR services is thus institutionalized in a manner that inherently calls into doubt the plausibility of NASDAQ's earlier assurances on which the Commission relied.

While Business Wire understands that companies listed on other exchanges were offered years of free wire distribution and other IR services if they would switch their listing to NASDAQ, Business Wire is not aware of a single instance in which a company listed on another exchange was offered years of free IR services "without regard to where the company is listed or determines to list," in the words of NASDAQ's February 5, 2010 representation to the Commission. The same holds true in the IPO context. Indeed, NASDAQ's bundling of free wire and other IR services as part of the initial listing fee allows NASDAQ to shut its IR competitors completely out of the market for companies going public.

In short, NASDAQ did in 2010 the same thing it had done in 2007 – *i.e.*, to obtain approval of a fee increase, it promised to decouple IR services from its listings, but then once the Commission approved the fee increase, NASDAQ proceeded to expressly tie substantial amounts of "free" IR services to a listing.

It was therefore not surprising when, earlier this year, the New York Stock Exchange sought approval "to amend [its] Listed Company Manual … by adding a new Section 907.00 that sets forth certain complimentary [IDS] products and services that are offered to currently and newly listed issuers." SEC Release No. 34-64506 (concerning File No. SR-NYSE-2011-20) at 4 (May 17, 2011). Among other things, the NYSE sought approval to cover the cost of complimentary IDS "provided by third-party vendors." *Id.* at 4. For example, the NYSE proposed to offer 24 months of complimentary web-hosting and wire distribution services – provided by third-party vendors, but paid for by the NYSE – to companies that became newly listed on the NYSE.

In approving the NYSE's proposal, the Commission noted that "the third-party products and services are provided through nonexclusive arrangements with vendors and the Exchange does not expressly endorse any particular vendor or any product or services provided by any particular vendor." 76 Fed. Reg. 51449, 51452 (Aug. 18, 2011) (printing Release No. 34-65127 (Aug. 12, 2011).

The Commission also explained that "it believes that the NYSE is responding to competitive pressures in the market for listing in making this proposal." *Id.*

II. NASDAQ's Proposal, Which Seeks Commission Approval For The Tying Of IDS And Other IR Services To A Listing Despite NASDAQ's Prior Promises To The Contrary, Should Be Rejected

As the Commission is aware, the rules of a national exchange such as NASDAQ must, among other things, both "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities" and "promote just and equitable principles of trade"[8] The Commission has interpreted these provisions to implicate antitrust concerns.[9]

Moreover, proposed rule changes must "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]."[10] Rather, an exchange's rules must be designed to "remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest" and must not "permit unfair discrimination between customers, issuers, brokers, or dealers."[11]

Business Wire respectfully submits that NASDAQ's proposal fails all these tests for the reasons set forth below and therefore should be rejected.[12]

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[8] Exchange Act § 6(b)(4).

[9] *See, e.g., Order Granting Approval to Proposed Rule Change by the Philadelphia Stock Exchange, Inc. to Institute an Antitrust Compliance Policy*, Exch. Act. Rel. No. 34-44527 (July 9, 2001) (approving proposed rule change that "should help to promote just and equitable principles of trade"); *In re Certain Activities of Options Exchanges,* Admin. Proceeding No. 3-10282 (Sept. 11, 2000) (exchanges consented to adopt rules prohibiting anti-competitive behavior).

[10] Exchange Act § 6(b)(8).

[11] *Id.*, § 6(b)(5).

[12] *Id.*, § 19(b)(2)(B) ("The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of [the Act] and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding.").

A. NASDAQ's Proposal Should Be Rejected Because It Will Inequitably Allocate Listing Fees And Discrimination Among NASDAQ Issuers

Section 6(b)(4) of the Exchange Act require NASDAQ to "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities." NASDAQ's proposal fails to meet this standard in at least two different ways.

First, there is an obvious inequitable allocation – and the sort of discrimination among issuers prohibited by Section 6(b)(5) of the Exchange Act – with respect to fees paid by currently listed and newly listed companies. While NASDAQ tries to excuse this by contending that newly listed companies need help adjusting to the responsibilities of a publicly traded company (implying they are all small companies without resources to pay for these services or the sophistication to know what is required), this is simply not true – witness, for example, such recent IPOs on NASDAQ of Qlik Technologies, Inc. (market capitalization of $1.8 billion) and Vera Bradley, Inc. ($1.5 billion), or, on the NYSE, of Linkedin Corp. ($7.5 billion), HCA Holdings ($10.4 billion), and Kinder Morgan Energy Partners ($22.5 billion).

The main reason for NASDAQ to provide "free" IDS and other IR services to such companies is to attempt to lock them into using NASDAQ CS once the "free" services expire.[13] And, to the extent some IPOs are smaller and less savvy about the responsibilities of publicly traded companies, those are the very companies most likely to feel coerced to use the IDS and other IR services forced upon them by NASDAQ OMX through NASDAQ CS in order to comply with public disclosure requirements enforced by NASDAQ OMX through NASDAQ.

NASDAQ is also providing "free" IDS and other IR services to companies, of any size, that switch their listings from the NYSE – where these companies pay for their own IDS and certain other IR services – to NASDAQ, thus discriminating and inequitably allocating listing fees among more mature companies. The types of

[13] Once a company uses NASDAQ CS for IR, it will be difficult to switch IDS providers. NASDAQ CS' web hosting entity, Shareholder.com, contains an archive of press releases by companies who use NASDAQ CS. A company that moves to another IDS provider will lose access to that archive and cannot easily re-create it.

companies affected are illustrated by the five that NASDAQ reported switched their listings from the NYSE in the fourth quarter of 2009, ranging from Micron Technologies (market value of $5 billion) to Vodafone Group ($132 billion).

As far as Business Wire is aware, ***none*** of those five companies received "free" IDS before they switched. Instead, they used independent third-party vendors, which often (as in the case of Business Wire, which had Micron as a client before it switched listings), lost that business after the companies switched to the "free" IDS they were now paying for as part of listing on the NASDAQ Exchange.

Indeed, ***none*** of these companies would receive free "IDS" if they were still listed on the NYSE (let alone receive it from a company owned by the NYSE). Under the NYSE's new Section 907.00, existing listings do not receive complimentary IDS. Only new listings receive complimentary IDS, and then, again, only from third-party vendors. NASDAQ's claims to the contrary – e.g., that it needs to offer ***four years*** of up to $20,000 per year of free wire distribution through NASDAQ CS to companies with market value exceeding $500 million that switch their listing from the NYSE to NASDAQ "because … these companies receive comparable services from the NYSE, which they would forgo by switching their listing," Release No. 34-65324, *supra*, at 4-5 – is demonstrably not true.

Second, a company that lists with NASDAQ and is coerced by its tying to use NASDAC CS for IR services effectively pays a lower listing fee than a similarly situated company that opts for IR services provided by Business Wire or another NASDAQ CS competitor. Since the NASDAQ listing fee would bundle the IR services cost with the fees for new listing – supposedly providing up to $169,000 more in services than the same fees paid by companies that for any reason opted to use a competing IR provider – an inequitable result would necessarily follow, distorting the net listing fees paid by otherwise indistinguishable companies.

In sum, companies that use the "free" IDS and other IR services pay the same fees to the exchange as companies who choose instead to purchase such services from third parties. The second set of companies is simply subsidizing the first by paying a portion of the costs that are incurred by NASDAQ to provide "free" services, which the second set of companies have elected not to use. Under no reasonable definition is such an arrangement an "equitable allocation."

The Commission has previously rejected fee proposals by the FINRA f/k/a the NASD which would have had the effect of cross-subsidizing other parts of its operations for an unfair competitive advantage, based on the rationale that the FINRA was functioning in a capacity similar to a public utility. *See Order Announcing Commission Findings, Modifying Interim Relief, and Instituting Proceedings*, Release No. 20874, File No. 4-256, 49 Fed. Reg. 17640, 17646-48 (1984) ("allocation of NASDAQ system costs is absolutely necessary to ensure that NQDS charges are derived solely from those NASDAQ functions relevant to the service provided to Instinet and its subscribers"); *see also NASD v. SEC*, 801 F.2d 1415, 1420-21 (D.C. Cir. 1986) (affirming the Commission's ruling). The proposal here should meet the same fate.

B. NASDAQ'S Proposal Should Be Rejected Because It Will Burden Competition In Apparent Violation Of The Antitrust Laws

Tacitly acknowledging that the Commission must consider the extent to which NASDAQ's proposed rule change will burden competition for IDS and other IR services, NASDAQ (predictably) argues it will not. Release No. 35-65324, *supra*, at 8-9. But as the Supreme Court has held, in "tak[ing] account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations," the Commission must consider for itself "'whether the action will promote ... competition.'" *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264, 283 (2007) (quoting 15 U.S.C. § 77b(b)). As shown below, NASDAQ's proposal would not promote competition but instead would have inevitable anticompetitive effects of the sort made unlawful under Sections 1 and 2 of the Sherman Act, as well as analogous state laws.

1. NASDAQ Is Tying IDS And Other IR Services To Its Listing Service In Violation Of Section 1 Of The Sherman Act

"A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product.'"[14] A tying arrangement violates Section 1 "if the seller has appreciable economic power in the tying product market and if the arrangement affects a substantial

[14] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461 (1992).

volume of commerce in the tied market."[15] Absent rare circumstances, tying is a *per se* violation of Section 1 – that is, a tying arrangement is illegal, regardless of whether further investigation might reveal the arrangement is "reasonable."[16] Thus, an antitrust violation is established if three requisites are met:

> (1) Defendant tied together the sale of two distinct products or services;
>
> (2) Defendant possesses enough economic power in the tying product market to coerce its customers into purchasing the tied product; and
>
> (3) The tying arrangement affects a "not insubstantial volume of commerce" in the tied product market.[17]

All three elements are present here.

First, it cannot be disputed that the listing service NASDAQ and exchanges have historically provided is separate from the IDS that Business Wire, GlobeNewswire and other vendors have historically provided, to say nothing of the other IR Services NASDAQ seeks to tie to its listings (which also have been sold separate from a listing by vendors not associated with exchanges). Two products are considered separate if there is "sufficient consumer demand so that it is efficient for a firm to provide [one] separately from [the other]."[18] Such separate demand is shown here by the fact the two products have been sold separately.[19] Until recently, companies purchased listing services from NASDAQ and purchased IDS and other IR services from third parties.

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[15] *Id.*; *see also Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re: Am. Express Merchants' Litig.)*, 554 F.3d 300, 308 n.6 (2d Cir. 2009).

[16] *Eastman Kodak*, 504 U.S. at 461-62.

[17] *Cascade Health Solutions, Inc. v. PeaceHealth, Inc.*, 515 F.3d 883, 913 (9th Cir. 2008) (citations omitted).

[18] *Eastman Kodak*, 504 U.S. at 462.

[19] *Jefferson Parish Hos. Dist. No. 2 v. Hyde*, 466 U.S. 2, 22 (1984); *United States v. Microsoft*, 253 F.3d 34, 86-87 (D.C. Cir. 2001) (*en banc*) (*per curiam*).

By offering "free" IDS and other IR services to listing customers through its subsidiaries, NASDAQ is tying the two services in a manner analogous to the "bundling" it proposed in 2006 and then purportedly withdrew (and that it again promised not to do just last year). While having the nominal right to choose their own providers of IDS and other IR services, customers for new listing services or NYSE-listed companies that switch to NASDAQ will inevitably treat NASDAQ's listing service and its "free" IR services as a single unit and direct their IDS business to GlobeNewswire since they are already incurring that cost and their other IR business to NASDAQ CS' other IR service providers. This is precisely the sort of conduct the antitrust laws prohibit.

The mere fact that NASDAQ characterizes the offer as "free" does not alter the analysis (particularly where, as here, the "free" service is being offered a year after a substantial price increase in the bundled product). "Of course, in a tying case if the evidence shows that 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.'"[20] That a customer could purchase ***additional*** IDS or other IR services from a third party such as Business Wire is irrelevant to the tying analysis, which focuses on the forced purchase of an additional product from the antitrust violator, not on any other additional purchases a party might make.

Second, NASDAQ clearly has sufficient market power to coerce purchase of the tied product(s).[21] In anticipation of its current proposal, NASDAQ last year increased its fees for all newly listed companies as well as the vast majority of

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[20] *U.S. Philips Corp. v. International Trade Comm.*, 424 F.3d 1179, 1191 n.4 (Fed. Cir. 2005) (quoting *Multistate Legal Studies v. Harcourt Brace Jovanovich Legal & Prof. Pubs*, 63 F.3d 1540, 1548 (10th Cir. 1995)); *accord* Areeda & Hovenkamp, ANTITRUST LAW Vol. IIIA ¶ 760b at 49 (2002) ("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").

[21] Notably, "market power" sufficient to establish a tying violation is a substantially lower threshold than the "monopoly power" necessary to establish a monopolization claim under Sherman Act § 2. *See, e.g.*, *Eastman Kodak*, 504 U.S. at 462 (tying arrangement "violates § 1 of the Sherman Act if the seller has 'appreciable economic power' in the tying product market").

companies already listed on it. The cost of providing the tied services is thus foisted on a broad group, while the tied product is provided to a subset of that group. The only way to avoid the cost of the "free" tied services is to suffer the heavy costs attendant upon moving to a different exchange (or de-listing entirely). Those costs are particularly significant for smaller public companies, which tend to be listed on NASDAQ. Given this almost complete lack of choice available to NASDAQ-listed companies, the second requirement is easily met.[22]

Even absent footing the bill for the cost of this "free" service through the substantial listing fee increases imposed last year (and those to come, no doubt, in the near future), NASDAQ indisputably has sufficient market power to coerce at least a substantial number of newly listing companies to use the tied product. Smaller public companies – the very ones NASDAQ claims are most in need of its "free" IR services – are unlikely to list on the NYSE or another exchange, and have no choice but to purchase the tied product(s) since they are paying for them as part of the listing fee. And, of course, in its regulatory role NASDAQ will, on the one hand, be informing new public companies of their public disclosure obligations while, on the other, be offering to provide them those very disclosure services for "free." The coercive nature of NASDAQ's dual role is apparent.

While NASDAQ attempts to discount its market power by claiming that only 3% of listed companies and less than 1% of public companies generally would be eligible for its "free" tied product(s) under its proposal, Release No. 34-65324, *supra*, at 9 & n.12, NASDAQ overlooks that 100% of new public companies who list on NASDAQ will already be paying for the cost of IDS and IR services as part of listing fee. Third party IDS and other IR service providers will be entirely shut out of this market (which, as explained below, has in the past been fertile ground for these third party vendors to obtain new clients).

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22 *See, e.g.*, *Fortner Enters.*, 394 U.S. at 502 ("Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. . . . [E]ven absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.") (internal citations and quotations omitted).

Third, the amount of commerce affected in the IR services market is far above the "not insubstantial" requirement. The threshold for meeting this requirement is modest (indeed, so modest it is virtually always conceded by defendants in tying cases). As the Supreme Court held in the leading case on this issue, 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*." *Fortner Enters.*, 394 U.S. at 504.

That minimal threshold is clearly surpassed here. Apparently aware of this, NASDAQ attempts to understate the impact of what it is asking the Commission to approve, post hoc, by citing IPO statistics from the past three years, a period when the number of companies going public was extremely depressed by the worldwide financial crises. Before the crisis – and, no doubt, after it finally passes – the number of IPOs, and the amount of commerce affected, was and will be much higher. A little over a decade earlier, 1999 saw 480 IPOs by U.S. companies, which generated gross proceeds of $61.63 billion, while 2006 and 2007 – just before the crisis hit – saw 198 and 237 IPOs, respectively.

Of the 134 new listings on NASDAQ during 2006, more than half (71) used Business Wire as their IDS provider, generating hundreds of thousands of dollars in revenue for Business Wire. Under NASDAQ's subsequently imposed practice of bundling IDS and other IR services into the price of a new listing, Business Wire is now shut out of that market – *i.e.*, market foreclosure is virtually 100%. This impact on the IDS market – which does not include the impact on other third-party competitors of NASDAQ CS in the IDS market and does not address the impact on the much broader IR services market – is far more than *de minimis*. *See, e.g., Datagate, Inc. v. Hewlett-Packard Co.*, 60 F.3d 1421, 1426 (9th Cir. 1995) (potential impact on $100,000 per year of sales sufficient to meet test); *Tic-X-Press, Inc. v. The Omni Promotions Co.*, 815 F.2d 1407, 1420 (11th Cir. 1987) ("While $10,091.07 is not an overwhelmingly large amount, particularly compared with the 9-13.5 million in total ticket sales over the relevant period, it is certainly more than *de minimis*").

Further, the concrete damage NASDAQ's practice, if approved, would cause should not be overlooked. In the short run, NASDAQ bundling of "free" IDS and other IR services with the fees paid by newly listing companies effectively coerces such companies into either using an inferior service provided by the companies NASDAQ CS has acquired or paying twice to obtain services from a higher caliber competitor such as Business Wire.

But the inequitable allocation of listing fees inherent in this situation will no doubt prompt NASDAQ to return to the Commission, citing complaints by currently listed companies about inequitable treatment as an excuse to seek approval to expand its bundling of "free" IDS and other IR services into the fees paid by all companies to list on NASDAQ – the very thing it sought to accomplish in its original proposal in SR-NASDAQ-2006-040. That, of course, would have an even greater impact on commerce, and could well wind up foreclosing any meaningful competition by Business Wire or any other third-party IR service provider among any of the 2400 companies listed on the NASDAQ (nearly a third of whom have used Business Wire services so far this year).

In the long run, the impact on competition in the IDS market – and the broader IR services market – would be devastating. That competition is necessary, of course, to ensure innovation, efficiency and delivery of the best products and services at the minimum cost and price. In the long run, NASDAQ's practices, if approved, may well leave companies listing on NASDAQ without the very real benefits of competition for some or all of these essential services. [23]

Whether viewed in the light of NASDAQ's current practices or viewed in the context of its larger strategy, NASDAQ's proposal would undoubtedly impose a "burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]."[24]

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[23] *See, e.g.*, *Microsoft*, 253 F.3d at 87 ("Direct competition on the merits of the tied product is foreclosed when the tying product is sold only in a bundle with the tied product or, though offered separately, is sold at a bundled price, so that the buyer pays the same price whether he takes the tied product or not. In both cases, a consumer buying the tying product becomes entitled to the tied product; he will therefore likely be unwilling to buy a competitor's version of the tied product even if, making his own price/quality assessment, that is what he would prefer.").

[24] Exchange Act §§ 6(b)(8) and 15A(b)(9).

2. Offering Free IDS And Other IR Services For 2-4 Years Evinces An Attempt To Monopolize In Violation Of Section 2 Of The Act

Attempted monopolization under Section 2 is established if the party: "(1) engage[s] in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."[25] Especially when viewed in the context of its larger strategy, NASDAQ's proposal appears to meet each requirement.

First, there is no question that pricing a product or service below marginal cost is predatory/anticompetitive conduct that can support an attempted monopolization claim.[26] Here, to the extent the Commission accepts NASDAQ's own representations that it will be offering IDS and other IR services for "free," that price is obviously below any reasonable measure of marginal cost.

Second, the intent to monopolize is easily inferred from the circumstances. NASDAQ OMX enjoys a unique advantage as owner of both a national securities exchange/regulator and a subsidiary that provides IDS and other IR services. By offering "free" IR services to listed companies through its subsidiary, while covering that loss through the fees its other subsidiary is allowed to charge in its position as an exchange (a field in which there are far fewer competitors), NASDAQ OMX is clearly acting not just to have the providers acquired by NASDAQ CS (such as GlobeNewswire) compete on even terms with Business Wire and others, but instead to drive those competitors out of the market for IDS and other IR services, first for new listings on NASDAQ and ultimately for all NASDAQ-listed companies.[27]

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[25] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

[26] *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

[27] The potential impact on competition is obvious. As explained above, a significant share of Business Wire's revenue comes from NASDAQ-listed companies – more than 800 of which currently use Business Wire – as well as NYSE-listed companies to which NASDAQ has and continues to offer to bundle "free" IDS and other IR services into the listing fee if they switch to NASDAQ.

Third, there is little question that the relevant market to consider in this analysis is the market for IDS and other IR services for NASDAQ-listed companies. While NASDAQ currently is bundling "free" IDS and other IR services into the price paid by companies newly listing on NASDAQ, there is ample reason to believe that NASDAQ intends to capture the market for all IDS and other IR services provided to NASDAQ-listed companies, and that the offers it belatedly asks the Commission to bless are not short-term inducements.

The offers described in NASDAQ's proposal would extend as long as four years. The amount of the fee increases obtained by NASDAQ in 2007 and again last year – while, both times, promising not to tie the provision of "free" IR services provided by NASDAQ CS to a listing on NASDAQ – is sufficient to subsidize its "free" service offer more broadly to all NASDAQ listees. NASDAQ's intentions in this regard are not speculative in light of its proposal in 2006 to increase listing fees to cover the cost of providing a bundle of IDS and other IR services to all its listed companies, and its announcement in 2007 that it would continue to offer bundled service after obtaining Commission approval of the listing fee increase.

With Business Wire and other competitors effectively shut out of the market, the IDS and other IR service providers acquired by what NASDAQ OMX now calls NASDAQ OMX Corporate Solutions would have an unfettered ability to raise prices and/or compromise service levels to the detriment of listed companies and the investing public. Of course, a company can have a high market share without enjoying monopoly power if there are actual or potential rivals available to enter the market if the company seeks to extract monopoly rents. Here, however, there likely would be no such constraint. Eliminating the ability of competitors to sell to NASDAQ-listed companies may well cripple them. And even if it did not, NASDAQ's ultimate goal of including the cost of IR services in the price of a listing would foreclose any competition. In the absence of actual or plausible competitors, NASDAQ's efforts to obtain monopoly power would be complete.

Viewed in the context of NASDAQ's past bundling proposal and recent fee increases, NASDAQ's current bundling practices, as set forth in SR-NASDAQ-2011-122, reflects an apparent attempt to obtain the Commission's approval for the next step in NASDAQ's effort to monopolize the market for IDS and other IR services provided to NASDAQ-listed companies.

C. NASDAQ's Proposal Should Be Rejected Because It Reduces Transparency

One of the Commission's significant goals in recent years has been to increase transparency in connection with the listing and trading of securities. Transparency is a central component in efforts to ensure that all investors and listed companies enjoy a level playing field when making investment and capital decisions, and that U.S. stock exchanges retain the confidence of investors and companies alike.[28]

Although it claims its proposal will help foster that goal, NASDAQ's proposal is a move in the opposite direction – toward reducing transparency in the securities listing/trading field. Historically, listed companies paid a fee for the core service offered by NASDAQ – listing on a securities exchange – and a separate fee for ancillary IR services. The result was total transparency. Especially in light of its 2007 and 2010 listing fee increases, the bundling for which NASDAQ now seeks Commission approval blurs the line between the core mandatory and auxillary (and largely elective) services, and leaves opaque, for example, how the extent to which the prior listing fee increases are cross-subsidizing the IR component.

The importance of transparency contributed to the outcome of a similar situation involving the Vancouver Stock Exchange ("VSE"). Prior to 1998, the VSE allowed IDS to be provided by any qualified party. That year, the VSE proposed to give Canada NewsWire a monopoly on IDS for VSE- listed companies, which is similar to what NASDAQ ultimately hopes to accomplish for NASDAQ CS. VSE's proposal received enormous criticism, resulted in a lawsuit alleging that the proposal was an unlawful restraint of trade and a hold placed on the policy by the British Columbia Securities Commission pending further review. Eventually, the VSE changed course and agreed that IDS should be open to competition.

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[28] As the then-Director of the Division of Market Regulation said in connection with a related subject (the pricing and provision of market data): "In this era of for-profit, publicly traded exchanges, we believe the historical constraints on individual members exercising control over SROs should be made explicit. Furthermore, comments on the Commission's market data proposal called for greater transparency of SRO revenues and expenses. The staff concurs and will recommend expanded public reporting by SROs of their financial and ownership structure." Http://www.sec.gov/news/speech/spch092304aln.htm.

D. NASDAQ's Proposal Should Be Rejected Because It Fosters A Conflict Of Interest Between NASDAQ As Regulator And IR Service Provider

NASDAQ's proposal also presents substantial risk of creating conflicts of interest and incentives for abuse of NASDAQ's privileged position as a regulator.

Although enforcing compliance with disclosure requirements is ultimately within the bailiwick of the Commission, NASDAQ has substantial oversight of its listed companies' compliance with federal law, and directly regulates them pursuant to its own rules. As NASDAQ's Rule 5101 states in pertinent part:

> Nasdaq ... has broad discretionary authority over the initial and continued listing of securities in Nasdaq . ... Nasdaq may use such discretion to deny initial listing, apply additional or more stringent criteria for the initial or continued listing of particular securities, or suspend or delist particular securities based on any event, condition, or circumstance that exists or occurs that makes initial or continued listing of the securities on Nasdaq inadvisable or unwarranted in the opinion of Nasdaq, even though the securities meet all enumerated criteria for initial or continued listing on Nasdaq.[29]

A significant area of NASDAQ oversight is in the area of dissemination of "material news." NASDAQ requires that listed companies provide it with advance notice of certain news events.[30] Failure to follow NASDAQ's prescribed procedures for reporting "material news" can result in delisting.[31]

Given NASDAQ's status as regulator, there are at least three reasons why an insuperable conflict of interest exists in NASDAQ's bundling of the very IDS whose adequacy NASDAQ has authority to regulate into the fees paid by a company to newly list on the NASDAQ Exchange.

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[29] Nasdaq Listing Rule 5101, "Preamble to the Rule 5100 Series."

[30] *See* Nasdaq Listing Rule 4120(c), "Procedure for Initiating a Trading Halt."

[31] *See* Nasdaq Listing Rule IM-5250-1, "Notification to Nasdaq MarketWatch Department."

First, NASDAQ's authority to rule on the adequacy of the disclosures makes it inappropriate for NASDAQ to set up itself – or a sister company owned by the same parent, which is the functional equivalent – as the "preferred provider" for the disclosures. Otherwise, NASDAQ can rule upon the viability of IDS provided by NASDAC CS. If companies choose not to use NASDAQ CS, it will lead to a situation rife with the possibility that certain companies (using NASDAQ CS) will receive or appear to receive more favorable treatment from NASDAQ than other companies (using Business Wire, PR Newswire, or another competitor).

Second, NASDAQ is in a position, quite apart from its regulatory role regarding the adequacy of disclosures, to determine how much disclosure is required in the first place, which creates the opportunity for NASDAQ to manipulate the quantity of disclosures to its advantage. As long as NASDAQ is offering "free" IDS, it would have an incentive to reduce the amount of disclosure required to save costs – which could impact the ability of investors to make fully informed decisions. Once NASDAQ has "locked in" a satisfactory number of customers on a paying basis – by rolling over their IDS into paying arrangements once the "free" services ends, or imposing future fee increases whether or not explicitly based on the provision of the bundled IDS – it would have an incentive to increase the amount of disclosure required, being able to impose additional and unnecessary burdens on listed companies so as to reap supra-competitive profits from its captive customer base.

Third, NASDAQ OMX's decision to enter into ancillary businesses not directly relevant to NASDAQ's primary function of listing and facilitating trading of securities necessarily puts it in a position of having to determine which aspect(s) of its businesses should be provided the necessary capital and other tools. As the Commission put it in a related context: "Given the inherent tension between an SRO's role as a business and as a regulator, there undoubtedly is a temptation for an SRO to fund the business side of its operations at the expense of regulation."[32]

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[32] *See* SEC, "Concept Release Concerning Self-Regulation" dated March 8, 2005, *available at* http://www.sec.gov/rules/concept/34-50700.htm) at text accompanying note 198; *see also id.* at text accompanying notes 272-73 (proposing that SROs "be required to effectively separate their regulatory function from their market operations and other commercial interests").

Notably, each of these conflicts inhere not just in the current proposal, but in NASDAQ CS' ownership of GlobeNewswire and other IR service providers. The risk of such conflicts are particularly high given that GlobeNewswire and NASDAQ CS' other IR service providers no longer have independent sales representatives; instead, NASDAQ sales representatives now market IDS and other IR services in addition to selling listings. For these reasons, Business Wire strongly believes that not only should the Commission reject NASDAQ's current proposal, it should undertake a review of NASDAQ's role in providing IDS and the other IR services provided by NASDAQ CS.

As a result of such a review, the Commission could require NASDAQ OMX to divest itself of NASDAQ CS, or at least require NASDAQ CS to sell its IDS providers to an independent third party or parties.[33] If the Commission believes divestiture is too intrusive a remedy, NASDAQ could at a minimum be ordered to operate GlobeNewswire and other IR providers on a strict arms-length basis. The specific restrictions should be determined after an opportunity for comment by the public generally, including NASDAQ, but should include at a minimum a prohibition on any bundling of IR services into listing fees and could also include, among other things, prohibitions on any cross-marketing of NASDAQ listings and NASDAQ CS' IR services and any coordination of pricing between the listing service provided by NASDAQ and the IR services provided by NASDAQ CS.

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[33] The Commission clearly has the authority to order such a divestiture. In particular, the Commission's mandate to protect "competition" under Exchange Act §§ 6(b)(8) and 15A(b)(9) is not limited to "competition" among various exchanges, but rather encompasses competition in other areas, such as in the market for Information Dissemination Services. This conclusion flows from the plain language of the Exchange Act, which places no limitation on the types of competition meant to be protected. It is confirmed by the Supreme Court's decision in *Credit Suisse Securities*, 551 U.S. at 283. Since the competition at issue in *Credit Suisse* was not competition among exchanges, it necessarily means the Commission's responsibilities include protecting other forms of competition.

III. Conclusion

If NASDAQ truly wanted to provide "comparable services" to what NYSE is now offering, Release No. 34-65324, *supra*, at 4-5, then NASDAQ should seek approval from the Commission to do the same thing the NYSE has done – to wit, offer newly listing companies complimentary IR services through an approved list of third-party providers from which the listing company can choose, rather than through NASDAQ's own vertically integrated affiliates.

Business Wire respectfully submits, however, that the Commission should not approve NASDAQ's proposal to do what NASDAQ has twice told the Commission it would not do in order to get its recent fee increases approved – tie offers of "free" IDS and other IR services to a listing on NASDAQ and bundle them into the cost of the listing.

In its prior rulings – both in 2007, when it approved NASDAQ's requested fee increase only after NASDAQ withdrew its proposal to bundle "free" IR services with the cost of a listing, and then again in 2010, when it conditioned approval of another proposed fee increase on NASDAQ's disavowal of any intent to tie "free" IR services with a listing – the Commission has recognized that NASDAQ should not bundle IR services with its listing service. That is no less true of NASDAQ's renewed effort, in SR-NASDAQ-2011-122, to tie years of "free" IR services to new listings. NASDAQ's proposal unduly burdens competition and inequitably allocates fees in a manner inconsistent with federal antitrust and securities laws and the imperative of heightened transparency. It should therefore be denied.

Respectfully Submitted,

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By: ______________________
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