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Attorneys at Law

December 8, 2011

SAN FRANCISCO

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

BOULDER

Re: SEC File Number SR-NASDAQ-2011-122
Business Wire's New Information on NASDAQ Proposal To Ratify Tying

Dear Ms. Murphy:

COLORADO SPRINGS

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").

DENVER

On October 7, 2011, we submitted on Business Wire's behalf a comment letter concerning the above-referenced proposed rule change requested by NASDAQ Stock Market LLC.[1] On November 15, 2011, we submitted an update to our prior submission. That same day, NASDAQ submitted a letter purporting to offer reasons for the legitimacy of its proposal. Later that week, non-attorney representatives met with Commission Staff to discuss NASDAQ's proposal. This letter responds to various issues raised in NASDAQ's letter and, in the process, follows up on certain issues discussed with Staff at the meeting.

DUBLIN

LONDON

NASDAQ contends comments submitted by Business Wire and PR Newswire Association LLC ("PRN") err legally, in asserting that NASDAQ is unlawfully tying IDS and other Investor Relations ("IR") services provided by NASDAQ OMX Corporate Solutions ("NOCS") to a listing on NASDAQ, and factually in describing NASDAQ's prior futile efforts to obtain approval for the same proposal. NASDAQ is wrong on both counts. While accusing Business Wire and PRN of "mischaracterizing" the history of its past proposals, NASDAQ does not dispute their central tenet that NASDAQ has been tying years of "free" IDS and other IR to a listing, which is not only illegal in this context but also exactly what NASDAQ told the Commission it would not do in order to obtain approval of two recent increases in the listing fees that NASDAQ is now using to "subsidiz[e]" the purportedly "free" IDS and other IR services. [2]

LOS ANGELES

SALT LAKE CITY

[1] Our October 7 letter followed one submitted by Neil Hershberg, Business Wire's Senior Vice President for Global Media, on September 28, 2011.

[2] Letter from Joan Conley, NASDAQ OMX at 1 (Nov. 15, 2011).

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A. NASDAQ Cannot Refute That, To Address Concerns About Inequity And Illegality, It Twice Promised Not To Do What It Now Seeks To Do

Although NASDAQ disputes a word here or there in the Business Wire and PRN letters, NASDAQ cannot dispute the following record:

In October 2006, NASDAQ sought an increase in its listing fees expressly to cover the cost of bundling with its listing service other ancillary IR services, including IDS. SR-NASDAQ-2006-040 at 10-11 (Oct. 2, 2006).

In January 2007, and to salvage the proposed fee increase in the face of dozens of complaints that increasing the listing fees to subsidize the cost of bundling IDS and other IR with a listing created an illegal tying arrangement, NASDAQ told the Commission it was abandoning its proposal to bundle free IDS and other IR with a listing. SR-NASDAQ-206-040 Amend. 3 at 3 (Jan. 16, 2007).

After NASDAQ dropped its proposal to bundle IDS and other IR with the listing product, the Commission approved NASDAQ's listing fee. "Because Nasdaq filed Amendment No. 3 to remove the bundle of [IR] services," the Commission did not address the "alleged illegal tying arrangements and other antitrust violations, and potential conflicts of interest" created by NASDAQ's proposed bundling. SEC Release No. 34-55202 at 8 (Jan. 30, 2007).

Despite representing to the Commission it would not bundle IDS and other IR with a listing, NASDAQ did exactly that, tying up to five years and $1 million of free IDS to a listing on NASDAQ. Letter of Jesse Markham, Jr., on behalf of Business Wire Re SR-NASDAQ-2009-081 at 3 (Nov. 24, 2009) (providing examples). NASDAQ's November 15 letter does not dispute this history.

In October 2009, NASDAQ sought another increase in its listing fees. SR-NASDAQ-2009-081 (Oct. 6, 2009). Having learned its lesson in 2006-07, NASDAQ did not overtly assert it was relying on the bundling of free IDS and other IR with a listing as a justification for the fee increase. Instead, it asserted the increase was justified by "a number of new initiatives by Nasdaq" in recent years, which it did not identify. 74 Fed. Reg. 57212, 57212 (Nov. 4, 2009).

In January 2010, Business Wire provided examples of NASDAQ tying free IDS and other IR to new listings to illustrate how and why NASDAQ was seeking the fee increase to subsidize the bundling free IR with a new listing. Letter of Jesse Markham, Jr., on behalf of Business Wire (Jan. 14, 2010).

In early 2010, Commission Staff apparently expressed their concerns about the inequitable nature of this arrangement to NASDAQ:

> In [its] comment, Business Wire objected to the proposed fee change because NOCS and its subsidiaries have offered certain companies a discount or free trial of their products.[3] Although such offers are extended as a means of marketing NOCS's products and services, they typically occur in meetings and discussions about the company's choice of listing market. We further understand that the Staff may have concerns about whether, under the circumstances, such offers could be viewed as leading to an inequitable allocation of listing fees.

Letter of Arnold Golub on behalf of NASDAQ OMX at 1 (Feb. 5, 2010).

Thus while Staff may not have "'recognize[d]' that the proposed fees would result in an inequitable allocation of listing fees,'" NASDAQ Nov. 15 Letter at 1, Staff recognized that, "under the circumstances" – *i.e.*, where free IR is tied to new listings – it "could" result in "an inequitable allocation of listing fees."

To address Staff's concerns, NASDAQ assured the Commission it would not tie offers of free IDS or other IR to a listing. Golub Letter, *supra*, at 2 & n.4.

The Commission then approved the fee increase on the basis that NASDAQ's "representations that offers of IDSs by NOCS will be made independent of the listing status" of the potential customer had eliminated the concern 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." SEC Release No. 34-6-61669 at 12-13 (March 5, 2010).

In its November 15 letter, NASDAQ does not dispute that, despite assurances to the Commission that it would not tie free IDS or other IR to a listing – on which the Commission expressly relied in granting the listing fee increase – NASDAQ has continued to do exactly that. *Breach Spotlights Pitfalls of Nasdaq's Diversification*, Wall St. J., Feb. 8, 2011 (reporting that in December 2010, NASDAQ tied free IR services, valued at $150,000 a year, to listing); Letter of Jesse Markham, Jr., on behalf of Business Wire at 6-7 (Oct. 7, 2011); Letter of Roger Myers on behalf of Business Wire at 2 (Nov. 15, 2011).

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[3] Contrary to NASDAQ's claim, providing years of "free" IDS and IR services does not qualify as a "free trial" or "promotional" samples.

Instead, NASDAQ in a footnote asserts that "to the extent that NASDAQ did adopt a prior position that the Commission relied upon, the way to change that position is through a rule making process, such as the current one, which is designed for the very purpose of adopting and amending rules and interpretive positions." NASDAQ Nov. 15 Letter at 2 n.5.

That might be true if NASDAQ had honored its commitments to the Commission and was now seeking prospective approval to take a different tack. But that is not what has happened. To the contrary, NASDAQ violated its commitments almost as soon as they were made, and continued to tie years of free IDS and other IR services to companies listing on NASDAQ, including those who switched from the NYSE. NASDAQ's refusal to stop doing what it had told the Commission it would stop doing is no doubt what compelled NYSE Euronext to seek approval of NYSE Rule 970.00. NASDAQ is now using Commission approval of NYSE Rule 970 to justify NASDAQ's request for post-hoc approval to continue to do what it has been doing for four years in violation of the express assurances it gave the Commission.

In light of this history, it is not surprisingly that NASDAQ acknowledges that, in order to obtain the prior two listing fee increases, "NASDAQ removed components of its proposal and/or made commitments to the Commission about our business practices, thereby eliminating the need for the Commission to rule on these matters." NASDAQ Nov. 15 Letter at 2.

But then NASDAQ does a curious thing. Not only does NASDAQ not dispute that it failed to keep those commitments, it goes on to attempt to use the Commission's approval of the proposals after the tying components were removed as some sort of proof that NASDAQ's proposal is equitable. "[I]n approving these NASDAQ proposals, the Commission explicitly found that NASDAQ's fees provide for the equitable allocation of reasonable fees among issuers and do not unfairly discriminate between issuers." *Id.* at 2.

It should go without saying that Commission approval of NASDAQ's two prior listing fee increases, after NASDAQ withdrew the tying component from one and expressly committed not to tie free IDS and other IR to a new listing to ameliorate Staff's concerns about the other, is hardly an indication that NASDAQ's new proposal to engage in the same tying arrangements would not result in an inequitable allocation of listing fees.

B. Contrary To NASDAQ, The Commission Has Not Approved Such An Inequitable, Anticompetitve Proposal, And It Should Not Start Here

In a telling statement, NASDAQ acknowledges that, because it abandoned its 2006 proposal to bundle "free" IDS and other IR with the price of its listing service and assured the Commission it would not engage in such bundling in order to get its 2009 proposal approved, "the Commission had never ruled on the permissibility of an exchange subsidizing the services for certain of its listed companies until the recent approval of a rule change by the New York Stock Exchange." NASDAQ Nov. 15 Letter at 1.

The thrust of this and related arguments is that the Commission need not seriously consider the legality or inequity of NASDAQ's proposal on the theory that the Commission allowed the NYSE to do the same thing. That position is without merit, however, as NASDAQ's proposal to tie "free" IR services provided by NASDAQ to new listings on NASDAQ raises issues under antitrust and securities laws that the NYSE's new rule did not present.

In its comment submitted last week, the NYSE explained the dispositive differences between NASDAQ's proposal and NYSE's Rule 907.00 and how the former unfairly discriminates against issuers in violation of Section 6 of the Act. Letter of Janet McGinness for NYSE Euronext (Nov. 30, 2011).[4] Business Wire will therefore turn to the illegality of NASDAQ's tying.

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[4] "Free" IR services are offered only to companies that transfer listings from the NYSE to NASDAQ or list initially with NASDAQ. To elaborate on the NYSE's comment, this is palpably inequitable to existing listees vis-à-vis new listings as well as companies that switch listings. NASDAQ's argument that there is nothing inequitable about treating otherwise-identical entities so disparately defies logic.

As for NASDAQ's insistence that its program would differ in no material respect from NYSE's program, it rests upon an untenable assertions that "[j]ust as NYSE selects its service providers, so does NASDAQ." NASDAQ Nov. 15 letter at 2. To again elaborate briefly on NYSE's comment, NYSE allows listing companies to ***choose*** among competing IR service providers; NASDAQ does not, but instead requires the listee to take IR services from NASDAQ's affiliate. These are not the same. NASDAQ's protestation that its proposal is a "fair" response to the NYSE is thus unavailing. *Id.* at 3. A ***fair*** response would be for NASDAQ to offer listees what NYSE offers: complimentary IR services for a fixed period selected from among a number of competing providers.

Central to NASDAQ's submission is the inaccurate insistence that its proposal does not involve anticompetitive tying. This is central because if the "free" service bundling is a tying arrangement it is unlawful as a matter of law, inequitable to consumers and rival IR service providers, and anticompetitive.

Essentially NASDAQ argues that "free" services cannot harm consumers or rivals and cannot involve the sort of economic coercion that is the essential element of unlawful bundling under antitrust laws. But NASDAQ's argument defies common sense and established law.

As a condition for obtaining "free" IDS and other IR services, NASDAQ ***requires*** that the customer also acquire listing services from NASDAQ. That such bundling of a "free" product with a separate product over which the seller has some degree of market power is tying is obvious.[5] In *United States v. Microsoft*, the defendant had bundled Internet Explorer browser software with the Windows operating system at a single licensing fee. There was no charge for Internet Explorer, and in fact the market for browser software then included Microsoft's primary rival, the market leader Netscape, which also did not charge any licensing fee for its browser. The "free" bundling of Internet Explorer into Windows drove Netscape out of business.[6]

It is equally obvious that competing IR service providers cannot compete over the long term against such tying arrangements. Competition in the market for IDS and other IR services cannot be expected to remain robust if NASDAQ is allowed to essentially harness its market power with respect to NASDAQ listings to eliminate meaningful competition. Unlike NASDAQ, independent IDS and other IR service providers cannot use listing fees to cross-subsidize the provision of "free" IDS and other IR services. Independent IDS and other IR service providers therefore cannot compete with NASDAQ's offers of years of free services to companies newly listing on NASDAQ without going bankrupt. And companies looking to save money in a difficult economy cannot afford to pay twice for IDS and other IR services – once as a compelled part of their listing fees and a second time to use an independent provider of their choice.

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[5] *See, e.g., Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 461 (1992); *U.S. v. Microsoft*, 253 F.3d 34, 86-87 (D.C. Cir. 2001) (en banc) (per curiam).

[6] Unlike this case, the *Microsoft* case involved technological innovation, and so the court declined on that basis to apply the *per se* rule against tying. There is no basis here to apply any rule other than the normal *per se* prohibition.

NASDAQ's purported business justification for denying newly listing companies this choice and compelling them to use NASDAQ's captive IR services – that it can thus control quality – is devoid of factual support or, indeed, truth. NASDAQ Nov. 15 Letter at 2. Quality control is pure pretext. There is no shred of evidence offered for the offensive suggestion that Business Wire offers service inferior to NASDAQ. As should not be surprising for a provider that purports to give away years of IDS and other IR services for "free," the truth is exactly the opposite.

One reason NASDAQ's IR services cannot compete on their own, and instead require NASDAQ to attempt to force new listings to use them by offering their services purportedly for "free," is that the quality of NASDAQ's captive IDS and other IR services is not competitive. *See, e.g.*, Reuters, *Lax security at Nasdaq helped hackers*, Nov. 18, 2011 ("A federal investigation into last year's cyber attack on Nasdaq OMX Group found surprisingly lax security practices that made the exchange operator an easy target for hackers ….").[7]

The Commission therefore should not allow NASDAQ's red herring argument about quality to obscure its true intent; by leveraging the significant market power of its control over its exchange, NASDAQ obviously seeks to expand its position in IDS and other IR markets to the detriment of IDS and IR rivals.

And let there be no mistake, the market power here lies with NASDAQ, not Business Wire or PRN. Independent providers have no power to compel companies newly listing on NASDAQ to use their IDS or other IR services. But NASDAQ has the ability, in pitch meetings to sell new listings and as part of regulating companies listed on its exchange, to coerce listed companies to use NASDAQ's own providers even where those companies would otherwise choose another provider based on quality of service.

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[7] The FBI's report of NASDAQ failure to provide adequate security for its IR services is far from the only area in which NASDAQ has failed to ensure that its captive IDS provider, Globe Newswire, meets market standards. For example, while Business Wire has invested millions of dollars in creating its own dedicated and patented wire distribution network to ensure simultaneous and real-time delivery to satisfy the Commission's Regulation Fair Disclosure, NASDAQ has not invested in a proprietary delivery system and thus cannot ensure simultaneous delivery. Instead, Globe Newswire relies on "off-the-shelf" FTP transmissions, which cannot guarantee simultaneity, a critical component of Regulation FD disclosure requirements intended to ensure all market participants have equal access to market-moving information.

Before NASDAQ moved into the IDS market, Business Wire would get the IDS business from more than half of companies newly listing on NASDAQ. And before NASDAQ began tying "free" IDS to a listing, Business Wire wold retain the IDS business of clients when the switched their listings from another exchange to NASDAQ. Now NASDAQ retains for itself 75 percent or more of the IDS business for companies newly listing on NASDAQ – even before implementation of the proposal before the Commission, which would undoubtedly move that figure close to 100 percent. And when clients switch listings from another exchange to NASDAQ, they now feel compelled to use the "free" IDS bundled into the price of the license.[8]

In the November 18 meeting with Staff, one point of discussion was the extent to which there are meaningful entry barriers in the market for IDS and other IR services. Antitrust policy considers ease of entry "only if such entry will deter or counteract any competitive effects of concern." U.S. Dept. of Justice and Federal Trade Comm'n, Horizontal Merger Guidelines § 9 (Aug. 19, 2010). Entry is likely, timely and effective only where a new entrant can be expected to attain sufficient scale to compete effectively within a reasonable time. *Id.*
The recent history in the IDS context is to the contrary. Not only are new entrants unlikely to compete effectively,[9] but competition in the IDS market is likely to shrink if independent providers are foreclosed by NASDAQ from a significant portion of the market to provide IDS to companies listed on NASDAQ.[10]

Moreover, NASDAQ's proposal itself represents a significant entry barrier. A potential entrant faced with competing against NASDAQ's abuse of its vertical integration and competing against "free" offers to a segment of the market would find less risky investments more attractive.

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[8] As illustrated by the information provided in Business Wire's November 15 letter, independent IDS providers continue to lose clients to NASDAQ due to its bundling of "free" IDS with the listing ***even before*** the Commission rules on (let alone approves) NASDAQ's proposed bundling. This week, Business Wire was informed that another long-standing client was switching its IDS to NASDAQ as a result of NASDAQ bundling IDS with the listing.

[9] Most recently, Thomson Reuters Corporation tried to enter the IDS/IR market, but has been unable to gain traction despite its enormous size and wealth.

[10] Recent experience in the UK illustrates the difficult market IDS providers face even absent NASDAQ's anticompetitive proposal, as both NewsLink and Cision (formerly known as Waymaker) have left the IDS market.

Finally, NASDAQ's tortured reading of *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007), mistakenly suggests the Commission should not enforce antitrust law or policy. *Credit Suisse* certainly did not hold, as NASDAQ asserts, that "securities laws preclude the application of antitrust laws" in securities-related markets. NASDAQ Nov. 15 Letter at 4. To the contrary, the Supreme Court explicitly left application of antitrust law and policy to the Commission. In *Credit Suisse*, the Court displaced private antitrust enforcement in the context of unlawful bundling allegations ("laddering") because the Commission has both the power to oversee the same conduct, and "has continuously exercised its legal authority to regulate conduct of the general kind now at issue" which would otherwise fall within the reach of private antitrust enforcement. *Credit Suisse*, 551 U.S. at 277.

Conclusion

As shown above and by the NYSE, NASDAQ demonstrably errs in asserting that Commission approval of NYSE's Rule 907.00 constitutes some sort of ruling on Business Wire's and PRN's concerns or precedent for NASDAQ's proposal.

Rather, the record is clear that SR-NASDAQ-2011-12 is an attempt to obtain approval for what NASDAQ abandoned in 2006-07 and what it promised the Commission just last year it would not do. Consequently, this will be the first time "the Commission ha[s] []ever ruled on the permissibility of an exchange subsidizing the [ancillary IR] services [provided by its own providers] for certain of its listed companies." *Id.* at 1. Business Wire submits that the Commission should not approve such an anticompetitive rule change, and certainly should not take such a dramatic and potentially damaging step without further inquiry.

Accordingly, Business Wire respectfully requests that the Commission either disapprove NASDAQ's SR-NASDAQ-2011-12 or "institute proceedings to determine whether to disapprove," the proposed rule change.

Respectfully Submitted,

Jesse W. Markham, Jr.
Roger Myers

By: _____
Jesse Markham
Co-Chair, Antitrust and Competition Group

cc: David Shillman