GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5306
Tel 202.955.8500
www.gibsondunn.com

Eugene Scalia
Direct: +1 202.955.8206
Fax: +1 202.530.9606
EScalia@gibsondunn.com

October 4, 2011

VIA FACSIMILE AND HAND DELIVERY

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

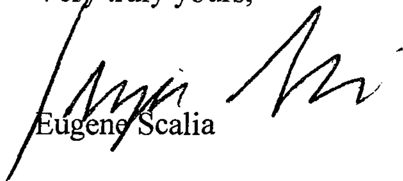
Re: Petition for Review of Order Disapproving NASDAQ's "Platform Pricing" Proposal, Release No. 34-65362, File No. SR-NASDAQ-2011-10

Dear Ms. Murphy:

I am writing as counsel for The NASDAQ Stock Market, Inc. ("NASDAQ"). Please find enclosed the original and three copies of NASDAQ's Petition for Review of the order disapproving NASDAQ's "platform pricing" proposal (Securities Exchange Act Release No. 34-65362, File No. SR-NASDAQ-2011-10). I am simultaneously sending you a copy of this petition for review by way of facsimile telephone number (202) 772-9324.

Any questions concerning this matter can be directed to me as counsel of record. My contact information appears above.

Very truly yours,

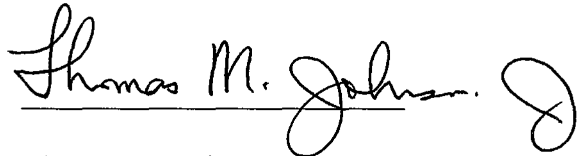


Eugene Scalia

CERTIFICATE OF SERVICE

I, Thomas M. Johnson, Jr., counsel for The NASDAQ Stock Market, Inc., hereby certify that on October 4, 2011, I served copies of the attached Petition for Review of Order Disapproving NASDAQ's "Platform Pricing" Proposal (Release No. 34-65362, File No. SR-NASDAQ-2011-10) on Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, by way of facsimile telephone number (202) 772-9324, and by hand delivering the original and three copies to 100 F Street, N.E., Washington, D.C. 20549-1090.

Dated: October 4, 2011



Thomas M. Johnson, Jr.

UNITED STATES OF AMERICA
BEFORE THE
SECURITIES AND EXCHANGE COMMISSION

In the Matter of the Petition of: The NASDAQ Stock Market, Inc.	File No. SR-NASDAQ-2011-10

PETITION FOR REVIEW OF ORDER DISAPPROVING NASDAQ'S "PLATFORM PRICING" PROPOSAL

Jeffrey S. Davis
John M. Yetter
The NASDAQ Stock Market, Inc.
1100 New York Avenue, N.W.
Washington, D.C. 20005

Eugene Scalia
Amir C. Tayrani
Thomas M. Johnson, Jr.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Date: October 4, 2011

Counsel for Petitioner

TABLE OF CONTENTS

Page

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 7

I. The Proposed Rule Change Is Deemed Approved Because The Commission Did Not Issue An Order Disapproving The Rule Change Within The Period Prescribed By The Exchange Act 7

II. The Division's Disapproval Of Discounts From Prices Previously Approved By The Commission Lacks Evidentiary Support And Ignores Extensive Evidence Of Competition In The Relevant Markets 11

A. The Division's Failure To Consider NASDAQ's Evidence Of "Platform" Competition Among Exchanges Is Arbitrary And Capricious 14

B. The Division's Failure To Consider NASDAQ's Evidence Of Robust Competition In The Markets For Execution Services And Market Data Is Arbitrary And Capricious 16

C. The Division Failed To Put Forward Any Evidence In Support Of Its Conclusion That A Proposed Discount Off Previously-Approved Prices Is Anti-Competitive 19

III. The Division's Order Is Inconsistent With Prior Actions By The Commission Approving Price Differentiation And Similar Bundled Discount Arrangements 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page(s)

Cases

Am. Equity Inv. Life Ins. Co. v. SEC,
613 F.3d 166 (D.C. Cir. 2010) 3

Am. Mining Congress v. EPA,
907 F.2d 1179 (D.C. Cir. 1990) 14

Atl. Richfield Co. v. USA Petroleum Co.,
495 U.S. 328 (1990) 20

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993) 20, 23

Busic v. United States,
446 U.S. 398 (1980) 11

Business Roundtable v. SEC,
647 F.3d 1144 (D.C. Cir. 2011) 3, 12, 13, 15, 16, 18

Cargill, Inc. v. Monfort of Col., Inc.,
479 U.S. 104 (1986) 20

Cascade Health Solutions v. PeaceHealth,
515 F.3d 883 (9th Cir. 2008) 20

Chamber of Commerce v. SEC,
443 F.3d 890 (D.C. Cir. 2006) 21

Chamber of Commerce of the U.S. v. SEC,
412 F.3d 133 (D.C. Cir. 2005) 3, 12

Concord Boat Corp. v. Brunswick Corp.,
207 F.3d 1039 (8th Cir. 2000) 20

Covad Commc'ns Co. v. FCC,
450 F.3d 528 (D.C. Cir. 2006) 14

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009) 25

Indep. Petroleum Ass'n of Am. v. Babbitt,
92 F.3d 1248 (D.C. Cir. 1996) 23

Jicarilla Apache Nation v. U.S. Dep't of Interior,
613 F.3d 1112 (D.C. Cir. 2010) 25

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 14

Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29 (1983) 12, 14, 18

NetCoalition v. SEC,
615 F.3d 525 (D.C. Cir. 2010) 2, 11, 13, 17, 20

Statutes

5 U.S.C. § 706(2) 11

15 U.S.C. § 78d(a) 9

15 U.S.C. § 78d-1(a) 10

15 U.S.C. § 78d-1(b) 10

15 U.S.C. § 78d-1(c) 10

15 U.S.C. § 78k-1(a) 22

15 U.S.C. § 78s(b) 2, 8, 9, 11, 17

Pub. L. No. 111-203, 124 Stat. 1376 (2010) 8

Regulations

17 C.F.R. § 200.10 9

17 C.F.R. § 200.30-3(a) 10

64 Fed. Reg. 70,613 (Dec. 17, 1999) 24

76 Fed. Reg. 4,970 (Jan. 27, 2011) 3

76 Fed. Reg. 6,165 (Feb. 3, 2011) 1

76 Fed. Reg. 44,388 (July 25, 2011) 2

76 Fed. Reg. 59,466 (Sept. 26, 2011) 2

Other Authorities

Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reforms*, 92 Harv. L. Rev. 547 (1979) 22

H. Hovenkamp, Antitrust Law (2d ed. 2006) 23

H. Hovenkamp, *Book Review: The Takings Clause and Improvident Regulatory Bargains*, 108 Yale L.J. 801, 827 (1999) 22

H. Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125 (2000) 23

H. Hovenkamp, Testimony on Robinson-Patman Act, Antitrust Modernization Commission (June 2, 2005), *at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Hovenkamp.pdf (last visited on Apr. 2, 2011) 23

Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change (SEC Sept. 14, 2001) 21

INTRODUCTION

The NASDAQ Stock Market, Inc. ("NASDAQ") hereby challenges an action taken pursuant to delegated authority in order to pursue a NASDAQ rule proposal that lowers prices and enhances competition. Specifically, on September 20, 2011, the Division of Trading and Markets ("Division") of the Securities and Exchange Commission issued an Order disapproving NASDAQ's proposal to lower the fees NASDAQ charges to execute investors' orders to buy and sell shares and also to lower the fees NASDAQ charges for NASDAQ market data. NASDAQ's rule proposal is consistent with prior pricing proposals that the Commission has approved, and it is supported by expert opinions and evidence that the proposal is pro-competitive and beneficial to investors. The Order effectively requires NASDAQ to maintain higher fees, in contravention of the Commission's duty under the Exchange Act to protect investors and promote competition.

NASDAQ proposed to discount the price of its depth-of-book data products and provide liquidity provider credits to customers who purchase a high level of market data for non-professional users and who direct a substantial amount of order flow to the exchange (the "Proposed Rule"). Although the Commission previously approved the non-discounted prices for NASDAQ's market data products, and although courts and commentators widely agree that discounts are pro-competitive, the Division nevertheless suspended the Proposed Rule and instituted proceedings to determine whether NASDAQ's bundled discount was somehow a "tying arrangement [that] may not be consistent with the statutory requirements applicable to a national securities exchange under the [Exchange] Act."[1] After granting itself a 60-day extension, and only three days before the 240-day deadline under the Dodd-Frank amendments

[1] *See* Securities Exchange Act Release No. 34–63796, 76 Fed. Reg. 6,165 (Feb. 3, 2011) (SR–NASDAQ–2011–010) (Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees) ("Suspension Order"), at 4.

to the Exchange Act was set to expire, the Division finally issued an order disapproving the Proposed Rule (the "Order").[2] But the Division's Order arrived too late—the Dodd-Frank amendments provide that a proposed rule "shall be deemed to have been approved" unless the *Commission* itself, rather than the Commission's staff acting pursuant to delegated authority, takes action on the proposed rule within 240 days. 15 U.S.C. § 78s(b)(2)(D). Because the Commission did not disapprove the Proposed Rule within the statutorily prescribed time period, the rule is now "deemed . . . approved."

In any event, despite the time it took the Division to act, the cursory Order contains a mere six pages of actual analysis and is devoid of any economic data or other empirical support for its sweeping conclusion that the supposed "linking of market data fees to execution volume, and the linking of transaction credits to market data purchases, will . . . negatively impact the competition that exists today in these two markets." Order at 13. Moreover, the Division ignored the expert reports and other evidence submitted by NASDAQ that showed that the markets for data and execution services are fluid and robust, and that a voluntary incentive to purchase both services in large quantities therefore cannot be an anti-competitive "tying" arrangement. In fact, NASDAQ's evidence showed that the Proposed Rule is but one of many pricing strategies that exchanges use to compete with one another on a "platform" basis to attract order flow and encourage different types of investors to purchase market data. This is precisely the type of "reasoned" evidence of "competitive forces" that the D.C. Circuit has invited exchanges to submit in support of proposed market data fees. *NetCoalition v. SEC*, 615 F.3d 525, 544 (D.C. Cir. 2010).

---

[2] *See* Securities Exchange Act Release No. 34–63796, 76 Fed. Reg. 59,466 (Sept. 26, 2011) (SR-NASDAQ-2011-010) (Order Disapproving a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees) ("Order"), at 1-2.

By declining to address this evidence, the Division has "failed once again . . . [to] adequately . . . assess the economic effects of a new rule." *Business Roundtable v. SEC*, 647 F.3d 1144, 1148 (D.C. Cir. 2011); *see also Am. Equity Inv. Life Ins. Co. v. SEC*, 613 F.3d 166, 167-68 (D.C. Cir. 2010); *Chamber of Commerce v. SEC*, 412 F.3d 133, 136 (D.C. Cir. 2005). Among other things, by simply asserting that the proposed discount is anti-competitive, the Division has "failed adequately to quantify the . . . costs" of approving the rule, "neglected to support its predictive judgments" about the effects the discount will have in practice, and "failed to respond to substantial [issues] raised by" NASDAQ in support of its discount. *Business Roundtable*, 647 F.3d at 1149.

The D.C. Circuit has stressed the need for agencies to support regulatory actions with reasoned, empirical evidence. The Division has failed to do so. The evidence submitted by NASDAQ amply supports the Proposed Rule as a pro-competitive price reduction that will benefit investors—particularly those who (like retail investors) historically have not purchased depth-of-book data in large quantities.

BACKGROUND

The Proposed Rule offers NASDAQ members two optional discounts on prices for market data and execution services that the Commission has previously reviewed and approved.[3] The discounts would be available to members who, in a particular month, simultaneously (a) purchase a substantial volume of market data for non-professional users (*e.g.*, retail customers), and (b) direct a substantial amount of liquidity to the exchange. Release at 6-7. The Proposed Rule provides three "tiers" or pricing levels to reward members who both utilize market data and execute trades on NASDAQ at specified levels. *See id.* at 5-7 (detailing three-

[3] *See* Securities Exchange Act Release No. 34-63745, 76 Fed. Reg. 4,970 (Jan. 27, 2011) (SR-NASDAQ-2011-010) (Proposed Rule Change to Reduce Market Data Fees and Transaction Execution Fees for Retail Investors) ("Release") at 4-7.

tier pricing structure). NASDAQ's market data and trading services would continue to be available on a non-bundled basis, at prices that have been approved by the Commission as fair and reasonable. No customer would be required to purchase anything. The optional bundled discounts for non-professional users are designed to offer attractive prices to retail investors and to enable NASDAQ to compete more effectively against new exchange competitors and alternative trading systems, including dark pools, which have lower regulatory costs and often attract order flow by providing market data free of charge. *See id.* at 7.

Through the Proposed Rule, "NASDAQ hopes to encourage a 'virtuous circle' in which firms route more liquidity-providing orders to NASDAQ and consume and distribute more data in order to receive the discount, with increased data distribution in turn" increasing the quality and value of the exchange's market data, thereby "encouraging still more liquidity provision." *Id.* at 5. NASDAQ also hopes that the rule will encourage more retail customers to use NASDAQ's depth-of-book products. *See id.*

NASDAQ designated the rule as immediately effective. Shortly after the Proposed Rule was published in the *Federal Register*, the Division temporarily suspended it and instituted proceedings to determine whether the rule should be approved or disapproved. *See* Suspension Order at 2. During the ensuing comment period, the Commission received three comment letters from outside parties. The letter from SIFMA and NetCoalition argued that NASDAQ exercised a "monopoly" over its own market-data products, and demanded that NASDAQ demonstrate that its products were priced at marginal cost (even though the Commission had previously approved the products' non-discounted prices).[4]

---

[4] Letter from SIFMA and NetCoalition to Elizabeth M. Murphy (Mar. 21, 2010) ("SIFMA Comment"), at 2-4.

In support of its Proposed Rule, and in response to the SIFMA/NetCoalition comment letter, NASDAQ submitted a rebuttal comment letter and two expert economic reports, which refuted the argument that it exercised monopoly power and showed that the market for order flow and market data products is robustly competitive.[5] With respect to order flow, the reports demonstrated, among other things, that exchanges compete vigorously for orders even with respect to their own listed stocks (*e.g.*, as of October 2010, only 29.5 percent of trades of NASDAQ-listed stocks occurred on NASDAQ), and that new entrants are capable of capturing a sizable portion of the market with incentives like free market data (*e.g.*, as of June 2008, 10.3 percent of shares in NASDAQ-listed stocks traded on BATS Trading). Ordover/Bamberger Report ¶¶ 12-14. The reports also contain numerous data points showing a robust market for NASDAQ's depth-of-book products—for example, substantial annual turnover in the client base, changes in the number of professional or corporate subscribers, differences in the popularity of different data feeds, and customer sensitivities to changes in price.[6] Accepting the D.C. Circuit's invitation in *NetCoalition*, NASDAQ also submitted evidence showing that competition for order flow exercised a significant constraint on the price of market data fees. For example, NASDAQ presented evidence showing that consumers of NASDAQ's depth-of-book data contribute, at a minimum, approximately 22% of total order flow to the exchange. NASDAQ Comment at 20; *NetCoalition*, 615 F.3d at 540-41. The Order does not address this evidence.

In addition, NASDAQ submitted evidence and analysis from leading antitrust authorities that discounts, including bundled discounts like the Proposed Rule, are pro-competitive absent a

---

[5] *See, e.g.*, Statement of Janusz Ordover and Gustavo Bamberger, File No. SR-NASDAQ-2011-010 (Dec. 29, 2010) ("Ordover/Bamberger Report"), at ¶¶ 23-28; Reply Statement of Janusz Ordover and Gustavo Bamberger, File No. SR-NASDAQ-2011-010 (Apr. 4, 2011) ("Ordover/Bamberger Rebuttal Report"), at ¶¶ 5, 18-19.

[6] *See* Letter from NASDAQ to Elizabeth M. Murphy (Apr. 4, 2011) ("NASDAQ Comment"), at 19-20.

finding of monopoly power or predatory pricing. *See* NASDAQ Comment at 14. NASDAQ also rebutted NetCoalition and SIFMA's arguments that it had to price its market data at marginal cost, by establishing that market data and execution services are "joint products" produced by a single integrated "platform"—*i.e.*, the NASDAQ exchange. In other words, NASDAQ incurs certain fixed costs in setting up its trading platform, which in turn provides a common forum both for order execution and for the collection and sale of market data. NASDAQ then "may choose [among] different pricing strategies and ways of recovering *total costs* and earning a return on [its] investments," such as offering liquidity provider rebates, charging low prices for market data, or charging high prices for accessing posted liquidity. *See* Ordover/Bamberger Report ¶ 23 (emphasis added). Because platforms compete with each other across these multiple, interwoven dimensions, it is "economically sensible" for NASDAQ to provide a discount that turns on the combined volume of market data and execution services that a user consumes. Order at 13. Indeed, other exchanges compete against NASDAQ across these same dimensions, with similar combinations of pricing and discounts across these same interlinked products and services. For example, "BATS Trading . . . has chosen an initial strategy of setting low (or zero) prices for market data, mid-range prices for executions, and relatively high liquidity rebates." Ordover/Bamberger Report ¶ 23. The Order does not address this evidence.

NASDAQ further showed that, as in the Proposed Rule, the Commission has historically permitted price differentiation between different categories of users (*e.g.*, professional vs. non-professional, high volume vs. low volume). NASDAQ Comment at 11-13. Moreover, NASDAQ noted that price differentiation generally enhances competition and benefits consumers because it allows sellers to make calibrated judgments about the appropriate

incentives to provide to the types of buyers who are most likely to respond by increasing their purchases; this, in turn, allows sellers to expand output and compete in ways that would not be practicable if differential pricing were not permitted. *See id.* at 12. Indeed, because NASDAQ has an incentive to offer market data to *all* consumers on competitive terms, it would not (absent regulatory constraints) offer its products to *any* set of consumers at elevated prices that the market is unable to bear. *See id.* at 14.

Despite the overwhelming evidence that NASDAQ submitted regarding the competitive markets for market data and execution services, as well as the absence of evidence suggesting that the proposed discount might somehow eliminate that competition, the Division placed the burden on NASDAQ to disprove that the "incremental step" of providing a bundled discount would "unnecessarily or inappropriately burden competition." Order at 12-13. Without citing or responding to any of NASDAQ's expert testimony or empirical data, the Division summarily concluded that NASDAQ had not met that burden, and that "preventing the linking of market data fees to trade executions will help bolster competitive forces in the area of market data, because exchange market data fees must appeal simultaneously to market participants that trade directly on an exchange and those that do not trade directly on an exchange." *Id.* at 13. The Division further concluded that NASDAQ's prices were "unreasonably discriminatory" because purchasers of the same market data product would pay different prices depending on the amount of order flow that the purchaser directed to the exchange. *Id.* at 15.

ARGUMENT

I. The Proposed Rule Change Is Deemed Approved Because The Commission Did Not Issue An Order Disapproving The Rule Change Within The Period Prescribed By The Exchange Act.

In the Dodd-Frank Act, Congress amended Section 19(b) of the Securities Exchange Act to impose a firm time limit on the period in which the Commission may approve or disapprove a

proposed rule change filed by a self-regulatory organization ("SRO"). Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 916(a), 124 Stat. 1376, 1834 (2010). Where the Commission fails to act within the statutorily prescribed time period, a "proposed rule change shall be deemed to have been approved." 15 U.S.C. § 78s(b)(2)(D). Because the Commission itself—rather than the Commission's staff acting pursuant to delegated authority—did not disapprove NASDAQ's proposed rule change within the period mandated by the Exchange Act, that rule change is now deemed approved.

Section 19(b)(2)(B)(ii) of the Exchange Act provides that "not later than 180 days after the date of publication [of a proposed SRO rule change in the *Federal Register*], the Commission shall issue an order approving or disapproving the rule change" and that the "Commission may extend the period for issuance . . . by not more than 60 days." 15 U.S.C. § 78s(b)(2)(B)(ii). To enforce compliance with this time limit, Congress further provided that a "proposed rule change shall be deemed to have been approved by the Commission, if the Commission does not issue an order approving or disapproving the proposed rule change . . . within the period described in" the statute. *Id.* § 78s(b)(2)(D)(ii).

The Commission failed to disapprove NASDAQ's proposed rule change within the 240-day period prescribed by the Exchange Act. NASDAQ filed its proposed rule change on January 10, 2011, and designated the rule change as immediately effective. The statutorily prescribed time period for the Commission's consideration of the proposed rule change began when the rule change was published in the *Federal Register* on January 27, 2011. Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees, 76 Fed. Reg. 4970 (Jan. 27, 2011); *see also* 15 U.S.C. § 78s(b)(2)(B)(ii). The Division of Trading and Markets, acting pursuant to delegated authority from the Commission,

temporarily suspended the rule change and instituted proceedings to determine whether to approve or disapprove the rule change in an order published in the *Federal Register* on February 3, 2011. Suspension Order at 2. In a notice published on July 25, 2011, the Division of Trading and Markets exercised its delegated authority to extend the time for the Commission to issue an order approving or disapproving the proposed rule change by 60 days, and "designate[d] September 23, 2011, as the date by which the Commission should either approve or disapprove the proposed rule change." Notice of Designation of Longer Period for Commission Act, 76 Fed. Reg. 44,388 (July 25, 2011). On September 20, 2011, the Division, again acting pursuant to its delegated authority from the Commission, issued an order disapproving NASDAQ's proposed rule change. Order at 2.

Although the Division of Trading and Markets exercised its delegated authority to disapprove NASDAQ's proposed rule change within the 240-day period prescribed by the Exchange Act, the Commission itself did not act before that period expired on September 23, 2011. The proposed rule change is therefore "deemed to have been approved by the Commission." 15 U.S.C. § 78s(b)(2)(D). The Exchange Act is clear that the "*Commission*"—not the Commission's staff acting pursuant to delegated authority—"shall issue an order approving or disapproving the proposed rule change" within the statutorily prescribed period. *Id.* § 78s(b)(2)(B)(ii) (emphasis added). Indeed, both the Exchange Act and the Commission's regulations explicitly differentiate between the Commission and the Commission's staff. *See, e.g., id.* § 78d(a) ("There is hereby established a Securities and Exchange Commission (hereinafter referred to as the 'Commission') to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate."); 17 C.F.R. §

200.10 ("The Commission is composed of five members, not more than three of whom may be members of the same political party. . . . The Commission is assisted by a staff . . . .").[7]

To be sure, the Commission has the statutory authority to "delegate . . . its functions" to the Commission's staff, 15 U.S.C. § 78d-1(a), and has delegated to the Division of Trading and Markets the authority to approve or disapprove proposed rule changes filed by SROs. 17 C.F.R. § 200.30-3(a)(12), (57). The Exchange Act further provides, however, that the "Commission shall retain a discretionary right to review the action of any such division of the Commission," 15 U.S.C. § 78d-1(b), and makes clear that "the action of any such division of the Commission . . . shall . . . be deemed the action of the Commission" *only* "[i]f the right to exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission." *Id.* § 78d-1(c); *see also* Commission Rule of Practice 431(e) ("Upon filing with the Commission of a notice of intention to petition for review, . . . an action made pursuant to delegated authority shall be stayed until the Commission orders otherwise . . . .")

Here, NASDAQ submitted timely notice of its intention to petition the Commission for review of the Division of Trading and Markets' order disapproving its proposed rule change and is hereby filing this timely petition for review of that order. *See* Commission Rule of Practice 430(b). The order of the Division of Trading and Markets therefore does not constitute action by the Commission because NASDAQ timely sought review of the Division's exercise of its delegated authority. *See* 15 U.S.C. § 78d-1(c). Despite NASDAQ's timely filing, however, the statutorily prescribed period for the Commission to "issue an order approving or disapproving

---

[7] *See also* 17 C.F.R. § 200.30-3(a)(57) (authorizing the Division of Trading and Markets "to extend for a period not exceeding 240 days from the date of publication of notice of the filing of a proposed rule change pursuant to Section 19(b)(1) of the Act, 15 U.S.C. 78s(b)(1), the period during which the *Commission* must issue an order approving or disapproving the proposed rule change") (emphasis added).

the rule change" (15 U.S.C. § 78s(b)(2)(B)(ii)) has already expired because the Division of Trading and Markets did not issue its disapproval order until September 20, 2011, and thereby exhausted 237 of the 240 days available for the Commission to issue a decision. In the absence of a timely decision by the Commission approving or disapproving NASDAQ's proposed rule change, that rule change was "deemed to have been approved by the Commission" upon the expiration of the 240-day statutory period on September 23, 2011. 15 U.S.C. § 78s(b)(2)(D).[8]

II. The Division's Conclusion That Discounts From Prices Previously Approved By The Commission Are Anti-Competitive Lacks Evidentiary Support And Ignores Extensive Evidence Of Competition In The Relevant Markets.

Even if the Proposed Rule were not already "deemed . . . effective," the Division erred when it concluded that the rule is inconsistent with Exchange Act requirements that fees be fair and reasonable and not unreasonably discriminatory. The Division's Order is arbitrary and capricious and could not plausibly survive judicial review. *See* 5 U.S.C. § 706(2).

In *NetCoalition*, the D.C. Circuit acknowledged that, in determining whether fees are fair and reasonable under the Exchange Act, an exchange may rely on the "'total platform' theory" of competition that NASDAQ advances here. 615 F.3d at 542 n.16. Under this theory, "market data and trade executions are 'joint products' with 'joint costs' at each trading 'platform,' or exchange." *Id.* "Although an exchange may price its trade execution fees higher and its market data fees lower (or vice versa), because of 'platform' competition the exchange nonetheless receives the same return from the two 'joint products' in the aggregate." *Id.* Thus, if an

[8] The Exchange Act provides that the Commission's discretionary review of delegated actions may occur "within such time and in such manner as the Commission by rule shall prescribe." 15 U.S.C. § 78d-1(b). That statutory authority to establish internal procedural rules cannot displace the Exchange Act's explicit requirement that the Commission "issue an order approving or disapproving [a] rule change" within 240 days of its publication, 15 U.S.C. § 78s(b)(2)(B)(ii), because it is well-settled that "a more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980).

exchange can provide evidence of robust competition between platforms for order flow and market data, the Commission can presume that the fees charged for either product in isolation reflect fair and reasonable market prices. *See id.* at 539-41. That is precisely what NASDAQ has done here: It submitted expert reports and other evidence to show that there is a "reasoned basis" to believe that "competitive forces" act as an adequate constraint on its prices. *Id.* at 544.

Although the Commission itself advanced the "platform theory" of competition before the D.C. Circuit in *NetCoalition* to defend the reasonableness of market data fees—where it relied on the same experts NASDAQ used here (*id.* at 542 n.16)—the Division did not address the relevance of this theory, or of NASDAQ's evidence of competition, in the Order. That is arbitrary and capricious.

Under the Administrative Procedure Act, agencies have "a statutory obligation to determine as best [they] can the economic implications of [a] rule." *Chamber of Commerce*, 412 F.3d at 143; *see also Business Roundtable*, 647 F.3d at 1148-49. An agency does not meet this obligation if it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made," has "entirely failed to consider an important aspect of the problem," or has "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted); *see also Business Roundtable*, 647 F.3d at 1148, 1151-52.

The Division's Order does not satisfy these standards for agency action. First, the Division ignored NASDAQ's evidence that it is pro-competitive to "bundle" discounts for execution services and market data because exchanges compete vigorously on a platform basis

for consumers in both of these closely-connected markets. The evidence shows that, rather than impairing competition, these discounts are driven by, and are an integral part of, competition for these interlinked products. Second, the Division failed to consider additional evidence submitted by NASDAQ that showed robust competition among exchanges for market data and execution services, which alleviates any credible concern that NASDAQ's prices (discounted or not) could harm competition. This evidence satisfied any burden that NASDAQ may have had to show that the existence of "competitive forces" constrained the prices at which it offers its products. *NetCoalition*, 615 F.3d at 544.

Third, the Division did not cite any counterbalancing evidence of its own that could support the conclusion that a discount off previously-established, Commission-approved prices is unfair or unreasonable. Because the Division "relied upon insufficient empirical data," its conclusion is unsupported and cannot stand. *Business Roundtable*, 647 F.3d at 1150. The lack of support for the Division's position is particularly glaring in light of well-established principles developed in the antitrust context, which show that price discounting is a desirable aspect of the competitive process, which benefits competition and consumers, and should only be prohibited in carefully circumscribed conditions that are not present here—such as cases of predatory pricing or monopoly power.

The evidence here shows the opposite of monopoly power—namely, that the proposed discount is a pro-competitive response to recent efforts by new exchanges and other alternative trading venues to attract order flow by providing their market data at little or no cost. NASDAQ's response to competitive pressure is a healthy sign of a well-functioning market, not an exercise of monopoly power. Therefore, in the event the Commission concludes that the

Proposed Rule has not already been deemed approved, the Commission should set aside the Division's Order and approve the Proposed Rule.

A. The Division's Failure To Consider NASDAQ's Evidence Of "Platform" Competition Among Exchanges Is Arbitrary And Capricious.

The Division's repeated failure to address evidence that NASDAQ submitted in support of the Proposed Rule is by definition arbitrary and capricious. *See State Farm*, 463 U.S. at 43. For example, although the Division referred in passing to NASDAQ's description of "platform pricing," it did not meaningfully address the critical point that the price of market data cannot be evaluated independently of the price of providing liquidity because exchanges make adjustments to both prices in an effort to recover the fixed, common costs associated with creating and running a trading platform. *See, e.g., Am. Mining Congress v. EPA*, 907 F.2d 1179, 1190-91 (D.C. Cir. 1990) ("[T]he agency's failure to respond to . . . specific challenges in the record is fatal here, since 'the points raised in the comments were sufficiently central that agency silence . . . demonstrate[s] the rulemaking to be arbitrary and capricious.'"); *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (when responding to rulemaking comments, an agency "must respond in a reasoned manner to those that raise significant problems").

The Division asserts, without evidence, that the Proposed Rule would hurt competition because it "would allow [NASDAQ] to use significant discounts on fees for its market data products as an inducement to attract order flow rather than relying on the quality of its transaction services and the level of its transaction fees to compete for orders." Order at 13-14. As noted above, however, attracting customers by offering lower prices is not an impairment of competition—it is the essence of competition. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("cutting prices in order to increase business often is the very essence of competition."). There is no sound basis in the evidence or in economic theory to

suggest that the impact on competition is any different simply because NASDAQ is offering a discount to attract customers that is based on its recognition that two joint products are interlinked. Just as other exchanges compete against NASDAQ on a "platform" basis, competition and consumers will benefit if NASDAQ is able to offer a competitive response.

As the evidence shows, market data and execution services are joint byproducts of running a trading platform. *See* Ordover/Bamberger Report ¶ 19. As order flow increases, so does the quantity and quality of market data, which in turn encourages further trading on the exchange. Thus, NASDAQ's proposed bundled discount "recognizes the value of liquidity provision and data distribution in creating the conditions that further encourage the creation of the trading platform's products." Release at 10. And, as NASDAQ showed, trading platforms use both market data fees and execution fees (among other things) as competitive tools to compete with each other to attract order flow. *See* Ordover/Bamberger Report ¶ 23. Because market data and execution services are joint products, it is inappropriate to price one or the other at marginal cost; rather, the joint costs of running NASDAQ's trading platform must be taken into account. *See id.* at ¶ 49.

The Division's Order, however, assumes the opposite—that the markets for data and order flow are unrelated and that it therefore would somehow distort the market to provide a discount on one based on the interrelationship of these products. That assumption cannot be squared with the Commission's position in *NetCoalition*, where it advanced the "platform" competition theory, or with the Division's duty to analyze and respond to relevant data in the record. By "ducking serious evaluation" of NASDAQ's "platform" approach to competition, the Division "acted arbitrarily." *Business Roundtable*, 647 F.3d at 1152.

B. The Division's Failure To Consider NASDAQ's Evidence Of Robust Competition In The Markets For Execution Services And Market Data Is Arbitrary And Capricious.

As *NetCoalition* counsels, NASDAQ supported its "platform pricing" theory with substantial evidence that competition among platforms for consumers of execution services and market data is robust. Again, the Division acted arbitrarily by failing to consider this evidence of competitive constraints in its Order. *See Business Roundtable*, 647 F.3d at 1155-56.

The Division does not dispute that competition between exchanges for order flow is "intense." Order at 13. NASDAQ also submitted extensive evidence to show that the same is true of competition for market data.

For example, there is substantial turnover in customers of NASDAQ's depth-of-book products. At the end of 2009, NASDAQ had 145 clients that purchased depth-of-book data for internal purposes.[9] In 2010, NASDAQ lost 68 of those clients (*i.e.*, 47 percent of its year-end customer count) and added another 179. Ordover/Bamberger Rebuttal Report at ¶ 12; Hopkins Statement at ¶ 7. During 2009, NASDAQ lost 38 clients and added another 60. *See id.* The fluidity of the client base for NASDAQ's products shows that it does not exercise "monopoly power" over market data and that its clients are not captive customers.

There is also variation in subscription levels among users of NASDAQ's data. For example, NASDAQ offers separate subscriptions for depth-of-book information for stocks listed on NASDAQ ("Tape C" information) and for stocks listed on the NYSE and American Stock Exchange ("Tape A/B" information). NASDAQ showed that it has about 20 percent more subscribers for its Tape C than for its Tape A/B depth-of-book product, even though the tape A/B product is less expensive, and even though as of February 2011 NASDAQ accounted for

[9] Ordover/Bamberger Rebuttal Report at ¶ 12; Statement of Randall Hopkins of NASDAQ Stock Market, Inc. ("Hopkins Statement") at ¶ 7 (Apr. 4, 2011).

11.9 percent of trading in NYSE-listed stocks. *See id.* These differences in subscription levels show that different market-data consumers have different preferences and thus are not *required* to purchase NASDAQ data—as one might expect if NASDAQ were a monopolist.

NASDAQ also submitted evidence that users of its depth-of-book data products are sensitive to changes in price. For example, in October 2003, NASDAQ reduced the price for its "TotalView" depth-of-book product from $150 to $70 per month per subscriber (for professional investors). *See* Ordover/Bamberger Rebuttal Report at ¶ 14; Hopkins Statement at ¶ 9. The result was a marked increase in subscriptions to TotalView: From 1,345 professional subscribers in August 2003 to 6,767 in January 2004, an increase of a factor of more than five. *See id.* This increase demonstrates that a large number of potential buyers who were unwilling to purchase TotalView at $150 per month were willing at the price of $70 per month. *See id.* This is precisely the type of evidence of competition that the D.C. Circuit found lacking in *NetCoalition*—"the number of potential users of the data [and] how they might react to a change in price." 615 F.3d at 542.

The Division does not consider the relevance of *any* of this data in analyzing whether NASDAQ's proposed bundled discount is competitive. Nor does it acknowledge the congressional presumption—embodied in the Dodd-Frank amendments authorizing immediately effective fees for market data and other products (15 U.S.C. § 78s(b)(3)(A))—that exchanges' pricing decisions are constrained by competitive forces and should not be impaired by excessive regulatory scrutiny or rules. To the contrary, the Division simply asserts that "competition in the market for depth-of-book market data is significant, but . . . not as intense as competition for transaction services." Order at 13. The only support for this statement that the Division musters is the "difficulty of attracting a sufficiently large volume of orders to generate valuable market

data streams that a wide range of market participants will want to obtain." *Id.* But the very purpose of the proposed discount is to attract additional order flow to the exchange—which in turn will increase the quantity and value of market data. It is certainly arbitrary and capricious to disapprove a rule that will enhance the very competition that the Division laments does not presently exist.

Moreover, the Division offers no support whatsoever for the notion that competition for depth-of-book data—which is concededly "significant"—is somehow insufficient to constrain NASDAQ's pricing behavior. *See Business Roundtable*, 647 F.3d at 1150 (Commission action was arbitrary and capricious where it "relied upon insufficient empirical data"). To the contrary, NASDAQ's evidence shows that this data is very valuable to certain types of investors, and that NASDAQ has an incentive to keep its prices competitive to entice new entrants to the market (e.g., retail investors) to purchase it. Moreover, investors contribute sufficient order flow to the exchange to *constrain* the price of market data—because an exchange would not set its market data fees so high as to discourage investors from trading on that exchange. In particular, NASDAQ conservatively estimated that at least 22% of its order flow is derived from customers who purchased its depth-of-book products—plainly enough to constrain the price that NASDAQ can charge for its market data. NASDAQ Comment at 20-21 (citing Hopkins Statement at ¶ 6). Because the Division's assessment of market-data competition conflicts with (and ignores) this record evidence, its decision cannot stand. *State Farm*, 463 U.S. at 43.

The Division also argues that other exchanges will not be able to "respond" to NASDAQ's proposed discount because "[n]ew exchanges generally do not have established market data streams and their market data is often free"; therefore, "they will not have established market data streams they can offer at reduced rates to entice participants to execute

trades on their new platforms." Order at 14. The fact that new exchanges offer free data, however, is one of the reasons why those exchanges have been extremely successful at enticing order flow away from traditional exchanges like NASDAQ. For example, BATS Trading began trading on January 27, 2006, and by June 2008, it accounted for 7.5 percent of trading in NYSE-listed stocks and 10.3 percent of trading in NASDAQ-listed stocks. *See* Ordover/Bamberger Report ¶ 14. Indeed, the proposed discount is a response *by NASDAQ* to that competitive pressure: "The proposal is . . . a competitive response to other trading venues that have used price discounts to entice firms to shift order flow and data consumption, and that may continue to do so in the future." Release at 3; *see also* Ordover/Bamberger Report ¶ 23. When one competitor offers a competitive discount in response to the low price (or zero price) of another competitor in order to retain or attract customers, that is the essence of competition. The Division should not penalize NASDAQ for responding to market signals by lowering its prices.

The BATS Trading model, which consists of "setting low (or zero) prices for market data, mid-range prices for executions, and relatively high liquidity rebates," is only one of many "different pricing strategies and ways of recovering total costs and earning a return on [an exchange's] investments." Ordover/Bamberger Report ¶ 23. That is the essence of "platform" competition—allowing exchanges to respond to market pressures by using the full panoply of competitive tools at their disposal to recover costs and make a profit. The Division acted arbitrarily by ignoring the wealth of evidence that NASDAQ submitted to support this theory.

C. The Division Failed To Put Forward Any Evidence In Support Of Its Conclusion That A Proposed Discount Off Previously-Approved Prices Is Anti-Competitive.

The Division not only failed to consider NASDAQ's evidence of competition in the markets for execution services and market data; it also failed to provide any support for its contrary conclusion that NASDAQ's proposed discounts are somehow anti-competitive.

As an initial matter, the Division ignores the fact that, as the D.C. Circuit noted in *NetCoalition*, the Commission has already approved the non-discounted prices of NASDAQ's depth-of-book products. 615 F.3d at 537. The reasonableness of NASDAQ's fees, in other words, has already been determined by the Commission and is not at issue. All that is at issue is the reasonableness of NASDAQ's proposed *discount* on its previously-filed, currently effective fees. If the Division's order stands, it would not make market data more affordable for *any* market participant. It would simply mean that *all* market participants would pay NASDAQ's non-discounted fees.

The Commission therefore bears the heavy burden of demonstrating, in the face of NASDAQ's evidence of robust competition for market data and order flow, that a discount on concededly reasonable and currently effective fees is anti-competitive. The Commission has not met that burden here.

As NASDAQ explained in its comment letter, courts have been wary of claims that offering discounts constitutes monopolistic or anticompetitive behavior.[10] To the contrary, "the Supreme Court has urged great caution and a skeptical eye" when dealing with a claim that a firm has unfairly discounted its products. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1060 (8th Cir. 2000) (internal quotation marks omitted). That is because "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). For the same reason, courts have also deemed "bundled" discounts, like the

[10] *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("discouraging a price cut and forcing firms to maintain supracompetitive prices . . . does not constitute sound antitrust policy"); *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) ("To hold that the antitrust laws protect competitors from the loss of profits due to . . . price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." (internal quotations and citations omitted)).

Proposed Rule, to be pro-competitive. *See, e.g.*, *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896 (9th Cir. 2008) ("we should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a rule that discourages legitimate price competition"). The only circumstance in which courts have found that a bundled discount might harm competition is when it was "offered by firms holding or on the verge of gaining monopoly power in the relevant market." *Id.* at 897.

As shown above, the Division has not even addressed the evidence in the record that shows that NASDAQ is not a monopolist and that competition for market data is robust. Nor has it provided any evidence to support its contrary view that NASDAQ's proposed discount is somehow predatory or otherwise anti-competitive. By failing to provide this analysis, and to substantiate that analysis with factual support, the Division acted arbitrarily. *See, e.g.*, *Chamber of Commerce v. SEC*, 443 F.3d 890, 905 (D.C. Cir. 2006) (holding that the public was entitled to notice of and an opportunity to comment on the fact that the agency's analysis relied on certain materials).

Ultimately, the Division's Order is an attempt to remove one particular "inducement" from the quiver of a trading platform that is looking to compete with other exchanges for order flow—namely, offering a discount on market data. Order at 14. Regulation, however, is a blunt instrument to attempt to cure a supposed defect of the free market by prohibiting one of several avenues by which private entities can sell and market their products. The Division's prohibition on bundled discounts ultimately amounts to a form of price control that is unlikely to do a better job at promoting competition than the price signals provided by the free market.[11] The Division

[11] *See, e.g.*, Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change, at § VII.D.3 (SEC Sept. 14, 2001) ("[T]he 'public utility' cost-based ratemaking approach . . . is resource-intensive, involves arbitrary judgments on appropriate costs,

has failed to address, evaluate, or rebut NASDAQ's unrefuted evidence of competition in the markets for market data and execution services. That was arbitrary and capricious. The evidence in the record demonstrates that these markets are robust, and the Division has not met the high hurdle of showing that NASDAQ's proposed discount is anti-competitive. Therefore, in the event the Commission concludes the Proposed Rule has not been deemed approved, the Commission should set aside the action by delegated authority and approve the Proposed Rule.

III. The Division's Order Is Inconsistent With Prior Actions By The Commission Approving Price Differentiation And Similar Bundled Discount Arrangements.

The Division also disapproved the Proposed Rule because it concluded that the proposed discount was somehow "unfairly or unreasonably discriminatory." Order at 14; 15 U.S.C. § 78k-1(a)(1)(C)(i)-(iv). In particular, the Division argued that it "is concerned that linking market data fees to transaction volume would essentially allow NASDAQ to charge significantly higher fees for market data to market participants that choose to trade at other exchanges, by providing discounts to those market participants that provide order flow to NASDAQ." Order at 15. This is, in effect, a repackaging of the Division's argument that the Exchange Act prohibits NASDAQ from providing a bundled discount. For the reasons explained above, that argument fails because there is nothing inherently unfair or discriminatory about offering an incentive to certain customers who choose to purchase both a large quantity of market data and direct a large amount of order flow to an exchange.

---

and creates distortive economic incentives."); *see also* Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 Harv. L. Rev. 547, 565 (1979) ("[I]nsofar as one advocates price regulation . . . as a 'cure' for market failure, one must believe the market is working very badly before advocating regulation as a cure. Given the inability of regulation to reproduce the competitive market's price signals, only severe market failure would make the regulatory game worth the candle."); H. Hovenkamp, *Book Review: The Takings Clause and Improvident Regulatory Bargains*, 108 Yale L.J. 801, 827 (1999) (noting that "the many defects of cost-of-service ratemaking have been a standard if not completely uncontroversial part of the literature for well over three decades").

In addition, as NASDAQ demonstrated in its Release and comment letter, the Division's conclusion that differential pricing violates the Exchange Act conflicts with sound economic principles and prior Commission precedent. When an agency acts inconsistently, it acts arbitrarily and capriciously. *E.g.*, *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.").

NASDAQ explained in detail in its comment letter that differential pricing is pro-competitive and beneficial to consumers. By enacting the antitrust laws, the Supreme Court has explained, "Congress did not intend to outlaw price differences that result from or further the forces of competition." *Brooke Group Ltd.*, 509 U.S. at 220. Similarly, Professor Herbert Hovenkamp, co-author of the leading treatise on antitrust law, has stated that differential pricing "resulting from an upstream firm's unilateral pricing decisions must enjoy a very strong presumption that [it is] socially beneficial and not 'anticompetitive' in any economically acceptable sense of that term."[12] Thus, for example, a supplier should be able to reward more aggressive dealers by giving them price discounts and rebates to increase the competitiveness of its distribution system and volume of sales. Likewise, sellers should be able to offer volume discounts to introduce their products to new customers or to reward distributors for high sales and aggressive promotion of their products.[13] Indeed, a prohibition against all differential pricing would harm buyers because sellers would likely respond by not making any price cuts at all to avoid the cost of extending them to all buyers, which would in effect establish an artificial price

---

[12] H. Hovenkamp, Antitrust Law ¶ 2342b (2d ed. 2006); H. Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 127 (2000).

[13] *Id.*; H. Hovenkamp, Testimony on Robinson-Patman Act, Antitrust Modernization Commission, at 8 (June 2, 2005), *at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Hovenkamp.pdf (last visited on Apr. 2, 2011).

floor for the product.[14] The Division provides no authority or factual support for its contrary conclusion—that it would somehow "bolster competitive forces" if "market data fees must appeal simultaneously to market participants that trade directly on an exchange and those that do not trade directly on an exchange." Order at 13.

Moreover, the Commission itself has approved of differential pricing on numerous prior occasions. For example, it has approved "volume tiers" for equity and options pricing that provide discounts to an exchange's heaviest liquidity providers. It has also acknowledged that exchanges can offer different prices to "particular classes of subscribers" based on market conditions such as "their economic circumstances and their need for and use of . . . information."[15] It has even approved or cited favorably to differential pricing between retail and non-retail investors, including with respect to the *same depth-of-book products* at issue here.[16] Far from undermining the purposes of the Exchange Act, the Commission found that such differential pricing "provide[s] an opportunity for many investors to have access to the enhanced data provided by these services, which should help to increase transparency."[17]

Finally, earlier this year, the Commission approved a bundled discount substantially similar to the Proposed Rule. The Chicago Board Options Exchange ("CBOE") proposed a rule whereby one of its members would receive a sliding-scale discount in transaction fees charged for trades of CBOE's singly-listed options products based on the volume of multiply-listed

---

[14] H. Hovenkamp, Antitrust Law ¶ 2340b.

[15] *See* Concept Release, Regulation of Market Information Fees and Revenues, 64 Fed. Reg. 70,613, 70,630 (Dec. 17, 1999).

[16] *See* Order Approving Proposed Rule Change Relating to Fees for Nasdaq Entitlement Packages, 67 Fed. Reg. 70,471, 70,472 (Nov. 22, 2002); *see also* Concept Release, 64 Fed. Reg. at 70,630-31.

[17] Order, 67 Fed. Reg. at 70,472.

options that the member traded during a given month.[18] CBOE explained that it was proposing this bundled discount to "allow the Exchange to remain competitive with similar programs at other exchanges."[19] In the event the Commission concludes that the Proposed Rule has not already been approved, NASDAQ's bundled discount should be approved by the Commission for the same reason—its purpose is to remain competitive with alternative trading platforms and other exchanges by providing an incentive for purchasers of market data to direct order flow to the exchange.

The Division does not mention these other rules, nor does it explain its sudden departure from its past positions. That is arbitrary and capricious. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (an agency must "display awareness that it is changing position," and "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books"); *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) ("We have held that [r]easoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent, and an agency that neglects to do so acts arbitrarily and capriciously.") (internal quotation marks omitted). Rather than persist down this misguided path, the Commission should recognize that the Proposed Rule provides a legitimate incentive for NASDAQ's best customers to purchase market data on behalf of retail investors and direct order flow to the exchange.

---

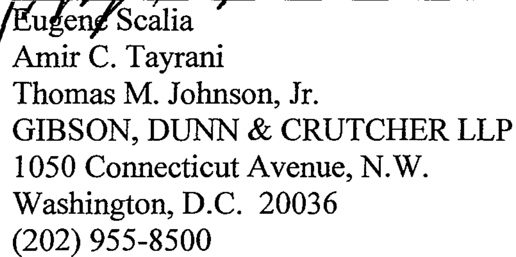
[18] *See* Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Exchange Fees for Fiscal Year 2011, Release No. 34-63701; File No. SR-CBOE-2010-116 (Jan. 11, 2011).

[19] *Id.* at 14.

CONCLUSION

For the foregoing reasons, NASDAQ's "platform pricing" proposal is deemed approved because the statutorily prescribed period for the Commission to act has expired. In the alternative, NASDAQ requests that, in the event the Commission concludes that the proposal has not been deemed approved, the Commission review and set aside the Division's order and approve the proposal because it is consistent with the requirements of the Exchange Act.

Respectfully submitted,



Eugene Scalia
Amir C. Tayrani
Thomas M. Johnson, Jr.
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Jeffrey S. Davis
John M. Yetter
The NASDAQ Stock Market, Inc.
1100 New York Avenue, N.W.
Washington, D.C. 20005

Date: October 4, 2011