



February 6, 2012

Via Electronic Mail (rule-comments@sec.gov)

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

COMMENT LETTER AND PETITION FOR SUSPENSION AND DISAPPROVAL

Re: Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Fees for the NYSE Arca Integrated Data Feed, Exchange Act Release No. 66128, File No. SR-NYSEArca-2011-96 (Dec. 28, 2011) (the “Notice”).

Dear Ms. Murphy:

SIFMA¹ and NetCoalition² appreciate the opportunity to comment on the above-captioned Notice, under which NYSE Arca, Inc. (the “Exchange”) proposed fees for the NYSE Arca Integrated Data Feed, which consists of NYSE Arca’s BBO, NYSE Trades, and NYSE ArcaBook data products.³

The proposed rule change purported to become effective upon filing with the U.S. Securities and Exchange Commission. As explained below, and because the Exchange’s actions are inconsistent with the United States Court of Appeals for the District of Columbia Circuit’s

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

² NetCoalition is the public policy voice for some of the world’s most innovative companies on the Internet. NetCoalition represents the interests of Internet and technology companies, including Amazon.com, eBay, Google, Bloomberg L.P., IAC/Interactive, and Yahoo!.

³ *Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Fees for the NYSE Arca Integrated Data Feed*, Exchange Act Release No. 66128; File No. SR-NYSEArca-2011-96; 77 Fed. Reg. 2331 (Jan. 10, 2012).

opinion in *NetCoalition v. SEC*,⁴ we respectfully request that the Commission suspend the rule change and institute proceedings to disapprove.

A. The Exchange’s “Platform Competition” Theory Is Unsupported By Substantial Evidence.

The Notice simply reiterates the Exchange’s platform theory of competition (in which supposed competition among exchanges for listings and order flow purportedly results in the selling of market data at a “fair and reasonable” rate) in concluding that the proposed rule will not impose any burden on competition that is not necessary or appropriate in furtherance of the Exchange Act.⁵ The United States Court of Appeals for the District of Columbia Circuit rejected the similar “order flow” theory of competition in *NetCoalition* and the Commission has never found that “platform competition” in fact precludes the Exchange from charging supracompetitive fees for its market data. In fact, as discussed in the attached report of Dr. David Evans,⁶ the “platform competition” theory is fundamentally flawed and thus an inappropriate ground for NYSE Arca to rely upon in submitting the Notice, or for the Commission to rely upon in allowing the Notice to remain effective.

B. The Exchange’s Unsubstantiated Recitation Of “Alternatives” To The Integrated Data Is Contrary To The D.C. Circuit’s Decision In *NetCoalition*.

The Exchange notes that “[t]he existence of alternatives to the NYSE Arca Integrated Data Feed, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources . . . ensure that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives.”⁷ The Exchange fails to support this conclusion with any evidence. Indeed, under the D.C. Circuit’s decision in *NetCoalition*, a market data provider must evaluate the number of potential users of its data and assess how those users might react to changes in the price of the data.⁸ Moreover, the *NetCoalition* Court clearly held that core data “is not a ‘substitute’ for depth-of-book data.”⁹ As the Court found in *NetCoalition*, “only NYSE Arca offers access to [security-specific] limit orders included in its depth-of-book product” and as such, “the risk that NYSE Arca could exercise market power appears to be elevated.”¹⁰ The Commission should not permit a rule change to remain effective when it ignores such clear precedent.

⁴ 615 F.3d 525 (D.C. Cir. 2010).

⁵ 77 Fed. Reg. at 2333.

⁶ See *Response to Ordoover and Bamberger’s Statement Regarding Nasdaq’s Proposed Rule Change Concerning The Pricing of Depth-of-Book Market Data* (March 21, 2011) (attached hereto as Exhibit 1).

⁷ 77 Fed. Reg. at 2332.

⁸ 615 F.3d at 542-43.

⁹ 615 F.3d at 543.

¹⁰ 615 F.3d at 538.

C. Charging A Premium For The Integrated Data Feed Disadvantages Certain Investors Who Must Rely On The “Core” Data Distributed Through The Consolidated Tapes.

The Exchange has previously stated that the Integrated Data Feed will provide a “lower latency solution to those vendors and subscribers that are interested in receiving market data as quickly as possible.”¹¹ The Exchange did not explain which vendors and subscribers it was referring to, why faster data is important to them, and on what basis the Exchange believed there are investors who are satisfied with slow data. Faster data will advantage certain investors over others. Vendors and subscribers who can afford the Integrated Data will buy it because it gives them a trading advantage over those who cannot afford to purchase it.

Charging a premium for the Integrated Data Feed leaves those who cannot afford it (the vast majority of investors) with access only to the slower data feeds. As such, the Exchange’s rule does not “promote a free and open market” as the Exchange asserts.¹² In fact, advantaging certain investors over others through faster market data (based on ability to pay) contravenes Section 6(b)(8) of the Exchange Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”¹³ Likewise, charging different prices for similar data contravenes the anti-discrimination provisions of Sections 6(b) and 11A of the Exchange Act and Rule 603(a) thereunder.¹⁴

The Commission should suspend an exchange rule that burdens competition and discriminates between or among purchasers of the exchange’s products. As the Commission is aware, Rule 700(b)(3) of its Rules of Practice states that “an exchange must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder” and that the “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”¹⁵ The Exchange has not met that burden here. The Commission should temporarily suspend the proposed rule and commence proceedings to consider disapproval in light of these important issues.

Finally, SIFMA and NetCoalition have repeatedly raised with the Commission important issues regarding market data fees. The Commission should not permit unsubstantiated fee filings to remain effective while the follow-up *NetCoalition* matter remains pending before the D.C. Circuit. The Commission should suspend the Notice and future similar rule changes until the D.C. Circuit renders a final opinion in that case.

¹¹ *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Offering a Market Data Product to Vendors and Subscribers That Combines Three Existing Market Data Feeds as Well as Additional Market Data From the Exchange Into One Integrated Product, the NYSE Arca Integrated Data Feed*, Release No. 34-65669; File No. SR-NYSEArca-2011-78; 76 Fed. Reg. 69311, 69312 (Nov. 8, 2011).

¹² 76 Fed. Reg. at 69312.

¹³ 15 U.S.C. § 78(b)(8).

¹⁴ 15 U.S.C. § 78f(b); 15 U.S.C. 78k-1(a)(1)(C)(i)-(iv); 17 CFR 242.603(a).

¹⁵ 17 C.F.R. 201.700(b)(3).

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

Respectfully submitted,

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EXHIBIT 1