



August 28, 2014

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

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Kevin M. O’Neill, Deputy Secretary

COMMENT LETTER AND PETITION FOR DISAPPROVAL

Re: Notice of Filing Proposed Rule Change to Establishing the NYSE Best Quote & Trades Data Feed, Release No. 34-72750; File No. SR-NYSE-2014-40

Dear Mr. O’Neill:

SIFMA¹ appreciates the opportunity to comment on the above-captioned notice (the “Notice”), under which New York Stock Exchange LLC (the “Exchange”) proposes to establish a new market data product called NYSE Best Quote & Trade (“NYSE BQT”).²

The U.S. Securities and Exchange Commission (the “Commission”) shall by order approve or disapprove such proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved in accordance with Section 19(b)(2)(B) of the Securities Exchange Act of 1934, as amended (the “Exchange Act”).³ For the reasons set forth below, and because the Exchange’s actions are inconsistent with the decisions of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*,⁴ we respectfully petition the Commission to disapprove the proposed rule change.⁵

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 Notice of Filing of Proposed Rule Change Establishing the NYSE Best Quote & Trades Data Feed, Release No. 34-72750; File No. SR-NYSE-2014-40; 79 Fed. Reg. 46494 (August 8, 2014).

³ See 15 U.S.C. § 78s(b)(2)(B).

⁴ *NetCoalition v. SEC*, 715 F.3d 342 (D.C. Cir. 2013); (“*NetCoalition IP*”); 615 F.3d 525 (D.C. Cir. 2010) (“*NetCoalition P*”).

⁵ 15 U.S.C. § 78s(b)(2)(B).

This is not the first time the Exchange and other national securities exchanges have filed proposed rule changes for market data products that do not comport with the standards the Court established in the *NetCoalition* cases. The Commission should disapprove of this and other similar unlawful market data product rule changes proposed by self-regulatory organizations (SROs). The Commission staff should not be approving such rule change filings if on their face they are unlawful. The rule change at issue here is unlawful because it is based on invalid grounds, omitted cost data, and otherwise failed to comport with the Exchange Act as interpreted by the Court in *NetCoalition I*, and reaffirmed in *NetCoalition II*. We therefore urge the Commission to disapprove this and other similar rule changes.

A. The Exchange Attempts to Evade the Proposed Rule Change Process.

The Exchange argues repeatedly that it proposes to offer the NYSE BQT data feed in a capacity similar to that of a “vendor.”⁶ The Exchange asserts that its “vendor” capacity eliminates the Commission’s right to review the data feed under the Exchange Act and it “reserves the right to argue, with respect to the NYSE BQT data feed or any other product, that there is no requirement for a filing under Section 19 of the Act to enable the Exchange to offer such products.”⁷ The Exchange asserts that the Commission does not have a right to review this or other products.

Selling a combination of data feeds from NYSE platforms does not make the Exchange a “vendor” in a fashion that negates its statutory obligations as an SRO. Further, the distribution of all of the underlying feeds, as well as any combination the Exchange has created, is subject to the *NetCoalition* holdings (discussed below). The Exchange’s false vendor approach attempts to immunize data fees from review in order to nullify the “fair and reasonable” standard.

In order to evade the proposed rule change process, by relying on a false “vendor” capacity, the Exchange attempts to trump its obligations as an SRO and essentially make all of its market data distribution unreviewable. This robs the public of the opportunity to comment guaranteed by the Exchange Act and the Administrative Procedures Act. The Commission should ensure that rule changes are in fact filed with the Commission, provide the public with an opportunity to meaningfully comment, and are appropriately evaluated by the Commission.

The Exchange argues that there is no need for it to file a rule change and then cites another product that circumvented the process as evidence of competition. Needless to say these are not competitive products. NASDAQ evaded the rule change process with NLS Plus, a data product offered by NASDAQ OMX Information, LLC, a NASDAQ affiliate structured to sit outside of the SRO. Thus, “neither NLS Plus nor its pricing was subject to the rule filing process.”⁸ In any event, the Commission should not allow an exchange to ignore the law by pointing to another exchange which has ignored the law.

⁶ See 79 Fed. Reg. at 46496-46498.

⁷ See 79 Fed. Reg. at 46496.

⁸ See 79 Fed. Reg. at 46497.

B. The Exchange Has Failed to File the Necessary Proposed Rule Change with the Commission for Market Data Fees.

Under the Exchange Act, the Exchange is required to file a proposed rule change with the Commission⁹ to establish fees for market data products. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted.¹⁰ In the Notice, the Exchange states that “the Exchange will file a separate rule filing to establish the fees for NYSE BQT” despite the fact that it has already selected a fee.¹¹ In addition, the Exchange already actively markets and promotes the NYSE BQT product without filing the rule change that is legally required and justifying the fee that it has selected.¹² The Exchange has circumvented the fee rule change filing process for the past 16 months as it markets NYSE BQT and has pricing in its promotional materials on its website.¹³ Yet, the Exchange intentionally omits from the proposed rule change any meaningful fee analysis, which is an integral part of the discussion for this product.

C. Market Data Fees Must Be “Fair And Reasonable.”

Under the Exchange Act, the Commission is required to ensure that the proposed fees are, among other things, “fair and reasonable.”¹⁴ SIFMA disagrees with any notion that the amendment to Section 19(b)(3)(A) of the Exchange Act in Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the “Dodd-Frank Act”)¹⁵ reflects a presumption that these types of fees are constrained by competitive forces and that the Commission is therefore relieved of its obligation to ensure that data fees are “fair and reasonable” within the meaning of Section

⁹ See 15 U.S.C. § 78s(b)(1).

¹⁰ *Id.*

¹¹ 79 Fed. Reg. at 46496, 46497. “To ensure that vendors could compete with the Exchange by creating the same product as NYSE BQT and sell it to their clients, the Exchange would charge its clients for the NYSE BQT feed an amount that represents the cost to a market data vendor to obtain the six underlying data feeds, plus \$1,000 per month to reflect the value of the aggregation and consolidation function.”

¹² See NYSE BQT promotional materials found at: <http://www.nyxdata.com/Data-Products/NYSE-Best-Quote-and-Trades> (accessed August 26, 2014).

¹³ See NYSE BQT Press Release dated April 17, 2013, which can be found at: <http://www1.nyse.com/press/1366195155744.html> (accessed August 26, 2014). See also NYSE Global Market Data by Todd Watkins dated April 17, 2013, which discusses NYSE BQT’s fees and can be found at: <https://exchanges.nyx.com/en/todd-watkins/nyse-bqt-more-flexible-lower-cost-alternative-level-1-market-data> (accessed August 26, 2014).

¹⁴ Section 11A(c)(1)(C) of the Exchange Act provides that fees must be “fair and reasonable” and not “unreasonably discriminatory” while Section 6(b)(4) provides that an exchange must “provide for the equitable allocation of reasonable dues, fees, and other charges among . . . persons using its facilities.”

¹⁵ Pub. L. No. 111-203, H.R. 4173 (June 29, 2010).

11A(c)(1)(C).¹⁶ Neither the plain language of the amendment to Section 19(b)(3)(A), nor the available legislative history of that amendment, supports such a presumption.¹⁷

The Exchange has failed to file a proposed rule change for fees, and thus has failed to provide the Commission with any evidence for it to determine that the market data fees are “fair and reasonable.” The fees for the six underlying feeds and their combination into NYSE BQT must be “fair and reasonable.”

D. The Exchange Has Not Shown That These Market Data Fees Are Constrained By Competitive Forces.

The Exchange has not shown that it is subject to significant competitive forces that would limit it to charging reasonable fees in pricing this market data. *NetCoalition I* made clear that the costs incurred in providing market data are relevant in assessing the reasonableness of the fees because “in a competitive market, the price of a product is supposed to approach its marginal cost, *i.e.*, the seller’s cost of producing one additional unit . . . [and] the costs of collecting and distributing market data can indicate whether an exchange is taking ‘excessive profits’ or subsidizing its service with another source of revenue.”¹⁸ Thus, the cost of producing market data would be direct evidence of whether competition constrains the ability to impose supracompetitive fees.¹⁹ In *NetCoalition II*, the Court reiterated its holding, stating that *NetCoalition I* “remains a controlling statement of the law as to what sections 6 and 11A of the Exchange Act require of SRO fees.”²⁰ The Notice, however, does not contain evidence of the Exchange’s costs of collecting and distributing the market data. Nor does it provide the Commission with the type of substantial evidence the *NetCoalition* Courts found to be necessary to sustain an exchange rule seeking to impose a market data fee.

1. The Exchange is the exclusive distributor of NYSE BQT.

The Exchange’s assertion that other vendors can readily compete is wholly inconsistent with the contract it requires vendors to sign.²¹ The Exchange restricts competition by providing itself with “sole discretion” over the data, particularly with respect to the indirect access service permissions that would apply to a competing vendor. The Exchange’s “sole discretion” language is present throughout the “Customer Use of Market Data” section of the vendor services agreement. The Exchange also mandates that an application/questionnaire must be completed and approved by the Exchange for the data.²² Further, the Exchange explicitly states that any redissemination or other use of that type of market data is prohibited. This contract gives total

¹⁶ 15 U.S.C. § 78k-1(c)(1)(C).

¹⁷ For further discussion of these arguments, please *see* Comment Letter of SIFMA and NetCoalition re: Release No. 34-62887 and Release No. 34-62908 (Oct. 8, 2010).

¹⁸ 615 F.3d at 537.

¹⁹ 615 F.3d. at 537-38.

²⁰ 2013 WL 1798998 at *11.

²¹ NYSE Vendor Agreement available at <https://cta.nyxdata.com/CTA> (accessed August 27, 2014).

²² *Id. See Exhibit A.*

latitude to the Exchange so it can maintain its “exclusive distributor” status.

Further, the fee the Exchange has selected will stave off competition by vendors: “To ensure that vendors could compete with the Exchange by creating the same product as NYSE BQT and sell it to their clients, the Exchange would charge its clients for the NYSE BQT feed an amount that represents the cost to a market data vendor to obtain the six underlying data feeds, plus \$1,000 per month to reflect the value of the aggregation and consolidation function.”²³ A vendor cannot take the six feeds and create a competing product without paying the fee for all six feeds plus a \$1,000 Exchange markup. Vendors would have no choice but to pay the Exchange’s markup. This precludes a vendor from aggregating and consolidating data in a more cost-effective manner. By definition a vendor would be offering a more expensive product with higher latency. This is not a formula for competition.

2. The Exchange does not support its contention that there are reasonable substitutes for the market data.

The Exchange also asserts that alternatives to the data product at issue here are available,²⁴ but it does not provide any evidence that the alternatives are reasonable substitutes such that price is constrained by competitive forces. Under the Court’s holding in *NetCoalition I*, a market data provider must provide “evidence of trader behavior”—such as the number of potential users of its data and how those users might react to changes in the price of that data—to support its conclusion that competition constrains its ability to charge supracompetitive fees for market data.²⁵ The Exchange, however, provides no evidence as to how users might react to changes in the price of its data product.

E. The Exchange is Actively Marketing and Offering a Product that Does Not Have the Required Regulatory Approval

The Exchange began marketing and offering the NYSE BQT product *16 months ago* on April 17, 2013 without receiving Commission approval to offer the product. To date, the Exchange still has not filed a rule change for NYSE BQT’s associated fees despite their existence on its website. The Exchange should not be engaged in such activities prior to receiving any approval of a rule change, and the Commission should not allow these activities because they ignore and nullify the statutory approval process set forth in Section 19(b)(2)(B). Such activities also intentionally contravene the Exchange Act and Administrative Procedure Act’s notice, comment, and review process. The public has a right to meaningfully comment prior to the Exchange’s marketing of a product.

²³ See 79 Fed. Reg. 46496, 46497.

²⁴ As discussed herein, one “alternative” is not even approved (BATS One) and another evaded the rule change process (NLS Plus). 79 Fed. Reg. at 46497.

²⁵ 615 F.3d at 542-43.

Further, the Exchange goes on to cite as evidence of competition the BATS One Feed product, another product offered and marketed without the required regulatory approval.²⁶ Regulatory approval is legally required, not optional.

Conclusion

For the foregoing reasons, the Commission should disapprove this rule change under Section 19(b)(2)(B) because disapproval is necessary or appropriate in the public interest, for the protection of investors, and in furtherance of the purposes of the Exchange Act. Fees such as those described in the Notice demand Commission attention.

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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,

Ira D. Hammerman
Executive Vice President & General Counsel

²⁶ See Notice of Filing of Proposed Rule Change to Establish a New Market Data Product Called the BATS One Feed, Release No. 34-72688; File No. SR-BATS-2014-028; 79 Fed. Reg. 44941 (August 1, 2014) and SIFMA's comment letter thereto (filed August 22, 2014).