

February 7, 2008

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

Ms. Nancy M. Morris, Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, DC 20549-1090

**Re: In the Matter of NetCoalition etc., Order Granting Petition for Review  
of File No. SR-NYSEArca-2006-21**

Dear Ms. Morris:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> appreciates the opportunity to respond further to the Commission’s invitation to provide comments in its order granting the petition of NetCoalition for review of the action of the Division of Trading and Markets in approving by delegated authority File No. SR-NYSEArca-2006-21 (“Petition”),<sup>2</sup> a rule change proposed by NYSEArca, Inc. (“NYSEArca”) to establish fees for the receipt and use of depth-of-market data.

SIFMA reiterates its appreciation to the Commission for its unanimous order granting the Petition. We understand that the Commission has rarely, if ever before, granted such a petition. We believe this unanimous Commission action recognizes not only the critical importance to the investing public of the issues raised by the NetCoalition Petition, but also the need to review the decision-making that took place in this important area. The issues raised are of fundamental importance to our members,<sup>3</sup>

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<sup>1</sup> SIFMA brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington D.C. and London, and its associated firm, the Asian Securities Industry and Financial Markets Association, is based in Hong Kong.

<sup>2</sup> Securities Exchange Act of 1934 (“Exchange Act”) Release No. 55011 (Dec. 27, 2006).

<sup>3</sup> See, e.g., Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (Aug. 1, 2007); Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (Mar. 5, 2007); Comment Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21 (Jan. 17, 2007). See also Comment Letter on Regulation

which is why SIFMA filed a motion to intervene in this matter,<sup>4</sup> on which the Commission has not yet acted.

The wide range of lengthy and thoughtful submissions in support of the NetCoalition Petition – not only from significant traditional market players, but also from major organizations representing the broader universe of businesses and investors – further underscores our position that the Commission must adhere to a fair and transparent process for the review of SRO market data rule proposals that comports with the Act and which includes clearly articulated standards.<sup>5</sup>

We understand that the Division of Trading and Markets has delivered a proposed order some 80 pages long with 250 footnotes to the Commission for *seriatim* approval. Given the proposed order's length, as well as public statements that the primary argument offered therein for seriatim approval is that market data fees are fair because there is competition in the market for order flow, we believe the proposed order and the reasoning and supporting data that led to it will be materially different from the staff's original order of approval dated October 12, 2006. Only the findings in that latter order – based on NYSEArca's original request for approval almost two years ago – have been subjected to public review and comment. Accordingly, we respectfully request that, prior to rendering a final decision, the Commission issue the proposed order for public notice and comment. If the Commission intends to rely upon data and related analyses that have not previously been made part of the public record, those too should be made publicly available for review and comment.

The legislative history of the Securities Acts Amendments of 1975 underscores congressional insistence that the Commission publish all correspondence with a self-regulatory organization, such as NYSEArca, concerning a proposed rule change, such as the instant rule proposal.<sup>6</sup> The U.S. Court of Appeals for the District of Columbia Circuit

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NMS from Marc Lackritz, President, SIA to Jonathan Katz, Secretary, SEC (Feb. 1, 2005), File No. S7-1-04, at 25-31; Comment Letter from SIFMA re: Regulation NMS, File No. S7-1-04 (June 30, 2004); Comment Letter from SIFMA re: SRO Governance and Transparency Concept Release, File No. S7-39-04 (Mar. 9, 2005).

<sup>4</sup> Letter from SIFMA re: In the Matter of NetCoalition, File No. SR-NYSEArca-2006-21: Notice of Intervention (Aug. 16, 2007).

<sup>5</sup> See, e.g., Comment Letters from the Hon. Paul J. Kanjorski, Chairman, Subcomm. on Capital Markets, Insurance, and Government Sponsored Enterprises, U.S. House of Representatives (Dec. 12, 2007); the Hon. Richard H. Baker, Member, U.S. House of Representatives (Oct. 1, 2007); David T. Hirschman, Senior Vice President, U.S. Chamber of Commerce (May 3, 2007); Keith F. Higgins, Chair, Committee on Federal Regulation of Securities, Business Law Section, of the American Bar Association (Feb. 12, 2007); Joseph Rizzello, Chief Executive Officer, National Stock Exchange (Feb. 27, 2007); James A. Forese, Managing Director, Head of Global Equities, Citigroup (Feb. 5, 2007); Jeffrey T. Brown, Senior Vice President, Charles Schwab & Co.; Richard M. Whiting, Executive Director and General Counsel, The Financial Services Roundtable (Jan. 17, 2007); Sanjiv Gupta, Bloomberg L.P. (Jan. 17, 2007).

<sup>6</sup> See, e.g., Securities Acts Amendments of 1975, Report of the Senate Comm. on Banking, Housing and Urban Affairs to Accompany S.249, S. Rep. No. 94-75, 94th Cong., 1st Sess. 29-30 (1975):

also has emphasized that administrative agencies have an affirmative obligation to promote transparency in their proceedings.<sup>7</sup> Furthermore, if NYSEArca has filed any amendments to its rule filing that have not yet been published, those materials also should be published for comment before the Commission takes action in this matter.

We believe that approval of this order could represent a significant departure from how market data has been treated under the Securities Acts Amendments of 1975. If the Commission is redefining market data into new categories or setting forth the standards that apply to review of the fees charged for that data, such agency action should be subject to rulemaking, also requiring notice and opportunity for public comment. Finally, given the importance of this issue, and particularly since the lack of transparency and a predictable process is at the core of the public's concerns here, we believe a *seriatim* approval process is not appropriate.<sup>8</sup>

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In order to facilitate expeditious Commission review and evaluation of [proposed rule changes] and to assure informed public comment on them, Section 19(b)(1) would require all self-regulatory organizations to file with the SEC in connection with any proposed rule change a “concise general statement of the basis and purpose” of the proposed rule change. *It is the Committee’s intention in adopting this standard to hold the self-regulatory organizations to the same standards of policy justification that the Administrative Procedure Act imposes on the SEC.*

. . . [T]he Committee believes interested persons should have a meaningful opportunity to obtain accurate information about proposed changes in self-regulatory rules and to comment on the need or justification for these changes. Section 19(b)(1) would require the SEC to give notice and provide an opportunity for interested persons to participate in the process of reviewing a proposed change in a self-regulatory organization’s rules. *In addition, this section would require that all comment and all correspondence between the SEC and the self-regulatory agency concerning the proposal be available for public inspection. . . .*

<sup>7</sup> If the SEC were to produce an analysis of that which has not previously been introduced into the record of this proceeding without first exposing such data to public comment, the Commission would not have the ability to evaluate external analyses of such data and would improperly frustrate the purpose of the comment process. *See Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530-31 (D.C. Cir. 1982):

The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule making process. If the notice of proposed rule making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency’s proposals. . . . In order to allow for useful criticism, it is especially important for the agency to identify and make available technical studies and data that it has employed in reaching the decisions to propose particular rules. To allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.

<sup>8</sup> These issues are part of the broader unresolved concerns regarding self-regulation in an era of for-profit exchanges. *See* Comment Letter from SIFMA re: Establishing Fees for Registering and Transferring Registration of Associated Persons, File No. SR-NASDAQ-2007-099 (Jan. 23, 2008).

We strongly urge that any draft order, any new amendments filed, all supporting documents and studies, and all communications with NYSEArca or other self-regulatory organizations relating to the order be made available to the public for comment in advance of any final Commission consideration. Following that public comment process, final Commission action should then take place only after an open meeting or hearing before the Commission.

We thank the SEC for its consideration of our views and reiterate our appreciation to the Commissioners for having voted unanimously to institute this significant proceeding. If you have any questions, please call me at 202-962-7373.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ira D. Hammerman". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Ira D. Hammerman  
Senior Managing Director and General Counsel

cc: The Hon. Christopher Cox, Chairman  
The Hon. Paul S. Atkins, Commissioner  
The Hon. Kathleen L. Casey, Commissioner  
Dr. Erik R. Sirri, Director, Division of Trading and Markets  
Robert L.D. Colby, Deputy Director, Division of Trading and Markets  
David Shillman, Associate Director, Division of Trading and Markets  
Stephen L. Williams, Economist, Division of Trading and Markets  
Brian G. Cartwright, General Counsel  
Dr. James A. Overdahl, Chief Economist