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June 6, 2013

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 DISAPPROVAL

Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change Establishing Non-Display Usage Fees and Amending the Professional End-User Fees for NYSE Amex Options Market Data, Release No. 34–69553; File No. SR–NYSEMKT–2013–40.

Dear Ms. Murphy:

SIFMA[1] appreciates the opportunity to comment on the above-captioned notice (the "Notice"), under which NYSE MKT LLC (the "Exchange") proposes to establish non-display usage fees and to amend the Professional End-User fees for NYSE Amex Options market data.[2]

The proposed rule change purports to have become effective upon filing with the U.S. Securities and Exchange Commission (the "Commission") under Section 19(b)(3)(A) 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 temporarily suspend the rule change under Section

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 and Immediate Effectiveness of Proposed Rule Change Establishing Non-Display Usage Fees and Amending the Professional End-User Fees for NYSE Amex Options Market Data, Release No. 34–69553; File No. SR–NYSEMKT–2013–40; 78 Fed. Reg. 28926 (May 10, 2013).

3 15 U.S.C. § 78s(b)(3)(A).

4 Nos. 10-1421, 10-1422, 11-1001, 11-1065, 2013 WL 1798998 (D.C. Cir. April 30, 2013) ("*NetCoalition II*"); 615 F.3d 525 (D.C. Cir. 2010) ("*NetCoalition I*").

Washington | New York
1101 New York Avenue, 8th Floor | Washington, DC 20005-4269 | P: 202.962.7300 | F: 202.962.7305
www.sifma.org

19(b)(3)(C) of the Exchange Act[5] and institute proceedings to disapprove the rule change under Section 19(b)(2)(B) of the Exchange Act.[6]

This is not the first time the Commission has allowed the Exchange and other national securities exchanges to file for immediate effectiveness market data fee rules that do not comport with the standards the Court established in the *NetCoalition* cases. The Commission should immediately suspend the effect of this and other similar unlawful market data fee rule changes proposed by self-regulatory organizations. The Commission staff should not be accepting such rule change filings as complete, and those rule changes cannot become effective upon filing, 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 act immediately to suspend this and other similar fee rule changes until the Commission and the public have had ample time to determine whether they should be disapproved.

A. 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."[7] 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")[8] reflects a presumption that all fees are constrained by competitive forces[9] and that the Commission is therefore relieved of its obligation to ensure that data fees are "fair and reasonable" within the meaning of Section 11A(c)(1)(C).[10] Neither the plain language of the amendment to Section 19(b)(3)(A), nor the available legislative history of that amendment, supports the Exchange's contention that the amendment reflects such a presumption.[11]

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

The Commission has not required the Exchange to show, and 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,

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5 15 U.S.C. § 78s(b)(3)(C).

6 15 U.S.C. § 78s(b)(2)(B).

7 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."

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

9 78 Fed. Reg. at 28930-32.

10 15 U.S.C. § 78k-1(c)(1)(C).

11 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).

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."[12] Thus, the cost of producing market data would be direct evidence of whether competition constrains the ability to impose supracompetitive fees.[13] 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."[14] 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 "joint products" approach does not support the Exchange's contention that the proposed data prices are constrained by competition.

The Exchange's "joint products" approach to pricing data products[15] is inconsistent with the Exchange Act, contradicts economic reality, and is unsupported by substantial evidence.[16]

The "joint products" approach is inconsistent with the "fair and reasonable" requirement of Section 11A(c)(1)(C) of the Exchange Act because under the platform approach to pricing, the Exchange may set market data prices at supracompetitive levels as long as they charge less for other services, even though some users of the data may consume only data services, but not other services such as trade execution. This approach to pricing would therefore immunize data fees from review by wrapping them together with fees for other services and would thus nullify the "fair and reasonable" standard.

In addition, the "joint products" theory is flawed because market data is bought and sold separately from execution services, as evidenced by the fact that SIFMA member firms' customers often buy market data on its own.[17] The price of two products that are bought and sold separately is the result of the distinct competitive conditions confronting each product.[18]

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12 615 F.3d at 537.

13 615 F.3d. at 537-38.

14 2013 WL 1798998 at *11.

15 78 Fed. Reg. at 28931-32.

16 *See generally Response to Ordover and Bamberger's Statement Regarding Nasdaq's Proposed Rule Change Concerning The Pricing of Depth-Of-Book Market Data* ("*Response*") (March 31, 2011) (attached hereto as Exhibit 1).

17 *See Response* at 26-27.

18 *See Gartenberg v. Merrill Lynch Asset Mgmt., Inc*., 694 F.2d 923, 929 (2d Cir. 1982).

In any event, there is no substantial evidence here to support the Exchange's "joint products" theory, only the same type of conclusory statements dismissed by the D.C. Circuit in *NetCoalition I*.[19]

2. The Exchange does not support its argument that order flow competition constrains market data fees.

The Exchange also concludes the fees here must be competitive because the market for order flow is subject to competitive forces.[20] The Court in *NetCoalition I* rejected this "order flow" argument because, as is the case here, there was no support for the assertion that order flow competition constrained an exchange's ability to charge supracompetitive prices for its data.[21] In rejecting the argument, the Court discounted the statements made by various exchanges to the effect that they consider the impact on order flow in setting data prices: "The self-serving views of the regulated entities . . . provide little support to establish that significant competitive forces affect their pricing decisions."[22]

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

The Exchange also asserts that several alternatives to the data product at issue here are available, but it does not provide any evidence that the alternatives are reasonable substitutes such that price is constrained by competitive forces.[23] 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.[24] Yet the Exchange provides no evidence, only theories, as to how users might react to changes in the price of its data product.

Conclusion

For the foregoing reasons, the Commission should suspend this unenforceable rule change[25] under Section 19(b)(3)(C) because suspension is necessary or appropriate in the public interest, for the protection of investors, and in furtherance of the purposes of the Exchange Act.[26]

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19 *See* 615 F.3d at 541 (noting the "lack of support in the record" and characterizing proffered support as "conclusion[s], not evidence").

20 78 Fed. Reg. at 28932.

21 615 F.3d at 539-42.

22 615 F.3d at 541.

23 78 Fed. Reg. at 28932. *See also Response* at 12-13.

24 615 F.3d at 542-43.

25 As noted above, Section 19(b)(3)(C) provides: "Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this subparagraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable federal and state law."

26 15 U.S.C. § 78s(b)(3)(C).

Although the D.C. Circuit held in *NetCoalition II* that a Commission failure to suspend a rule that is inconsistent with the Exchange Act is not directly appealable to the Court of Appeals, the Court did expressly confirm that the Section 19(d) denial of access remedy is available. Fees such as those described in the Notice demand Commission attention. It would be a dereliction of the Commission's duty to protect the public for the Commission to blink away serious legal objections to an exchange rule. That is particularly the case in view of the fact that exchanges enjoy a government-protected monopoly and are for-profit companies that will naturally tend to favor their stockholders' interests over the public interest.

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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
Senior Managing Director & General Counsel
SIFMA

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