SIFMA
Securities Industry and
Financial Markets Association

July 1, 2008

Via Electronic Mail (rule-comments@sec.gov)
Ms. Florence Harmon
Acting Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: File No. SR-NASDAQ-2006-060 (SEC Release Nos. 34-55255 and 34-57965);
File No. SR-NASDAQ-2008-050 (SEC Release Nos. 34-57965 and 34-57973)

Dear Ms. Harmon,

The Securities Industry and Financial Markets Association[1] ("SIFMA") appreciates the opportunity to comment on the above-captioned items. Two of the most difficult and contentious structural issues facing the Commission and the market today are how to establish statutorily sound principles for analyzing market data rule changes and how to ensure that the investing public is not disadvantaged by changes to the self-regulatory organization ("SRO") rulemaking process. Without addressing, much less resolving, these issues, the Commission granted accelerated approval to SR-NASDAQ-2006-060, which establishes a new Nasdaq last sale data service.[2] This action, involving "findings" under the Securities Exchange Act of 1934 ("Exchange Act"), is based on an apparently provisional "belief" that in effect prejudges several issues that are presently before the Commission in connection with its final resolution of the

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[1] The Securities Industry and Financial Markets Association brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA's mission is to promote policies and practices 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 Asia Securities Industry and Financial Markets Association, is based in Hong Kong. (More information about SIFMA is available at: www.sifma.org.)

[2] SIFMA notes that SR-NASDAQ-2008-050 should also not have been approved since this proposal is for a free trial period for the same last sale product as in SR-NASDAQ-2006-060, which has underlying issues which have not yet been resolved.

NetCoalition petition.[3] For the reasons set forth below, we respectfully submit that the Commission's order approving SR-NASDAQ-2006-060 is legally inadequate. The Commission in the very least should order that the four-month trial period – in terms of the fees – be subject to the Exchange Act Section 19(b)(2) prior notice and comment process instead of the Exchange Act Section 19(b)(3)(A) effective on filing process well before the four months run on the pilot.[4]

Background. The rule change set forth in SR-NASDAQ-2006-060 provides for a new market data service, the Nasdaq Last Sale Service ("NLS"). Nasdaq announced the launch of NLS as a four-month pilot on June 2, 2008.[5] NLS provides real-time intraday last sale data for all securities traded on Nasdaq systems and the Financial Regulatory Authority/Nasdaq Trade Reporting Facility, which incorporates last sale data on off-exchange transactions in securities listed on other exchanges.

The service described in SR-NASDAQ-2006-060 is not simply a refinement of existing services, but is instead a new data product. The Commission published for comment SR-NASDAQ-2006-060 in SEC Release No. 34-55255 (February 8, 2007). That filing states: "The Nasdaq Last Sale market data products will offer Nasdaq data in a new form not previously available to market data consumers. It will also offer a data product at a new price point." At that time, Nasdaq proposed to bundle two other proprietary market data products, Nasdaq Market Velocity and Nasdaq Market Forces, into the NLS "in order to promote the distribution of the Nasdaq Market Analytics Data Package."[6] That rule change was filed and published for full notice and public comment pursuant to Exchange Act Section 19(b)(2). Three comment letters were submitted to the Commission, followed by a letter from Nasdaq responding to the comments.

Without addressing those comments or waiting until it reaches final resolution of the NetCoalition petition in accordance with proper procedures, the Commission has now approved on an accelerated basis an amendment to SR-NASDAQ-2006-060 providing for a four-month pilot phase. The Commission explained this decision by saying that it "believes" that SR-NASDAQ-2006-060 is consistent with the Exchange Act "for the reasons noted preliminarily in the Draft Approval Order" pertaining to the NetCoalition petition even though the comment period on the Draft Approval Order upon which this belief is based remains open for further public discussion (it does not expire until July 10, 2008). There are serious issues raised in the NetCoalition petition as to whether the entire approach in SR-NASDAQ-2006-060 contravenes provisions of the Exchange Act applicable to Nasdaq that should not be dismissed prematurely in the absence of a final and complete record of all relevant proceedings.

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3 *See Matter of NetCoalition*, SEC Release No. 34-55011 (December 27, 2006); SEC Release No. 34-59717 (June 4, 2008), 73 Fed. Reg. 32751.

4 We do not comment herein on whether the Commission should rescind its legally insufficient approval order or on whether Nasdaq's operation of the service without valid approval violates the Exchange Act.

5 *See* "'Real Time' Stock Quotes Issued in a Nasdaq Test," *Wall St. J.*, June 3, 2008, at C5.

6 These two products are not included in the recent rule filing.

Statutory Standards. On the substance of Nasdaq's desire to introduce new market data products, we note that we generally support increased market transparency and technological improvements. That being said, however, Nasdaq should not be allowed to achieve those objectives by circumventing the statutory requirements. We incorporate by reference herein but will not reiterate all of our previously filed comments and concerns about SR-NASDAQ-2006-060.[7]

Exchange Act Section 19(b)(2) requires the Commission, in approving a Nasdaq rule change, to "find" that the rule change is consistent with provisions of the Exchange Act applicable to Nasdaq. If it does not make that finding, it must enter proceedings to disapprove the rule. It appears that the Commission approved SR-NASDAQ-2006-060 on the basis of a preliminary "belief" of statutory consistency based upon a new and unresolved approach to rule filing reviews preliminarily announced in the Draft Approval Order. This highly irregular path of SRO rule review taken by the Commission – a path we do not believe we have ever seen before – is arbitrary and capricious.

We note that the Commission order designates last sale data as "non-core," governed by the Commission's new approach announced in the Draft Approval Order that relies on "market forces" to determine whether a fee for such "non-core" data is fair and reasonable. Even assuming, for the sake of argument, that the Commission's distinction between "core" and "non-core" is supportable under the Exchange Act, if anything is "core" data it would be last sale data. It should not matter that such data is coming directly from an exchange, or from the exchange to the consolidator; it is still within the scope of the type of data that the Commission has defined as core. As we have argued many times before, SIFMA firms are willing to pay fees to obtain such data, as long as those fees are reasonably related to the cost of producing it. Nasdaq's filing fails to provide any rationale for the cost, except that the New York Stock Exchange has also now imposed the very same fee for selling its own exclusive last sale data directly to vendors and broker-dealers. There is no attempt to justify the fee in relation to the costs of providing this data to the public.

NetCoalition Petition. The Commission and market participants have long been concerned about potential SRO abuse in the market data context.[8] Those concerns have become more pronounced with the advent of for-profit exchanges, which enjoy and exploit government-granted monopolies and regulatory powers. These issues came to a head when the Commission's staff approved under delegated authority the NYSE Arca market data product, SR-NYSEArca-2006-21. NetCoalition challenged that approval in its Rule 430 petition, asserting that the decision embodied (a) a conclusion of law that is erroneous, or (b) an exercise of discretion or decision of law or policy that is important and that the Commission should review.[9] The NetCoalition petition sought to force a change in the way depth-of-book and other

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[7] SIFMA comment letter dated March 7, 2007, available at: http://www.sec.gov/comments/sr-nasdaq-2006-060/nasdaq2006060-1.pdf.

[8] *See*, e.g., "Regulation of Market Data Fees and Revenues," SEC Release No. 34-42208 (December 9, 1999); and "Regulation NMS: Final Rules and Amendments to Joint Industry Plans," SEC Release No. 34-51808 (June 9, 2005).

[9] NetCoalition petition page 2.

market data products were considered – with the goal being a transparent, predictable process that comports with the statute.[10]

The Commission voted unanimously to grant this petition. As far as we have been able to ascertain, this is the only time in the history of the SEC that such a petition has been granted. Indicative of the importance of the proceeding, the submissions supporting the petition included filings by major financial players, including SIFMA, the Financial Services Roundtable, and the National Stock Exchange, as well as representatives of the broader public, including Chairman Kanjorski of the House of Representatives Subcommittee on Capital Markets, the United States Chamber of Commerce and the American Bar Association Committee on Federal Regulation of Securities. The petition is now the subject of the Commission's Draft Approval Order, the final resolution of which should provide further guidance on these matters.[11]

The Exchange Act does not contemplate that, to expedite rule review, the Commission can approve for a short period of time a rule that may well not meet statutory standards and where the Commission has grounded its "findings" on provisional beliefs in a draft order, rather than on conclusions of law based on a complete record underlying the Commission's final official decision.

SRO Rule "Streamlining." Nasdaq continues to argue that the SEC approvals of its rule proposals related to market data products and fees are unnecessarily delayed. SIFMA notes that the reason for this delay is that the market data fee review process is flawed and under legal challenge as a result of the Net Coalition petition. The issues related to this fee proposal and the approval process are reflective of the broader issue that fees proposed by the exchanges, such as Nasdaq and the NYSE, are not being adequately reviewed by the SEC to ensure that they are fair and reasonable.

According to the SEC website, thus far in 2008, Nasdaq has filed 34 rule filings, of which 19 (55%) were for immediate effectiveness. In 2007, the numbers were 89 rule filings, of which 47 (52%) were for immediate effectiveness. In 2006, the numbers were 62 rule filings, of which 30 (48%) were for immediate effectiveness. Nasdaq's total filings for immediate effectiveness over two and one half years is 96, NYSE's total is 157, and NYSE Arca's total is 124. Of these 377 rule changes filed for immediate effectiveness, we are aware of the broader public protesting only a handful (discussed below) and of the Commission abrogating only one. Clearly, it is difficult for Nasdaq or the other SROs to argue that either the public or the Commission are objecting in instances where the law is not clear or the issue is not important.

As these statistics show, Rule 19b-4 already provides for streamlining the process for a large proportion of SRO rule filings. Nevertheless, SROs may still be dissatisfied with the current procedures for processing their rule proposals. The SROs, however, cannot change that process themselves. That is the Commission's prerogative, and we understand that further streamlining is at the top of the Commission's rulemaking agenda.[12] Nonetheless, the desire to

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[10] Indeed, the petition protests the abuse of the "effective upon filing" process in the market data context.

[11] SEC Release No. 34-59717 (June 4, 2008), 73 Fed. Reg. 32751.

[12] *See* "Cox may revise rules in his SEC swan song," *Wall St. J.*, June 13, 2008, C2.

streamline the process should not trump the need to proceed with appropriate caution and statutory compliance in cases such as this.

Statutory Purpose and Congressional Intent. When measured against what the Congress announced it intended Exchange Act Section 19(b) to accomplish, the Commission's approval of SR-NASDAQ-2006-060 at this juncture – on the basis of a preliminary belief – is particularly inappropriate. In amending the Exchange Act in 1975, the Congress made it clear that exchanges were no longer free to have rules that fell outside the statutory standards and that were exempt from Commission review. The Congress repealed former Exchange Act Section 6(c) and, for the first time, subjected exchanges to the more exacting standards that had previously applied only to the NASD as a registered national securities association. The Senate described the reasons for that change as follows:

> [T]here is nothing in the [pre-1975] Exchange Act which explicitly limits or defines an exchange's rule-making authority: Indeed, present [*i.e.*, pre-1975] Section 6(c) states:
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> > Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.
>
> The authority of national securities associations is dealt with substantially differently. . . . The Committee believes that the statutory pattern governing the scope of the NASD's authority is basically sound. The bill would extend the pattern now applicable to registered securities associations to exchanges. Thus, the bill would eliminate . . . the seemingly open-ended authority in present Section 6(c).
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> Under the bill the scope of the rule-making authority and responsibility of all self-regulatory organizations would be defined in terms of purposes and standards . . . The purposes to be served by self-regulatory rules would be expressed affirmatively and negatively (what the rules must be, and what they may not be, designed to accomplish).[13]

Nasdaq Public Misrepresentation. We believe the Commission should be concerned when publicly traded companies misrepresent product offerings. Nasdaq is not just any company – it is an SRO with a quasi-governmental imprimatur. The intended market for this product is not professional investors, but rather unsophisticated investors. In this context it is particularly disturbing that Nasdaq's press release was misleading when it stated that "Nasdaq becomes the first U.S. stock exchange to facilitate universal, free access to real-time stock quotes – or the last quoted price."[14] The fact is that Nasdaq is only providing last sale data, not real-time stock

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[13] 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. 26-7 (1975).

[14] Nasdaq Release, June 2, 2008.

quotes or indeed any quotes at all (they are not providing bids or asks). The media, however, failed to properly draw this crucial distinction as evidenced by stories like The Wall Street Journal's "Real Time Stock Quotes Issued in a Nasdaq Test."[15] We would add that it is not entirely clear that Nasdaq is providing "free" quotes when distributors will be charged up to $150,000 per month. If Nasdaq wants to provide free quotes – like BATS – they do so. If Nasdaq is not providing its quotes without charge to any distributors including Internet portals, the Commission should require Nasdaq to be fully transparent in its public announcements and should accurately describe what Nasdaq is proposing in the Commission's own orders.

Conclusion. The subject of market data product and fee approvals has been among the most contentious market issues the Commission has dealt with in recent years. The Commission should not permit SROs to ignore statutory requirements. For the reasons noted above, we respectfully submit that the Commission's order approving SR-NASDAQ-2006-060 is legally inadequate and that it should order, at the very least, that Nasdaq's four-month trial period – in terms of the fees – be subject to the Exchange Act Section 19(b)(2) prior notice and comment process, instead of the Exchange Act Section 19(b)(3)(A) effective on filing process, well before the four months run on the pilot.

We would welcome an opportunity to discuss our views with the Commission and the Staff. I can be reached in this regard at 202-962-7300.

Respectfully submitted,

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
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[15] *See* Wall St. J., *supra* note 4.