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VIA Electronic Submission and U.S. Mail

The Honorable Christopher Cox
Chairman
U.S. Securities and Exchange Commission
100 F Street, NW
Washington, DC 20549

Re: Response to NetCoalition Petition for Commission Review of SR-NYSEArca-2006-21

Dear Chairman Cox:

On December 27, 2006, the Commission granted a Petition (the "Petition") of NetCoaltion.com ("NetCoalition") for Commission Review of the action of the Division of Market Regulation in approving by delegated authority fees that NYSE Arca, LLC ("NYSE Arca") proposed to establish for its Arca Book product (the "Arca Book Fees").[1] We thank the Commission for this opportunity to comment on the Petition.

The Petition uses a shotgun approach in contesting the exercise of discretion by the Division of Market Regulation and the Commission. Many of the Petition's points have no bearing on NYSE Arca's Arca Book fee filing[2] whatsoever or apply to matters well beyond an assessment of whether Arca Book Fees meet the statutory requirements under the 1934 Act and Regulation MMS.

In this letter, we first describe the environment for the provision of market data over the internet and explain that market-based solutions have mooted the Petition's concerns. Then, we comment that, as a matter of law, NetCoalition had no standing under SEC Rules of Practice to bring the Petition. Following that, we voice our agreement with the Approval Order's conclusion that the Arca Book Fees meet the statutory standards for fee filings, as they are fair and reasonable and not unreasonably discriminatory. Finally, we seek to debunk some of the misconceptions that pervade the Petition.

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1 Release No. 34-54597; File No. SR-NYSEArca-2006-21 (October 12, 2006; the "Approval Order").

2 See Release No. 34-53592; File No. SR-NYSEArca-2006-21 (June 9, 2006; the "Arca Book Fee Filing").

I. **Industry Responsiveness.**

By laying out a complex web of dissociated arguments, the Petition complicates what is really a simple comment: The essence of the Petition is that Arca Book Fees and other developments have:

A. hampered the ability of investors to access real-time data by eliminating large internet portals' access to real-time data; and

B. jeopardized the advertisement-sponsored business models of internet portals in the market data arena.

To dispel both of these notions, we wish to place the business models of NetCoalition's internet portals into the historical context of the market data business and to demonstrate that investors have ready access to real-time prices, generally for free. We also wish to describe how the long-standing tradition of market-based solutions has again responded to the needs of the markets' customers.

A. **Market Forces and Industry Dynamism.**

The supply of real-time data to investors, if market forces were allowed to interact without interference, would be contingent upon two things: the willingness of the markets to make their proprietary data available to intermediaries, such as vendors, broker/dealers and internet portals, and the willingness of those intermediaries to make the data available to investors. If data distribution does not serve the business interests of both the markets and the intermediaries, then investors will not receive the data. The combination of the markets' charges and the intermediaries' charges determines the amounts that investors pay for market data. Notably, Congress and the Commission regulate the markets' data fees, but allow the intermediaries to charge whatever the market will bear.

In addition, the business of real-time data distribution is dynamic, not static. Markets craft new market data products and find new and more efficient ways to provide access to that data. Intermediaries change their business models. New competitors enter the industry. The needs of investors change frequently. The markets develop solutions to meet those changing needs. We submit that they do so best when unencumbered by industry regulation.

B. **Nonprofessional Subscriber Fees for Consolidated Data.**

For trading-quality, consolidated data -- data on which investors can make trading decisions -- the markets that participate in the four national market system plans that govern market data (the "NMS Plans")[3] made important product changes nearly ten years ago. Those changes promoted the widespread availability of consolidated last sale price

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[3] The CTA Plan, the CQ Plan, the OPRA Plan and the Nasdaq/OTC Plan.

information and consolidated quotation information to nonprofessional investors. It did so by drastically reducing the fees applicable to the receipt of consolidated data by nonprofessional investors. For example, the Network A Participants did two things: They reduced the rate payable for consolidated real-time Network A prices and quotes to $1/month per nonprofessional investor, and they introduced a "pay-as-you-go" model of $.0075 cents per quote. In addition, they determined to continue their long-standing practice of permitting displays of 20-minute-old last sale prices free of charge.

Broker-dealers have coupled these low fees with other trading tools as a strategy to encourage customers to self-direct their accounts. The move toward self-directed accounts has enabled broker-dealers to eliminate a huge expense by vastly reducing the number of brokers that they require, to reduce commission rates substantially, and to provide real-time consolidated NMS Plan data to investors for no charge. Broker-dealers absorb the NMS Plan nonprofessional investor fees because doing so is in their economic best interests. Providing investors with free access to the data has stimulated trading activity and commission revenue. In turn, the significant rise in broker-dealer commission revenues has contributed to the further reduction in commission rates. There is no economic dysfunction and the investing public has benefited.

C. **Internet Portals**.

At the same time, a new category of intermediary has entered into the marketplace: internet portals. Yahoo Finance, Google Finance, and a host of other internet sites with no trading or order-entry capabilities now provide a very efficient means for providing investors the ability to monitor stock prices and other financial news. They compete not for trading commissions but for eyeballs to their sites. For many investors, internet portals have replaced the newspaper stock tables of an earlier era.

The internet portals convert their site visitors into revenue through advertising revenue, "click" revenue, or mark-ups on market data services. Until recently, visitors to internet sites only had access to the trading-quality real-time consolidated NMS Plan data described above. Some internet portals, like Yahoo, decided to pass the NMS Plan fees along to consumers with a mark-up. Yahoo packaged Network A data with Network B data and data made available under the OPRA Plan and the "Nasdaq/UTP Plan"[4] and charged each investor $13.95 per month, $9.95 more than Yahoo paid to the NMS Plans for that package of data. Because the Commission does not regulate vendors and their right to mark prices up, market forces drove Yahoo's success at attracting investors to its $13.95 service. This is as it should be. Yahoo provided investors with the alternatives of purchasing the $13.95 real-time service from Yahoo, accessing delayed prices that Yahoo and hundreds of other internet sites make available without charge, or receiving real-time data from their broker-dealers without charge.

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4 That is, the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotations and Transaction Information for Nasdaq-Listed Securities Trading on Exchanges on an Unlisted Trading Privilege Basis.

Several years ago, certain electronic communications networks ("ECNs") began to make their real-time quotes available for free in order to gain visibility in the market place. The quotes did not represent the high-quality, consolidated information that the Commission requires for making trading decisions. However, some internet portals determined that the free availability of these quotes made them suitable for distribution to visitors to their internet sites. These internet portals displayed the real-time ECN quotes along with delayed data from the NMS Plans.

At certain times, the ECN quotes aligned relatively well with the prevailing NMS Plan quotes; at other times they did not. Despite the fact that the quality of the real-time ECN quote may have rendered it more misleading than helpful, the real-time banner associated with it was important to the business models of the internet portals. It was another way in which they attracted viewers that they could convert into revenue.

D. The NYSE Internet Proposal.

As internet access was developing, the Commission proposed and adopted Regulation NMS. Rule 603 of Regulation NMS amends its predecessor statute so as to allow markets to vend their own last sale price information outside of the national market system plans, so long as the single-market prices are not made available in the context of trading or order-routing functionality (an "SRO-Only Prices Service").[5] NYSE Arca and other markets applaud this change because it allows us to create new and innovative products for investors.

With this new distribution right in hand, NYSE contemplated the implementation of NYSE-only last sale price services. In a practice that is consistent with the advent of many market data products over the years, Google and CNBC approached NYSE about their internet portal needs.[6] They asked NYSE to craft a real-time last sale price product that they could use without the administrative burdens that the NMS Plans attach to their products. Because neither of them supports trading or order-entry functions, they also made clear that they prefer not to pay for the trading-quality consolidated data stream that the NMS Plans make available. Though Google and CNBC had access to real-time quotes from ECNs, they considered NYSE real-time prices to be superior. For them, the NYSE brand has considerable value and furthers their own business objectives.

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5 See Rule 603(c)(1) under Regulation NMS.

6 It is worth noting that neither NetCoalition nor any of its members (other than Google) ever approached NYSE Arca or NYSE to ask for a real-time product for their internet needs. By going directly to the Commission without first approaching the markets, NetCoalition has hampered the markets' ability to respond, has impeded NYSE Arca's ability to compete with other markets, and has chilled the willingness of markets to propose new products. Fortunately, one NetCoalition member had the foresight to approach NYSE directly, an action that has resulted in a market solution rather than a regulatory mandate.

In response to that dialog with Google, CNBC and other internet portals, NYSE recently submitted to the Commission a proposed product (the "NYSE Internet Proposal") that would meet the needs of internet portals and add to the number of choices that are available to intermediaries and investors for their receipt of real-time prices.[7] The NYSE Internet Proposal responds to the requests of the internet service providers for a product that provides unlimited real-time prices at a fixed price and that eliminates the administrative burdens associated with NMS Plan products. Both Google (a NetCoalition member) and CNBC have enthusiastically endorsed the NYSE Internet Proposal and have indicated that they will provide NYSE last sale prices for free on their internet sites.

NYSE Arca, like NYSE and other markets, continues to have incentives to promote the widespread distribution of its information. When the data-distribution models currently available to access real-time data no longer suit the marketplace, or if a category of intermediaries feels that current methods do no fit its business needs, NYSE Arca will work with them to craft new ones. Market forces, not regulation, will best respond to changing market needs.

E. Mooting NetCoalition's Argument.

The confluence of investors' pervasive access to internet portals, the Commission's recent green light to SRO-Only Prices Services, internet portals' search for means of access to data that is suitable to their business models, and the markets' search for innovative new products that meet the needs of their constituents has resulted in NYSE's submission of the NYSE Internet Proposal. At least one other exchange has responded as well,[8] evidencing that competitive forces are alive and well.

Most importantly, the NYSE Internet Proposal provides a significant benefit to investors. It adds to the data-access alternatives available to them and improves the quality, timeliness and affordability of data that they can receive over the internet. For the markets and the rest of the securities industry, not to mention the investing public, that is a significant development. It also indicates that markets can find solutions to issues if given the opportunity to do so.

One can measure whether prices comply with the "fair" and "reasonable" standards in many different ways. In the realm of proprietary market data products,[9] the laws of supply and demand provide an appropriate basis for determining whether fees are fair and reasonable. In response to internet portals' request for a product suitable for internet service providers, NYSE submitted the NYSE Internet Proposal to the Commission. After discussions with those internet portals, NYSE established the price

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7 See File No. SR-NYSE-2007-04, which NYSE submitted to the Commission on January 12, 2007. the Commission has yet to rule on the NYSE Internet Proposal.

8 See File No. SR-Nasdaq-2006-060.

9 That is, products that individual exchanges make available outside of NMS Plans and that are not essential to making trading decisions.

and other terms and conditions for which it was willing to make its proprietary information available. Some major internet portals determined that paying that price and complying with those terms and conditions are in their best business interests. This interaction of market forces makes the price fair and reasonable. For internet portals, this approach would enhance the ability for hundreds of millions of investors to access real-time prices free of charge. Everybody wins. Let the markets work.

In sum, the NYSE Internet Proposal moots the Petition. NetCoalition can no longer claim that NYSE Arca's business decision to convert Arca Book into a fee-liable product harms visitors to internet sites or jeopardizes the internet portals' advertisement-sponsored business models. It also stands as testimony to the success of market-based solutions to industry needs.

II. NetCoalition Has No Standing to Petition the Commission.

Rule 430 of the SEC Rules of Practice (the "Rules") allows a party to an action made pursuant to delegated authority, or any person aggrieved by that action, to seek Commission review of the action by filing a notice of intention to petition an action taken by the staff of the Commission pursuant to delegated authority. On November 6, 2006, NetCoalition.com ("NetCoalition") submitted such a notice to seek Commission review of the Division of Market Regulation's approval of Arca Book fees on authority delegated by the Commission. The Commission's grant of the Petition triggered an automatic stay of the approval of the Arca Book fees pursuant to Rule 431. As a result of the stay, NYSE Arca finds itself at a competitive disadvantage relative to exchanges that the Commission has allowed to charge for market data products that are substantially similar to Arca Book.

NYSE Arca submits that NetCoalition's Petition does not satisfy the statutory requirements for the submission of a petition under Rule 430 and that the Petition is therefore invalid as a matter of law.

A. NetCoalition Is Not an Aggrieved Person.

NetCoalition is not a "party to an action made pursuant to delegated authority" and is not "a person aggrieved by such action," as required by section (b)(1) of Rule 430 of the Rules. Under that section, NetCoalition must show, not only that it is a person, but that it is a person *aggrieved*. This, it has failed to do. In fact, the Petition fails to identify a single NetCoalition member that was receiving Arca Book data at the time that NYSE Arca submitted the Arca Book Fee Filing.

Commission opinions addressing Rules 430 and 431 have not focused on whether the party seeking review of a decision made pursuant to delegated authority was a "person aggrieved."[10] Arguably, this is because few parties have brought petitions

[10] *See, e.g.*, GB Holdings, Release No. 34-49549, 2004 WL 1207928 (Apr. 9, 2004) (reversing the decision of the Commission, pursuant to delegated authority, on the

pursuant to Rules 430 and 431, and those that have were persons that the Commission action directly affected; i.e. people who were *clearly* aggrieved.

Nevertheless, the Commission has, itself, argued in other contexts (i.e., matters not involving Rules 430 and 431) that whether a person is aggrieved is, fundamentally, a question of standing.[11] The Commission's position in these cases is that a person must have standing to be "aggrieved", and without standing, there is no basis for a challenge to Commission actions.

Standing requires a showing of (1) an injury in fact,[12] that (2) is causally connected to the challenged conduct,[13] and (3) for which a favorable decision will redress the injury.[14] When an organization or association wishes to assert associational standing on behalf of its members, as NetCoalition seeks to do, it must demonstrate that:

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ground that the Division of Market Regulations had mistakenly concluded that there had been no objections to the application of GB Holdings to withdraw certain notes from listing and registration on the American Stock Exchange; objection had been made by, and petition was brought by, 10 percent owner of the stock of GB Holdings); Knight Trading Group, Inc., Release No. 34-46609, 2002 WL 1961282 (Aug. 23, 2002); *In re. S.E.C. ex rel. Glotzer*, 374 F.3d 184, 188-189 (2d Cir. 2004).

11 *See, e.g., Indep. Investor Protective League v. Securities and Exch. Comm'n*, 495 F.2d 311 (2d Cir. 1974) (holding that investor league which challenged the Commission's grant of exemptions to various applicant companies under the Investment Company Act of 1940 was not "aggrieved" within the meaning of that act, and therefore had no standing to challenge the Commission's actions); *Option Advisory Serv., Inc. v. Securities and Exch. Comm'n,* 668 F.2d 120 (2d Cir. 1981) (per curiam) (same); *Fund Democracy, LLC v. Securities and Exch. Comm'n*, 278 F.3d 21 (D.C. Cir. 2002) (same).

12 An "injury in fact" is "an invasion of a legally protected interest that is concrete and particularized and, thus, actual or imminent, not conjectural or hypothetical." *DH2, Inc. v. United States Securities and Exch. Comm.*, 422 F.3d 591, 596 (7th Cir. 2005).

13 Causal relation requires that "the injury can be fairly traced to the challenged action of the defendant." *Id.*

14 *DH2, Inc. v. United States Securities and Exch. Comm'n,* 422 F.3d 591, 596 (7th Cir. 2005). In *DH2,* the plaintiff challenged a Commission rules release which required mutual fund companies to estimate current fair prices of securities when the market price at which those securities closed had become unreliable. The plaintiff argued that such a rule would cause it economic harm, because the companies in which it invested would be required, under the rule, to engage in subjective, estimated pricing of their securities. The court held that the claimed injury was too attenuated, and dismissed the case for lack of standing.

> its members would otherwise have standing to sue in their own right, the interests it seeks to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[15]

In *Indep. Investor Protective League,* the court held that a claim that "it is quite conceivable that in the future" its members would be investors was an insufficient basis for standing. Rather, "a plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected."[16]

The market for Arca Book quotations, and therefore the individuals and organizations that the Arca Book Fees will directly impact, are the broker-dealer members of NYSE Arca and other market professionals and institutional investors. NetCoalition, by contrast, is a "public policy" lobbying group for certain major internet companies, including "CNET Networks, Bloomberg L.P., Google, IAC/Interactive Corp., and Yahoo!"[17]

In another case, the Court of Appeals for the District of Columbia Circuit considered who or what constitutes a "person aggrieved" the 1934 Act. In *Nat'l Ass'n of Securities Dealers, Inc. v. Securities and Exch. Comm'n,* 431 F.3d 803 (D.C.Cir. 2005), NASD, via its National Adjudicatory Council ("NAC"), had disciplined two of its members for, among other things, engaging in a manipulative scheme. The disciplined members sought review before the Commission, which reversed the decision of NAC. NASD then petitioned for review in court, claiming that its Market Regulation Department ("MRD") would be frustrated in its mission if the Commission's reversal were permitted to stand, because the MRD would be unable to take disciplinary action against members and associated persons, except in the very narrow circumstances covered by the decision of the Commission.

The court refused to consider NASD's petition on the merits, because it concluded that NASD lacked standing to sue, and it therefore dismissed the case. Specifically, the court held that NASD was not a "person aggrieved," within the meaning of §25(a) of the 1934 Act,[14] and therefore could not establish standing. NASD had claimed that it was a "person aggrieved" because the definition of "person" in the 1934 Act includes juridical persons (i.e. companies).[14] The court rejected this argument, concluding, first, that NASD was not a "person" because the 1934 Act separately defined "self-regulatory organization[s]" such as NASD,[14] and, more importantly, NASD was not a person *aggrieved* because any adjudicative authority that NASD had was entirely derivative of the authority vested in the Commission.

15 *Fund Democracy, LLC*, 278 F.3d at 25.

16 495 F.2d at 312.

17 Petition, p. 1, note 1.

At best, the Petition makes the unsubstantiated claim that "[t]he instant proposal imposes fees that put NYSEArca quotations beyond the reasonable economic reach of an advertiser-supported medium like the Internet, thereby harming the investors and the internet service providers that are Petitioner's members."[18] This claimed "injury" is speculative at best, and certainly does not rise to the level of a cognizable injury in fact.

Similarly, NetCoalition cannot assert institutional standing because none of its members have standing in their own right.[19] In fact, NetCoalition concedes that the proposed Arca Book Fees may not be prohibitive to investors,[20] in which case advertising revenues will not be lost and NetCoalition's members will suffer no harm.

Combining NYSE's suitable proposed alternative (i.e., the NYSE Internet Proposal) with the Petition's failure to cite a single NetCoalition member who used Arca Book data for internet displays at the time that NYSE Arca proposed the Arca Book Fees leads to the inescapable conclusion that the Arca Book Fees imposed no harm on either NetCoalition or its members. NetCoalition must do more to establish standing than "imagine circumstances in which [it] could be affected" by the proposed fee.[21] Indeed, it must allege that it "has been or will in fact be *perceptibly* harmed by the challenged" fee.[22] This, it has not done.

Therefore, NYSE Arca respectfully submits that NetCoalition lacks standing as an aggrieved person to challenge the Commission's actions pursuant to delegated authority, and that the Commission erred in granting the Petition.

B. **The Findings Are Those of the Commission, Not the Staff.**

The Commission derives its authority to delegate certain functions to the Division of Market Regulation pursuant to paragraph (a)(12) of Rule 30-3 ("Delegation of Authority to Director of Division of Market Regulation") of the Commission's Rules of Organization and Management. That delegation authorizes the Division of Market

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18 Petition, p. 3.

19 *See Fund Democracy, LLC, supra*.

20 *See, e.g.*, Petition p. 15 ("Relatively few of our members' customers are going to purchase market data at $75 per month [an amount proposed for access to Nasdaq data]. It is unclear how many would buy NYSEArca data at $9 per month, but clearly even at $1 per month – *where one might expect more user participation* – the Commission staff is authorizing a transfer from retain investors to a for-profit monopoly of hundreds of millions of dollars annually, with literally zero showing of any cost basis.") (emphasis added).

21 *Indep. Investor Protective League*, 495 F.2d at 312.

22 *Id.* (emphasis added.)

Regulation to act on the Commission's behalf to "publish" and "approve" SRO proposed rule changes.[23]

However, the Petition alleges that the Division of Market Regulation did more than publish and approve the Arca Book Fee Filing. It intimates that the Division of Market Regulation, and not the Commission, made the determinations and findings set forth in the Approval Order.[24] That reading of the Approval Order conflicts with its plain language. The Approval Order states that the Commission, not the Division of Market Regulation, made, *inter alia*, the following findings and conclusions:

1. Arca Book Fees are consistent with the requirements of the 1934 Act and the rules and regulation under the 1934 Act;

2. Arca Book Fees are consistent with section 6(b)(4) of the 1934 Act;

3. NYSE Arca has not failed to justify NYSE Arca Fees; and

4. Arca Book Fees will not diminish market transparency or impede competition.

After attributing those findings to the Commission, the Approval Order attributes the issuance of the Approval Order to "the Division of Market Regulation, pursuant to delegated authority."[25]

Aside from the fact that the statutory delegation of authority does not delegate to the Division of Market Regulation the authority to make findings and conclusions on behalf of the Commission, the history of the Arca Book Fee Filing belies the Petition's notion that the Division of Market Regulation made the findings and conclusions. The Arca Book Fee Filing was the result of a deliberative process, a process in which the Commissioners played a role. The process included several comments letters, two

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23 17 CFR 200.30-3. That delegation of authority reads as follows:

> [T]he Securities and Exchange Commission hereby delegates . . . the following functions to the Director of the Division of Market Regulation to be performed by him or under his direction by such person or persons as may be designated by the Chairman of the Commission:
>
> (a) With respect to the Securities Exchange Act of 1934 . . .
>
> (12) Pursuant to Rule 19b-4 (§ 240.19b-4) of this chapter, to publish notices of proposed rule changes filed by self-regulatory organizations and top approve such proposed rule changes.

24 Petition, p. 2.

25 Approval Order, p. 2.

responses to those letters from NYSE Arca, numerous discussions between NYSE Arca staff and Commission staff, reports to NYSE Arca staff of conversations between Commission staff and Commissioners, and a four-month interlude between filing and approval. NetCoalition was well aware of this process, as it submitted one of the comments letters. We believe that it is disingenuous of NetCoalition to ascribe the Approval Order's findings and conclusions to Commission staff.

III. <u>**Applying the Statutory Standards**</u>.

The 1934 Act and Commission rules under the 1934 Act subject market data fees to the following standards:

A. NYSE Arca must provide for the "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."

B. Rule 603(a)(2) of Regulation NMS requires NYSE Arca to provide market data on terms that are not unreasonably discriminatory.

C. Rule 603(a)(1) of Regulation NMS requires that market data fees must be fair and reasonable.

The Arca Book Fees meet all of these standards. For one thing, they represent the first time that NYSE Arca has established a fee that a person or entity other than an Arca member or listed company must pay. By imposing fees on those who use the facilities of NYSE Arca but do not otherwise contribute to NYSE Arca's operating costs, the Arca Book Fees provide an equitable allocation of fees and charges.

The Arca Book Fees subject all professional subscribers to the same fees and all nonprofessional subscribers to the same fees. The only "discrimination" that takes place is that professional subscribers would pay higher Arca Book Fees than nonprofessional subscribers. However, the Commission and the industry have long deemed discrimination in favor of nonprofessional subscribers to be reasonable.

That leaves the "fair" and "reasonable" standards. The Petition goes on at length about the failure of the Arca Book Filing to justify Arca Book Fees. We disagree. The Arca Book Filing states that the level of the proposed Arca Book Fees is justified because:

A. they compare favorably to the level of fees that other U.S. markets and the CTA and Nasdaq/UTP Plans impose for comparable products;

B. the quantity and quality of data the NYSE Arca includes in Arca Book compares favorably to the data that other markets include in their market data products; and

C. the fees will enable NYSE Arca to recover the resources that NYSE Arca devoted to the technology necessary to produce Arca Book data.

These justifications are consistent with industry norms. The Commission has approved a number of filings with these sorts of justification arguments. In the Approval Order, the Commission stated, "the Commission disagrees with commenters' assertion that the Exchange has failed to justify its proposed fees."[26]

In setting the level of Arca Book Fees, NYSE Arca did not act arbitrarily or capriciously, as the Petition suggests.[27] Rather, NYSE Arca studied what other markets charge for comparable products and took into consideration a number of additional factors, including:

(1) consultation with some of the entities that NYSE Arca anticipated would be likely to take advantage of Arca Book Fees;

(2) the contribution that revenues accruing from Arca Book Fees would make toward replacing the revenues that NYSE Arca stands to lose as a result of the removal of the NQDS service from the Nasdaq/UTP Plan;[28]

(3) the contribution that revenues accruing from Arca Book Fees would make toward NYSE Arca's market data business;[29]

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26 Approval Order, p. 11

27 Petition, p. 6

28 As a consequence of the Commission's approval of the exchange registration of the Nasdaq Stock Market, Inc. ("Nasdaq") in 2006, the NQDS service moved from the Nasdaq/UTP Plan) to Nasdaq. (See Release No. 34-53128; File No. 10-131 (January 13, 2006; the order by which the Commission approved Nasdaq's registration as an exchange) and Release No. 34-53250; File No. S7-24-89 (February 7, 2006; the order by which the Commission approved the move of the NQDS service from the Nasdaq/UTP Plan to Nasdaq).)

NYSE Arca's portion of the revenues attendant to the NQDS service under the Nasdaq/UTP Plan amounted to approximately $8 million per year. Because of the move, NYSE Arca loses those revenues. NYSE Arca projects that Arca Book revenues will initially enable NYSE Arca to recapture only a portion of its lost NQDS revenues.

29 While NYSE Arca cannot predict the amount of revenues that NYSE Arca will collect from Arca Book Fees, NYSE Arca anticipates that its market data revenue as a percent of its total revenue is likely to remain close to its 2005 total, which was about 17 percent of NYSE Arca's revenues, slightly less than industry norms. See Section IV(D)(d) of the Self-Regulation Concept Release. The rest of NYSE

(4) the contribution that revenues accruing from Arca Book Fees would make toward meeting the overall costs of NYSE Arca's operations;

(5) projected losses to NYSE Arca's business model and order flow that might result from marketplace resistance to Arca Book Fees; and

(6) the fact that Arca Book is primarily a product for market professionals, who have access to other sources of market data and who will purchase Arca Book only if they determine that the perceived benefits outweigh the cost.

In short, NYSE Arca's review of the arguments that the Petition makes does not change NYSE Arca's view that Arca Book Fees reflect an equitable allocation of NYSE Arca's overall costs to users of its facilities.

IV. Debunking Misconceptions.

A. There Is No Cost-Based Pricing Mandate.

The Petition would have the reader believe that Arca Book Fees must be subjected to a "rigorous cost-based analysis."[30] Out of the Securities Exchange Act Amendments of 1975, the hundreds of pages of legislative history underlying those amendments, the many concept releases, committee reports and rules proposals regarding market data, and the hundreds of Commission orders approving SRO and NMS market data fee filings that pre-date the Petition, NetCoalition is able to cite only one instance to support this claim.[31] In its 1999 Concept Release on Market Data Fees and Revenues, the Commission proposed a framework for setting market data fees that it would base on a flexible application of costs. In the context of promoting that flexible cost-based approach, that Commission added a sentence that noted that Congress did not impose a cost-of-service standard, but that "the Commission . . . believes that the total amount of market information revenues should remain reasonably related to the cost of market information."

Arca's 2005 revenues consisted of revenues from transaction fees (82 percent) and revenues from listing and other sources (one percent).

30 Petition, p. 10.

31 The Petition also cites the Concept Release concerning Self-Regulation (Release No. 34-50700; File No. S7-40-04 (November 18, 2004; the "Self-Regulation Concept Release")) to support the notion that the Commission has concluded that a cost-based standard is required to justify a market data fee. However, the Self-Regulation Concept Release says no such thing. See Section IV(D)(d) of that release.

The Petition states that Commission "staff has departed markedly from this wise counsel,"[32] interpolating the Commission's 1999 statement to mean that the Commission has somehow imposed a strict cost-based standard for market data fees since the 1999 Concept Release.

We disagree. The Petition's intimation that the staff has failed to apply the Commission's standard since 1999 and that the Commission has failed in its oversight of the staff's application of the standard is simply untrue. Neither Congress nor the Commission has ever adopted such a standard. Nor should it. The Petition fails to mention that a significant portion of the industry soundly rejected cost-based market data pricing in response to the 1999 Concept Release,[33] that the Commission raised the subject again in 2000 by forming a committee of industry experts[34] to study that and other market data questions and that that committee soundly rejected the concept of cost-based pricing.[35] The Commission again raised the question of a flexible cost-based pricing

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32 Petition, p. 11.

33 See, for example, letter from Michael Atkin ,Vice President, Financial Information Markets, Software and Information Industry Association, to Jonathan G. Katz, Secretary, Commission, dated March 30, 2000; letter from Sara Banerjee and Ralph Bassfeld of Telekurs Financial Information Ltd to Jonathan G. Katz, dated March 28, 2000; letter of Kenneth S. Spirer of Merrill Lynch, Pierce, Fenner & Smith Incorporated to Jonathan G. Katz, dated March 31, 2000; letter of Wendy L. Gramm and Susan E. Dudley of The Regulatory Studies Program of the Mercatus Center at George Mason University to Arthur Levitt, Chairman, Commission, dated March 31, 2000; letter of Thomas J. Jordan, President, Jordan & Jordan to Jonathan G. Katz, dated April 7, 2000, and letter of James E. Buck, Senior Vice President and Secretary, NYSE, to Jonathan G, Katz, dated April 10, 2000.

34 The Advisory Committee on Market Information (the "Advisory Committee") included high-ranking representatives of academia, securities markets, market data vendors, online and traditional broker-dealers, institutional investors, a consulting firm and an industry trade association. Gerald Putnam, then the Chief Executive Officer of Archipelago(NYSE Arca's predecessor), was one of the representatives. The industry trade association that participated took an active part in the Advisory Committee's deliberations and today is part of the Securities Industry and Financial Markets Association, a trade association that has joined NetCoalition in opposing Arca Book Fees.

35 The Advisory Committee rejected utility rate-making in general and the flexible cost-based approach in particular. It dismissed the approach as "unwise," "unworkable," "disfavored," "resource-intensive" and "distortive." (See "Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change" (September 14, 2001) at p. 93.)

standard as part of its Self-Regulation Concept Release and as part of its Regulation NMS initiative.[36] Once Again, a significant portion of the industry opposed the concept.

NYSE Arca concurs with the many others commenters who oppose the establishment of a cost-based approach.[37] In its April 10, 2000, response to the 1999 Concept Release (the "NYSE Response"), NYSE commented that the cost-based approach that the Commission has proposed "simply will not work. It would inappropriately burden both the government and the industry, stifle competition and innovation, and in the end, *raise* costs and, potentially, fees." NYSE Arca shares this view and refers the Commission to Part I(B) of the NYSE Response and to Appendices C, C-1 and C-2 to the NYSE Response for a solid explanation of the many reasons why NYSE Arca believes that NetCoalition's assertion that market data fees should be cost-based is not in the best interests of the industry.

B. Comparisons Are a Proper Basis for Justifying Fees.

The Petition would have the reader believe that the Arca Book Filing failed to provide adequate justification for the level of the proposed Arca Book Fees. In light of the Commission's finding in the Approval Order that the Arca Book Filing adequately justified the proposed level of Arca Book Fees, the Petition seemingly asks the Commission to substitute NetCoalition's judgment for that of the Commission.[38] It asserts that justification of fees by comparing them to other fees does not satisfy the statutory requirement.

We disagree. The Arca Book Fees compare favorably to those that NYSE charges for OpenBook and Nasdaq charges for TotalView. It also compares favorably to the fees that the American Stock Exchange has recently proposed for its depth-of-book product.[39] As the Commission has written, the fees that United States securities markets charge compare favorably to those that foreign exchanges charge and market data revenues constitute a smaller portion of the total revenues of United States securities markets than those of foreign countries.[40] The revenues that all securities markets collect from the sale of market data compare favorably to the revenues that market data vendors receive for acting as intermediaries in providing the markets' data to their subscribers.[41]

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36 Release No. 34-51808; File No. S7-10-04 (the "Regulation NMS Adopting Release").

37 See footnote 32.

38 The Approval Order concludes, "Accordingly, the Commission disagrees with commenters' assertion that the Exchange has failed to justify its proposed fees."

39 See File No. SR-AMEX-2006-100.

40 See Section IV(D)(d) of the Self-Regulation Concept Release.

41 NYSE Arca notes that NetCoalition lists Bloomberg LLP as a Trustee. On average, a broker pays Network A approximately $25 per month per device for the receipt and use of Network A data. That broker typically pays Bloomberg

The markets' revenues represent a tiny fraction of the vendors' revenues.[42] The revenues that market data currently contributes to the markets' collective revenue pool compare favorably with their historic contribution.

Most notably, market data revenues compare favorably to the markets' cost of producing the data. Although the Petition asserts that increases in transaction fees have generated sufficient fees to offset the modest costs of consolidating and disseminating market data, the reality is that, if the Commission were to require markets to cost-justify their market data fees, the costs would be far from modest. Because producing market data is a primary exchange output, most amounts that an exchange spends on systems, infrastructure and development is properly allocated to market data production. The production costs represent the costs of attracting order flow to that market. For NYSE Arca, market data covered approximately 18 percent of total NYSE Arca expenses for 2005.

In our view, these comparisons are not misplaced. They provide a sound and appropriate basis for asserting that fees are fair and reasonable.

C. Arca Book Fees Are Not an Exercise of Monopoly Power.

If the scattered approach of the Petition can be said to focus on any one thing, it is the allegation that Arca Book Fees amount to an exercise of monopoly pricing power. This is a misconception. Markets compete with one another by seeking to maximize the amount of order flow that they attract. The markets base the competition for order flow on such things as technology, customer service, transaction costs, ease of access, liquidity and transparency. In recent months, significant changes in market share, the rush to establish trade-reporting facilities for the reporting of off-exchange trades, frequent changes in transaction fees and new market data product proposals have provided evidence of the intensity of the competition for order flow.

The following description of how many brokerage firms typically handle the orders that they receive illustrates one aspect of competition in the securities industry:

$1500 to $2000 per month to act as an intermediary in getting the Network A data (and other markets' data) to the broker.

We also note that supporting the broad-based pricing initiatives set forth in the Petition, such as cost-based pricing, comports with comments that Bloomberg has made for years and serves Bloomberg's business model nicely.

42 In the Commission's Self-Regulation Concept Release, the Commission pointed out that "in 1998, the total SRO market data revenue . . . represented a very small portion of the securities industry's total expenses for the year -- less than 1/4th of one percent." See Section IV(D)(d) of the Self-Regulation Concept Release.

- When a brokerage firm receives an order, its first preference is to internalize its execution. This allows it to avoid exchange fees and to earn a "dealer" profit.

  However, internalization requires a price on which to base the trade. The price that the markets discover under the NMS Plans is always a safe price for the brokerage firm to use.

  If successful in internalizing the order, the brokerage firm can simply post the trade to the NASD.

- If the brokerage firm is unable to internalize the trade, typically, it next takes the order to dark pools, crossing networks, ECNs, alternative trading systems, or other non-traditional execution facilities to search for an execution.

- If the brokerage firm is unable to execute the order at any of those locations, it resorts to its safety net: traditional exchanges. Currently, eleven exchanges trade listed securities in the United States.

- If NYSE Arca is successful in having the brokerage firm chose to send the order to it rather than another exchange, the order follows one of three paths:

  1. NYSE Arca will create a trade price and execute the order immediately;

  2. if the order cannot be executed immediately, the brokerage firm may elect to have NYSE Arca display the order in Arca Book, which contains a compilation of all limit orders that broker-dealers have submitted to NYSE Arca for display; or

  3. the brokerage firm may elect to have NYSE Arca hold a portion of the order as hidden interest that NYSE Arca holds in reserve, which means that NYSE Arca will not include the undisplayed portion of the order as part of the Arca Book display.

As a result of all of the choices and discretion that are available to brokers, the displayed depth-of-book data of one trading center does not provide a complete picture of the full market for the security. It displays only a portion of all interest in the security. A brokerage firm has potentially dozens of different information sources to choose from in determining if, where, and how to represent an order for execution. Singling out depth-of-book information for utility-type regulation harms the markets providing the information to investors, and furthers the business agendas of brokers who wish to use the depth-of-book information to compete against the markets that provide it.

The Commission has prescribed top-of-the-book consolidated market data as the data required for best execution purposes and the NMS Plans make that data available.[43] While some brokers may wish to supplement that data with depth-of-book and other information to facilitate their order-routing decisions, no regulatory requirement makes this anything other than optional. In addition, those who choose to use Arca Book data as part of an order execution strategy have no obligation to send their order flow to NYSE Arca for execution. For instance, they may opt to internalize the order, essentially free riding on the Arca Book information, rather than to send their order flow to NYSE Arca.

The marketplace is the best determinant of the amount of reward for quality and innovation. If NYSE Arca were to set Arca Book Fees too high, broker-dealers and other professionals would forego Arca Book data and would choose to receive the depth-of-book service of other markets. If too many market professionals reject Arca Book as too expensive, NYSE Arca would have to reassess the Arca Book Fees because Arca Book data provides transparency to NYSE Arca's market, transparency that plays an important role in the competition for order flow. In short, the monopoly power that the Petition asserts does not exist.

More importantly, any suggestion that NYSE Arca or any other exchange holds a monopoly in the order-execution business is simply wrong. The order-execution business is highly competitive. Firms choose how to execute their orders and have no obligation to route them to a particular exchange for execution. While the Arca Book Fees entitle the recipient to receive Arca Book limit order information for Network A securities, Network B securities and Network C securities (i.e., stocks listed on Nasdaq), NYSE Arca does not maintain a dominant share of the market in any of the three networks.[44]

Assuming, *arguendo*, that NYSE Arca holds monopoly pricing power, the Petition's assertion that the exercise of this power harms investors is also misplaced. The overwhelming majority of retail investors are unaffected by the inter-market competition over proprietary depth-of-book products. For them, the consolidated top-of-the-book data that the markets make available under the NMS Plans provides adequate information on which they can base trading decisions. The industry makes that market data widely

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43 In connection with its adoption of Regulation NMS, the Commission reviewed, and submitted for comment, whether to mandate the markets' distribution of top-of-the-book data and depth-of-book data. It affirmed (again) its long-standing policy of requiring the markets to make consolidated national best bids and offers available, but leaving distribution of a market's depth-of-book data to the market's discretion, subject to standards of fairness and reasonableness. <u>See</u> Section V(A)(4) of the Regulation NMS Adopting Release.

44 During 2005, NYSE Arca enjoyed the following percentages of shares traded:

Network A: 3.6 percent

Network B: 30 percent

Network C: 23 percent

available, and at no direct cost to the investor.[45] Products such as that proposed in the NYSE Internet Proposal provide them with a source of price information that keeps them sufficiently abreast of the market. The few retail investors who feel they need depth-of-book information can simply purchase it. In the Arca Book filing, that would cost the investor as little as $5 per month.

The Commission designed Regulation NMS, in part, to promote innovation in the market data arena. This initiative has already yielded positive results, as markets have proposed several new and innovative products since the adoption of Regulation NMS.[46] This burgeoning creativity benefits the marketplace but contradicts the Petition's assertions of monopoly power in the market data industry. Ironically, the Petition has blocked this progress by preventing new market data products from reaching consumers.

D. Arca Book Fees Will Not Impose a Burden on Competition.

Arca Book Fees do not discriminate unreasonably and therefore do not impose a burden on competition on broker-dealers, other market professionals or any other party that wishes to receive Arca Book data. Each recipient must pay the same fees as every other recipient.

The Approval Order specifies that "the Commission does not believe that the imposition of fees for NYSE Arca data will diminish market transparency or impede competition." We agree. In fact, the establishment of Arca Book Fees represents the epitome of competition. It reflects the interplay of market forces at work. NYSE Arca believes that the revenues that NYSE Arca receives from Arca Book Fees will enable NYSE Arca to compete better with markets that have larger revenue sources than NYSE Arca. So does the NYSE Internet Proposal and other innovative market data products that markets have recently introduced or will soon be introducing.

In turn, the establishment of Arca Book Fees will reduce burdens on competition for markets that elect not to charge for their depth-of-book data. They will have less competition when seeking parties to take their data.

E. Per-Terminal Fees Are Not Intended for Unregistered Use.

The Petition would have the reader believe that Arca Book Fees would impose exorbitant charges on internet users. It suggests that the exchanges would receive about

45 For example, the ten largest online brokers provide CTA and CQ data to their clients free of charge.

46 For example, the NYSE Internet Proposal, the NYSE Retail Trading Product and Program Trading Product (File No. SR-NYSE-2006-32; Release No. 34-54055), the AMEX depth-of-book proposal (File No. SR-AMEX-2006-100), and Nasdaq's proposed Nasdaq Custom Data Feeds (Release No. 34-54959; File No. SR-NASDAQ-2006-056).

$44 billion dollars in revenue as the result of per-terminal internet fees.[47] Of course, this is nonsense.

NYSE Arca targeted the Arca Book service primarily for professional subscribers. Current consumption of order-book products by nonprofessional investors demonstrates that very few nonprofessional investors find value in these products. While internet portals may elect to make it available to nonprofessional users at the nonprofessional rates, NYSE Arca only imposes the nonprofessional subscriber charge in respect of those investors who wish to receive it. To receive the service, an interested investor must register to use the product and execute an agreement to do so. In addition, NYSE Arca imposes the nonprofessional fees on the vendor intermediary rather than on the end user. As is the case today with nonprofessional subscriber fees under the NMS Plans, the intermediaries may absorb those fees, may pass them through to the end-users, or may mark them up, as NetCoalition-member Yahoo does. In performing its math, the Petition assumes that all 49 million Americans that visit financial sites would subscribe and pay.[48] That calculation misconstrues the process.

F. NYSE Arca Will Not Impose Fees Retroactively.

The Petition would have the reader believe that NYSE Arca would impose the Arca Book Fees retroactively. NYSE Arca has never represented that it would do so and has no intention of doing so.

G. Market Data Revenues Have Remained Stable.

A letter of the Securities Industry and Financial Markets Association ("SIFMA") comments on the Petition.[49] In that letter, SIFMA comments that market data revenues of NYSE Group (the parent company of NYSE Arca and NYSE) for the third quarter of 2006 rose 33.7 percent from the year-earlier (i.e., 2005) three-month period. However, that statistic does not mean that NYSE or NYSE Arca recognized a significant increase in market data revenues during 2006. It only reflects that 2005 market data revenues for NYSE Group, unlike its 2006 counterpart, does not include NYSE Arca market data revenues (since NYSE Arca's merger with NYSE had not yet been consummated). In fact, the combined market data revenues for NYSE and NYSE Arca showed a slight decline from 2005 to 2006.[50]

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47 Petition, p. 14

48 *Id.*

49 See letter from Ira Hammerman, Senior Managing Director and General Counsel, SIFMA, to Nancy Morris, Secretary, Commission, dated January 17, 2007 (the "SIFMA Letter").

50 Pro forma results disclose that NYSE Arca and NYSE received a combined $242 million in 2005, while NYSE Group received $235 million for 2006.

H. Users Receive CQS Data and Arca Book Data at Similar Speeds.

The SIFMA Letter comments about the speed with which the Arca Book data feed will allow recipients to receive Arca Book data, noting that NYSE Arca has advertised that the unconsolidated Arca Book feed is faster than the consolidated feed that the markets make available under the CQ and Nasdaq/UTP Plans. However, the variations in speed are measured in milliseconds, a time difference that only the most sophisticated order-routing engines would notice. From a display perspective, the difference is imperceptible. Furthermore, the CQ Plan participants have undertaken a technology upgrade that will reduce latency for the CQ data feed. It will thereby reduce the difference in speed between the Arca Book feed and the CQ Plan feed. The CQ Plan participants currently anticipate that they will complete the upgrade later this month. They anticipate that the upgrade will reduce the latency of the CQ Plan feed from several hundred milliseconds to approximately 30 milliseconds. As data-distribution speed continues to grow in importance, market forces will motivate markets to devote the resources necessary to increase further their distribution speeds, to the benefit of the investing public.

* * *

Arca Book Fees fit comfortably into the matrix of fees that other markets charge for depth-of-book data. They are fair and reasonable and represent an equitable allocation of NYSE Arca dues, fees and charges. As a legal matter, NetCoalition had no standing to submit the Petition. In addition, the Petition relies upon a panoply of misconceptions, including that NYSE Arca exercises monopoly pricing power and that market data fees are subject to a cost-based standard. It seeks to impose government rate-regulation, which would stifle innovation of market data products that provide value to the marketplace. It fails to recognize the availability of alternative sources of information for NetCoalition's internet service providers.

The Petition's more "cosmic" market data-pricing arguments go well beyond the question of whether NYSE Arca is proposing to set Arca Book Fees at an appropriate level. Those arguments are not appropriate considerations in the context of what is essentially a "me too" fee filing. The NYSE Internet Proposal makes moot the one argument in the Petition that is relevant to a determination of whether Arca Book Fees comply with regulatory standards. Namely, it eliminates NetCoalition's argument that Arca Book Fees jeopardize the advertisement-sponsored business models of internet portals in the market data arena and hamper the ability of investors to access real-time data by eliminating large internet portals' access to real-time data. The stay places NYSE Arca at a competitive disadvantage to those markets that the Commission allows to charge for depth-of-book services and violates the 1934 Act goal of "fair competition . . . among exchange markets."[51]

[51] See section 11A(a)(1)(C)(ii) of the 1934 Act.

For all of these reasons, we urge the Commission to affirm its approval of Arca Book Fees and to remove the stay.

Sincerely,

Cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Roel C. Campos, Commissioner
The Hon. Annette L. Nazareth, Commissioner
The Hon. Kathleen L. Casey, Commissioner
Erik Sirri, Director, SEC Division of Market Regulation
Robert Colby, Deputy Director, SEC Division of Market Regulation