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NYSE Arca

November 8, 2006

VIA Electronic Submission and U.S. Mail

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

> **Re: Response to NetCoalition.com Notice of Intention
> to Petition for Review of SR-NYSEArca-2006-21**

Dear Chairman Cox:

Rule 430 of the SEC Rules of Practice 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. We understand that on November 6, 2006,
NetCoalition.com submitted such a notice (the "Notice") to seek Commission review of
the Division of Market Regulation's approval of Arca Book fees on authority delegated
by the Commission.[1] If the Commission deems the Notice to have been properly filed,
the Notice triggers an automatic stay of the approval of the Arca Book fees upon NYSE
Arca's receipt of actual notice from the Commission.[2] For reasons detailed below, the
Commission should reject the Notice because NetCoalition.com does not have standing
under SEC Rules. Should the Commission accept NetCoalition.com's Notice, we urge
the Commission to order the removal of the automatic stay immediately and to decline to
review the Approval Order.

To begin, NetCoalition.com 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 SEC Rules of Practice. NetCoalition.com has never arranged to receive
Arca Book data from Arca Book nor has it ever redistributed Arca Book data over the
Internet. In no way have Arca Book fees aggrieved NetCoalition.com.

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[1]   Release No. 34-54597; File No. SR-NYSEArca-2006-21, October 20, 2006 (the
"Approval Order").

[2]   See section (f) of Rule 431 of the SEC Rules of Practice. NYSE Arca notes that,
as of the date of this letter, it has yet to receive actual notice from the Commission
that NetCoalition.com filed the Notice.

Furthermore, in the Notice, NetCoalition.com specifies that it is simply a public policy voice. It makes no claim that it represents any other party or any aggrieved person. Nevertheless, it is worth noting that the internet displays that NetCoalition.com attached to the Notice do not reflect Arca Book data, undermining any argument that those internet service providers are aggrieved persons. Rather those displays reflect the use of market data that they received from INET or Brut or from an Electronic Communications Network ("ECN"), but not from NYSE Arca.

Because NetCoalition.com is not a party to the Approval Order and is not an aggrieved person under the Approval Order, section (b)(1) of Rule 430 of the SEC Rules of Practice does not grant NetCoalition.com a right to seek Commission review of the Approval Order by filing a notice of its intention to petition for review.

In addition to ordering the removal of the stay, the SEC Commissioners should immediately exercise their discretion under section (b)(2) of Rule 431 of the SEC Rules of Practice to decline to review the Approval Order. While we understand that certain issues regarding market data fees are still under discussion, NetCoalition.com's petition is completely without merit.

In implementing billing and collection mechanisms for Arca Book, NYSE Arca followed the letter of a purposefully written Approval Order that rejected the several issues that NetCoalition.com raises in its Notice.[3] The Approval Order was issued only after consideration of several rounds of comprehensive comments by the industry and responses by NYSE Arca. From that filing[4] and other proposed rule changes, the SEC has heard and rejected all of the arguments that the Notice raises.

In fact, the comment letters cited in the Approval Order include one from NetCoalition.com itself.[5] In its comment letter, NetCoalition raised substantially the same arguments that it raises in its Notice, including questioning whether NYSE Arca

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[3] By declining to remove the stay, the Commission would cause hardship to vendors, brokers and NYSE Arca. They would each have to unwind the billing and collection infrastructures that they established subsequent to the Approval Order. They will need to modify or stop routine invoicing processes and stop and reverse credit card payments. Investors will be confronted with awkward credits and debits on their credit card statements. In general, marketplace confusion would result.

[4] See Release No. 34-53592; File No. SR-NYSEArca-2006-21 (the "Arca Book Fee Filing"). It appeared in the Federal Register on June 9, 2006.

[5] See letter from Markham C. Erickson, Executive Director and General Counsel, Netcoalition.com, to the Honorable Christopher Cox, Chairman, SEC, dated August 9, 2006).

successfully justified the fairness and reasonableness of Arca Book fees. As the Notice mentions, the Approval Order concludes that the fees are justified because they compare favorably to those imposed by other U.S. markets and the CTA and Nasdaq UTP Plans for comparable products. However, as the Notice fails to mention, the Approval Order also concludes that NYSE Arca further justified the fairness and reasonableness of the Arca Book fees on the bases of (1) NYSE Arca's devotion of resources to enhancing Arca Book's technology, and (2) the quantity and quality of Arca Book data relative to comparable market data products.

The Approval Order concludes, "Accordingly, the Commission disagrees with commenters' assertion that the Exchange has failed to justify its proposed fees." Thus, by all indications, the staff of the Division of Market Regulation thoroughly vetted the Arca Book Fee Filing and the Approval Order within the Commission and among the Commissioners.

Importantly, the NetCoalition.com Notice does not claim that the ECN information that is the subject of its grievance is Arca Book information. The several screen displays that the Notice incorporates display INET and Brut services, services that are completely unrelated to the Arca Book service. That is, NetCoalition is commenting on a fee structure that several markets -- and not just NYSE Arca -- impose.

The Commission should remove the stay of the Approval Order because the application of the Notice's requested action would place a competitive burden uniquely on NYSE Arca and foster unequal regulation of the securities markets. The need to address broader data fee questions, such as those that the Concept Release concerning Self-Regulation[6] raises, should not trigger a reversal of a well-reasoned SEC approval order. Instead, the industry should debate the issue in a way that will not cause disruption to the Arca Book data feed -- a data feed that is of great value to investors. If the SEC perceives the need to make changes after the conclusion of that deliberative process, it has the authority to do so.

NetCoalition.com asserts that "exchanges are increasingly seeking to restructure fee arrangements to maximize exchange profits." Yet the ECN information to which NetCoalition.com refers was not the subject of any previous arrangement. Certain ECNs adopt a business model that includes making market information available without apparent fees. Of course, we have no way of knowing if the internet service providers make non-disclosed deals with the ECNs since ECN market data fees, unlike SRO market data fees, are not regulated.

NetCoalition.com states that "in some cases, exchanges have sought retroactive fee changes." That is not true with Arca Book nor can we recall any instance of NYSE or NYSE Arca ever imposing retroactive charges. We do not know to what NetCoalition.com is referring.

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[6]   See Release No. 34-50700, File No. S7-40-04, November 18, 2005.

NetCoalition.com also states that "we believe that the exchanges should be required to disclose a more robust methodology when seeking to impose fees. . . ." Once again, the SEC understands best the application of the "fair" and "reasonable" standards that SEC rules impose on SRO market data fees. In our view, the SEC has a long-standing track record of assuring that market data fees are fair and reasonable. It has not failed to intercede when it found a fee to be other than fair and reasonable.

Furthermore, NetCoalition.com states that "the exchanges demands have resulted in the most popular Internet financial Web sites eliminating access to real-time market data for most of the hundreds of millions of users of the Internet. The result is that market data information seems to be one of the only areas of the World Wide Web where Internet users cannot easily access real time information." We could not disagree more. The internet financial websites apparently arranged with INET and Brut, which were then both ECNs, to receive real-time market data services. Now that Nasdaq is incorporating INET and Brut into the Nasdaq exchange, they lose their status and identity as ECNs and Nasdaq is free to amend its fee structure to reflect the new status of INET and Brut, so long as the fees remain fair and reasonable. However, the internet financial websites are free to arrange to receive real-time market data services from any of the several other ECNs.

Of course, we believe that providing hundreds of millions of internet investors with market data that reflects only the liquidity available on one ECN is very troublesome. No ECN controls a meaningful portion of trading activity or contributes meaningfully to the National Best Bid and Offer. In our view, the real-time ECN information that NetCoalition members were distributing was more misleading than useful. Yet, the internet pages that NetCoalition attached to its Notice display no disclaimers informing investors that the market data is suspect and may not reflect the true market for each security. Rather, those pages make it appear as though the viewer is receiving real-time data that is tantamount to the highly reliable consolidated data that the markets make available under the CTA and CQ Plans.

We compare a single ECN's real-time data to broker-dealer distribution of market data. Every major on-line broker provides to its customers access to real-time, consolidated, streaming market data free of charge. As a result, most individual investors with brokerage accounts receive free access to consolidated real-time information from their brokerage firms. Network A charges $1 per month per investor to the broker to provide this service for NYSE-listed securities. In NYSE-listed securities, this service contains nearly 1.5 billion updates per month. The $1 fee assures that all users of real-time data contribute to the infrastructure to produce and distribute the data.

The markets that trade NYSE-listed securities also permit NetCoalition.com's internet service providers, such as Yahoo! and AOL, to provide consolidated real-time market data to investors for the same $1-per-investor monthly Network A fee. The internet service providers understand the superiority of the markets' consolidated real-time data

over that of an ECN. The markets charge each of them an aggregate of $3 per month per investor to receive consolidated real-time market data for all listed securities (i.e., those listed on NYSE, AMEX and Nasdaq). However, a quick look at the Yahoo! website reveals that Yahoo! then charges investors $13.95 per month for that market data. That is, the internet service provider has seen fit to profit from the Networks' data by marking up the price nearly 400 percent.

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Based upon these arguments, we urge the Commissioners to order immediately the removal of the stay, pending its determination of whether to review the Division of Market Regulation's approval of the Arca Book fees and any subsequent Commission review of that action.

Sincerely yours,

cc: Commissioner Paul S. Atkins
        Commissioner Roel C. Campos
        Commissioner Annette L. Nazareth
        Commissioner Kathleen L. Casey
        Eric Sirri, Director, SEC Division of Market Regulation
        Robert Colby, Director, SEC Division of Market Regulation
        Nancy Morris, Secretary, SEC