FINRA
Financial Industry Regulatory Authority

March 27, 2008

Ms. Nancy M. Morris
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-FINRA-2007-041: Response to Comments

Dear Ms. Morris:

On December 21, 2007, Financial Industry Regulatory Authority, Inc. or "FINRA" (f/k/a the National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission (the "SEC") proposed rule change SR-FINRA-2007-041 to modify the percentage of New York Stock Exchange ("Tape A"), American Stock Exchange and regional exchange ("Tape B"), and Nasdaq Exchange ("Tape C") market data revenue shared with FINRA members reporting trades to the NASD/Nasdaq Trade Reporting Facility (the "NASD/Nasdaq TRF")[1] and create a tiered rebate schedule that would base the percentage of market data revenue shared with a given member on the member's "Market Share," as defined in the proposed rule change. On January 24, 2008, the SEC published the proposed rule change for comment in the Federal Register.[2] The comment period closed on February 14, 2008. The SEC received one comment letter in response to the Federal Register publication.[3]

1 Effective July 30, 2007, FINRA was formed through the consolidation of NASD and the member regulatory functions of NYSE Regulation. Accordingly, the NASD/Nasdaq TRF is now doing business as the FINRA/Nasdaq TRF. FINRA will file a proposed rule change to reflect the formal name change of each FINRA Trade Reporting Facility in the Manual.

2 See Securities Exchange Act Release No. 57164 (January 17, 2008), 73 FR 4295 (January 24, 2008) (notice of filing of SR-FINRA-2007-041).

3 The SEC received a comment letter from Christopher Gilkerson and Gregory Babyak, Co-Chairs, Market Data Subcommittee of the Technology and Regulation Committee, Securities Industry and Financial Markets Association ("SIFMA"), dated February 14, 2008.

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The commenter argues that the proposed rule change is deficient in that it does not address the competitive impacts of the proposed rebate schedule. The commenter asserts that, in the long run, the higher rebates proposed for the NASD/NYSE Trade Reporting Facility[4] and the NASD/Nasdaq TRF may not be beneficial to SIFMA's members if they result in fewer TRF choices, thereby diminishing competition. The commenter states that the proposed rule change, by merely stating in a conclusive manner that "FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the Act," does not meet the requirements of the Securities Exchange Act of 1934 (the "Act").

The Act does not require that FINRA rules impose no economic burden on competition, but rather that any such burden be necessary and appropriate to further the purposes of the Act.[5] It is FINRA's view that a reduction in pricing by a self-regulatory organization (or a rebate in this instance) with respect to any facility or service does not constitute an undue burden on competition that is not in furtherance of the Act.

The commenter also makes several arguments that are not germane to this proposed rule change. First, the commenter argues that the proposed market data rebate demonstrates that the market data fees levied on firms are excessive and have no reasonable basis. Second, the commenter argues that the proposed market data rebate demonstrates the ability of self-regulatory organizations to allocate the costs of collecting and distributing market data to others. Third, the commenter argues that the commenter and other parties are unable to comment fully on the policies behind the proposed rule change due to a lack of transparency regarding market data costs and revenues.

As the commenter has pointed out, the reasonableness of market data fees and the purported lack of transparency regarding the cost of collecting the market data are at issue in the NetCoalition Petition. Approval of this proposed rule change does not require resolution of these issues. Additionally, with respect to the commenter's assertion that it cannot comment fully on the proposed rule change, it is FINRA's view that the proposed rebate schedule is reasonable for the reasons stated in the published rule filing. The commenter's assertion does not, in FINRA's view, refute the stated rationale for the proposed rebate schedule and FINRA does not believe that the costs of collecting and distributing the market data – which costs are not set by FINRA – are necessarily determinative of the reasonableness of the rebate.

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4 See Securities Exchange Act Release No. 56754 (November 6, 2007), 72 FR 64101 (November 14, 2007) (notice of filing of SR-NASD-2007-031). On February 4, 2008, FINRA submitted its response to comments as Partial Amendment No. 3 to SR-NASD-2007-031.

5 Section 15A(b)(9) of the Act requires that FINRA's rules not impose "any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]." 15 U.S.C. 78o-3(b)(9).

If you have any questions, please contact me at (202) 728-8190 or Stephanie Dumont at (202) 728-8176.

Very truly yours,

Lisa C. Horrigan
Associate General Counsel