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December 7, 2012

Ms. Elizabeth M. Murphy
Secretary
United States Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Response to Comments
File No. SR-NASDAQ-2012-090

Dear Ms. Murphy:

The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) submits this letter to respond to additional comments filed in connection with the above-referenced proposal to amend Nasdaq Rule 4626 to establish a one-time, voluntary accommodation pool of up to \$62 million to compensate Nasdaq members and their customers for objectively measured losses directly arising from system difficulties Nasdaq experienced during the initial public offering (the “IPO”) of Facebook, Inc. (“Facebook”) on May 18, 2012.¹ On October 26, 2012, the Securities and Exchange Commission (the “Commission”) issued an order instituting proceedings to determine whether to approve or to disapprove the Proposal.² In response to the Commission’s invitation for additional comment on the Proposal, six comment letters have been filed,³ in addition to eleven comment letters originally filed regarding the Proposal⁴ and Nasdaq’s original response to

¹ Securities Exchange Act Release No. 67507 (July 26, 2012), 77 FR 45706 (August 1, 2012) (SR-NASDAQ-2012-090) (“Accommodation Proposal” or “Proposal”).

² Securities Exchange Act Release No. 68115 (October 26, 2012), 77 FR 66197 (November 2, 2012) (SR-NASDAQ-2012-090) (“Proceedings Order”).

³ See Letter from Mark Shelton, General Counsel, UBS Americas, to Elizabeth M. Murphy, Secretary, Commission (November 23, 2012) (“UBS Letter”); Letter from Finkelstein Thompson LLP et al. to Elizabeth M. Murphy, Secretary, Commission (November 23, 2012) (“Finkelstein Letter”); Letter from Tim Mann (November 23, 2012) (“Tim Mann Letter”); Letter from Jeremy Abelson, MJA Capital (November 21, 2012) (“MJA Capital Letter”); Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, Commission (November 20, 2012) (“SIFMA Letter”); Letter from John Robinson (November 13, 2012) (“John Robinson Letter”).

⁴ The comment letters originally filed regarding the Proposal are described in the Proceedings Order.

those comments.⁵ Nasdaq appreciates the opportunity to respond to these additional comments and urges prompt approval of the Proposal.

Nasdaq Rule 4626(a) protects Nasdaq from liability for all “claims arising out of the NASDAQ Market Center or its use.” The Commission approved Rule 4626 as consistent with the Securities Exchange Act of 1934 (the “Act”),⁶ and similar rules are in effect at all other US exchanges.⁷ Such rules exist precisely because of the possibility of events such as the system difficulties that occurred during the Facebook IPO. They reflect the regulatory policy objective of ensuring that exchanges are not the financial guarantors of specific outcomes with respect to the hundreds of billions of dollars of orders that they process every day. Exchanges perform vital functions that are unique to their regulatory status, including (i) providing a framework for capital formation through the IPO process, (ii) reviewing listed companies’ compliance with listing standards, and enforcing those standards to protect investors; (iii) providing trading venues that are available to all interested market participants on a non-discriminatory basis, (iv) maintaining fair and orderly markets and performing price discovery functions that are used by other trading venues and market participants to benchmark their own trading activity, and (v) regulating the conduct of their members.⁸ Because they perform these functions, they are subjected to pervasive regulation by the Commission. In the absence of rules such as Rule 4626, a single catastrophic event could bankrupt one or multiple exchanges, thereby imperiling the performance of their unique functions, with attendant consequences for investor confidence, investor protection, and macroeconomic stability.

⁵ Letter from Joan C. Conley, Senior Vice President & Corporate Secretary, Nasdaq, to Elizabeth M. Murphy, Secretary, Commission (September 17, 2012) (“Prior Nasdaq Letter”).

⁶ Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550 (January 23, 2006) (File No. 10-131) (“Nasdaq Registration Approval Order”). See also Securities Exchange Act Release Nos. 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR-NASDAQ-2006-001); 60794 (October 6, 2009), 74 FR 52522 (October 13, 2009) (SR-NASDAQ-2009-084); and 64365 (April 28, 2011), 76 FR 25384 (May 4, 2011) (SR-NASDAQ-2011-058).

⁷ See, e.g., BATS Exchange and BATS-Y Exchange Rules 11.16; C2 Options Exchange Rule 6.42; CBOE Options Exchange Rule 6.7; CME Rule 578; EDGA and EDGX Rules 11.11; ISE Rule 705; NASDAQ OMX PHLX Rule 3226; NASDAQ OMX BX Rule 4626; NYSE Rules 17 and 18; NYSE MKT Rule 905NY; NYSEArca (Options) Rule 14.2; NYSEArca (Equity) Rule 13.2; One Chicago Rule 421. In fact, earlier this week, the Commission approved a similar limitation of liability rule for a newly registered exchange. See Securities Exchange Act Release No. 68341 (December 3, 2012), 77 FR 73065 (December 7, 2012) (File No. 10-207) (approving, inter alia, Rule 527 of the Miami International Securities Exchange, LLC).

⁸ The fact that some exchanges, including Nasdaq, have entered into contracts with the Financial Industry Regulatory Authority (“FINRA”) or other self-regulatory organizations (“SROs”) to provide certain regulatory services does not relieve those exchanges of responsibility for ensuring that FINRA adequately enforces the exchanges’ rules. Nasdaq Registration Approval Order, 71 FR at 3556 (“[T]he Nasdaq Exchange bears the responsibility for self-regulatory conduct and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on the Exchange’s behalf.”). Moreover, the core functions related to the launch of an IPO – listing and real-time surveillance of trading to ensure a fair and orderly market – are performed by Nasdaq directly and are not the subject of a regulatory services agreement with FINRA.

Nasdaq's Proposal would, if approved, establish a one-time voluntary program to increase the funds made available for specific, objectively identifiable losses directly attributable to the system issues experienced by Nasdaq in the Facebook IPO. In the absence of the Proposal, existing Rule 4626(b) limits such payments to \$500,000 and authorizes Nasdaq to determine which claims will be considered valid as ones directly resulting from a system failure, and which will be considered indirect, speculative, or attributable to the actions or system failures of a member. If approved, the Proposal would increase available funds to \$62 million and would ground the rationale for the payment or denial of particular claims in a transparent and logical analysis of the experience of particular types of orders on May 18, 2012, subject to the administration of FINRA.

The vast majority of Nasdaq's members have raised no objections to the Proposal, and two of the members with the largest volume in Facebook shares on May 18 – Citadel LLC and Knight Capital Group, Inc.⁹ – have written to urge the Commission to approve it. The Proceedings Order, however, draws particular attention to three sets of concerns articulated by commenters: “the limited categories of claims eligible for compensation, the method of determining losses for certain eligible claims, and the requirement that a member waive all claims against Nasdaq or its affiliates for losses that relate to the Facebook IPO Cross.”¹⁰ Accordingly, Nasdaq is writing to provide additional perspective on these issues.

First, the Proposal is not designed to compensate members for all losses alleged in connection with the Facebook IPO, but rather only those losses directly attributable to the system issues experienced by Nasdaq. The Proposal identifies those categories of transactions on May 18 that may have been affected by the Nasdaq system issues, and provides an objective and transparent means of calculating the losses caused by such issues. Concerns about the categories of eligible claims have been advanced principally by commenters advocating for individualized, subjective consideration of their positions.¹¹ UBS, for example, claims to have suffered losses of \$350 million as the result of internal decisions and/or unique systems issues that resulted in the submission of “multiple orders” and “a substantial unintended long position.”¹² The Proposal is not designed – nor should it be designed – to address specific members' individual problems, or to compensate members for losses not directly attributable to the Nasdaq system issues. UBS also criticizes Nasdaq for prioritizing payments under the Proposal to members who have compensated or commit to compensating their customers for losses, arguing that such prioritization may leave insufficient funds to compensate members for

⁹ Letter of John C. Nagel, Managing Director & General Counsel, Citadel Securities, to Elizabeth M. Murphy, Secretary, Commission (August 21, 2012); Letter of Leonard J. Amoruso, General Counsel, Knight Capital Group, Inc., to Elizabeth M. Murphy, Secretary, Commission (August 29, 2012).

¹⁰ Proceedings Order, 77 FR at 66201-66202.

¹¹ See, e.g., UBS Letter; Tim Mann Letter; MJA Capital Letter.

¹² Letter of Mark Shelton, General Counsel, UBS Americas, to Elizabeth M. Murphy, Secretary, Commission (August 22, 2012) (“Prior UBS Letter”).

losses associated with proprietary trades. Based upon its analysis, Nasdaq believes that the \$62 million it proposes to make available will be sufficient fully to compensate valid claims under the terms of the Proposal. In any event, Nasdaq believes that its proposed prioritization of payment in favor of members who have or will pass such compensation on to their customers is consistent with the purposes of the Act.

Second, comments concerning the proposed method of calculating the amount of eligible claims based on the value-weighted average price of Facebook stock during the first 45 minutes of trading after execution reports were delivered to members, are either founded upon individual members' subjective trading decisions or are, in effect, complaints about the amount of compensation Nasdaq proposes to make available. To the extent such comments seek to permit individualized compensation based upon members' subjective decision making, Nasdaq submits that any such program would lead to inconsistent and potentially discriminatory results. An objective benchmark to evaluate claims is appropriate, not one premised on individualized evaluation of a member's subjective intent and decision making, and (for the reasons articulated in greater detail in the Prior Nasdaq Letter) the benchmark Nasdaq has proposed is reasonable, non-discriminatory and otherwise consistent with the Act. To the extent such comments are directed generally to increase the pool of funds Nasdaq has proposed to make available, Nasdaq has made its Proposal voluntarily and members are free to accept it or not. Nasdaq is not prepared to increase the maximum amount of its proposed accommodation. As a result, a change in the benchmark price would actually reduce the funds available to claimants that acted quickly to mitigate their losses, for the benefit of those that did not.

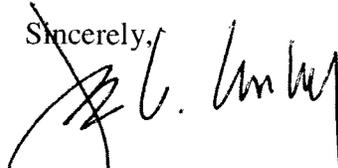
Finally, UBS and other commenters object to the requirement that members benefitting from the Proposal execute a release of claims related to the Facebook IPO, although UBS acknowledges that some of its concerns were addressed by the Exchange's September 17 letter to the Commission.¹³ The short and complete response to such objections is that member participation in the proposed accommodation is entirely voluntary. Any member who objects to providing a release – limited to the same Facebook IPO event for which they are seeking an accommodation payment – is free to decline to participate, and would be in the same position as if the Commission disapproved the Proposal. Nasdaq believes that most members will determine it to be in their interests to participate in the accommodation program. Indeed, Nasdaq sincerely hopes that UBS will reach that conclusion itself. The provision of a release in return for payment of a disputed claim is routine. Here, in the absence of the Proposal Nasdaq has made to amend Rule 4626, member compensation would be substantially more limited than it would be if Nasdaq's Proposal is approved. Moreover, Nasdaq is not prepared to make the accommodation it proposes to members that are unwilling to accept that accommodation in full satisfaction of any claims they might otherwise assert against Nasdaq.

¹³ Specifically, the Proposal would require "the execution and delivery to Nasdaq of a release by the member of all claims by it or its affiliates against Nasdaq or its affiliates for losses that arise out of, are associated with, or relate in any way to the Facebook, Inc. IPO Cross or to any actions or omissions related in any way to that Cross, including but not limited to the execution or confirmation of orders in Facebook, Inc. on May 18, 2012."

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For all of the foregoing reasons, and as further explained in the Proposal filing and the Prior Nasdaq Letter, Nasdaq submits that its Accommodation Proposal is consistent with the Act and requests approval by the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "J. C. Conley". The signature is written in a cursive style with a large, looping initial "J".

Joan C. Conley