

***Statement of Thomas Wittman
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1. Introduction and Background

Good afternoon Chair White, Commissioners, Committee Members and my fellow panelists. My name is Tom Wittman. In May of this year, I was pleased to be allowed by the Committee to participate on a panel concerning Rule 611 of Regulation NMS. I thought it was a useful discussion.

Of course, I thank the Commission for inviting me here today to discuss the assigned topic of “the regulation of exchanges and other trading venues.” While this is an important topic, I think it is not part of the long and complex list of significant market structure issues that we face; as such, I respectfully suggest it takes this Committee’s focus off the ball.

There is little real doubt or disagreement that the SEC regulates exchanges and the markets effectively – or that exchanges regulate their members effectively. We all know that markets around the world copy and adapt our system of securities regulation to their markets.

Although not perfect, we feel the exchanges under the self-regulatory model have done a good job at protecting investors while also preserving the resources of the SEC. Investors trading on exchanges get high-quality, low-cost executions in tiny fractions of seconds, and U.S. market data from exchanges is richer in content and lower in cost than market data anywhere in the world. Exchanges are the cornerstone of a healthy, robust and competitive U.S. equity ecosystem that is the envy of the world; I hope you can understand why we feel that the Committee’s focus on the topic of this panel is misplaced if we are attempting to achieve improvement to market structure that is meaningful to investors and public companies.

Has the self-regulatory framework failed? Can broker-dealers police themselves as SROs do? Can the SEC regulate all issuers, all broker-dealers, and all trading without assistance from the exchanges and how large a staff would it need? Protection of investors and issuers must be the yardstick by which all proposals are measured, and by that measure, exchanges are absolutely critical to a well-performing equity market.

Having worked at exchanges for almost three decades, I understand well the important role of strong regulation in protecting investors and public companies. Since joining the Philadelphia Stock Exchange in 1987, I have been engaged in every element of market infrastructure that touches investor orders, including trading engines, routers, back-office, and clearance and settlement. I’ve migrated systems from open outcry, to electronic messaging, to automated matching.

Today, I serve as Executive Vice President and Global Head of Equities at Nasdaq. As CEO and President of The NASDAQ Stock Market LLC, NASDAQ OMX PHLX LLC and NASDAQ OMX BX, Inc., I can tell you without hesitation that sound regulation is at the heart of everything I do every single day at Nasdaq.

Nasdaq has operated within the SRO model for almost 45 years, and today, Nasdaq owns, operates and regulates more of the global infrastructure of public markets than any company on earth. We own 24 markets, 3 clearing houses, and 5 central securities depositories, spanning the globe. Eighteen of our 24 markets trade equities, including the First North Markets in Stockholm, Copenhagen and Helsinki that list emerging growth companies in Europe. The other six trade options, derivatives, fixed income products, and commodities. Seventy exchanges in 50 countries trust our technology to run their regulated markets, and markets in 26 countries rely on our surveillance technology to protect investors, together driving growth in emerging and developed economies. Nasdaq works within more regulatory regimes than any other company, and it is a laboratory for some of the most innovative and effective regulatory tools in the world.

2. The Role of Exchanges

From our perspective, the capital formation engine of U.S. economy rests squarely on the shoulders of exchanges. Starting with initial public offerings – entrusted by Congress exclusively to exchanges – and continuing through secondary trading, Nasdaq, and other exchanges provide deep pools of liquidity and efficient systems to trade securities that market participants trade in any given day. By providing deep and liquid markets, exchanges provide efficient pricing and funding of entrepreneurial activity. The value of an enterprise, how much capital it should receive, and at what cost are best determined by a deep competitive market like the public markets. A company that has a clear price set in the open market will attract more investors and lenders to help them fund growth. Moreover, a healthy public equity market enables companies to raise capital more efficiently, funding more rapid growth and more jobs. Companies create 90 percent of their new jobs after they go public. An IPO is the best public policy outcome in terms of jobs for the broader economy. A company that has exchange-traded shares can better use its stock as a currency to grow its business and incentivize employees. A successful IPO is a very public signal to other entrepreneurs about the availability of capital financing. Lastly, a public listing allows the most diverse universe of investor's access to ownership. This democratization allows employees, individual investors, pension plans, mutual funds, corporations and others to put their capital to work and enjoy the rewards, and risks, of equity ownership.

The exchanges are integral to public price formation for trillions of dollars of public company capitalization and investor savings. The strength of our exchange reference prices – comprised exclusively of trading interest displayed on public markets such as Nasdaq – has made U.S. capital markets the economic fulcrum of the world. The public reference price broadly underpins the U.S. financial system by providing a mechanism for pricing primary and secondary trading of cash equities, as well as for pricing options,

futures, and other equity derivatives. While un-displayed liquidity is valuable to some investors at some junctures, market centers that contribute displayed quotes to the public reference price provide unsurpassed economic value to public companies, to all investors and to the market as a whole.

Based on its history and global experience, Nasdaq believes that well-regulated exchanges are vital to the sustained growth of the global economy. To truly be successful, however, exchanges must serve companies of all sizes, and the various market participants that make up the U.S. securities markets. It is because of the diverse nature of issuers and market participants, Nasdaq believes that “one size fits all” regulation and market structure does not work. As such, Nasdaq supports the work of the Committee in considering novel changes to market structure to bring about more fair and efficient markets.

3. Self Regulation

The regulation of the Commission and of the SROs, under the Commission’s oversight, has been a hallmark of modern markets since its establishment in 1934 helped to restore investor confidence in capital markets following the market crash of 1929. Congress recognized that the Commission cannot regulate on its own when it passed the Exchange Act, and consequently it required exchanges to register with the Commission, regulate their members and adopt rules consistent with Exchange Act’s requirements, among other things. Thus emerged the U.S. system of cooperative regulation under which SROs, as front-line regulators of their markets, conduct the day-to-day regulation and administration of the nation’s securities markets under the close supervision of the Commission. Indeed, U.S. taxpayers derive substantial benefit from the SRO model, without which the SEC would have to drastically expand to fulfill the regulatory responsibilities that SROs handle today. As a direct result of this cooperative regulation, I say without hesitation that transparency into the operation of exchanges has never been greater. This transparency builds trust among market participants and regulators alike.

Nasdaq became an exchange in 2006 when it separated from NASD, now known as FINRA. At that time, Nasdaq and NASD entered into an agreement, after public comment and Commission approval, to allow NASD to continue to supervise some aspects of the Nasdaq market. Instead of overseeing a market that it owned, NASD would be acting as Nasdaq’s contractor. This agreement continues today and blazed the trail for other exchange SROs to follow. What is absolutely critical to understand is that a regulatory services agreement does not absolve Nasdaq or any other exchange SRO of responsibility for regulation of its market. Rather, it assigns some responsibilities to FINRA that build on its history and expertise, while Nasdaq retains numerous other responsibilities, as well as the obligation to supervise FINRA’s performance. This arrangement has protected investors well, as it allows Nasdaq to retain direct regulatory oversight in areas that it is the most effective at performing, while allowing FINRA to perform regulatory functions for Nasdaq that

is better performed by them, such as identifying violative conduct across multiple markets, examination of members and disciplinary proceedings.

We consider FINRA as the gold standard when it comes to investigation and adjudication of member conduct. We know this both because of their past history and record, and because we keep a close watch on what they do for us. As such, Nasdaq believes that this relationship results in the most effective regulatory oversight, to the benefit of all market participants, and, as I will discuss further, our focus on regulation has never been sharper. The bottom line is that we have final authority and responsibility to oversee all regulation of our markets, whether it is done internally or by FINRA.

Under the Exchange Act, exchange SROs engage vigorously on a daily basis to:

- maintain fair and orderly markets;
- prevent fraudulent and manipulative acts and practices;
- promote just and equitable principles of trade;
- remove impediments to and perfect the mechanism of a free and open market and a national market system;
- protect investors and the public interest; and
- prevent unfair discrimination between customers, brokers, and dealers.

Exchange SROs oversee broker-dealers as they interact with the market by:

- adopting member and market regulation rules;
- implementing systems to detect rule violations;
- disciplining broker-dealers that violate rules; and
- ferreting out activity that harms investors and stopping it.

The exchange SROs' roles in daily trading activity are also unique. They:

- publish data to the market;
- halt trading in emergencies;
- route trading activity to the exchange with the best bid/offer price; and
- provide visible liquidity.

If exchanges did not meet these obligations price discovery would erode, and the public company model would be threatened. Along with these complex and myriad responsibilities, exchanges receive absolute immunity when they are "acting under the aegis" of their regulatory duties. As you will see, the regulatory functions performed by exchanges, and Nasdaq in particular, have evolved with the changing nature of the markets, but we remain on the front line of regulating our markets.

4. National Market System Plans

In 1975, Congress directed the Commission, through Section 11A of the Exchange Act, to establish a national market system that relies on exchanges to organize, oversee, and regulate U.S. markets through the funding and operation of numerous national market system plans. In the ensuing 40 years, the Commission has used NMS plans to improve every facet of U.S. equity markets placing exchanges on the front lines of every aspect of the national market system, helping to create the most competitive markets in the world, the richest-content data in the world, and the strongest investor safety net in the world.

The NMS Plan approach has worked so well that the Commission has recently added plans that: order exchanges to collaborate to limit market volatility through the Limit Up Limit Down Plan; enhance cross-market surveillance through the Consolidated Audit Trail Plan; and improve liquidity and market quality of smaller companies through the Tick Pilot Plan. Some generate revenue, most do not, but all are costly, time-consuming, and complex. And all are essential to investors. With this long record of success and results, one is forced to ask if anything is broken with the NMS Plan approach.

5. Nasdaq's Regulatory Program

Turning to our specific regulatory programs, Nasdaq operates three primary regulatory functions. We have a Market Regulation group, which is charged with the oversight of trading in our markets. We also operate a Listing Qualifications group, which is charged with the oversight of the initial and continued listing of securities. Lastly, our Office of General Counsel is charged with drafting rule filings submitted to the Commission and other regulators. Through these programs, we are heavily involved in the regulation of our markets. In fact, the majority of our regulatory budget is spent on in-house technology and personnel – not outsourced regulation. We invest heavily in technology to automate our regulatory program, including the integration of our rules into our trading platforms. This automation enables our staff to focus on regulatory tasks that people are best at – designing and refining our regulatory systems, investigating potential rule violations, and making critical judgements based on facts and circumstances developed therefrom.

(a) Market Regulation Group

Our Market Regulation group conducts real-time regulation of electronic trading and of our Phlx trading floor. To carry out this responsibility, the Market Regulation group develops electronic surveillance patterns to detect rule violations. The Market Regulation group also halts trading in listed stocks to allow dissemination of material news and for other regulatory reasons. In this regard, the Market Regulation group reviews approximately 50,000 press releases a year to evaluate whether a trading halt is appropriate. Moreover, the Market Regulation group is

heavily involved in the IPO process, monitoring initial trading of IPOs. Lastly, the Market Regulation group performs post-trade surveillance for certain markets.

Day to day, the Market Regulation group performs real time surveillance of 6 securities markets, including the Phlx auction market trading floor. In 2014, the group performed 545 securities halts and trade reviews. In total, the Market Regulation group processed 290,895 alerts and referred 766 matters to FINRA in 2014. This regulation nets real results. Nasdaq working with FINRA initiated 61 significant disciplinary actions in 2014, in which substantial monetary penalties were issued, in addition to suspensions, bars and expulsions.

With the increase in the speed of trading, Nasdaq's oversight necessarily adapted to include even more-data driven analysis of trading for compliance with our rules. The Market Regulation group developed several new alerts for surveillance of so-called high frequency trading, which was in addition to the 23 surveillances FINRA utilized for HFT-related reviews. Moreover, in 2010 we acquired the SMARTS Group, the world-leading technology provider of market surveillance solutions to exchange and have integrated the SMARTS technology into our real-time surveillance. But our investment has not just been in technology. The Market Regulation group has enhanced its staff by creating a new regulatory technology team, hiring statistical data analysts to perform data analysis on trading behavior.

Lastly, the Market Regulation group conducts a regulatory testing program that is responsible for running over 80,000 electronic test scripts across our 6 U.S. trading systems to evaluate system performance against our rules. We believe that it is the largest and most sophisticated program of its kind in the world.

(b) Listing Qualifications Group

Nasdaq runs what we view as the world's largest public company listing operation. On our markets, we list over 3,500 companies in 9 countries, with a total market valuation of 9.5 trillion dollars. In the U.S., we have robust listing rules in addition to over 450 frequently asked questions provided on our website to assist companies and market participants understand how these rules work in practice. Through our listings program we review applications to list on our exchange and oversee the continued listing of companies, consistent with our rule-based listing standards. Within our Listing Qualifications group, we have both initial and continued listing teams, as well as a listing investigations team. Our initial listings team reviews prospective new listings for compliance with our initial listing standards. They reviewed 97 new company applications and processed 80 new company listings in the third quarter of this year. Our continued listings team performs daily review of over 2,600 exchange-listed public companies for compliance with continued listing standards. In 2014, our listings staff reviewed over 45,000 SEC filings, relying on sophisticated technology to prioritize filings and quickly identify any potential concerns for investigation and follow up. In 2014, continued listing team issued 62 delisting letters to companies that no longer met

our listing standards. Our listing investigation team is responsible for conducting deep dive investigations of both listed companies and prospect listings for significant issues that may rise to a public interest concern.

Independent from the Listing Qualifications group, is a hearings and appeals process available to companies that have been denied initial or continued listing. This adjudicatory process provides companies a forum in which they can argue their case for initial or continued listing. In this regard, the adjudicators in these processes are not Nasdaq employees, but rather independent professionals that weigh the arguments of companies and of staff.

(c) Rule Filings

Exchanges are the only operationally transparent trading venues. Investors and issuers know everything about how exchanges operate, how we approve listed companies and trading firms, how we operate our matching engines and routers, and how we charge for our services. Each year, Nasdaq publicly files 300 to 400 proposed rule changes describing the intricate details of our technology, business, and regulation. It requires collaboration between legal, business and regulatory groups to gain the necessary regulatory approvals of changes to our rules. Such changes may be as simple as modifying an existing fee, or as complex as implementing a novel market quality program.

Despite the burdens, Nasdaq fully supports and embraces the rule filing process. Investors need to know that exchanges are transparent; that our rules are published on public websites; and that we are accountable to the SEC for the accuracy of those rules. Members need to know how they are regulated, how they are assessed fees, and how their orders are executed and routed. Public companies need to know that their IPOs and secondary trading will be safe and secure, and that liquidity will be deep and constant. Nasdaq and other exchanges have a unique public duty and public trust that can only occur in the disinfecting sunshine of the rule filing and publication process.

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Given all of the regulatory work done by Nasdaq, and the investments in staff and capital, you can see why we strongly disagree that we have in any way ceded regulatory oversight of our markets – we are very much on the front lines of regulating our markets. First and foremost, this is because we are performing the obligations imposed upon us by the Exchange Act. When exchanges engage in these quasi-governmental functions pursuant to the authority delegated to them by the Exchange Act, they are immune from civil liability. This doctrine of SRO immunity was recognized by the courts in the 1980s, and has been upheld in numerous cases, as recently as this year. Moreover, given the trillions of dollars in value of transactions handled by the exchange SROs, no exchange could be capitalized to self-insure the entire market.

With respect to data, we note that the framework for handling exchange data and the revenues that flow from that data has been evaluated several times. For example, following a market data concept release in 1999, market data was evaluated in 2001 by the Advisory Committee on Market Information, which recommended, among other things, “that market participants generally have the flexibility to distribute separately additional market information.” The Advisory Committee further stated “the Commission should permit market participants to separately distribute deeper market information, beyond the core market data made available on a consolidated basis.” The Advisory Committee understood that competition among providers was the best approach to ensure investors receive the best data at the lowest cost. The recommendations made by that committee laid the groundwork for the data distribution framework we have today, as reflected in Regulation NMS. The Commission recognized when it passed Regulation NMS that competitive pricing of data products, coupled with the regulatory obligations relating to core data, best serves the regulatory needs of investors.

By contrast, there are certain market venues that are not subject to level of regulation that exchanges are subject to. While we understand the differing regulatory structure of exchange SROs and ATSS, what is not clear is how this differential regulation protects investors. ATSS, including those that operate dark pools do not perform the same functions as an exchange and are not subject to the same pervasive governmental oversight and public reporting requirements as SROs. Moreover, ATSS are able to make business decisions with much greater alacrity than exchange SROs, which are required to file their rules with the Commission and gain approval of changes to those rules, including changes to their fees.

The cost of admission to run an effective and well-regulated exchange SRO is high. I think ATSS recognize this, as evidenced by the over 40 ATSS trading NMS stocks today that elect not to register as exchange SROs.

6. Our Views

We know that the U.S. markets can work better. Today’s U.S. markets are increasingly fragmented. Liquidity in U.S. stocks is dispersed across 11 exchanges, over 40 other registered equity execution venues, and uncounted other trading facilities. The declining cost of launching and operating electronic order crossing systems has led to a proliferation of decentralized pools of liquidity that compete by offering their owners and customers reductions in fees, obligations, transparency and order interaction. Markets also compete on speed and on their cleverness in meeting regulatory obligations. Although there are opportunities for improvement, we do not believe that the self-regulatory framework is broken.

The Committee has a real opportunity to recommend beneficial changes to market structure. The issues I see as important to address are access fees and novel ways to improve market quality for Main Street investors. I doubt that a one-size-

fits-all-approach works in today's equities markets, and I encourage the Committee recommend to the Commission that it allow innovation and experimentation in access fees and incentives to improve market quality. Pricing is a fundamental market structure issue, and innovation and experimentation in pricing should be encouraged by the Commission. As I noted in May, complex order types exist, in large part, to capture liquidity rebates and avoid paying access fees. How can the exchanges and Commission work together to change this?

Nasdaq conducted a relatively small-scale experiment in reducing access fees and rebates for a handful of securities, but should there be a larger cross-market experiment? I think the Committee should also consider ways in which we can help issuers of less-liquid securities improve their liquidity in the markets. We believe that issuers should have the choice to compensate market makers that support their securities, with the goal of better spreads for their investors and enhanced liquidity. Our observation as a global market operator is that market quality incentive programs of this kind have successfully enhanced liquidity and market quality for investors in Europe for several decades. We believe that they could also be useful to smaller, less liquid companies, where it is currently not profitable for market making firms to provide liquidity and support.

As I mentioned the last time I was before this Committee, given the intense price competition we question the time and resources spent analyzing whether exchanges have fully justified proposals reducing their fees. Nearly 40 percent of executions occur on venues that lack not only pre-trade price discovery but operational and fee transparency, yet Nasdaq has encountered difficulty in gaining Commission approval of a fee reduction for members that transact the most volume across all three of its options exchanges. I ask again, in what other industry would a company be prohibited from lowering prices for its most valued and value-contributing customers?

Just as not all issuers are the same, not all investors are the same. As I noted in May, the Commission and the exchanges can do more to protect Main Street investors. The Commission has long differentiated among investors based on investable assets. It has also considered differentiating between investors based on their holding periods or other indicators of buy-and-hold strategies. The display and protection of customer limit orders are consistent with this approach, and have been an overwhelming positive force in U.S. markets for both equities and options customers. Exchanges should be free to experiment with other ways to protect true investors. Equity exchanges like Nasdaq have attempted limited programs to support retail investor orders, options exchanges have "customer priority," but more can and should be done. I encourage the Committee recommend to the Commission that it give exchanges space to explore other ways to support true Main Street investors.

Lastly, I would like to highlight a concern of Nasdaq, and other markets and market participants. On October 20, 2015, I, together with others, submitted a letter

to the Commission concerning the composition of this Committee and its lack of transparency. I think the letter speaks for itself, but I would like to point out that there is not a single non-financial public company, individual investor, retail broker-dealer or any exchanges that list operating companies on the Committee.

7. Conclusion

As you can see, Nasdaq is on the front line of regulating its markets. The integrity of the markets and sound regulation are job number one for Nasdaq. We see no reason to eliminate the SRO framework for exchanges, but rather believe that the SRO regulatory framework is fundamental to protecting investors. As wise policymakers often say, "first, do no harm." In other words, in proposing change be sure you consider the law of unintended consequences.

I thank the Chair, the Commissioners and the Committee for their time and attention. We appreciate the Committee's thoughtful consideration of these issues and welcome the opportunity to work with the Commission and the Committee to consider important changes in market structure for the benefit investors and listed companies. I look forward to your questions.