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Ms. Vanessa A. Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Exemption for Certain Exchange Members, Release No. 34-95388; File No. S7-05-15 (July 29, 2022)

Dear Ms. Countryman:

Nasdaq, Inc. (“Nasdaq”) appreciates the opportunity to comment on the Commission’s re-proposed amendments to establish a more limited exemption under Section 15(b)(8) (the “Re-Proposal”)¹ of the Securities Exchange Act (the “Exchange Act”). The Re-Proposal would require certain registered brokers or dealers, who satisfy the current exemption under Rule 15b9-1, to become a member of a national securities association (“Association”).² The Re-Proposal would not exempt either broker-dealers trading in off-exchange venues or those trading on exchanges of which such broker-dealers are not members from the requirement to become members of an Association, unless they fall within one of the proposed exceptions.

¹ Securities Exchange Act Release No. 34-95388 (July 29, 2022), 87 FR 49930 (August 12, 2022).

² The Re-Proposal would amend Rule 15b9-1 by replacing the proprietary trading exemption with more narrow exemptions under Section 15(b)(8). Under the Re-Proposal, a Commission-registered broker or dealer would be required to become a member an Association, *i.e.*, the Financial Industry Regulatory Authority (“FINRA”), if the broker or dealer effects securities transactions other than on an exchange of which it is a member unless all of the following exemptions are met: (1) it is a member of a national securities exchange; (2) it carries no customer accounts; and (3) such transactions (i) result solely from orders that are routed by a national securities exchange of which the broker or dealer is a member to comply with Rule 611 of Regulation NMS or the Options Order Protection and Locked/Crossed Market Plan; or (ii) are solely for the purpose of executing the stock leg of a stock-option order.

As a self-regulatory organization (“SRO”) with responsibility for overseeing three equities markets³ and six options markets,⁴ we are keenly interested in the Re-Proposal. Nasdaq believes that the U.S. markets must be efficiently and effectively monitored to identify and prevent activity that may threaten market integrity or harm investors or the public. We appreciate and underscore the Commission’s recognition of the importance of the SRO model in policing the nations securities markets. SROs, including Nasdaq, have been incredibly successful in maintaining safe and transparent markets.

While we generally support the Re-Proposal’s requirement that broker-dealers effecting securities transactions off-exchange and/or in the fixed income space register with an Association, we do question whether there are regulatory benefits that outweigh the significant costs of requiring Association membership for options trading firms who primarily trade on exchanges where they are a member, but who may as a necessity of conducting that business occasionally effect trades on exchanges of which they are not a member. Those broker-dealers trade off-member exchange primarily to hedge risk and/or to satisfy their best execution, order protection, or locked/crossed market obligations. Moreover, they are already subject to regulatory oversight by both their member exchange and the SEC. The added cost to those firms to register with an Association may be large. Without a discernible regulatory benefit, we encourage the Commission to consider maintaining an exemption from Association membership for those broker-dealers.

Self-Regulatory Organizations Have Comprehensive Regulatory Programs to Monitor and Protect the U.S. Markets

The Commission is correct that Congress has historically favored self-regulation in part because the complexities of securities practices made it desirable for SRO regulatory staff to be intimately involved with SRO rulemaking and enforcement.⁵ That is why the Exchange Act requires SROs like Nasdaq to have a comprehensive regulatory program. Since it became a national securities exchange, Nasdaq has taken the responsibility to monitor its markets very seriously. In addition to contracting with FINRA to perform certain regulatory work, Nasdaq historically retained operational responsibility for a number of regulatory functions, including real-time surveillance, qualification of companies listed on Nasdaq and most surveillance related to its affiliated options markets. In 2017, Nasdaq significantly expanded its regulatory program when it established an Investigation and Enforcement Team to investigate and prosecute member misconduct occurring on its equities and options markets. This enabled Nasdaq to marry its existing surveillance capabilities with its surveillance, investigation and enforcement staff, thereby increasing effectiveness and enabling prompt action.

Nasdaq is proud of the work it does to protect investors and market integrity. In addition to maintaining a robust regulatory program, we work closely with FINRA and our SRO counterparts to ensure that any misconduct identified is investigated. We believe that the existing mechanisms in place to surveil, investigate, and prosecute options trading firms on a cross market basis is

³ The Nasdaq Stock Market LLC; Nasdaq BX, Inc.; and Nasdaq PSX.

⁴ The Nasdaq Options Market LLC; BX Option Market; Nasdaq PHLX LLC; Nasdaq ISE, LLC; Nasdaq GEMX, LLC; and Nasdaq MRX, LLC.

⁵ See Re-Proposal at 49932 n.19.

sufficient. Indeed, multiple mechanisms exist to ensure no gaps in regulatory coverage of on-exchange activity. Those include (1) use of the Designated Examining Authority under Rule 17d-1; (2) allocation of regulatory responsibility for common members to a single SRO for common rules, pursuant to Rule 17d-2; (3) regulatory services agreements; (4) cross-SRO referrals; and (5) coordination under the International Surveillance Group (“ISG”) and its subgroups.

Nasdaq also believes that the SRO model works most efficiently when unnecessary regulatory duplication is minimized. If the Re-Proposal is adopted, the minimization of regulatory duplication must remain in focus because FINRA would have jurisdiction over firms that trade on exchanges of which they are not a member. To the extent that such firms engage in misconduct on a Nasdaq-affiliated exchange, Nasdaq would retain a regulatory obligation to enforce and prosecute the misconduct occurring on its markets. In those instances, Nasdaq intends to leverage the existing mechanisms in place to manage the extent to which firms are subject to duplicative discovery-related requests. One such mechanism is the Cross-Market Regulation Working Group (“CMRWG”), a subgroup of the ISG.

The CMRWG is comprised of exchange SROs and FINRA. It provides a nonexclusive forum for discussions and referrals to occur and/or to coordinate on matters of joint interest to its members, while preserving each SRO’s independent decision-making and enforcement authority. Therefore, while Nasdaq will seek to minimize discovery burdens, nothing in the Re-Proposal detracts from our authority or responsibility to hold bad actors accountable for violating or aiding and abetting the violation of the Securities Exchange Act of 1934, the rules and regulations thereunder, the by-laws and rules of Nasdaq or any interpretation thereof, and the rules, regulations, resolutions and stated policies of the Board of Directors or any Committee of Nasdaq.

Contrary to the Commission’s belief, however, firms will still be subject to multiple sets of rules and interpretations if the Re-Proposal is adopted. Nasdaq remains obligated to enforce its members’ compliance with exchange rules and the federal securities laws. But under the Re-Proposal, those firms would also be subject to FINRA’s rules, thereby increasing the likelihood that an action may result in different rule interpretations. Thus, it will be imperative for FINRA to continue to work collaboratively as part of the CMRWG. Moreover, while we remain committed to working collaboratively on parallel investigations, Nasdaq must act in the best interests of its markets and investors. The Re-Proposal does not change that.

The Re-Proposal Will Be Overly Burdensome on Options Trading Firms Who Already Have Sufficient Regulatory Oversight

While Nasdaq broadly agrees with the Re-Proposal, we urge the Commission to consider the impact Association registration will have on options trading firms in general and small floor brokers in particular. The Re-Proposal may have unintended downstream implications for this group. Any additional costs imposed on these members by an amended Rule 15b9-1, such as the costs of putting into place policies and procedures and the costs of maintaining compliance with FINRA’s capital and reporting rules, as well as membership and trading-related fees, may potentially lead some floor brokers to cease trading altogether on the floor of an exchange.

We also reiterate our June 4, 2015, comments to the Commission's 2015 proposal regarding the Re-Proposal's impact on small entities.⁶ The Regulatory Flexibility Act of 1980 requires the Commission to undertake a flexibility analysis of a proposed rule amendment in order to measure its impact on small entities unless the Commission certifies that the proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Commission concludes that of the 65 broker-dealers that are not currently FINRA members, there are at most four firms deemed to be small entities. The Commission then certifies that the proposed amendments to Rule 15b9-1 would not, if adopted, have a significant economic impact on a substantial number of small entities. We disagree. There are 39 members of our Exchanges that are not currently FINRA members, 13 of which are overseen by Nasdaq PHLX LLC as the Designated Examining Authority. Certain of those members conduct off-exchange trading on behalf of their clients and thus would not be eligible for the proposed exceptions. The economic impact to these members would be significant based on the Commission's estimate of costs involved for firms to join and maintain their membership with FINRA. Because we do not see a regulatory benefit to subjecting these firms to FINRA oversight, we urge the Commission to consider exempting broker-dealers from FINRA membership if their off-member exchange activity in equities or options is for the purpose of hedging the risk of their member exchange options activity or in furtherance of their member exchange options activity.

Nasdaq appreciates the opportunity to share its views on the Re-Proposal and welcomes the opportunity to discuss these comments further.

Respectfully,



Erik Wittman
Deputy Head of Enforcement
The Nasdaq Stock Market LLC

⁶ Securities Exchange Act Release No. 74581 (March 25, 2015), 80 FR 18036 (April 2, 2015).