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805 King Farm Boulevard
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VIA ELECTRONIC MAIL

December 17, 2021

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Proposed Fifty-Second Amendment to the Joint SRO Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privilege basis, Securities Exchange Act Release No. 93618 (November 19, 2021), 86 Fed. Reg. 67562 (November 26, 2021) (File No. S7-24-89).

Proposed Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan, Securities Exchange Act Release No. 93625 (November 19, 2021), 86 FR 67517 (File No. SR-CTA/CQ-2021-03).

Dear Ms. Countryman:

The Nasdaq Stock Market LLC ("Nasdaq" or the "Exchange") appreciates the opportunity to comment on the proposed Fifty-Second Amendment to the Joint SRO Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-listed Securities Traded on Exchanges on an Unlisted Trading Privilege basis ("UTP Plan"),[1] and the proposed Twenty Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan ("CTA/CQ Plan")[2] (collectively, the "NMS Plans").

[1] See Securities Exchange Act Release No. 93618 (November 19, 2021), 86 Fed. Reg. 67562 (November 26, 2021) (File No. S7-24-89).

[2] See Securities Exchange Act Release No. 93625 (November 19, 2021), 86 FR 67517 (File No. SR-CTA/CQ-2021-03).

As Nasdaq has repeatedly stated in comment letters,[3] and in federal court,[4] the Market Data Infrastructure ("MDI") Rule is fundamentally flawed.

Today, we have a single, reliable top-of-book consolidated data feed that is supplemented by depth of book, auction and other information available from individual exchanges. Fees for consolidated top-of-book information are set by the NMS Plans, while fees for depth of book, auction and other proprietary data are set by the competitive market. The MDI Rule moves the decision to set fees for depth of book and auction from the competitive market to, in effect, a quasi-governmental rate-making board in the form of the UTP and CTA Operating Committees.

Setting aside its serious concerns with the MDI Rule, Nasdaq worked with the other participants and the advisors in the NMS Plans to set fees for the new core data in a fair and reasonable manner using current proprietary data fees—shaped by market forces—as a starting point for estimating the value of the newly-designated core data. For the reasons set forth below, we believe that this methodology is the fairest, and most efficient, approach for setting the required fees.

Basing fees on the value of the underlying data is the fairest and most economically efficient method for setting fees.

Setting fees according to the value of the data leads to optimal consumption.[5] Fees that are too low do not allow producers to remain profitable; fees that are too high lead to under-utilization. Some users, such as institutional traders, internalizers and arbitrageurs, earn large profits from utilization of exchange data. Others, like retail investors, earn less. Applying the same fees to both categories would result either in low-value users subsidizing high-value users, or fees that are not economically sustainable for producers.

The NMS Plans have historically used the value of the data to consumers to set fees. Professionals pay higher fees than Main Street retail investors, and algorithms, dark pools and electronic traders pay higher fees than human professionals. This is an efficient—and fair—allocation because professionals earn more from the data than retail, and algorithms, dark pools and electronic traders earn more than human professionals.

Fees should also reflect the value extracted from data by entities such as dark pools and index providers that trade little and therefore do not contribute to data quality.

[3] See, e.g., Letter from John A. Zecca, Executive Vice President, Chief Legal Officer, & Chief Regulatory Officer, Nasdaq, to Vanessa Countryman, Secretary, SEC, re Proposed Rule on Market Data Infrastructure (Release No. 34-88216; file No. S7-03-20, RIN 3235-AM61) (May 26, 2020), available at https://www.sec.gov/comments/s7-03-20/s70320-7235187-217094.pdf.

[4] See The Nasdaq Stock Market LLC v. Securities and Exchange Commission, Case No. 21-1100 (DC Cir.).

[5] See, e.g., F. P. Ramsey, A Contribution to the Theory of Taxation, 37 THE ECONOMIC JOURNAL 145 (March 1927), available at https://eml.berkeley.edu/~saez/course131/Ramsey27.pdf (seminal economic article positing that fees for goods produced in an industry with high-fixed costs should be set in accordance with the value that customers place on them).

Some commentators have suggested that fees should be based on the cost, rather than value.[6] The Commission has offered no guidance as to how such a cost-based rate system might work in practice.

Moreover, the inefficiencies and arbitrary outcomes associated with cost-based ratemaking are widely recognized. Trading platforms produce market data as a joint product with trading execution services, in the same sense that mutton, wool and sheepskin are joint products produced by sheep. Any cost allocation between joint products is inherently arbitrary and would therefore need to be conducted in accordance with some uniform rubric established by the Commission. That rubric would need to assess the range of functions necessary to produce data—such as data protection, monitoring, distribution, risk management, cybersecurity, infrastructure, regulatory compliance, storage, labor, and controls—and determine the appropriate share of the cost of each to be allocated to data. It would also need to determine the appropriate rate of return on these costs.

This problem is compounded by the fact that the Operating Committee would be required to assemble cost information from different exchanges that have different costs. Yet a cost-based fee structure would need to feature a fee and revenue allocation structure that somehow managed to allow each exchange to cover its costs without also incentivizing exchanges to "gold plate" their cost base, a commonly recognized inefficiency associated with cost-based ratemaking.

Creating such an elaborate ratemaking structure is not only an unnecessary expenditure of resources, it is also contrary to the Congressional mandate for the Commission, discussed further below, to "rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'"[7] Fees for depth of book, auction and other proprietary data are currently set by the competitive market. If the MDI Rule is to remain in place, fees should, to the greatest degree possible, reflect the competitive marketplace and not the decisions of a ratemaking authority.

In light of these intractable problems, we submit that setting fees based on costs is impractical, unworkable, unfair, inherently arbitrary, and contrary to the Congressional intent that the Commission rely on competition, whenever possible, in meeting its regulatory responsibilities.

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[6] One example of this is the suggestion that the UTP/CTA Plan "back out" fees for the current UTP/CTA Processors from the proposed fee structure. See Letter from Adrian Griffiths, Head of Market Structure, MEMX LLC, to Vanessa Countryman, Secretary, Securities and Exchange Commission, re CTA/CQ/UTP Plan Fee Amendments, Securities Exchange Act Release Nos. 34-93625 (SR-CTA/CQ-2021-03); 34-93618 (S7-24-89) ("MEMX Comment Letter"), available at https://www.sec.gov/comments/s7-24-89/s72489-9409041-262866.pdf. However, the MDI Rule requires the current Processors to continue operations until the Operating Committee recommends to the Commission that they be retired. As such, there are no "savings" to back out of any proposed fee structure at this time. Moreover, we believe that the impact of any such future adjustment on fees would be immaterial.

[7] See NetCoalition v. SEC, 615 F.3d 525, 534-35 (D.C. Cir. 2010); see also H.R. Rep. No. 94-229 at 92 (1975) ("[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.").

The best base from which to determine for the value of new core data are the fees currently charged for proprietary data, which have been tested by the competitive market.

As the D.C. Circuit recognized in NetCoalition v. Securities and Exchange Commission, "[n]o one disputes that competition for order flow is 'fierce.' … 'In the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution'; [and] 'no exchange can afford to take its market share percentages for granted' because 'no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers'…."[8] The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including sixteen SRO markets, as well as internalizing broker-dealers and various forms of alternative trading systems ("ATSs"), including dark pools and electronic communication networks ("ECNs"), as well as the continuing entrance of new market participants.

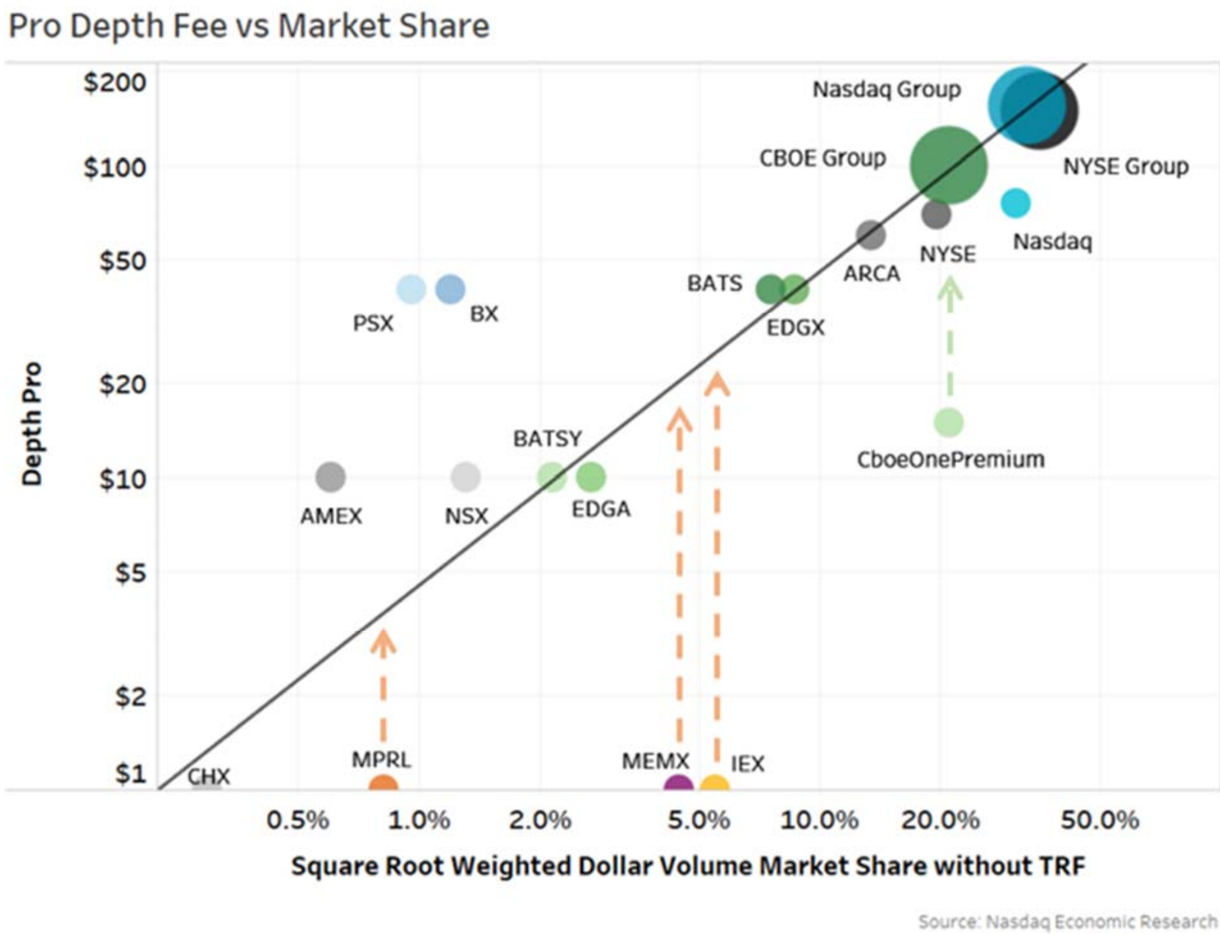
Market data is part of the competition for order flow. Indeed, the quality of market data itself is determined by order flow—the more order flow, the better the quotes and trades will reflect the state of the market as a whole, and the more valuable the market data. No exchange can afford to overprice the total cost of its services without potentially losing order flow, and damaging its overall ability to compete. Thus, the exchange operates as a typical unified platform in which an alteration to the platform's input (order flow) changes the value of the platform and demand for its outputs (both data and trading services), and vice versa.

The relationship between market data and order flow is demonstrated by comparing the fees charged for professional, depth of book data against a weighted average proxy for market share of the exchange.[9] As the following graph shows, exchanges that produce more valuable market data generally charge higher fees, and those with less valuable data charge lower fees. As such, fees vary according to the underlying value of the data, as measured by the liquidity available at that exchange.[10]

[8] See NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

[9] See Phil Mackintosh, "Accounting for Prices of NMS-II Depth," (December 9, 2021), available at https://www.nasdaq.com/articles/accounting-for-prices-of-nms-ii-depth.

[10] Some commentators have implied that the "high" level of market data fees implies that the market is not competitive. As the Supreme Court explained in Ohio v. Am. Express, 138 S.Ct. 2274, 2288 (2018), absent a restriction on output, a price increase (or a price above other competitors' prices) may simply reflect increases in the value of services, recovery of costs (including fixed costs), or an appropriate return on investment. "Market power is the ability to raise price profitably ***by restricting output***." Id. (emphasis in original). As there is no evidence of output restriction by, for example, limiting the distribution of market data to a particular class of participant (such as holders of a limited number of exchange memberships), there is no evidence of market power.



Congress directed the Commission to "rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'"[11] As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. "If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior."[12] Accordingly, "the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[13] In its 2019 guidance on fee proposals, Commission staff indicated that they

[11] See NetCoalition v. SEC, 615 F.3d 525, 534-35 (D.C. Cir. 2010); see also H.R. Rep. No. 94-229 at 92 (1975) ("[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.").

[12] See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

[13] Id.

would look at factors beyond the competitive environment, such as cost, only if a "proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces."[14]

Because they are tested by market competition, current proprietary data fees provide a good and indicative starting point for estimating the value of new core data and setting fees at their efficient level.[15] Trading platforms are incentivized to set fees at a level commensurate with the value of the data, or face loss of market share by overpricing that data. This provides a substantial basis for showing that current proprietary fees—and, by extension, the proposed fees for new core data—are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.

The Operating Committee analyzed a number of methodologies to calculate the value of the new depth fees and settled on a conservative approach.

As set forth in the transmittal letter, the Operating Committee analyzed three methodologies for estimating the value of depth of book data:[16]

- Intermarket Sweep Order ("ISO") Trade-Based Model, which analyzed the number of ISOs executing through the NBBO, looking at the number of ISOs executed in the first five levels of depth as compared to all ISOs executed.

- Depth to Top-Of-Book Ratio Model in which the participants reviewed the depth to top-of-book ratios of professional device rates on Nasdaq (Nasdaq Basic/Nasdaq TotalView), Cboe (Cboe Full Depth) and NYSE (BQT/NYSE Integrated), as well as the ratio proposed by IEX between its proposed fees for real-time top of book and depth feeds (TOPS/DEEP).

- Message-Based Model, which examined the total number of orders displayable in the first five levels of depth as compared to all displayable orders.

The Depth to Top-Of-Book Ratio Model produced fees in the middle of the range. This model in turn produced a range of ratios, which varied depending on the specific proprietary data fees examined. This range of results reflects differences in what each exchange chooses to include in its particular depth of book package, as well as differing business strategies among the

[14] See U.S. Securities and Exchange Commission, "Staff Guidance on SRO Rule filings Relating to Fees" (May 21, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

[15] Proprietary data fees are also subject to notice and comment and a Commission review of whether the fees provide for an equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. This provides a further basis for relying on such fees as a basis for developing the new NMS Plan fee structure.

[16] The Committee also briefly considered, but decided not to pursue, a fee based on the amount of data that would be transmitted under the expanded definition of core data, which is estimated to be approximately ten times greater than the amount of information currently transmitted by the Processors as top of book data. See Phil Mackintosh, "Accounting for Prices of NMS-II Depth," (December 9, 2021), available at https://www.nasdaq.com/articles/accounting-for-prices-of-nms-ii-depth.

exchanges. In order to extract the best estimate for the true value of depth of book data from the "noise" of differing products and business strategies, the participants took an average of these ratios. Using the average removes the idiosyncrasies produced by the competitive strategy of individual exchanges and leaves a more robust indication of market value.

Criticizing the methodology based on a single calculation misses the mark—the analysis was based on a holistic examination of the market.

The Members Exchange ("MEMX"), in its comment letter, presented a single calculation as purported evidence that the proposed fee schedule is too high, and therefore will "limit access to NMS information."[17] This commentary misses the mark for several reasons.

First, no single calculation or ratio will reflect the market as a whole. As discussed above, the exchanges sell market data in a competitive environment—individual exchanges may elect to charge more or less for market data as a matter of business strategy. Employing an average "smooths out" idiosyncrasies in order to obtain a more accurate estimate of the relative value of depth of book data to top of book data. The idea that there are some calculations that resulted in lower fees is no surprise—an "average," by definition, is composed of a number of different ratios, some of which will be higher, and some of which will be lower, than the mean.

Second, the analysis criticizes a set of professional fees as purportedly representative of the fee schedule as a whole, ignoring the much lower fees for the general investing public.[18] As explained above, equal is not fair. Professional users, such as large traders, make large profits from data while non-professional users in the general investing public do not. The Depth to Top-Of-Book Ratio Model results in a fee structure that is fair and efficient because it requires those that profit the most from the data to pay their fair share, and those that profit less from the data to pay less.

Third, the comment letter argues that "high" fees for professionals will limit access to the underlying data. This is misleading. A fee that is derived from the interplay of market forces is not "limiting access" to any data. As the Supreme Court explained, a price increase (or a price above other competitors' prices) may simply reflect increases in the value of services, recovery of costs (including fixed costs), or an appropriate return on investment.[19] A restriction in output may limit access, but nothing in the proposal restricts output in any way.

For all of these reasons, the criticism is unsound.

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[17] See MEMX Comment Letter, available at https://www.sec.gov/comments/s7-24-89/s72489-9409041-262866.pdf.

[18] To be clear, the MEMX Comment Letter acknowledges the existence of lower fees for non-professional users, but does not address the fact that professional fees should be higher than non-professional fees to account for the differing value of the data to the user. See MEMX Comment Letter ("As shown in the table below, *while the proposed fees would be lower for the limited subset of Non-Professional users that consume depth-of-book quotation information*, the proposed fees are otherwise higher than the fees currently charged for proprietary data products that offer similar information.") (emphasis added).

[19] See Ohio v. Am. Express, 138 S.Ct. 2274, 2288 (2018).

The Commission should approve the fees as proposed, but should consider delaying implementation of the MDI Rule until all relevant litigation has been resolved.

The new NMS Plan and the MDI Rule itself are subject to litigation in federal court. While the Exchange believes that the proposed fee structure is an equitable, fair, reasonable, and not unreasonably or unfairly discriminatory application of the MDI Rule, the MDI Rule itself is fundamentally flawed for all of the reasons set forth above as well as for the reasons set forth in Nasdaq's other comment letters and in its appellate briefs, and may change as a result of the court's decisions. It would therefore be prudent for the Commission to delay implementation of the Rule until the underlying litigation is resolved.

Thank you for the opportunity to comment on this Proposal. Please do not hesitate to contact me with any questions.

Sincerely,

Erika J. Moore

Erika Moore
Vice President and Corporate Secretary