February 14, 2024

BRETT KITT
ASSOCIATE VICE PRESIDENT,
PRINCIPAL ASSOCIATE GENERAL COUNSEL
805 KING FARM BLVD
ROCKVILLE, MD 20850

Ms. Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, File No. S7-30-22, Release No. 34-96494

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq") writes to provide a supplemental comment[1] on the above-referenced equity market structure reform proposal that the Securities and Exchange Commission (the "SEC" or the "Commission") published on December 14, 2022.[2] Specifically, Nasdaq submits this Letter to respond to a comment letter filed by the Investors Exchange ("IEX") on October 19, 2023 (the "IEX Letter"), in which IEX makes several false assertions and misleading arguments in support of the NMS Proposal.[3] We wish to correct the rulemaking record as to these false assertions and misleading arguments, including the following:

1. **IEX asserts falsely that a "general consensus" of commenters to the NMS Proposal supports a reduction of the access fee cap to $0.001 per share for all stocks priced at or more than $1.00 per share.** No such consensus is evident from the comment letters. Instead, most commenters who have expressed a view on this topic either urge the SEC to study the matter further before proceeding with any particular reduction in the fee cap, support a decrease in the fee cap that is

1 Nasdaq previously filed two comment letters in this rulemaking. See Letter from J. Zecca to V. Countryman, SEC, (Aug. 9, 2023) available at https://www.sec.gov/comments/s7-30-22/s73022-242819-510642.pdf ("First Nasdaq Letter"); Letter from J. Zecca to V. Countryman, SEC, Re: Equity Market Structure Proposals (Mar. 30, 2023), available at https://www.sec.gov/comments/s7-31-22/s73122-20162299-331153.pdf ("Second Nasdaq Letter").

2 See Securities Exchange Act Release No. 34-96494 (December 14, 2022), 87 FR 80266 (December 29, 2022) (the "NMS Proposal")

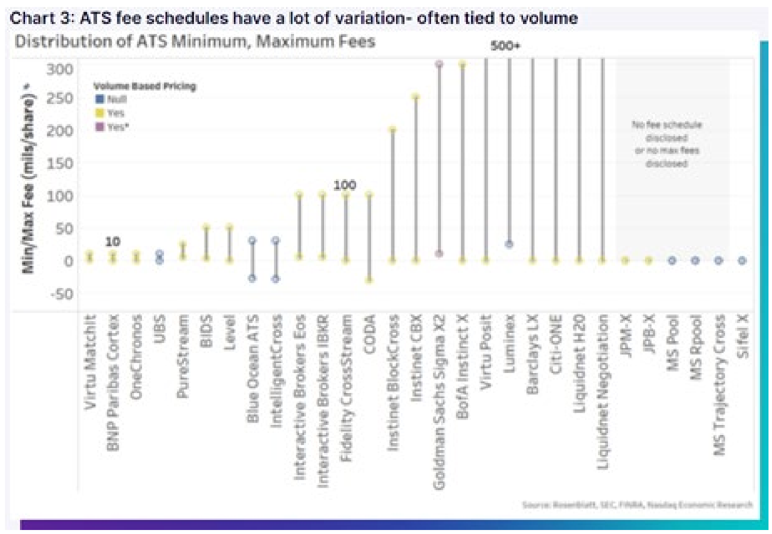
3 See Ltr. from J. Ramsay, IEX, to V. Countryman, dated October 19, 2024, available at https://www.sec.gov/comments/s7-30-22/s73022-276579-672162.pdf.

proportionate to any corresponding reduction in tick sizes, or oppose the Proposal altogether. Moreover, for those commenters that have expressed support for the second of these positions, most support a new tick size of $0.005 for tick-constrained stocks, with a corresponding fee cap of $0.0015. IEX also overstates the extent to which institutional and other investors agree with its position.

2. **No valid basis exists to support IEX's claim that the current access fee cap is excessive.** Much like the SEC, IEX makes an unwarranted assumption that access fees must be proportionate to the "true costs" of execution on exchanges. IEX also asserts that exchange technology costs – or the cost of machines – have fallen over time, and that exchange fees should fall commensurately. Hardware is indeed one input into the costs of running a liquid exchange – however, it is one input among many. As Nasdaq has explained in its prior comments to the Commission, exchange access fees are not a simple mechanism for exchanges to recover the technology costs of accessing liquidity on their markets. For example, Nasdaq devotes considerable resources and effort to gather liquidity at the NBBO. The challenges of attracting liquidity are caused by many developments in markets – one key example being the ability and practice by some marketplaces to segment order flow while others such as exchanges are not allowed to do so. As Nasdaq noted in its prior comment letters, exchange access fees and rebates also compensate participants for the risks associated with providing liquidity to exchanges. These risks are the products, not of exchange practices, but instead of regulatory disparities that exist among exchanges and non-exchanges, including the previously mentioned ability of non-exchange market centers to segment order flow based on customer type. It is also worth noting that overall message traffic Nasdaq handles has increased significantly over the past decade – with traffic doubling from 2019 levels over the past few years alone. Even if IEX's argument was valid that the access fee cap should be tied to the true costs of trading, neither IEX nor the SEC demonstrate what they believe to be the true cost to trading on an exchange. Most importantly, they fail to demonstrate that a $0.001 fee cap properly reflects this true cost of trading or does so better than the existing fee cap.
3. **IEX is disingenuous in arguing that concerns about the effects of the proposal on rebates are unwarranted because the SEC is not proposing to reduce rebates.** Although the SEC states in the NMS Proposal that it intends for fee cap reductions to accommodate new proposed tick sizes, it also states that one of its other aims in reducing access fees is to "lower the total amount of access fees collected and rebates distributed, reducing, though not eliminating, any distortionary effects of exchange rebates on order routing and likely improving market efficiency." [4]
4. **IEX is incorrect that the existing fee cap and maker-taker fee model are responsible for a long-term trend towards greater non-displayed trading.** IEX argues that the fee cap allows exchanges to leverage protected quotes to charge higher fees than do alternative trading systems ("ATSs") and other non-exchange market

[4] NMS Proposal, supra. at 80303.

centers. This argument is misleading because it compares ATS fees to exchange access fees only, rather than to exchange access fees net of rebates. When compared on an apples-to-apples basis, exchanges are often less expensive trading venues than are ATSes and other non-exchange market centers. Even if you look at access fees alone (i.e. without netting against rebates) there are large variations among ATS fees and some of them are similar or higher than exchange fees. We note that we recently conducted our own analysis of ATS fees, as disclosed on Form ATS-N, which revealed a great deal of variability in ATS fees, including fees as high as $0.06 per trade, as well as volume-based pricing.[5]



That said, IEX is also wrong that the ongoing erosion and toxification of lit markets is the product of exchange access fees; many other factors are responsible for this troubling trend, including the ability of non-exchange market centers to segment order flow, negotiate individualized pricing deals, and provide price improvement in ways that exchanges cannot do.

5. **IEX is incorrect that rebates are unnecessary for exchanges to attract liquidity.** Again, the argument that rebates are unnecessary to attract liquidity runs contrary to the evidence. In fact, as the SEC recognized, when Nasdaq experimented with reducing both access fees and rebates for a subset of stocks in 2015, liquidity measures for those stocks declined and Nasdaq lost market share in those stocks.[6]

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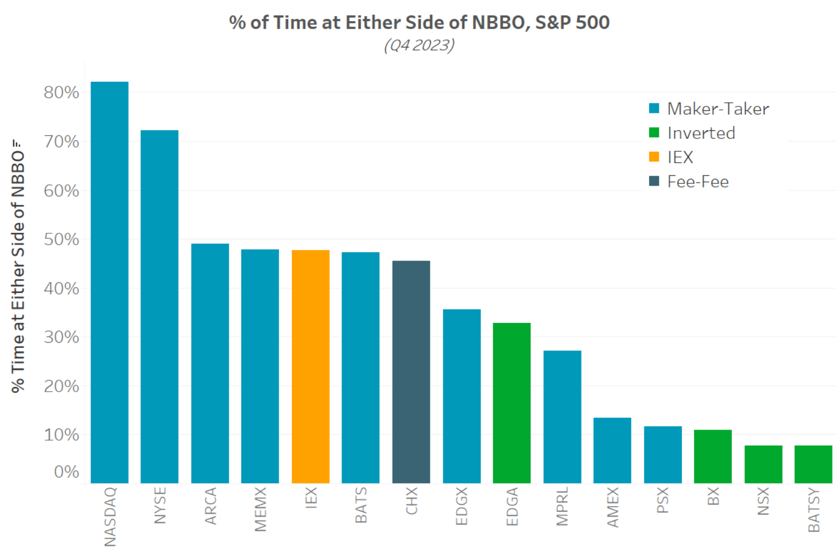
5 Phil Mackintosh,"Leveling a Slice of the Playing Field," February 2024, at https://www.nasdaq.com/articles/leveling-a-slice-of-the-playing-field.

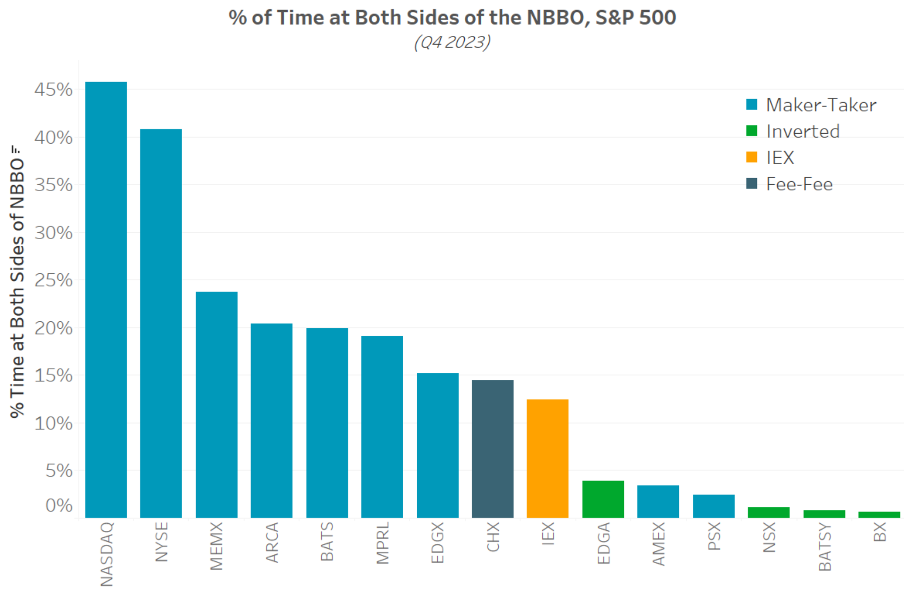
6 See Frank Hatheway, Nasdaq Access Fee Experiment (Mar. 2015), available at https://pages.stern.nyu.edu/~jhasbrou/SternMicroMtg/Old/SternMicroMtg2015/Supplemental/Access%20Fee%20Experiment%20-%20Month%20One%20Report%20Final.pdf; see also Frank Hatheway, Nasdaq Access Fee Experiment Report II (Mar. 2015), available at

IEX touts the success of its own proprietary "D-Limit" order type to support the claim that exchanges can compete effectively based on limiting adverse selection risks rather than on the basis of rebates. This argument is flawed in numerous respects. First, even if one were to believe IEX's puffery about D-Limit's superiority, one could argue that its success only undermines the rationale for the SEC to slash access fees and rebates – that is, IEX and D-Limit seemingly are capable of competing in the market on their own merits, without a need for regulatory intervention.[7] Second, the fact of the matter is that D-Limit is not as successful as IEX claims it to be. Although IEX accuses Nasdaq of cherry-picking data to argue that non-rebate paying exchanges suffer worse execution quality, it appears that IEX is guilty of doing that very thing in its rebuttal. Indeed, more recent data from Q4 2023 demonstrates that even after the introduction of D-Limit, IEX still falls behind most of the larger maker-taker exchanges in terms of time at either side of the NBBO and even more so in terms of time spent at both sides of the NBBO:



https://pages.stern.nyu.edu/~jhasbrou/SternMicroMtg/Old/SternMicroMtg2015/Supplemental/Access%20Fee%20Experiment%20-%20Second%20Report%20Final.pdf.

7 IEX also fails to mention the fact that D-Limit uses maker-taker exchange quotes in order to function.



Third, IEX's argument that rebates are unnecessary is undermined by the fact that IEX itself recently began offering rebates to its members.[8] IEX would argue that the "collective action problem" forced it to do so to remain competitive with other maker-taker exchanges, but the reality is that it is a competitive market and IEX would not have offered rebates if they lacked value.

6. **IEX dismisses real and serious consequences to investors of the SEC's proposal to slash access fees and rebates.** Rather than deal with the serious implications of the SEC's proposal on investors, including a less reliable and representative NBBO, wider spreads, higher costs to investors, and less liquidity for thinly-traded stocks, IEX dismisses these effects as an imaginary "parade of horribles" that Nasdaq and others have conjured to scare the SEC. Putting aside the fact that the SEC itself acknowledges that these effects are real and could indeed ensue from its proposal, [9] IEX does nothing but wave its hands to rebut data provided by Nasdaq. For example, it fails to address a real-world example of what happened to spreads when in 2020, MIAX and MEMX introduced and then discontinued rebates on stocks. [10] It also fails to respond to Nasdaq's data showing that a widened spread that would result from removing fees and rebates would cost retail investors – which by and large do not currently pay access fees – as much as $687 million each year. [11]

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8 See Securities Exchange Act Release No. 34-98063 (August 4, 2023), 88 FR 54373 (August 10, 2023) (SR-IEX-2023-08).

9 See NMS Proposal, supra, at 80328 (stating that "[t]he primary likely effect of the decline in rebates disbursed and access fees collected would be to reduce the amount of liquidity provision—particularly among stocks with narrow spreads," while arguing that such effects would be offset by the alleviation of distortions arising from rebates).

10 See Second Nasdaq Letter, supra.

11 See id.

7. **IEX is wrong that the Commission has amassed ample evidence over decades to support its conclusion that access fees and rebates are harmful and distortive.** Clearly, the Commission did not agree with this sentiment when it proposed to launch the Transaction Fee Pilot in 2018. At that time, the Commission stated that it "currently lacks the data necessary to meaningfully analyze the impact that exchange transaction fee-and-rebate pricing models have on order routing behavior, market and execution quality, and our market structure generally." [12] As Nasdaq noted in the First Nasdaq Letter, the NMS Proposal did not cite any new research conducted subsequent to the Transaction Fee Pilot to support the SEC's change of position that access fees and rebates are actually harmful. [13]

Nasdaq appreciates the opportunity to comment further on the NMS Proposal. We hope that the Commission will consider these comments in its deliberations on this rulemaking.

Sincerely,

Brett Kitt

Cc: The Honorable Gary Gensler, Chairman, SEC
The Honorable Caroline A. Crenshaw, Commissioner, SEC
The Honorable Hester M. Peirce, Commissioner, SEC
The Honorable Jaime Lizárraga, Commissioner, SEC
The Honorable Mark T. Uyeda, Commissioner, SEC
Director Haoxiang Zhu, Division of Trading and Markets

[12] See Securities Exchange Act Release No. 34-84875 (Dec. 19, 2018), 84 FR 5202, at 5203 (Feb. 20, 2019).

[13] See First Nasdaq Letter, supra, at 26.