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August 7, 2024

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

**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 further comment on the equity market structure reform proposals published by the Securities and Exchange Commission (the “SEC” or the “Commission”) published on December 14, 2022.¹ As we noted in our letter on March 30, 2023,² and as we have said numerous times previously, we have significant concerns regarding the statutory authority of the Commission to engage in ratemaking.³ We question the Commission’s authority to reduce the access fee cap beyond what is needed to accommodate new, smaller tick sizes, thereby with the implicit aim of limiting the ability of exchanges to provide meaningful rebates to market participants.

Recent Supreme Court decisions, including Loper Bright Enterprises v. Raimondo,⁴ and West Virginia v. EPA,⁵ underline our concern that the Commission must adhere more closely to congressional intent in carrying out its statutory duties. This is a clear instance where the Commission’s actions exceed its intended authority. If Congress had intended for the Commission to regulate exchanges like public utilities, it knows how to do so, as it has done in numerous other contexts,⁶ but it did not do so in this case.

¹ See Securities Exchange Act Release No. 34-96494 (December 14, 2022), 87 FR 80266 (December 29, 2022) (the “NMS Proposal”).

² See Letter from J. Zecca to V. Countryman, SE, Re: Equity Market Structure Proposals (Mar. 30, 2023), available at <https://www.sec.gov/comments/s7-31-22/s73122-20162299-331153.pdf>.

³ See, e.g., Ltr. From J. Zecca to V. Countryman, dated Aug. 9, 2023, at 3, available at <https://www.sec.gov/comments/s7-30-22/s73022-242819-510642.pdf> (arguing that Congress did not confer statutory authority upon the Commission to engage in regulatory ratemaking); Ltr. From E. Knight to B. Fields, dated May 25, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3718533-162485.pdf> (arguing against the Commission’s proposal to establish a transaction fee pilot, in part, because it would involve impermissible ratemaking by the Commission).

⁴ See Loper Bright Enterprises v. Raimondo, 603 U.S. ___ (2024).

⁵ See West Virginia v. Environmental Protection Agency, 597 U.S. 697 (2022).

⁶ See, e.g., Federal Power Act, 16 U.S.C. 824e (authorizing the Federal Energy Regulatory Commission to determine just and reasonable rates and charges for electricity transmission and to fix the same by order).

Instead, Congress prescribed that the Commission review each proposed exchange fee for reasonableness, equitable allocation, unfair discrimination, and undue burdens on competition on an individualized basis.

Moreover, the Commission's charge to establish a national market system evidences no express intent for the Commission to impose price controls upon exchanges as a means of promoting competition. Congress cannot be presumed to have hidden its intent to regulate the markets in this manner using vague and ambiguous statutory language.⁷

The Commission lacks the authority to enact radical changes to exchange access fees without explicit congressional mandate. It is imperative that regulatory initiatives be grounded in a clear statutory foundation to ensure their legitimacy and effectiveness.

We appreciate the opportunity to provide further input on this critical matter and urge the Commission to reconsider its approach in light of recent judicial developments. Ensuring that regulatory actions are within the scope of congressional intent will promote confidence in the regulatory framework and support the continued health and stability of our financial markets.

Sincerely yours,

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

⁷ West Virginia v. Environmental Protection Agency, *supra* (holding that courts will not presume that Congress intended to authorize agencies to tackle major questions of economic and social importance without express statutory authority).