

April 29, 2024

Via Electronic Mail (rule-comments@sec.gov)

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

Re: File No. SR-NASDAQ-2024-007¹ and File No. SR-NASDAQ-2024-013²

Dear Ms. Countryman:

The Healthy Markets Association³ writes to object to Nasdaq's factually unsupported filing to add a new product that is nothing more than an attempt to squeeze yet more revenue from access to the Exchange.

As explained below, the Cabinet Filings (each of which is an inexplicably brief 9 pages) do not satisfy Commission Rules or the law, and the Commission should disapprove them.

Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review exchange filings and determine that those filings are consistent with the Exchange Act,⁴ including that an exchange's rules:

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² *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Expand its Cabinet Proximity Option Program*, SEC, Exch. Act Rel. No. 99633, Feb. 29, 2024, available at <https://www.sec.gov/files/rules/sro/nasdaq/2024/34-99633.pdf>; and *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Cabinet Proximity Option Fee to Establish a Reservation Fee for Cabinets with Power Densities Greater Than 10kW*, SEC, Exch. Act Rel. No. 99796, Mar. 20, 2024, available at <https://www.sec.gov/files/rules/sro/nasdaq/2024/34-99796.pdf> (collectively, "Cabinet Filings").

³The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

⁴ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) ("The SEC "shall approve" a self regulatory organization's proposed rule change only "if it finds that such proposed rule change is consistent with" provisions of the Exchange Act."). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, available at <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (declaring that in order for the Commission to "meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.").

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”⁵
- not be “designed to permit unfair discrimination”;⁶
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;⁷ and
- be designed “to protect investors and the public interest.”⁸

Rule 700(b)(3) of the Commission's Rules of Practice clearly establishes that:

Rule 700(b)(3) of the Commission's Rules of Practice states that the “burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.” Rule 700(b)(3) also states that “the description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.” Any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.⁹

In 2017, the Court of Appeals for the District of Columbia Circuit remanded the Commission’s approval of another self-regulatory organization’s rule change, explaining that the Administrative Procedure Act requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”¹⁰

Put simply, the exchange must provide sufficient details to support its filing, and the Commission must examine those details and independently determine that the exchange’s rule meets the requirements of the Exchange Act.

⁵ 15 U.S.C. § 78f(b)(4).

⁶ 15 U.S.C. § 78f(b)(5).

⁷ 15 U.S.C. § 78f(b)(8).

⁸ 15 U.S.C. § 78f(b)(5).

⁹ *Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34–88261, Feb. 21, 2020, available at <https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf> (emphasis added) (citing 17 C.F.R. § 201.700(b)(3)).

¹⁰ *Susquehanna*, at 445 (internal citations omitted).

Proposal

Nasdaq has allowed customers to rent cabinet space in its data center close to its matching engine for years. The exchange now seeks to specifically charge for a new cabinet option, which would allow for higher power densities (over 10kW).¹¹

Unfortunately, the Proposal is not as simple as it seems.

Analysis

The Nasdaq Cabinet Filing Lacks Sufficient Detail to Provide a Basis for the Commission to Conclude that It Complies with Commission Rules and the Exchange Act

In 2014, the Commission settled an enforcement action against the NYSE for, amongst other things, providing “co-location services to customers on disparate contractual terms without an exchange rule in effect that permitted and governed the provision of such services on a fair and equitable basis.”¹²

A decade later, Nasdaq appears eager to offer similarly discriminating co-location services. Nasdaq generally asserts that the Cabinet Proposal seeks to implement a new product and fee structure that is not particularly unusual in the marketplace. And, to be clear, the Commission has permitted exchanges to create ever-more data-related products, each of which is typically a minor tweak for its prior version.

However, the Cabinet Proposal is not seeking to merely tweak an existing product. Unfortunately, we wouldn’t have known that from the filings. However, as we learned from reading the well-researched comments from McKay Brothers¹³ and Panorama Financial Markets Advisory,¹⁴ Nasdaq is in the process of materially altering the physical characteristics of its communications offerings to customers – much like NYSE considered with its “wireless connectivity” filings several years ago. The details of those alterations will materially impact whether the products themselves could ever satisfy their requirements under the Exchange Act.

¹¹ Cabinet Proposal, at 3.

¹² Press Release, *SEC Charges NYSE, NYSE ARCA, and NYSE MKT for Repeated Failures to Operate in Accordance With Exchange Rules*, SEC, May 1, 2014, available at <https://www.sec.gov/news/press-release/2014-87> (referencing *In the Matter of New York Stock Exchange LLC, et. al.*, SEC, Admin. Proc. File 3-15860, Exch. Act Rel No. 72065, May 1, 2014, available at <https://www.sec.gov/files/litigation/admin/2014/34-72065.pdf>).

¹³ Letter from Jim Considine, McKay Brothers, LLC, to Vanessa Countryman, SEC, Mar. 22, 2024, available at <https://www.sec.gov/comments/sr-nasdaq-2024-013/srnasdaq2024013-449139-1150422.pdf>.

¹⁴ Letter from Brett Redfearn, Panorama Financial Markets Advisory, to Vanessa Countryman, SEC, Apr. 23, 2024, available at <https://www.sec.gov/comments/sr-nasdaq-2024-013/srnasdaq2024013-462411-1209635.pdf>.

However, Nasdaq appears to have inexplicably left that essential information out of the instant filings.

Rather than address this massive infrastructure overhaul – of which these filings are essential elements – Nasdaq asserts that:

The Exchange offers the Cabinet Proximity Option program as a convenience to customers. No firms are required to reserve cabinets via the Cabinet Proximity Option program and it is only for those customers that choose to collocate directly with the Exchange. Participants can avoid reserving cabinets under this program (and the related fee) by (1) collocating but not reserving space in advance of needing it; (2) ordering cabinet space immediately and paying cabinet fees (without reserving in advance); (3) collocating indirectly through a vendor to defray costs; or (4) not collocating at all.¹⁵

Convenience doesn't appear to be the correct word. As others have noted, and the Commission staff is well aware, geographical changes that may mean tiny fractions of a second changes to trading speeds may be extremely relevant to financial market participants.

Are the alternatives suggested by the exchange commercially viable for those customers? What are the costs and benefits to those customers for choosing to not collocate? We suspect these types of questions aren't identified, much less addressed, because the answers would directly counter Nasdaq's narrative. For example, a firm choosing to not collocate would be at a material competitive disadvantage to those that are collocated in speed-based trading strategies. And different capabilities within that collocated server may itself render material, competitive advantages to those who pay versus others.

Nasdaq's filings fail to acknowledge, much less address these issues. For those reasons alone, the filings should be disapproved.

The Cabinet Filings Are Indicative of the Commission's Failure to Effectively Enforce the Requirements of the Exchange Act

If the road to hell is paved with good intentions, then the road to inequitable, wasteful, and investor-harming market structure is paved with the Commission passively permitting exchanges to adopt seemingly innocuous, "incremental," and "not novel" changes to their rules. Neither of the Cabinet Filings appears to reflect the import of the changes being implemented by Nasdaq pursuant to them, and the Commission's releases don't even ask for the relevant information. Why not?

¹⁵ Cabinet Proposal, at 4.

It seems as though the Commission staff seems to have implicitly determined that the Cabinet Filings are sufficiently similar to others that it hasn't materially challenged in the past, and so has determined that it need not ask any probative questions now. The staff's past failures to adequately review filings and ensure compliance with Commission Rules and the law are not a valid excuse for failing to do so now.

A child who doesn't complete her homework on Wednesday is unlikely to find a sympathetic teacher if she attempts to justify the failure by explaining that she also didn't do her homework on Monday. We suspect that the same would be true here, if a court were to analyze the entirely non-public record of the Commission staff's review of these Cabinet Filings.

At root, the Cabinet Filings are about the exchange providing a time and space advantage for customers with the resources to pay for them – at the expense of other market participants who can't or won't.

While some markets may allow for sufficient competition to avoid rent-seeking behavior, the monopoly position exchanges have over access to themselves must be addressed by diligent Commission oversight. Further, unlike other markets, Congress expressly directed the Commission in the 1975 Act amendments to not just constrain monopolistic behavior by exchanges, but also protect competition in the markets, protect customers from discrimination, as well as broadly protect investors. Unfortunately, the agency has generally failed to meet its burden.

The Commission and staff should take a moment to contemplate how we got to a stage where access to the public capital markets on commercially competitive terms routinely costs firms hundreds of thousands of dollars per month.

The Cabinet Filings are little more than a continuation of Nasdaq's quest to squeeze ever-more revenues out of its captive customer base through the fractalization of its captured, monopolistic access to market information. It could offer three lengths of cables. Then subdivide that to offer four. It could offer three cabinet options, then subdivide that to offer four. It could split each of its data feeds into different feeds with different elements, so that a firm could be forced to purchase each data element independently. Why, for example, does Nasdaq believe that financial firms may be willing to pay for the new products?

What benefit does the proposed change have on the markets, if not to provide a discriminatory advantage to those who purchase it, and disadvantage those who do not? In fact, we can think of no other value for Nasdaq's decision to offer it pursuant to these terms. These are precisely the types of products that the Commission should be scrutinizing extremely carefully under the Exchange Act, as inconsistent with both the prohibition on undue burdens on competition, but also inconsistent with the protection of investors and fair and efficient markets.



A MEMBER ORGANIZATION

Put simply, Nasdaq and other exchanges have created private toll roads to public market access, but without the benefit of a state or federal regulator meaningfully constraining the fees. The Commission has not just the authority, but the obligation, to constrain the otherwise imbalanced power of the exchanges to access their markets.¹⁶

Conclusion

As the Nasdaq Cabinet Filing is insufficiently supported by facts and analysis provided by the Exchange for the Commission to determine that the rule would comply with the law and Commission rules, the Commission should disapprove it.

Thank you for your consideration. If you have any questions, please contact me at (202) 909-6138 or ty@healthymarkets.org.

Sincerely,

Tyler Gellasch
President and CEO

¹⁶ See generally, Letter from John I. Sanders and Benjamin Leighton, Wake Forest School of Law Community Law and Business Clinic, to Mary Jo White, SEC, Oct. 20, 2015, available at <https://www.sec.gov/comments/265-29/26529-33.pdf> (urging the Commission to better regulate co-location products).