



April 11, 2024

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

Re: File No. SR-NASDAQ-2024-008; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ respectfully submits this comment letter to the U.S. Securities and Exchange Commission (the “Commission”) in response to the rule filing by The Nasdaq Stock Market LLC (“Nasdaq”) to amend its fee schedule to raise its fees for connectivity and co-location services by 5.5%, subject to certain exceptions described in the fee filing (“Fee Filing”).² For the reasons set forth below, we urge the Commission to temporarily suspend the proposed Fee Filing under Section 19(b)(3)(C) of the Securities Exchange Act of 1934 (“Exchange Act”) and issue an order instituting proceedings (“OIP”) to determine whether to approve or disapprove it under the Exchange Act. We further urge the Commission to disapprove the Fee Filing as Nasdaq has not met its burden as a self-regulatory organization (“SRO”) of showing that the proposed fees meet the requirements under the Exchange Act that such fees be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition.³

In the Fee Filing, Nasdaq notes that it generally has not increased the fees for the services covered by the Fee Filing in a number of years, even though there has been “notable inflation” since 2015. Nasdaq also notes that certain costs related to the data center facility, hardware and equipment, and personnel have increased over time due in part to annual escalation clauses for such services. Using these factors as a basis, Nasdaq seeks through the Fee Filing a 5.5% increase in fees for the services covered by the filing, even though it asserts that this increase will

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See Release No. 34-99744 (March 15, 2024), 89 FR 20287 (March 21, 2024).

³ See Exchange Act Section 6(b).

not cover the full extent of the cost increases it has incurred. Nasdaq seeks to justify the fee increases in the Fee Filing as being reasonable by noting that the fees collected for the services subject to the fee increases have fallen in real terms due to inflation, while its own costs have increased.

As Nasdaq is well aware, Nasdaq as an SRO has the burden under the Commission's Rules of Practice "to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder."⁴ As the Commission noted in a recent OIP suspending a Municipal Securities Rulemaking Board fee filing:⁵

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, and 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. Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change. [footnotes omitted]

To assist in complying with these obligations, the Commission staff in 2019 issued guidance to the SROs on information that they could include in fee filings to help demonstrate that filings met the Exchange Act fee requirements.⁶

Contrary to these Exchange Act and Commission requirements, Nasdaq has completely failed in the Fee Filing to provide any detail that would allow the Commission or commenters to determine whether the fee increases sought in the filings are fair and reasonable and otherwise meet the Exchange Act fee standards. For example, instead of providing concrete examples with actual dollar amounts of how the costs specific to providing the connectivity and co-location services have increased, Nasdaq relies on vague descriptions of how inflation has led to general increased costs in providing such services. Nasdaq also does not directly explain in the Fee Filing why the co-location physical cable connections have become more expensive to provide over the past several years, such as by providing details about why maintaining the physical cables is more expensive now versus when the fees were established several years ago. In addition, Nasdaq provides no explanation of how it arrived at the 5.5% increase, which appears arbitrary without an understanding of the actual costs that led Nasdaq to decide that such an increase is warranted and appropriate.

In examining the Fee Filing closely, it appears that Nasdaq is unwilling to provide such data in an effort to mask the real reason it is seeking the fee increases in the Fee Filing. In particular, Nasdaq is seeking the fee increases to raise its profit margin on providing the services covered by those increases. Nasdaq has realized that inflation has reduced the profitability of

⁴ See Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

⁵ See Release No. 34-99444 (January 29, 2024), 89 FR 7424 (February 2, 2024).

⁶ See Commission "Staff Guidance on SRO Rule Filings Relating to Fees" (May 21, 2019) (<https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>).

providing such services and is now seeking to return to those prior profitability levels. Of course, such a reason is not a basis on which to demonstrate that the proposed fees are consistent with the Exchange Act fee standards.

Nasdaq also seeks to rely on “platform theory” to argue that the fee increases meet the Exchange Act fee standards. Nasdaq essentially asserts that exchange members and other market participants can go to other venues if the fees are too high to obtain similar products and services, which Nasdaq claims is evidence of competition in the marketplace. However, as SIFMA, exchange members, and other market participants have noted, competition for order flow does not constrain the costs of such unique products and services because market participants feel obligated to purchase to them to be in a position to satisfy their best execution obligations.⁷

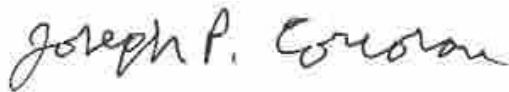
* * *

SIFMA appreciates the opportunity to submit this letter to the Commission regarding Nasdaq’s Fee Filing. For the reasons set forth above, we urge the Commission to ultimately disapprove the filing after suspending it and issuing an OIP, as Nasdaq has not met its burden of demonstrating that the proposed fees are consistent with the Exchange Act fee requirements. If you have any questions or need any additional information, please contact Ellen Greene at (212) 313-1287 or Joe Corcoran at (202) 962-7383.

Sincerely,



Ellen Greene
Managing Director
Equities & Options Market Structure



Joseph Corcoran
Managing Director, Associate General Counsel
SIFMA

⁷ See, e.g., (<https://www.sec.gov/comments/sr-nysenat-2020-05/srnysenat202005-7409615-219150.pdf>).