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May 17, 2024

Via Electronic Submission

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

Re: File No. SR-NASDAQ-2024-016; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Encourage Members to Contribute Liquidity to the Exchange by Offering [Members] that Maintain a Particular Minimum Trading Volume Lower Fees for Specified Market Data and Connectivity Products

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 the fees it charges its members and other market participants for market data and high-speed co-located connectivity if these firms do not meet the volume threshold described in the filing (the "Fee Proposal").[2] For the reasons set forth below, we urge the Commission to temporarily suspend the Fee Proposal 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 Proposal because Nasdaq has not met its burden as a self-regulatory organization ("SRO") of demonstrating 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.

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[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 Proposed Rule Change Offering [Members] that Maintain a Particular Minimum Trading Volume Lower Fees for Specified Market Data and Connectivity Products, Exchange Act Release No. 99879 (April 1, 2024), 89 FR 24070 (April 5, 2024).

Nasdaq's Fee Proposal would reward certain exchange members by lowering the monthly fees for two Nasdaq products, depth-of-book Non-Display Usage market data[3] and high-speed connections co-located within the Nasdaq Data Center, on the condition that members meet a volume threshold "of at least one million shares of added executed displayed liquidity on average per trading day in all securities through one or more of the member's market participant identifiers ('MPIDs') on the Nasdaq Market Center." Nasdaq acknowledges that "by definition," market participants that are not Nasdaq members cannot qualify for the lower fees for either of these products because non-members "do not post displayed liquidity to the market."[4] Therefore, such market participants will automatically be charged the higher fees for the relevant market data and co-located high-speed connections.

I. SRO Obligations Related to Fee Filings

As Nasdaq is aware, as an SRO, it 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."[5] As the Commission noted in a recent OIP suspending a Municipal Securities Rulemaking Board fee filing:

> 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 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.[6]

To assist SROs in complying with the Exchange Act and relevant rules and regulations governing SRO fees, Commission staff in 2019 issued guidance to the SROs regarding information they should consider including in fee filings.[7] As discussed in that guidance, SROs in their fee filings need to "be sufficiently detailed and specific to support a finding" that the proposed fees are consistent with the Exchange Act requirements.

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[3] Nasdaq Equity 7, Section 123 defines the terms "Depth-of-Book" and "Non-Display Usage."

[4] Fee Proposal, 89 Fed. Reg. at 24071.

[5] See Rule 700(b)(3), Commission Rules of Practice, 17 C.F.R. 201.700(b)(3) (2024).

[6] See Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Establish the 2024 Rate Card Fees for Dealers and Municipal Advisors Pursuant to MSRB Rules A–11 and A–13, Exchange Act Release No. 34-99444 (January 29, 2024), 89 Fed. Reg. 7424, 7428 (February 2, 2024) (footnotes omitted); see also, Susquehanna Int'l Group, LLP v. Sec. & Exch. Comm'n, 866 F.3d 442 (D.C. Cir. 2017).

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

II. Nasdaq has Failed to Demonstrate that the Fee Filing is Consistent with the Exchange Act Requirements Governing SRO Fees

Based on the lack of detail and specificity in Nasdaq's Fee Proposal, Nasdaq has not met its burden of providing sufficient information to support a finding that the proposal is consistent with the Exchange Act requirements governing SRO fees.

First, Nasdaq's Fee Proposal would unduly burden competition.[8] The current Fee Proposal is substantially similar to a Nasdaq proposal the Commission disapproved in 2011 that would have raised Nasdaq's market data fees for members that did not meet minimum thresholds for executed volume.[9] In its order disapproving the proposal, the Commission found that Nasdaq failed to demonstrate that its proposal was consistent with the Exchange Act's requirements and rules and regulations thereunder.[10] Notably, the Commission stated that it "does not believe that NASDAQ has adequately articulated why the linking of market data fees to execution volume . . . will not negatively impact the competition" for market data. Rather, the Commission expressed its belief that "preventing the linking of market data fees to trade executions will help bolster competitive forces in the area of market data, because exchange market data fees must appeal simultaneously to market participants that trade directly on an exchange and those that do not trade directly on an exchange."[11] The Fee Proposal would establish a two-tier fee structure for the relevant market data and connectivity services. Non-members would always pay the higher fees as would those members that are unable to meet the volume threshold. This approach would appear to create a significant competitive imbalance in the markets for the relevant market data and connectivity services, benefitting large members, and Nasdaq, at the expense of non-members and small members. The Fee Proposal does not provide sufficient information or analysis to overcome these concerns.[12]

Nasdaq also has not demonstrated that the fee increases it proposes are reasonable. Instead, Nasdaq relies on a self-serving report prepared by Nasdaq economists, which generically asserts that exchanges like Nasdaq are subject to platform competition, and that "[e]vidence of platform competition demonstrates that each exchange product is sold in a competitive environment, and its fees will be an equitable allocation of reasonable dues, fees, and other

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[8] 15 U.S.C. § 78f(b)(8).

[9] See Order Disapproving a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees, Exchange Act Release No. 65362, File No. SR-NASDAQ-2011-010 (Sept. 20, 2011), 76 Fed. Reg. 59466 (Sept. 26, 2011).

[10] Id. at 59469.

[11] Id.

[12] See Staff Guidance (stating that where, as here, exchange products enable a competitive advantage and are priced at a premium that only large firms are able to reasonably afford, "the SRO must address why the proposed fee or fee structure does not favor certain categories of market participants in a manner that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.").

charges, provided that nothing about the product or its fee structure impairs competition."[13] The report also generally asserts, for example, that "[p]latform competition has constrained market data fees over the last two decades."[14]

SIFMA and a host of market participants have previously provided information and analysis rebutting the argument that platform competition constrains exchange market data fees. SIFMA has demonstrated several times over the years that an exchange's decision to offer multiple products (trading services and market-data products) does not constrain prices in the manner contemplated when a platform facilitates a multi-sided transaction. A study SIFMA previously provided to the Commission noted that trading on various exchanges can be substitutable, while trade data from various exchanges is not.[15] The prices that exchanges charge for trading are roughly reasonable, while the prices for trading data have in some cases increased significantly in past years with no apparent competition-based reason. Direct, high-speed connectivity to an exchange is similarly not substitutable to such connectivity to another exchange.

Moreover, the data on the increases of exchange market data fees from 2010 to 2018 directly undercuts the platform theory argument. In this regard, the results presented in the SIFMA Expand Study indicate that aggregate charges for the market data products subject to the Exchange Act have only increased as trading platforms have proliferated and trading execution prices have fallen.[16]

Even if the Commission were to consider Nasdaq's platform theory argument, Nasdaq has not included the type of information that would support a finding that the proposed fees are consistent with the Exchange Act fee requirements. Among other things, the Staff Guidance notes that, "[a]n assertion based on 'total platform theory' that an SRO's aggregate return across multiple product lines, such as transactions, market data, connectivity, and access, is constrained by competition at the platform level is insufficient unless substantiated with evidence demonstrating <u>that the theory applies in fact to the fee at issue</u>."[17]

The general evidence in Nasdaq's report of the effects of platform competition on exchange products and services, however, is not enough for Nasdaq to demonstrate that it was "subject to significant competitive forces" in setting the fees in its proposal, including the level

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[13] Fee Proposal, 89 Fed. Reg. at 24071; <u>see also</u>, <u>id</u>. at 24072 (stating that as long as a "proposed rule change does not in and of itself undermine competition, evidence of platform competition is sufficient to show that the produce operates in a competitive environment").

[14] Phil Mackintosh & Michael Normyle, "How Exchanges Compete: An Economic Analysis of Platform Competition," at Section 4.8, p. 81 (Nasdaq Economic Research, Feb. 2024).

[15] <u>See</u> Lawrence R. Glosten, "Economics of the Stock Exchange Business: Proprietary Market Data," p. 4 (Jan. 2020).

[16] <u>See</u> https://www.sifma.org/wp-content/uploads/2019/01/Expand-and-SIFMA-An-Analysis-of-Market-Data-Fees-08-2018.pdf.

[17] Staff Guidance (emphasis added).

of those fees.[18] Neither the proposal nor the report demonstrate that platform competition constrains the specific market data and co-located connectivity fees at issue in the Fee Proposal. For example, the Fee Proposal and the report did not address how the fees for these products are constrained by platform competition, how that purported competition impacted the levels at which Nasdaq determined to set the proposed fees for these products, whether there are reasonable substitutes for the relevant products, any revenue or cost analysis to demonstrate the need for the increased fees, or any evidence that the increased fees would not result in supra-competitive profits for Nasdaq. In addition to failing to provide evidence to support its platform theory arguments in the Fee Proposal, Nasdaq did not include any other analysis or support for the reasonableness of the fee increases or the amounts thereof.[19]

As stated above, Nasdaq acknowledges that "by definition," non-members will pay the higher fees for the market data and co-located connectivity.[20] The Exchange also acknowledges that any non-members that wish to qualify for the lower fees under the Fee Proposal "have the option of becoming members . . . ."[21] This approach is inconsistent with the Exchange Act, which requires that an SRO's rules, which include its fee structures, "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and <u>other persons using its facilities</u>,"[22] and that national securities exchanges distribute market data information "on terms that are not unreasonably discriminatory."[23] The Exchange's Fee Proposal is inherently inequitable and unreasonably discriminatory because it is impossible for non-members, which use Nasdaq's facilities, including the relevant market data and connectivity services, to qualify for the lower fees because they are unable to execute any amount of added displayed volume on Nasdaq. In this respect, certain of these non-members are Nasdaq market data subscribers that are not broker-dealers and have no intention of registering as such.

The Fee Proposal also would discriminate unfairly based on members' Exchange-executed volume. The Exchange asserted that smaller members will be able to meet the proposed volume threshold because of the current rebates it offers members that display liquidity on Nasdaq.[24] The Exchange also asserted that, "[t]he [volume] threshold is . . . set at a level that Nasdaq believes any member—even smaller members—should be able to meet without

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[18] Staff Guidance.

[19] The Fee Proposal would raise the relevant market data fees by 33 percent and the co-located connectivity fees by about 12 percent without any explanation for selecting these levels.

[20] The filing asserts that the proposal "is not unfairly discriminatory" because "Non-Display Usage and the Exchange's 40Gb and 10Gb Ultra high-speed connections will be offered to all members and non-members on like terms." This appears to be inaccurate because non-members, who are unable to execute added displayed volume on the Exchange, will have no way to qualify for the reduced fees described in the proposal.

[21] Fee Proposal, 89 Fed. Reg. at 24074.

[22] 15 U.S.C. § 78f(b)(4) (emphasis added).

[23] 17 C.F.R. § 240.603(a)(2) (2024).

[24] Fee Proposal, 89 Fed. Reg. at 24071.

significant effort."[25] But Nasdaq provided no support for these assertions or analysis demonstrating its rationale for selecting the proposed volume threshold level instead of other levels. For example, the Fee Proposal did not include the number or size of members that currently trade in volumes that meet the definition of the proposed term "Minimum ADV," how many additional members it would expect to cross the threshold as a result of the Fee Proposal, or comparison of these statistics at various volume threshold levels. Because Nasdaq made these assertions without providing evidence, statistics, or other support, it is difficult to provide meaningful comment on this aspect of the Fee Proposal.

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SIFMA appreciates the opportunity to submit this letter to the Commission regarding Nasdaq's Fee Proposal. For the reasons set forth above, SIFMA urges the Commission to suspend the Fee Proposal, issue an OIP, and disapprove the proposal, as Nasdaq has not met its burden of demonstrating that the proposed fees are consistent with the Exchange Act. 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

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[25] Id.