June 12, 2024

Submitted electronically

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Securities Exchange Act Release No. 100188 (SR-NASDAQ-2024-016)

Dear Ms. Countryman:

MEMX LLC ("MEMX") appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission ("Commission") on the above-referenced proposed rule change (the "Proposal").[1] The Proposal, which was filed by The Nasdaq Stock Market LLC ("Nasdaq") on March 22, 2024, would: (1) increase fees for certain market data and connectivity services, i.e., Non-Display Usage of Nasdaq depth-of-book data as well as 40Gb and 10Gb Ultra high-speed connections; and (2) discount those higher fees to prior levels for Nasdaq members that meet a Minimum ADV threshold established by the exchange.[2] The Commission suspended the Proposal on May 21, 2024.[3] MEMX writes now to urge the Commission to disapprove it. As discussed in this letter, Nasdaq has not met its burden to show that the proposed increase in fees

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1 See Securities Exchange Act Release No. 99879 (April 1, 2024), 89 FR 24070 (April 5, 2024) (SR-NASDAQ-2024-016) (Notice).

2 Id.

3 See Securities Exchange Act Release No. 100188 (May 21, 2024), 89 FR 46243 (May 28, 2024) (SR-NASDAQ-2024-016) (Suspension Order).

charged to non-members or smaller members that do not meet the Minimum ADV threshold is reasonable, equitable, and not unfairly discriminatory under the Securities and Exchange Act of 1934 (the "Act"). Moreover, the Proposal is yet another attempt by the largest U.S. equities exchange to leverage its market power to reduce competition for intraday trading by offering discounts on overpriced services to market participants that register as Nasdaq members and route their order flow to Nasdaq instead of availing themselves of competing execution venues.[4]

I. NASDAQ HAS NOT MET ITS BURDEN TO DEMONSTRATE THAT THE PROPOSED MARKET DATA AND CONNECTIVITY FEE INCREASES ARE REASONABLE AND EQUITABLE, AND SHOULD BE HELD TO THE SAME STANDARD AS MEMX AND OTHER U.S. EQUITIES EXCHANGES THAT HAVE PROVIDED RELEVANT FINANCIAL INFORMATION TO THE COMMISSION TO SUPPORT THEIR FEES

Nasdaq repeatedly characterizes the Proposal as a "discount"[5] or "reward"[6] for members that provide displayed liquidity on its market. However, the economic reality is that the Proposal is neither of those things. Not a single Nasdaq member or non-member will benefit from lower fees under the Proposal. Rather, some market participants will be charged *higher* fees for Nasdaq's market data and connectivity services, while others – i.e., Nasdaq members that meet the specified Minimum ADV threshold – will be "reward[ed]"[7] with the opportunity to avoid this fee hike.

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4 Nasdaq currently employs a similar structure for orders executed in its closing auction. The Commission has recognized that this practice "helps the primary listing exchanges extend their market power and softens inter-exchange competition." See Securities Exchange Act Release No. 98766 (October 18, 2023), 88 FR 76282 (November 6, 2023) (S7-18-23); see also Letter from Adrian Griffiths, Head of Market Structure, MEMX to Vanessa Countryman, Secretary, Commission dated January 5, 2024, *available at* https://memx.com/wp-content/uploads/MEMX-Comment-Letter-Tiers.pdf.

5 See supra note 1.

6 Id.

7 Id.

Whatever Nasdaq's rationale for characterizing the Proposal as a discount, the economic reality is that it would instead increase fees charged to a subset of market participants. This fee increase must be evaluated for consistency with the Section 6(b)(4) of the Act, which requires that "the rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."[8]

As discussed in the Suspension Order, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."[9] While other exchanges, including MEMX, have justified their non-transaction fees by providing detailed financial information to the Commission,[10] Nasdaq attempts to instead justify the proposed fee increase by claiming that its fees are generally subject to "platform competition,"[11] and that further analysis is therefore unnecessary. However, the self-serving discussion contained in Nasdaq's filing and the related analysis conducted by Nasdaq's own Chief Economist do not, in fact, establish that platform competition constrains its fees.

Indeed, not a single data point provided in Nasdaq's analysis "demonstrat[es] that competitive forces are sufficient to constrain the SRO's aggregate return across the platform,"[12] or otherwise proves that market participants can avoid purchasing Nasdaq services if the price of those services, either individually or as a whole, is unreasonable. The data Nasdaq does choose to provide in its analysis is also at odds with the Commission's explanation of data that would be

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8 15 U.S. Code § 78f(b)(4).

9 <u>See</u> supra note 3.

10 <u>See</u> <u>e.g.</u> Securities Exchange Act Release No. 97130 (March 13, 2023), 88 FR 16491 (March 17, 2023) (SR-MEMX-2023-04).

11 <u>See</u> supra note 1.

12 <u>See</u> Staff Guidance on SRO Rule Filings Relating to Fees dated May 21, 2019, *available at* https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

relevant to this inquiry, including "evidence of the SRO's sources and amounts of revenues, costs, and gross return of the entire platform."[13] It's failure to provide this information is particularly problematic given the fact that Nasdaq operates the largest U.S. equities exchange and therefore enjoys a unique competitive position. Even taken at face value, at most Nasdaq's analysis shows that certain other large exchange groups may similarly charge unreasonable fees today, free of competitive constraints felt by smaller exchanges with lower fees that Nasdaq largely ignores in its analysis.[14] But "a statement that another SRO offers a similar product or service at a similar or higher price is, alone, insufficient to establish that the market for that particular service is competitive."[15] The Commission must hold Nasdaq to the same standard as other exchanges that have had to provide relevant financial information to the Commission to justify their fees.

II. TYING MARKET DATA AND CONNECTIVITY FEES TO VOLUME IMPOSES AN UNDUE BURDEN ON INTERMARKET COMPETITION AND UNFAIRLY DISCRIMINATES AGAINST FIRMS THAT ARE NOT NASDAQ MEMBERS OR DO NOT MEET THE PROPOSED MINIMUM ADV THRESHOLD

Nasdaq cites the "fierce"[16] competition between national securities exchanges for order flow as support for its proposed market data and connectivity fees. What it fails to mention,

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13 Id.

14 Nasdaq's analysis generally reflects 2021 data related to trading on exchanges operated by the three incumbent exchange groups and one independent exchange with a unique market model, i.e., the Investors Exchange LLC. Data about the cost of trading on new maker/taker exchanges that compete more directly with the three incumbent exchange groups, including MEMX and MIAX Pearl, LLC, are excluded from various analyses. In addition, data about trading on all three independent U.S. equities exchanges is stale and does not reflect relevant changes made by each of those markets in the last three years, and with respect to various statements made about trading on MEMX, would be inconsistent with more recent data that Nasdaq does not to include in its analysis.

15 See supra note 12.

16 Id (citing *NetCoalition*, 615 F.3d at 539 (D.C. Cir. 2010)).

however, is that the Proposal is ultimately designed to *undermine* that competition. While Nasdaq characterizes the Proposal as promoting intermarket competition, the opposite is in fact true. Indeed, that's exactly what lead the Commission to disapprove Nasdaq's last attempt to tie its market data fees to volume transacted on the exchange.[17] The Proposal is no more consistent with the Act than Nasdaq's failed attempt to do the same thing nearly thirteen years ago.

Market data and connectivity are indispensable to broker-dealers and other market participants. As the single largest U.S. equities exchange, Nasdaq has a unique ability to extract economic rents from these critical services. Increasing such fees by as much as 33% would further increase the burden on market participants whether they trade on Nasdaq or not. However, the Proposal is not just about Nasdaq's ability to generate revenue from non-transaction services. In fact, many market participants – i.e., those that are Nasdaq members and meet the Minimum ADV threshold – would be absolved from the proposed fee increase. Similar to the disapproved 2011 Proposal, this structure unfairly discriminates against firms that do not meet those requirements and that would have to pay significantly higher fees as a result.[18] Nasdaq has not met its burden to show that such discrimination is "fair" under Section 6(b)(5) of the Act.[19] Moreover, this fee structure does not just impact the competitive environment for market participants. By predicating

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17 See Securities Exchange Act Release No. 65362 (September 20, 2011), 76 FR 59466 (September 26, 2011) (SR-NASDAQ-2011-010) (Order Disapproving a Proposed Rule Change To Link Market Data Fees and Transaction Execution Fees) ("2011 Proposal"). For example, in disapproving that filing the Commission stated that it is "concerned about placing an undue burden on competition in the execution services market" as "NASDAQ's proposal would allow it to use significant discounts on fees for its market data products as an inducement to attract order flow rather than relying on the quality of its transaction services and the level of its transaction fees to compete for orders." Id.

18 Id. ("The Commission also does not believe NASDAQ has demonstrated that the incremental step of linking the pricing of trade executions and market data is an equitable allocation of fees, or is not unfairly or unreasonably discriminatory.")

19 15 U.S. Code § 78f(b)(5).

fees for market data and connectivity services on trading on Nasdaq, it presents what we have called in other contexts a "Hobson's choice"[20] – become a Nasdaq member and execute the required Minimum ADV on the exchange, or become subject to additional price gouging for necessary services. Such an undue burden on competition is prohibited by Section 6(b)(8) of the Act.[21]

The fact that the Minimum ADV threshold is relatively modest, requiring that a Nasdaq member execute one million shares of displayed liquidity, does not make the proposed fees any less unfairly discriminatory or anticompetitive. For one, a firm that receives Nasdaq market data but is not a Nasdaq member today would have to become a member and incur infrastructure and other fixed costs to be able to execute any volume of displayed liquidity. As a practical matter, this will impose costs on firms that are not currently Nasdaq members whether they ultimately qualify for the reduced fee or not. And market participants that have reorganized their business in this manner may need to spread such costs across a larger volume of transactions than strictly required by the Minimum ADV threshold. What's more, Nasdaq could easily increase such thresholds in the future once it has established relevant regulatory precedent. Indeed, the 2011 Proposal would have introduced significantly higher volume requirements, and there is no reason to believe that once Nasdaq is done testing the waters it will not require that market participants divert more of their order flow to Nasdaq to avoid paying unreasonably high fees for market data and connectivity. Regardless, just like the 2011 Proposal, the Proposal's structure is inconsistent with the Act and should therefore be disapproved. The Act does not permit an exchange to charge

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20 See Letter from Adrian Griffiths, Head of Market Structure, MEMX to Vanessa Countryman, Secretary, Commission dated February 17, 2022, *available at* https://memx.com/wp-content/uploads/MEMX-Comment-Letter-NYSE-MOC-Fees.pdf.

21 15 U.S. Code § 78f(b)(8).

unreasonable fees for its services so that it can then coerce firms to trade on its market in order to avoid the brunt of those unreasonable fees.

III. THE COMMISSION SHOULD BE PARTICULARLY SKEPTICAL OF THE PROPOSAL AND OTHER SIMILAR FEE STRUCTURES IN LIGHT OF PROPOSED REGULATION NMS AMENDMENTS AND OTHER MARKET STRUCTURE RULEMAKING CURRENTLY UNDER CONSIDERATION

Nasdaq filed, and the Commission disapproved, a similar fee structure in 2011. Why then, is Nasdaq attempting to get a second bite at the apple more than a decade later? While it could be that Nasdaq believes the Commission to have a short institutional memory, the answer may instead lie in the Commission's anticipated changes to Regulation NMS and related market structure rules.[22] Although nobody knows where the Commission will ultimately land with respect to those rules, transaction-based incentives may be impacted in one way or another. The Proposal offers a potential end run around such changes by allowing larger incumbent exchanges to provide "incentives"[23] through increasing fees charged for related services and then "discount[ing]"[24] those fees for firms that meet specified volume thresholds. As discussed, such a fee structure does not actually reduce the fee burden on market participants because the discount is in name only. However, it *would* preserve the ability for incumbent exchanges to influence market participant routing behavior in a world where explicit transaction-based incentives are more difficult to offer due to regulatory constraints. Smaller exchanges that price their services fairly, as required by the

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22 See Securities Exchange Act Release Nos. 96494 (December 14, 2022), 87 FR 80266 (December 29, 2022) (Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders); 98766 (October 18, 2023), 88 FR 76282 (November 6, 2023) (Volume-Based Exchange Transaction Pricing for NMS Stocks).

23 See supra note 1.

24 Id.

Act, would not be able to provide comparable incentives as the incentives are predicated on charging excessive fees that are then reduced for market participants that route order flow to the exchange implementing the fee instead of one of many competing execution venues.

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We thank the Commission for the opportunity to comment on the Proposal. For the reasons discussed above, Nasdaq has not met its burden to show that the Proposal is consistent with the Act. The Commission must therefore disapprove it just as it did the 2011 Proposal.

Sincerely

/s/ Adrian Griffiths

Adrian Griffiths
Head of Market Structure