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VIA ELECTRONIC MAIL

July 19, 2024

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

Re: Order Instituting Proceedings for Proposed Rule Change to Increase Fees for Certain Market Data and Connectivity Products and to Maintain Fees for Such Products if Member Meets a Minimum Average Daily Displayed Volume Threshold, Securities Exchange Act Release No. 100188 (May 21, 2024), 89 Fed. Reg. 46243 (May 28, 2024) (File No. SR-Nasdaq-2024-016).

Dear Ms. Countryman:

The Nasdaq Stock Market LLC[1] ("Nasdaq" or "the Exchange") appreciates the opportunity to comment on the Commission's Order Instituting Proceedings[2] on its proposal to offer lower market data and connectivity fees to broker-dealers that bring liquidity to the Exchange. We believe that the Proposal will improve the efficiency of trading on the Exchange and enhance overall market transparency, and meets the Exchange Act's statutory requirements.[3]

<u>The proposed fees are reasonable and equitably allocated</u>.

Reliance on competitive solutions is fundamental to the Securities Exchange Act of 1934 (the "Exchange Act"). The Exchange has produced an expert report and supporting evidence

1 Nasdaq is a subsidiary of Nasdaq, Inc. ("NDAQ"), a global technology company serving the capital markets and other industries. Nasdaq has been a technology leader throughout its fifty-year tenure, developing market infrastructure that today powers more than 130 of the world's market infrastructure operators, including broker-dealers, exchanges, clearinghouses, and central securities depositories, in over 50 countries with end-to-end, mission-critical technology solutions. To learn more about the company visit www.nasdaq.com.

2 *See* Order Instituting Proceedings for Proposed Rule Change to Increase Fees for Certain Market Data and Connectivity Products and to Maintain Fees for Such Products if Member Meets a Minimum Average Daily Displayed Volume Threshold, Securities Exchange Act Release No. 100188 (May 21, 2024), 89 Fed. Reg. 46243 (May 28, 2024) (File No. SR-Nasdaq-2024-016) ("Order").

3 *See* Securities Exchange Act Release No.99879 (April 1, 2024), 89 FR 24070 (April 5, 2024) (SR-Nasdaq-2024-016) (proposal to encourage members to contribute liquidity to the Exchange by offering those that maintain a particular minimum trading volume lower fees for specified market data and connectivity products) ("Proposal").

demonstrating that the new fees are subject to competitive forces, and will enhance competition and benefit investors by incentivizing liquidity on the exchange. This report, entitled "How Exchanges Compete, An Economic Analysis of Platform Competition," is precisely the type of reasoned evidence that the courts and the Commission have invited exchanges to submit in support of proposed market data fees.[4]

Where significant competitive forces constrain fees, fee levels meet the Exchange Act's standard for the "equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities,"[5] unless there is a substantial countervailing basis to find that a fee does not meet some other requirement of the Exchange Act.[6]

Congress directed the Commission to "rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the" self-regulatory organizations ("SROs") "and the national market system.'"[7] This is the basis for the congressional presumption—embodied in the Dodd-Frank amendments authorizing immediately effective fees for market data and other products[8]—that exchanges' pricing decisions are constrained by competitive forces and should not be impaired by excessive regulatory scrutiny or rules. Following this mandate, the Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. The evidence produced by Nasdaq demonstrates that the Proposal supports competition, and therefore the proposed fees are reasonable and equitably allocated.

The Proposal does not permit unfair discrimination.

In most circumstances, including those here, offering different prices to different customers is procompetitive. There is nothing inherently unfair or discriminatory about offering an incentive to certain customers who choose to purchase both a large quantity of market data and direct a large amount of order flow to an exchange. To the contrary, it is clear as a matter of economics that offering pricing incentives to attract customer orders is procompetitive behavior that can benefit competition and enhance customer welfare. Not only does this pricing incentive enhance competition for order flow, but it also incentivizes traders to maintain on-exchange

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4 *See* SEC, "Staff Guidance on SRO Rule Filings Relating to Fees." (May 21, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees ("Fee Guidance"); *NetCoalition v. SEC*, 615 F.3d 525, 544 (D.C. Cir. 2010).

5 *See* 15 U.S.C. § 78f(b)(4).

6 *See* U.S. Securities and Exchange Commission, "Staff Guidance on SRO Rule filings Relating to Fees" (May 21, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees ("Fee Guidance") ("If significant competitive forces constrain the fee at issue, fee levels will be presumed to be fair and reasonable, and the inquiry is whether there is a substantial countervailing basis to find that the fee terms nevertheless fail to meet an applicable requirement of the Exchange Act (e.g., that fees are equitably allocated, not unfairly discriminatory, and not an undue burden on competition).").

7 *NetCoalition v. SEC*, 715 F.3d 342, 534-35 (D.C. Cir. 2013); see also H.R. Rep. No. 94-229 at 92 (1975) ("[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.").

8 *See* 15 U.S.C. § 78s(b)(3)(A).

liquidity, which benefits all market participants through more efficient trading and better overall market performance.

Differential pricing has been approved by the Commission.

Incentive programs have been widely adopted by exchanges, and are reasonable, equitable, and non-discriminatory because they are open on an equal basis to similarly situated members and provide additional benefits or discounts that are reasonably related to the value of an exchange's market quality and activity.

The Proposal does not place an undue burden on competition.

Providing discounts is not anti-competitive. "[T]he Supreme Court has urged great caution and a skeptical eye" when dealing with a claim that a firm has unfairly discounted its products.[9] As demonstrated in our expert report and accompanying analysis, the Proposal will support market quality, and the elements of the Proposal can be replicated by any other exchange at any time. If the Exchange is incorrect in its assessment of fees, its customers may react by redirecting order flow or otherwise reducing usage of Exchange services.

For all these reasons, the Proposal meets all of the statutory requirements.

As the Commission considers this Proposal, the Exchange notes that the Commission's decision must be based on reasoned, empirical evidence and that the Exchange Act's statutory deadline includes a requirement that the Proposal be considered and acted on by the Commission itself within the statutory deadline.

The Commission's analysis must be based on reasoned, empirical evidence.

The Commission must articulate a satisfactory explanation for its action in light of the evidence produced by the Exchange.

Under the Exchange Act and the Administrative Procedure Act, agencies have "a statutory obligation to determine as best [they] can the economic implications of [a] rule."[10] An agency does not meet this obligation if it fails 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," has "entirely failed to consider an important aspect of the problem," or has "offered an explanation for its decision that runs counter to the evidence before the agency."[11]

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[9] *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1060 (8th Cir. 2000).

[10] *Chamber of Commerce*, 412 F.3d at 143; *see also Business Roundtable v. SEC*, 647 F.3. 1144, 1148 (2011).

[11] *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted); *see also Business Roundtable*, 647 F.3d at 1148, 1151; *see also, e.g.*, *Am. Mining Congress v. EPA*, 907 F.2d 1179, 1190-91 (D.C. Cir. 1990) ("[T]he agency's failure to respond to . . . specific challenges in the record is fatal here, since 'the points raised in the comments were sufficiently central that agency silence . . . demonstrate[s] the rulemaking to be arbitrary and capricious.'"); *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (when responding to rulemaking comments, an agency "must respond in a reasoned manner to those that raise significant problems").

The Exchange has met its burden to provide evidence demonstrating that the proposed rule change is consistent with the Exchange Act.[12] The Commission now has a statutory obligation to review and analyze that evidence and articulate a satisfactory explanation for its actions.

The Commission itself, not staff acting under delegated authority, must act within the statutorily prescribed timing requirements of the Dodd-Frank Act.

The Dodd-Frank amendments provide that a proposed rule "shall be deemed to have been approved" unless, after instituting proceedings to determine whether the proposed rule change should be disapproved, the *Commission* itself, rather than the Commission's staff acting pursuant to delegated authority, takes action on the proposed rule within 240 days.[13] If the Commission does not disapprove the Proposal within the statutorily prescribed time period, the rule will be "deemed . . . approved." Accordingly, Nasdaq intends to implement the proposed rule change on January 2, 2025, unless the Commission itself disapproves the rule within the required time frame.

Summary of the Proposal

As described in detail in the filing,[14] the Exchange proposes that member firms that meet a minimum Average Daily Volume ("ADV") requirement continue to pay fees for Non-Display Usage of market data and 40Gb and 10Gb Ultra high-speed connections at current levels, while firms that do not meet that threshold, or provide no liquidity to the Exchange, pay higher monthly fees.

The goal of the Proposal is to encourage a "virtuous cycle" in which firms route more liquidity-providing orders to Nasdaq and consume and distribute more data to receive the discount. This will in turn increase the quality and value of the Exchange's market data, leading to more displayed liquidity on the Exchange, enhancing and enriching the market data distributed to the industry, which then increases the amount of interest in the platform. Higher levels of liquidity on the platform will enable the Exchange to offer investors a more robust, lower-cost trading experience through tighter spreads and more efficient trading, improving its competitive position relative to other exchanges and trading venues.[15] We expect other exchanges to offer their own competitive responses to make their own platforms more attractive, continuing a competitive cycle that benefits customers through improved product quality and lower prices.

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[12] *See* Securities and Exchange Commission Rules of Practice, Rule 700 (b)(3) (17 CFR 201.700(b)(3)) (stating 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.").

[13] 15 U.S.C. § 78s(b)(2)(D).

[14] *See* Securities Exchange Act Release No.99879 (April 1, 2024), 89 FR 24070 (April 5, 2024) (SR-Nasdaq-2024-016).

[15] To the degree that the additional liquidity is moved from off-exchange venues to on-exchange platforms, overall market transparency will improve as well.

The proposed fees are reasonable and equitably allocated.

Reliance on competitive solutions is fundamental to the Exchange Act.

Where significant competitive forces constrain fees, fee levels meet the Exchange Act's standard for the "equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities,"[16] unless there is a substantial countervailing basis to find that a fee does not meet some other requirement of the Exchange Act.[17] Evidence 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 charges, provided that nothing about the product or its fee structure impairs competition.[18]

Congress directed the Commission to "rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'"[19] This is the basis for the congressional presumption—embodied in the Dodd-Frank amendments authorizing immediately effective fees for market data and other products[20]—that exchanges' pricing decisions are constrained by competitive forces and should not be impaired by excessive regulatory scrutiny or rules. Following this mandate, the Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets.

In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that regulation of the national market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[21] As a result, the Commission has long relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. In 2008, the Commission explained

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[16] *See* 15 U.S.C. § 78f(b)(4).

[17] *See* U.S. Securities and Exchange Commission, "Staff Guidance on SRO Rule filings Relating to Fees" (May 21, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees ("Fee Guidance") ("If significant competitive forces constrain the fee at issue, fee levels will be presumed to be fair and reasonable, and the inquiry is whether there is a substantial countervailing basis to find that the fee terms nevertheless fail to meet an applicable requirement of the Exchange Act (e.g., that fees are equitably allocated, not unfairly discriminatory, and not an undue burden on competition).").

[18] Nothing in the Exchange Act requires the Commission to set aside economic reality in conducting its competitive analysis. Because the services covered by Nasdaq's filing are inextricable from the operation of exchanges as a platform, the competitiveness of these fees must be analyzed at the platform level rather than by positing the existence of a product-by-product market existing in isolation from the platform without basis in evidence or economic theory.

[19] *NetCoalition v. SEC*, 715 F.3d 342, 534-35 (D.C. Cir. 2013); see also H.R. Rep. No. 94-229 at 92 (1975) ("[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.").

[20] *See* 15 U.S.C. § 78s(b)(3)(A).

[21] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

that "[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior."[22] In 2019, Commission Staff reaffirmed that "[i]f significant competitive forces constrain the fee at issue, fee levels will be presumed to be fair and reasonable . . . ."[23]

Accordingly, "the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[24] Consistent with the Commission's longstanding focus on competition, Commission Staff have indicated that they would look at factors outside of the competitive market only if a "proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces."[25]

The new economic research provided by the Exchange provides substantial evidence that exchanges compete as platforms in the market for exchange services. Both the courts and the Commission have recognized that evidence of platform competition can be sufficient to constrain exchange fees. For example, SEC Staff Guidance published in 2019 acknowledged that platform competition can constrain aggregate returns, regardless of the pricing of individual products, and that platforms often have joint products.[26] Similarly, the Supreme Court in *Ohio v. American Express Co.*[27] recognized that, as platforms facilitate transactions between two or more sides of a market, their value is dependent on attracting users to both sides of the platform (i.e., network effects). Fees cannot be analyzed from only one side, but rather must be considered within the larger context of the platform to test for anti-competitive behavior.

Evidence of platform competition, which, by definition, involves competition across multiple products without necessarily involving direct competition among single products, is consistent with the Exchange Act. The Exchange Act mandates the "equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities,"[28] referring generally to "reasonable dues, fees, and other charges" as a whole, not individual fees. Nothing in the Exchange Act requires the individual examination of specific product fees in isolation from the actual market in which competition exists. Provided that a proposed rule change does not in and of itself undermine competition, evidence of platform competition is sufficient to show that the product operates in a competitive environment.

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22 *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 Fed. Reg. 74,770 (December 9, 2008) (SR-NYSEArca-2006-21).

23 *See* Fee Guidance, supra n. 4.

24 *See id*.

25 *See id*.

26 *See id*. As noted below, we cannot demonstrate that returns are equalized across platforms, as we do not know the costs of other exchanges. Having said that, the equalization of costs to the user demonstrates that platform competition constrains the fees charged by exchange platforms without requiring a separate analysis of whether returns are equalized across platforms.

27 *Ohio v. American Express Co.*, 585 U.S. 529 (2018).

28 *See* 15 U.S.C. § 78f(b)(4).

The Exchange has submitted new, original research, demonstrating that exchanges compete as platforms, and such competition constrains prices.

Our new data[29] shows that the combination of explicit all-in costs to trade and other implicit costs has largely equalized the cost to trade across venues, demonstrating that competition has helped constrain fees.[30] This is a function of the fact that, if the ***all-in*** cost to the user of interacting with an exchange—taking into account the amount of liquidity on the exchange—exceeds market price, customers shift purchases away from that exchange, and therefore the exchange must adjust one or more of its fees to attract customers. The "all-in" cost includes not only explicit costs, such as fees for trading, market data, and connectivity, but also the *implicit* costs of trading on an exchange. The realized spread, or "markout,"[31] captures the implicit cost to trade on a platform.

Data suggests that market participants employ sophisticated analytic tools to weigh the cost of immediate liquidity and lower opportunity costs against better spread capture (lower markouts) and explicit trading costs. Venues with the highest explicit costs—typically inverted and fee-fee venues—have the lowest implicit costs from markouts and vice versa. Higher positive markouts mean more spread capture, but those venues also tend to have the highest explicit costs, and provide the least liquidity, and positive externalities, to the market.

Platform competition has resulted in a competitive environment in the market for exchange services in which trading platforms are constrained by other platforms' offerings,

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[29] The Exchange proposed linking market data fees and order flow based on platform competition in 2011, but that proposal was rejected by Commission staff under delegated authority. 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). Although the Commission did not act on the proposal within the time frame required by statute and the proposal was therefore deemed approved, Nasdaq chose not to implement it. Moreover, the new research presented with this Proposal was not available in 2011, and this new evidence compels a different outcome.

[30] Competition across platforms constrains platform fees, and results in "all-in" costs becoming equal across platforms. The Staff Guidance on SRO Rule Filings Relating to Fees, however, states that platform theory requires that the "overall *return* of the platform, rather than the *return* of any particular fees charged to a type of customer, . . . be used to assess the competitiveness of the platform's market" (emphasis added), and states that "[a]n SRO that wishes to rely on total platform theory must provide evidence demonstrating that competitive forces are sufficient to constrain the SRO's aggregate return across the platform." See "Staff Guidance on SRO Rule Filings Relating to Fees." *SEC,* 21 May 2019, https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees. ("Staff Guidance on SRO Fees"). We do not know, and cannot determine, whether returns are equalized across platforms, because we do not have detailed cost information from other exchanges. An analysis of returns, however, is unnecessary to show that competition constrains fees given that, as we demonstrate below, platform competition can be demonstrated solely by examining costs to users.

To the extent that the Commission concludes that an analysis of returns is required, then the holding of *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) would dictate that the Commission must use its own examination and analytical capabilities to determine exchange returns rather than merely asserting that Nasdaq failed to meet a burden that would require Nasdaq to somehow obtain non-public information about its competitors.

[31] The concept of markout was created by market makers trying to capture the spread while providing a two-sided (bid and offer) market. For market makers, being filled on the bid or the offer can cause a loss if the fill changes market prices. For example, a fill on a market maker's bid just as the stock price falls results in a "virtual loss," because the market maker has a long position with a new offer lower than the fill.

taking into consideration the all-in cost of interacting with the platform. This constraint is a natural consequence of competition and demonstrates that no exchange platform can charge excessive fees and expect to remain competitive, thereby constraining fees on all products sold as part of the platform. The existence of platform-level competition also explains why some consumers route orders to the exchange with the highest explicit trading costs even though other exchanges offer free or a net rebate for trading.[32]

This conclusion is particularly striking given that different exchanges engage in a variety of business models and offer an array of pricing options to appeal to different customer types.

The largest exchanges operate maker-taker platforms, offering rebates to attract trading liquidity, which allows them to maintain actionable quotes with high liquidity and offer high-quality market data. The negative price charged to liquidity providers through rebates is part of the platform because it serves to create features attractive to other participants, including oftentimes tight spreads, actionable and lit quotes, and more valuable market data.

Inverted venues, in contrast, have the opposite price structure—liquidity providers pay to add liquidity, while liquidity takers earn a rebate. These platforms offer less liquidity, but better queue priority and faster fills. There are a wide range of other pricing models and product offerings among the dozens of lit and unlit trading venues that compete in the marketplace in addition to these examples.

The different strategies among exchanges also manifest in the pricing of other services, such as market data and connectivity. Some exchanges charge for such services, while others charge little or nothing (typically because the exchange is new or has little liquidity), just as some exchanges charge a fee per trade, while others pay rebates.

As long as total returns are constrained by competitive forces, there is no regulatory basis to be concerned with pricing of particular elements offered on a platform. Indeed, regulatory constraints in this environment are likely to *reduce* consumer welfare by constraining certain exchanges from offering packages of pricing and products that would be attractive to certain sets of consumers, thus impeding competition with venues that are not subject to the same regulatory limitations and reducing the benefits of competition to customers.[33]

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[32] Empirical evidence also shows that market data is more valuable from exchanges with more liquidity. Many customers decide not to take data from smaller markets, even though they are free or much lower cost than larger markets.

[33] The two research papers cited by SIFMA in its letter regarding the Proposal do not contradict—or even address—this research. See Letter from Ellen Greene and Joseph Corcoran, SIFMA, to Vanessa Countryman, Secretary, SEC, regarding File No. SR-Nasdaq-2024-016, available at https://www.sec.gov/comments/sr-nasdaq-2024-016/srnasdaq2024016-475571-1352736.pdf . The first, "Economics of the Stock Exchange Business: Proprietary Market Data," (January 2020), has no data analysis. It dismisses the concept of competition by highlighting a rebate filing by the CHX exchange, which had nothing to do with exchange proprietary data fees. Nothing in the paper analyzes fees or compares fees across platforms. The second, "An Analysis of Market Data Fees" by SIFMA, available at https://www.sifma.org/wp-content/uploads/2019/01/Expand-and-SIFMA-An-Analysis-of-Market-Data-Fees-08-2018.pdf, is not an analysis of competition or the competitive environment. It is, rather, little more than a compilation of expenditures over time, focusing on the period 2010 to 2018. There is no analysis of "all-in" costs or even an analysis of fees as such. Accordingly, neither provide evidence that rebuts the evidence offered by Nasdaq.

Platform competition in fact constrains market data fees.

Platform competition has constrained market data fees over the last two decades. Fees for the display of depth of book information are at the same nominal level (and lower after accounting for inflation) than they were in 2002.

In November of 2002, Nasdaq proposed a fee of $150 per user per month for its depth of book product, TotalView.[34] A year later, in October of 2003, Nasdaq lowered fees to $70 per month for professional users and $14 per month for non-professional users "in response to the lack of demand by vendors and users."[35] Today, those fees have barely changed in nominal terms: professional subscribers pay a monthly fee of $76 each for display usage of TotalView, and non-professional subscribers of TotalView pay a monthly fee of $15,[36] representing a considerable reduction in real terms.[37] Non-Display fees were last changed in January 2016,[38] after which they have remained unchanged. As with display fees, this represents a considerable reduction in real terms.[39]

Fees are constrained because Exchange customers can and routinely do shift their purchases elsewhere in response to competitive pricing alternatives. In 2022, for example, Nasdaq reported that the introduction of fees for the five MRX data feeds caused an approximately 15 percent reduction in the number of customers with access to those feeds, from 34 to 29.[40] Nasdaq has also had cancellations of BX and PSX data feeds because the liquidity available on those exchanges has been insufficient to support the cost of market data.

On larger exchanges, Nasdaq has seen high-frequency traders scale back their spending on connectivity by, for example, reducing the bandwidth on their connections, or by replacing sophisticated FPGA technology with standard connections. Customers have also reduced spending on display feeds.

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34 *See* Securities Exchange Act Release No. 46843 (November 18, 2002), 67 FR 70471 (Nov. 22, 2002) (SR-NASD-2002-33); see also Securities Exchange Act Release No. 55007 (December 22, 2006), 72 FR 600 (January 5, 2007) (SR-Nasdaq-2006-053 (recounting history of depth of book fee changes).

35 *See* Securities Exchange Act Release No. 48581 (October 1, 2003), 68 FR 57945 (October 7, 2003) (SR-NASD-2003-111); see also Securities Exchange Act Release No. 55007 (December 22, 2006), 72 FR 600 (January 5, 2007) (SR-Nasdaq-2006-053) (explaining the rationale for the fee reduction).

36 *See* The Nasdaq Stock Market LLC Rules, Equity 7 (Pricing Schedule), Section 123(b)(2).

37 The Bureau of Labor Statistics' CPI Inflation Calculator shows that, for Nasdaq's fees to have merely kept up with inflation, the TotalView fees today would have to be $114.79 for professional subscribers for display usage and $22.96 for non-professional subscribers – about 50% higher than today's prices. Instead, $76 in April 2023 is equivalent to $46.35 in October 2003, when adjusted for inflation. Similarly, $14 in April 2023 is equivalent to $8.54 in October 2003.

38 Prices are tiered above 10 servers.

39 The Bureau of Labor Statistics' CPI Inflation Calculator shows that, for Nasdaq's fees to have merely kept up with inflation since January 2016, the TotalView fees today would have to be $480.17 for non-display usage – 28% higher than today's prices. Instead, $375 in April 2023 is equivalent to $292.86 in January 2016, when adjusted for inflation.

40 *See* Securities Exchange Act Release No. 96144 (October 24, 2022), 87 FR 65273 (October 28, 2022) (SR-MRX-2022-22).

We also see evidence that the all-in costs to trade have fallen in nominal terms.[41] Figure 1, our most up-to-date analysis of all-in costs, shows that the explicit all-in costs per trade have fallen industry-wide since 2019 (excluding markouts).

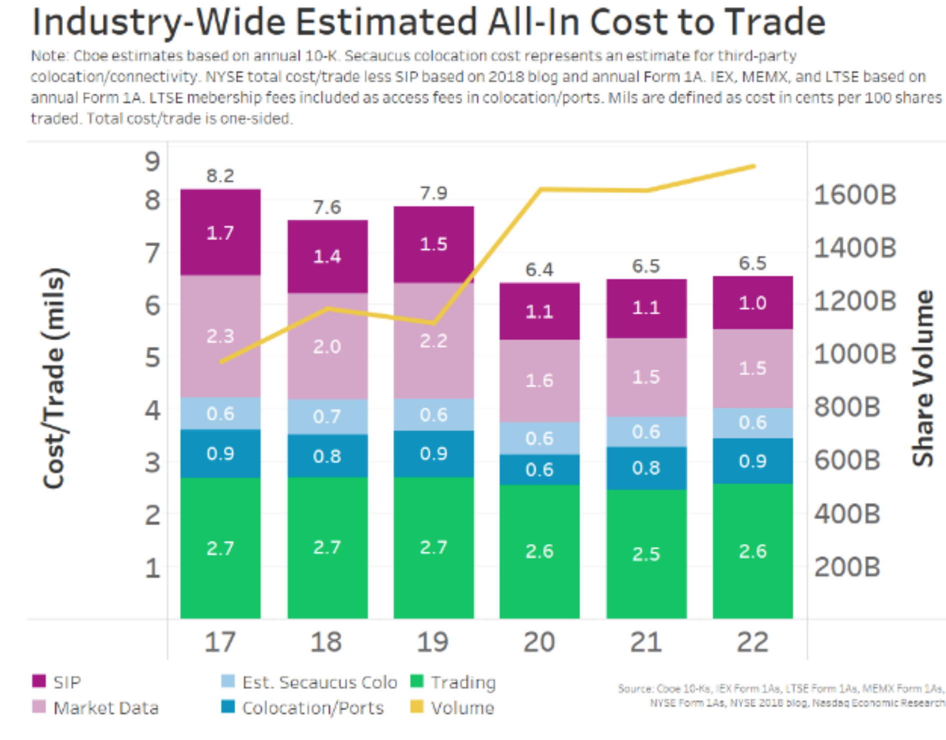

Figure 1: Industry-Wide All-In Cost to Trade.

Figure 2 shows that competition has essentially equalized the explicit all-in costs of the three largest exchange families (excluding markouts).[42]

[41] *See* Phil Mackintosh, "All-in Economics to Trade Are What Matters Most," available at https://www.nasdaq.com/articles/all-in-economics-to-trade-are-what-matters-most.

[42] This chart does not include implicit costs. As discussed in the proposal, we have found that implicit and implicit costs together have largely equalized across trading venues, not just the three largest exchange families. See Proposal Exh. 3.

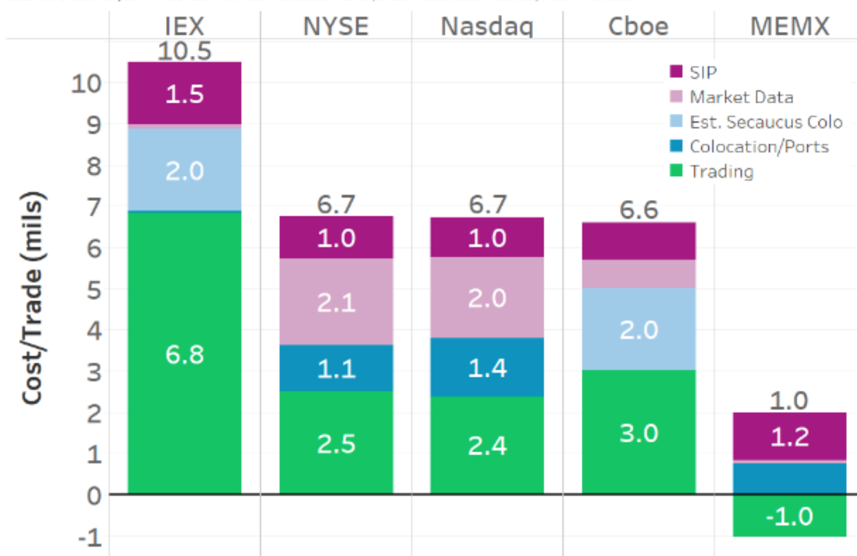

Figure 2: Explicit All-In Cost to Trade For Selected Exchanges

As market data and connectivity fees have remained roughly constant in nominal terms, they have fallen in real terms.[43]

Fees have been constrained because customers have a choice in market data and connectivity.

Customers have a choice in whether to purchase proprietary real time data and exercise that choice. The fact that customers are turning to other sources for their data needs means that there is a competitive constraint on the fees an exchange can charge. For example, only about half of the sample of market participants reporting on Form ATS-N purchase any proprietary real time data at all (15 out of 28, or approximately 54%), but rather rely on the Securities Information Processors ("SIPs")[44] for market information, as shown in Table 1 below.[45]

[43] *See* Proposal to Encourage Members to Contribute Liquidty to the Exchange by Offering those that Maintain a Particular Minimum Trading Volume Lower Fees for Specified Market Data and Connectivity Products (SR-Nasdaq-2024-015), Exh. 3, n.91, available at https://listingcenter.nasdaq.com/assets/rulebook/nasdaq/filings/SR-NASDAQ-2024-016.pdf.

[44] *See* UTP Plan, available at https://www.utpplan.com/ and CTA Plan, available at https://www.ctaplan.com/index.

[45] *See* Phil Mackintosh, "Leveling a Slice of the Playing Field," available at https://www.nasdaq.com/articles/leveling-a-slice-of-the-playing-field.

Venue	Volume Based Pricing	Customer Tiers	Negotiated Pricing	Bundled Fee	Subscriber Fee	Min Fee (mils)	Max Fee (mils)	Price Feed
UBS		Yes			Yes	0	10	Direct
Goldman Sachs Sigma X2	Yes*	Yes	Yes		Yes	10	300	Direct
JPB-X	Yes	Yes	Yes		Yes	0	No max	SIP
IntelligentCross		Yes	Yes		Yes	-28	30	Direct
JPM-X	Yes	Yes	Yes		Yes	0	No max	Direct
Level	Yes	Yes	Yes			0	50	SIP
MS Pool		Yes	Yes			0	No max	Direct
BofA Instinct X	Yes	Yes			Yes	0	300	Direct
Barclays LX	Yes	Yes	Yes			0	525	Direct
BIDS	Yes	Yes			Yes	3	50	Direct
MS Trajectory Cross			Yes			0	No max	SIP
Virtu MatchIt	Yes	Yes		Yes		1	10	Direct
Fidelity CrossStream	Yes	Yes	Yes		Yes	0	100	SIP
Interactive Brokers IBKR	Yes	Yes	Yes	Yes	Yes	5	100	SIP
Virtu Posit	Yes	Yes	Yes	Yes		0	500	Direct
MS Rpool		Yes	Yes			0	No max	Direct
PureStream	Yes		Yes		Yes	5	25	SIP
Instinet BlockCross	Yes		Yes	Yes		0	200	SIP
Liquidnet H20	Yes	Yes		Yes	Yes	0	600	Direct
BNP Paribas Cortex	Yes	Yes	Yes	Yes		0	10	Direct
Instinet CBX	Yes	Yes	Yes	Yes	Yes	0	250	SIP
CODA	Yes	Yes	Yes	Yes		-30	100	SIP
Liquidnet Negotiation	Yes	Yes	Yes	Yes		0	600	SIP
Luminex			Yes		Yes	25	500	SIP
Citi-ONE	Yes	Yes	Yes	Yes		0	600	Direct
Blue Ocean ATS			Yes		Yes	-27	30	7:30PM*
OneChronos	Yes			Yes		0	10	SIP
Sifel X		Yes		Yes		0	0	Direct
Interactive Brokers Eos	Yes	Yes	Yes	Yes	Yes	5	100	SIP

Bundle fee is marked "yes" if there is any reference to bundling in Form ATS fee schedule. Customer tiers is marked "yes" if ATS segments order flow. Negotiated pricing is "yes" if there is any reference to negotiation in Rosenblatt fee schedule. Subscriber fee is marked "yes" if subscribers are given different rates than non-subscribers. Volume based Pricing is marked "yes" if customer volume plays a role in determining rates on the Form ATS fee schedule.

Source: Form ATS-N, Rosenblatt, Nasdaq Economic Research

Table 1: Analysis of data feeds purchased by ATS customers.

Customers similarly have a choice in whether they purchase connectivity services.[46] As Figure 3 shows, while most of Nasdaq's top 25 customers purchase colocation services, that percentage drops below 60% for the next 25, only about 20 percent for the next 50, and approaches zero for most other customers.[47] The same trend applies to TotalView, Nasdaq's premier depth of book feed, where most of the top 25 customers purchase TotalView, but below 20 percent of customers outside of the top 100 do so. Of all Nasdaq customers, only 4 percent purchase any colocation services at all, while only 22 percent purchase depth of book information.

46 A broker-dealer need not purchase connectivity services directly from the Exchange; some broker-dealers purchase connections through a third-party that will sell access at a discount to multiple firms.

47 *See* Phil Mackintosh, "Is Free Fair To All," *Nasdaq,* (January 29, 2019), available at https://www.nasdaq.com/articles/is-free-fair-to-all-2019-01-29.

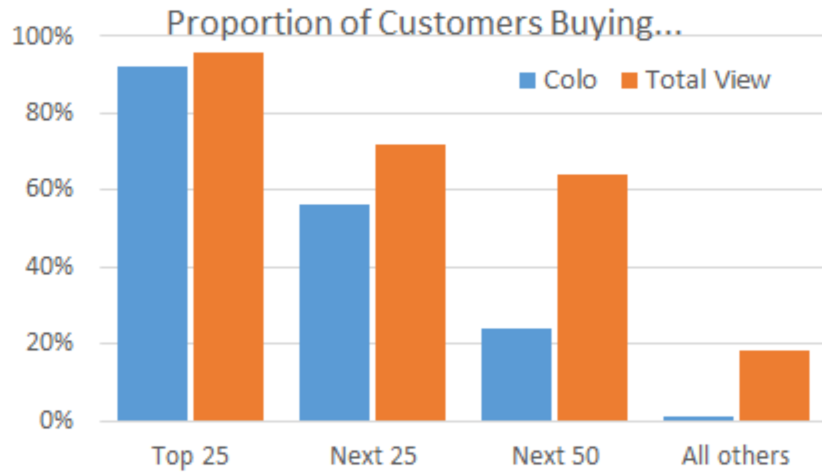

Figure 3: Proportion of Customers Buying Colocation Services and Dept of Book Data, by Customer Size.

Figure 4, which uses ATS data to compare the value of market data (as measured by average incremental contribution to the National Best Bid or Offer ("NBBO")) to percentage of price discount (as compared to the market leader) shows that the exercise of customer choice has in fact led exchanges to charge less for less valuable data, demonstrating that there is price elasticity of demand for market data.[48] Of note, some ATSs elect not to take even free data, as shown by the purple coloring on the bars denoting that data is free.

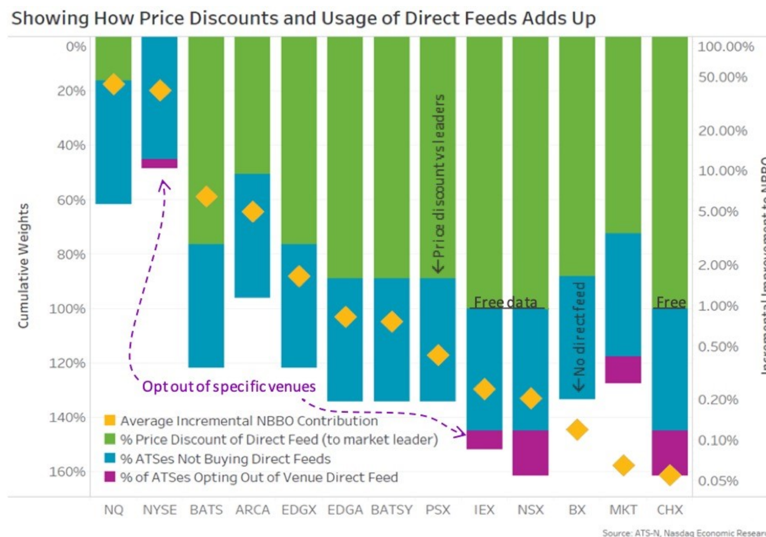

Figure 4: Comparison of Market Quality (as measured by average incremental contribution to the NBBO) to the price of a direct feed (relative to the market leader).

[48] *See* Phil Mackintosh, "Dispelling the Complementary Product Theory for Market Data," *Nasdaq,* (August 20, 2020), available at https://www.nasdaq.com/articles/dispelling-the-complementary-product-theory-for-market-data-2020-08-20.

<u>The Proposal will create positive network effects by attracting liquidity to the Exchange</u>.

Exchanges have a unique role to play in market transparency because they publish an array of pre- and post-trade data that non-exchange venues, almost entirely, do not.[49] Greater transparency benefits non-exchange venues by enabling them to provide more accurate pricing to their customers, and by helping such venues set their own prices, benchmark, analyze the total cost of ownership, and assess their own trading strategies.

The benefits of liquidity can be seen in an examination of the value of data on maker-taker exchanges. Due to reliable prices and high liquidity, price discovery tends to occur on these venues more, making their quote and trade information (data) an important input to more customers (including ATSs and wholesalers).[50] That in turn makes their data more valuable and easier to sell; "[d]ata from a stock exchange… are more valuable when the exchange carries more trading activity."[51]

As the SEC recently noted in its market infrastructure proposal,[52] the number of transactions completed in non-exchange venues has been growing. Allowing exchanges to compete as platforms means that they will be better able to compete against non-exchange venues, and, to the degree order flow is shifted from non-exchange to exchange venues, overall market transparency is improved.[53] Significantly, improving overall market transparency helps non-exchange venues as well by enabling them to provide more accurate pricing to their customers, and play their own role in capital formation more efficiently and effectively.

Increased order flow benefits investors by deepening the Exchange's liquidity pool, potentially providing greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency, and lowering spreads between bids and offers and thereby lowering investor costs.

It also offers lower trading costs. As trading platforms attract more liquidity, bid-ask spreads tighten, search costs fall (by limiting the number of venues that a customer needs to check to assess the market), and connection costs decrease, as customers have no need to connect

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[49] Non-exchange venues publish only post-trade information through the Securities Information Processors.

[50] *See* Mackintosh, Phil. "An Intern's Guide to the Market Structure Galaxy." *Nasdaq,* 16 Jul. 2020, https://www.nasdaq.com/articles/an-interns-guide-to-the-market-structure-galaxy-2020-07-16

[51] *See* Schwabe, Rainer. "Platform Competition and the Regulation of Stock Exchange Fees." *National Law Review,* 9 Jun. 2022, https://www.natlawreview.com/article/platform-competition-and-regulation-stock-exchange-fees; *see also* Mackintosh, Phil. "Accounting for Prices of NMS-II Depth." *Nasdaq,* 9 Dec. 2021, https://www.nasdaq.com/articles/accounting-for-prices-of-nms-ii-depth.

[52] *See* Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Price Orders, Securities Exchange Act Release No. 96494 (File No. S7-30-22), available at https://www.sec.gov/rules/proposed/2022/34-96494.pdf.

[53] Non-exchange venues rely on market data distributed by exchanges to set prices. Greater transparency allows both exchange and non-exchange venues to operate more effectively and efficiently.

to all venues.[54] The whole is therefore greater (in the sense that it is more efficient) than the sum of the parts.

The Commission must articulate a satisfactory explanation for its action in light of the evidence produced by the Exchange.

The Exchange has met its burden to demonstrate that the proposed rule change is consistent with the Exchange Act.[55]

The Commission now has a statutory obligation to review the relevant data and articulate a satisfactory explanation for its actions. Under the Exchange Act and the Administrative Procedure Act, agencies have "a statutory obligation to determine as best [they] can the economic implications of [a] rule."[56] An agency does not meet this obligation if it fails 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," has "entirely failed to consider an important aspect of the problem," or has "offered an explanation for its decision that runs counter to the evidence before the agency."[57] The Commission's analysis must be based on reasoned, empirical evidence.[58]

The Proposal Does Not Permit Unfair Discrimination

In this market, as in many others, offering different prices to different customers is procompetitive.

There is nothing inherently unfair or discriminatory about offering different prices to different categories of customers based on the type or quantity of the service purchased, such as an incentive to certain customers to direct more order flow to an exchange. To the contrary, it is clear as a matter of economics that offering pricing incentives in order to attract customer orders

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[54] Nasdaq's experience shows that fewer customers connect with smaller trading venues than with larger venues.

[55] *See* Securities and Exchange Commission Rules of Practice, Rule 700 (b)(3) (17 CFR 201.700(b)(3)) (stating 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").

[56] *Chamber of Commerce*, 412 F.3d at 143; *see also Business Roundtable*, 647 F.3d at 1148.

[57] *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citations omitted); *see also Business Roundtable*, 647 F.3d at 1148, 1151; *see also, e.g.*, *Am. Mining Congress v. EPA*, 907 F.2d 1179, 1190-91 (D.C. Cir. 1990) ("[T]he agency's failure to respond to . . . specific challenges in the record is fatal here, since 'the points raised in the comments were sufficiently central that agency silence . . . demonstrate[s] the rulemaking to be arbitrary and capricious.'"); *Covad Commc'ns Co. v. FCC*, 450 F.3d 528, 550 (D.C. Cir. 2006) (when responding to rulemaking comments, an agency "must respond in a reasoned manner to those that raise significant problems").

[58] *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 445 (D.C. Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) (To satisfy the "arbitrary and capricious" standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'").

is procompetitive behavior that can benefit competition in a market and enhance customer welfare.

Thus, for example, even though the antitrust laws contain provisions (in the Robinson-Patman Act, 15 U.S.C. § 13) that make it unlawful "to discriminate in price between different purchasers of commodities," Congress was careful to "condemn price discrimination only to the extent that it threatens to injure competition."[59] As the Supreme Court recognized, price differences can be consistent with—and indeed can enhance—competition.[60] Accordingly, "Congress did not intend to outlaw price differences that result from or further the forces of competition."[61]

Similarly, Professor Herbert Hovenkamp, co-author of the leading treatise on antitrust law, has stated that differential pricing "resulting from an upstream firm's unilateral pricing decisions must enjoy a very strong presumption that [it is] socially beneficial and not 'anticompetitive' in any economically acceptable sense of that term."[62] Thus, for example, it benefits competition and enhances consumer welfare when a supplier is able to reward more aggressive dealers by giving them price discounts and rebates to increase the competitiveness of its distribution system and volume of sales. Likewise, it benefits competition and enhances consumer welfare when sellers are able to offer volume discounts to introduce their products to new customers or to reward distributors for high sales and aggressive promotion of their products.[63]

Indeed, a prohibition against all differential pricing would suppress competition and harm buyers because sellers would likely respond by not making any price cuts at all to avoid the cost of extending them to all buyers, which would in effect establish an artificial price floor for the product.[64] Accordingly, the Supreme Court has cautioned against expanding the prohibitions against price discrimination because doing so could "help give rise to a price uniformity and rigidity in open conflict with the purposes of" the antitrust laws—that is, fostering competition and enhancing consumer welfare.[65]

Importantly, the utility of the market is also maximized when each joint product is optimally priced—as that reduces the amount of forgone consumer and producer surpluses (economic deadweight losses) due to inefficient pricing and production, where some underpay while others do not consume. Economic theory shows more optimal pricing could more readily

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[59] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993).

[60] *Id.*

[61] *Id*.

[62] H. Hovenkamp, Antitrust Law ¶ 2342b (2d ed. 2006); H. Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 127 (2000).

[63] *Id.*; H. Hovenkamp, Testimony on Robinson-Patman Act, Antitrust Modernization Commission, at 8 (June 2, 2005), *at* http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Hovenkamp.pdf (last visited on June 18, 2024).

[64] H. Hovenkamp, Antitrust Law ¶ 2340b.

[65] *Volvo Trucks N.A., Inc. v. Reeder-SIMCO GMC, Inc.*, 546 U.S. 164, 181 (2006) (quoting *Automatic Canteen Co. of Am. v. FTC*, 440 U.S. 61, 63 (1953)).

reflect the value of products to users, allowing exchanges to create new products for additional customers, increasing access to the market and promoting innovation.

Critically, in assessing whether fees are subject to competition, the pricing choices of one exchange should not be deemed unreasonable simply because they differ from the choices made by other exchanges (e.g., pricing higher in one joint product and lower in others). Differentiation and variation in product offerings are hallmarks of competition and beneficial to customers and consumer welfare. A fee proposal should not be rejected, for example, simply because a proposed price for one platform product is higher than a competitor's prices for a similar product because one can expect the first platform's other joint products to be priced lower to maintain platform competitiveness.

Differential pricing has been approved by the Commission.

The Commission itself has approved differential pricing on numerous prior occasions. For example, it has acknowledged that exchanges can offer different prices to "particular classes of subscribers" based on market conditions such as "their economic circumstances and their need for and use of . . . information."[66]

Incentive programs have been widely adopted by exchanges, and are reasonable, equitable, and non-discriminatory because they are open on an equal basis to similarly situated members and provide additional benefits or discounts that are reasonably related to the value to an exchange's market quality and activity.[67] Far from undermining the purposes of the Exchange Act, the Commission has found that such differential pricing "provide[s] an opportunity for many investors to have access to the enhanced data provided by these services, which should help to increase transparency."[68]

In 2021, Cboe initiated a Retail Membership Program that includes volume tiers similar to the current Exchange proposal.[69] In that proposal, Cboe introduced a retail membership program which offered discounted membership fees, port fees, and market data fees, along with the opportunity to receive enhanced rebates under new retail volume tiers, for up to 18 months

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[66] *See* Concept Release, Regulation of Market Information Fees and Revenues, 64 Fed. Reg. 70,613, 70,630 (Dec. 17, 1999).

[67] *See, e.g.*, Securities Exchange Act Release No. 92493 (July 26, 2021), 86 FR 41129 (July 30, 2021) (SR-CboeEDGX-2021-034) (proposal to provide discount to new members that meet certain volume thresholds, noting that "relative volume-based incentives and discounts have been widely adopted by exchanges . . . and are reasonable, equitable and non-discriminatory because they are open on an equal basis to similarly situated members and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity . . . .") (not suspended by Commission); see also Securities Exchange Act Release No. 53790 (May 11, 2006), 71 FR 28738 (May 17, 2006) (SR-Phlx-2006-04) ("The Commission recognizes that volume-based discounts of fees are not uncommon, and where the discount can be applied objectively, it is consistent with Rule 603. For the same reasons noted above, the Commission believes that the fee structure meets the standard in section 6(b)(4) of the Exchange Act in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among the Exchange's members and issuers and other persons using its facilities.").

[68] *See* Order, 67 Fed. Reg. at 70,472.

[69] *See* Securities Exchange Act Release No. 92493 (July 26, 2021), 86 FR 41129 (July 30, 2021) (SR-CboeEDGX-2021-034) (proposal to introduce a Retail Membership Program offering discounted membership fees, port fees and market data fees, and retail volume tier rebates).

for new retail member organizations. Specifically, the program offered a set level of discounts for new members in the first 12 months of membership, and additional discounts during months 13 through 19 for new members that meet a defined average daily volume threshold. Cboe explained that it believed that providing an incentive for new membership would bring additional liquidity to a transparent public market, to the benefit of all market participants.

Cboe also noted that volume-based incentives and discounts have been widely adopted by exchanges and are reasonable, equitable, and non-discriminatory because they are open on an equal basis to similarly situated members and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. The Commission did not suspend Cboe's immediately effective filing.

Price differentiation generally enhances competition and benefits consumers because it allows sellers to make calibrated judgments about the appropriate incentives to provide to the types of buyers who are most likely to respond by increasing their purchases; this, in turn, allows sellers to expand output and compete in ways that would not be practicable if differential pricing were not permitted.

Differentiated fees are fairer than flat fees.

Market participants vary widely with respect to the degree and types of interaction with exchanges, how they use exchange information and services, and the degree to which they capture private benefits from exchange services. Market Makers that provide bid and offer prices in thousands of securities depend upon deterministic and fast information so that they can adequately manage their risk and continue to provide robust bids and offers in the market and keep spreads narrow, whereas most investors only occasionally demand information at much lower speeds. A few customers place high demand on the exchange; the vast majority do not. However, the benefits of exchange products to various businesses are far from equal.[70]

Fees will be most efficient and fair if they vary by use case. Flat fees set according to the most capital-intensive use cases will lead to underutilization by the vast majority of investors, which have no need for low-latency, high-output feeds. On the other hand, setting fees according to the lightest use cases will lead to underinvestment in low latency products. The way to both finance sufficient investment to meet the needs of power users, as well as the more casual needs of the general investing public, is to set fees according to the use case.

This is already done for many products. To cite one example, professional subscribers to Nasdaq's depth of book fees are charged $76 for display usage, while non-professionals pay a monthly fee of $15.[71] This type of pricing helps finance the infrastructure investment required for professionals, and allows for the widespread distribution of financial information to the general investing public, who do not earn wages, commissions, or payment for order flow from their use of the data.

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[70] *See* Mackintosh, Phil. "What Is Core Data?" *Nasdaq,* 25 Feb. 2021, https://www.nasdaq.com/articles/what-is-core-data-2021-02-25

[71] *See* The Nasdaq Stock Market LLC Rules, Equity Rules, Equity 7 (Pricing Schedule), Section 123(b)(2).

The Commission must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so.

When an agency acts inconsistently, it acts arbitrarily and capriciously.[72] Rather than persist down this path, the Commission should recognize that, like other differentially priced products already offered by exchanges, the Proposal provides a legitimate incentive for Nasdaq's largest customers to purchase market data on behalf of retail investors and direct order flow to the exchange.

The Proposed Average Daily Volume threshold is reasonable.

The proposed ADV threshold is reasonable because the burden on any particular member is minor—members will receive rebates for the additional liquidity and should have no difficulty in meeting that threshold—and that minor burden is offset by the significant benefit to all market participants of more efficient trading and lower costs.

Moreover, the 1 million ADV threshold is only approximately 0.06 percent of total daily Nasdaq volume. Approximately 1.5 billion shares trade on Nasdaq on a daily basis, and there are approximately 275 trading firms on the Exchange. The average number of shares traded per firm is therefore approximately 5.5 million shares, over 5 times more than the 1 million ADV threshold set by this Proposal. As such, Nasdaq expects the proposed threshold to impose little burden on its members. This must be weighed against the benefit to the market overall of additional liquidity on the Exchange.

Non-members that, by definition, do not post displayed liquidity to the market would pay higher fees. This is because the non-members do not directly contribute order flow to the Exchange, but nevertheless benefit from that order flow through tighter spreads, better prices, and the other advantages of a more liquid platform.

Specifically, the Proposal is not unfairly discriminatory to non-member broker-dealers, which include brokers routing trades through members and off-exchange trading platforms that use exchange data to execute trades, because they have the option of becoming members to obtain lower fees under the Proposal, and because they realize the benefits of more liquidity—including tighter spreads and better prices—and it is not unfair discrimination to charge a higher fee for that benefit.

The Proposal is also not unfairly discriminatory with respect to non-member firms that are not broker-dealers, such as market data vendors and index providers, because they also benefit from the value that the additional liquidity generated by this Proposal will provide to the trading platform. As noted above, incentivizing higher levels of liquidity enhances and enriches the market data distributed to the industry, and increases the overall value of the platform. It is

[72] *See, e.g.*, *Indep. Petroleum Ass'n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996) ("An agency must treat similar cases in a similar manner unless it can provide a legitimate reason for failing to do so."); *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (an agency must "display awareness that it is changing position," and "may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books"); *Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010) ("We have held that [r]easoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent, and an agency that neglects to do so acts arbitrarily and capriciously.") (internal quotation marks omitted).

not unfair for such parties to pay a higher fee to reflect the greater value of the platform, nor is it unfair to calibrate the fees associated with this value to contribution that customers make, or do not make, to realizing this value.

The Proposal does not place an undue burden on competition.

Providing discounts is not anti-competitive.

Courts have been wary of claims that offering discounts constitutes monopolistic or anticompetitive behavior.[73] To the contrary, "the Supreme Court has urged great caution and a skeptical eye" when dealing with a claim that a firm has unfairly discounted its products.[74] That is because "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition."[75]

For the same reason, courts have also deemed "bundled" discounts, like the Proposal, to be pro-competitive.[76] The only circumstance in which courts have found that a bundled discount might harm competition is when it was "offered by firms holding or on the verge of gaining monopoly power in the relevant market."[77] In the present context, the evidence of platform-level competition, discussed above, provides powerful evidence that competition and rapid customer switching among competing platforms constrain the pricing of all elements of the platform, as well as any bundling of services within the platform. Indeed, bundling together elements of the services provided by the platform is a recognition that customers are viewing their costs across the platform and comparing suppliers' services on a platform basis, and thus is procompetitive.[78]

The Commission itself, not staff acting under delegated authority, must act within the statutorily prescribed timing requirements of the Dodd-Frank Act

A proposed rule is deemed approved when the Commission fails to issue an order disapproving the rule change within the period prescribed by the Exchange Act. In the Dodd-

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[73] *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) ("discouraging a price cut and forcing firms to maintain supracompetitive prices . . . does not constitute sound antitrust policy"); *Cargill, Inc. v. Monfort of Col., Inc.*, 479 U.S. 104, 116 (1986) ("To hold that the antitrust laws protect competitors from the loss of profits due to . . . price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share." (internal quotations and citations omitted)).

[74] *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1060 (8th Cir. 2000).

[75] *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990).

[76] *See, e.g.*, *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) ("we should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a rule that discourages legitimate price competition").

[77] *Id.* at 897. With 16 equity exchanges and none above 15% market share overall, there can be no question that no exchange holds monopoly power. See Nasdaq, U.S. Equities Market Volume Summary, available at https://www.nasdaqtrader.com/trader.aspx?id=FullVolumeSummary#.

[78] The Supreme Court has cautioned against defining narrow markets around specific elements of a platform, such as assessing only one side of a two-sided market, because such an analysis "would lead to 'mistaken inferences' of the kind that could 'chill the very conduct the antitrust laws are designed to protect.'" *Am. Express*, 585 U.S. at 546. The Supreme Court's warning is particularly apt here, in which any opposition to the Proposal would be aimed at preventing price discounting—the very conduct the antitrust laws are designed to protect.

Frank Act, Congress amended Section 19(b) of the Exchange Act to impose a firm time limit on the period in which the Commission may approve or disapprove a proposed rule change filed by an SRO.[79] Where the Commission fails to act within the statutorily prescribed time period, a "proposed rule change shall be deemed to have been approved."[80]

Section 19(b)(2)(B)(ii) of the Exchange Act provides that, after instituting proceedings to determine whether a proposed rule change should be disapproved, "not later than 180 days after the date of publication [of a proposed SRO rule change in the *Federal Register*], the Commission shall issue an order approving or disapproving the rule change" and that the "Commission may extend the period for issuance . . . by not more than 60 days."[81] To enforce compliance with this time limit, Congress further provided that a "proposed rule change shall be deemed to have been approved by the Commission, if the Commission does not issue an order approving or disapproving the proposed rule change . . . within the period described in" the statute.[82]

The Exchange Act is clear that the "*Commission*"—not the Commission's staff acting pursuant to delegated authority—"shall issue an order approving or disapproving the proposed rule change" within the statutorily prescribed period.[83] Both the Exchange Act and the Commission's regulations explicitly differentiate between the Commission and the Commission's staff.[84]

To be sure, the Commission has the statutory authority to "delegate . . . its functions" to the Commission's staff,[85] and has delegated to the Division of Trading and Markets the authority to approve or disapprove proposed rule changes filed by SROs.[86] The Exchange Act further provides, however, that the "Commission shall retain a discretionary right to review the action of any such division of the Commission,"[87] and makes clear that "the action of any such division of the Commission . . . shall . . . be deemed the action of the Commission" *only* "[i]f the right to

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79 Pub. L. No. 111-203, § 916(a), 124 Stat. 1376, 1834 (2010).

80 15 U.S.C. § 78s(b)(2)(D).

81 15 U.S.C. § 78s(b)(2)(B)(ii).

82 *Id.* § 78s(b)(2)(D)(ii).

83 *Id.* § 78s(b)(2)(B)(ii) (emphasis added).

84 *See, e.g.*, *id.* § 78d(a) ("There is hereby established a Securities and Exchange Commission (hereinafter referred to as the 'Commission') to be composed of five commissioners to be appointed by the President by and with the advice and consent of the Senate."); 17 C.F.R. § 200.10 ("The Commission is composed of five members, not more than three of whom may be members of the same political party. . . . The Commission is assisted by a staff . . . ."); *see also* 17 C.F.R. § 200.30-3(a)(57) (authorizing the Division of Trading and Markets "to extend for a period not exceeding 240 days from the date of publication of notice of the filing of a proposed rule change pursuant to Section 19(b)(1) of the Exchange Act, 15 U.S.C. 78s(b)(1), the period during which the *Commission* must issue an order approving or disapproving the proposed rule change") (emphasis added).

85 15 U.S.C. § 78d-1(a).

86 17 C.F.R. § 200.30-3(a)(12), (57).

87 15 U.S.C. § 78d-1(b).

exercise such review is declined, or if no such review is sought within the time stated in the rules promulgated by the Commission."[88]

Accordingly, the Commission must approve or disapprove the Proposal no later than 240 days after its publication in the *Federal Register*. If the staff disapprove the Proposal by delegated authority, and the Commission then grants Nasdaq's petition for review of the staff's order, the staff's order will not constitute action by the *Commission*—and, thus, unless the Commission rules on the merits of Nasdaq's petition within the statutorily prescribed 240-day period, the Proposal will have been deemed approved. Accordingly, if the proposed rule change is disapproved under delegated authority but nevertheless deemed approved as provided by the Exchange Act, Nasdaq would expect to implement the proposed rule change on January 2, 2025.

* * *

Nasdaq appreciates the opportunity to comment on its Proposal to offer lower market data and connectivity fees to broker-dealers that bring liquidity to the Exchange. For all of the reasons set forth above, we believe that the Proposal will improve the efficiency of trading on the Exchange and enhance overall market transparency, and that the proposed fees are reasonable and equitably allocated, not unfairly discriminatory, and do not place an undue burden on competition.

We also note that the Commission's analysis of the Proposal must be based on reasoned, empirical evidence and the Exchange Act requires that the Commission itself act on the Proposal within the statutory deadline.

Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Very Truly Yours,

John M. Yetter

[88] *Id.* § 78d-1(c); *see also* Commission Rule of Practice 431(e) ("Upon filing with the Commission of a notice of intention to petition for review, . . . an action made pursuant to delegated authority shall be stayed until the Commission orders otherwise . . . .").