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August 20, 2024

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

Submitted via email: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

**Re: The Nasdaq Stock Market LLC – Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Reconfigure Fees for the Daily List and Fundamental Data to Better Reflect the Value of the Information Distributed  
Release No. 34-100416; File No. SR-NASDAQ-2024-027**

Dear Ms. Countryman:

Bloomberg L.P.<sup>1</sup> (“Bloomberg”) respectfully submits this letter in response to the above-referenced proposal by the Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) filed with the U.S. Securities and Exchange Commission (“SEC” or the “Commission”) to increase and reconfigure fees for the Daily List and Fundamental Data product (“Proposal”)<sup>2</sup> and in response to Nasdaq’s August 14 comment letter on the Proposal (“Nasdaq Comment Letter”).<sup>3</sup> Specifically, Nasdaq seeks to: (1) increase the licensing fee for the Daily List from \$1,750 to \$3,500 per month and (2) publish a subset of the Daily List information, on its website.<sup>4</sup>

The Proposal does not provide sufficient detail or justification to demonstrate that the proposed fee increases are consistent with the Exchange Act and the Commission’s rules thereunder. Extensive background on the Proposal and why it falls well short of the statutory requirements can be found in Bloomberg’s July 30, 2024 comment letter previously submitted in

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<sup>1</sup> Bloomberg L.P. is a global leader in business and financial information, delivering trusted data, news, and insights that bring transparency, efficiency, and fairness to the markets. The company helps connect influential communities across the global financial system via reliable technology solutions that enable our customers to make more informed decisions and foster better collaboration.

<sup>2</sup> Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Reconfigure Fees for the Daily List and Fundamental Data to Better Reflect the Value of the Information Distributed, Release No. 34-100416 (June 25, 2024), available at <https://www.sec.gov/files/rules/sro/nasdaq/2024/34-100416.pdf> (“Proposal”)

<sup>3</sup> See Nasdaq Letter to the SEC, dated August 14, 2024, available at <https://www.sec.gov/comments/sr-nasdaq-2024-027/srnasdaq2024027-506675-1474402.pdf> (“Nasdaq Comment Letter”).

<sup>4</sup> Proposal at p. 2.

response to the Proposal (“Bloomberg Comment Letter”).<sup>5</sup> The following seeks to address several additional issues raised in the Nasdaq Comment Letter, including:

- The Proposal’s commitment to using the “same” distribution process as currently employed by NYSE, but then subsequently claiming in the comment letter that a discussion of NYSE’s distribution process is not relevant to the Nasdaq product;
- The Nasdaq Comment Letter’s failure to acknowledge the significant barriers to competition and glossing over the fact that the data at issue in the Proposal is either exchange-generated monopoly data or data to which Nasdaq has “preferred access;”
- That competition does not currently exist in the market for Nasdaq corporate actions data;
- That the Proposal does not attempt to provide the cost data necessary to ensure compliance with the Exchange Act; and
- The Proposal does not meet the requirements of the Exchange Act and must be rejected.

### **Nasdaq’s Assertion That It Will Publish Exchange Information Without Restriction**

Nasdaq seems puzzled as to why Bloomberg would suggest that NYSE’s distribution structure is pertinent to Nasdaq’s product. Nasdaq asserts that “a discussion of the restrictions on NYSE’s website is not relevant to a discussion about a Nasdaq product.”<sup>6</sup>

To the contrary, the NYSE distribution method is relevant because Nasdaq represented in the Proposal not only that it is relevant, but also that Nasdaq will literally be utilizing the “same” distribution process with respect to the corporate actions data. Nasdaq asserts: “With this filling, Nasdaq is proposing to employ the same distribution structure currently employed by NYSE.”<sup>7</sup> While anchoring its distribution structure to another SRO’s product – one that hasn’t been approved by the Commission and isn’t compliant with the requirements of the Exchange Act – is problematic, we should certainly take seriously Nasdaq’s assertion that it intends to “employ the same distribution structure currently employed by NYSE” when Nasdaq repeatedly states that.<sup>8</sup> Indeed, in the course of its 19-page Proposal, Nasdaq approvingly cites the NYSE model no fewer than four times.<sup>9</sup>

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<sup>5</sup> See Bloomberg L.P. Comment Letter to the SEC on the Proposal, dated July 30, 2024, available at <https://www.sec.gov/comments/sr-nasdaq-2024-027/srnasdaq2024027-501135-1466002.pdf> (“Bloomberg Comment Letter”).

<sup>6</sup> Nasdaq Comment Letter at p. 3.

<sup>7</sup> Proposal at p. 15.

<sup>8</sup> *Id.* at p. 15.

<sup>9</sup> *Id.* at pp. 6, 9, 14, 15.

## How Will These Alleged “Unidentified Restrictions” on Data Use Impede Competition?

The restrictions placed on information published on the Nasdaq (and even NYSE) website aren’t “unidentified.” The contractual, regulatory, commercial and practical obstacles to the emergence of competition are substantial and identified and previously highlighted with specificity in the Bloomberg Comment Letter.

The Exchange notes that “exchange-specific information” will be made available on its public website.<sup>10</sup> The Proposal argues that publication of the exchange-generated information on its website along with the information that may be obtained through other sources will provide the opportunity for a market participant to assemble “its own set of corporate actions information,” with the implication that this would constitute a substitute for the Daily List product and allow other hypothetical market participants to someday compete in the market.<sup>11</sup>

As we’ve noted previously in the Bloomberg Comment Letter, a website’s terms often condition access to and regulate the use of data that is published on the website. A user may be prohibited from making any meaningful use of the data making it impossible to use as a substitute or to replicate.

This is why Nasdaq’s repeated assertion in the Proposal that “Nasdaq is proposing to employ the same distribution structure currently employed by NYSE” is disconcerting.<sup>12</sup> As a condition to access and use of the NYSE corporate actions data, users must agree to:

... not sell, license, rent, modify, print, collect, copy, reproduce, download, upload, transmit, disclose, distribute, disseminate, publicly display, publicly perform, publish, edit, adapt, electronically extract or scrub, compile or create derivative works from any content or materials (including, without limitation, through framing or systematic retrieval to create collections, compilations, databases or directories) or otherwise transfer any of the content to any third person (including, without limitation, others in your company or organization). You agree not to decompile, reverse-engineer or disassemble any materials, information or other content available through this Website and not to insert any code or product to manipulate the content in any way that affects the user’s experience. Unless we give you prior written permission, use of any Web browsers (other than generally available third-party browsers), engines, software, spiders, robots, avatars, agents, tools or other devices or mechanisms to navigate, search or determine this Website is strictly prohibited.<sup>13</sup>

Even if Nasdaq rejects – rather than continues its embrace of the NYSE model – Nasdaq currently requires users of NasdaqTrader.com to agree to its own set of usage terms, including

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<sup>10</sup> *Id.* at p. 14.

<sup>11</sup> *Id.* at p. 11.

<sup>12</sup> *Id.* at p. 15.

<sup>13</sup> <https://www.ice.com/terms-of-use>

those pertaining to third-party data licensing,<sup>14</sup> copyright, trademarks, and disclaimers.<sup>15</sup> It is also subject to a U.S. services agreement.<sup>16</sup>

While the Nasdaq Comment letter claims it will publish a notice to ensure access to this Nasdaq-created data, given the actual Proposal's commitment to "employ the same distribution structure currently employed by NYSE" – which is to say, barring the use of data for any commercial purpose – raises concerns that language enabling the ability to compete may not be wholeheartedly implemented. The disclaimer is not sufficient, as these terms can be changed at any time. And if, in the future, Nasdaq withdraws the Daily List from the Nasdaq rulebook – as is being considered – and removes it from regulatory oversight, the disclaimer is left even more vulnerable to potential change.<sup>17</sup>

Beyond the usage restrictions, we have seen certain exchanges publish data in a format that is designed to either inhibit a user from making meaningful use of the data or add further delay on top of already significant latency. Not surprisingly, these hurdles are designed to compel market participants to subscribe to the exchange product. The mere prospect of potentially unreliable access to data discourages investment in new products, and Commission enforcement of the stated terms of the Proposal would require ongoing Commission engagement in a manner that is at odds with the efficient use of Commission time and resources.

### **Does Nasdaq Have Preferred Access?**

Nasdaq takes issue with Bloomberg's characterization that Nasdaq has "preferred access" to information obtained from the issuers – as distinct from the sole monopoly access to Nasdaq generated data. Specifically, the Nasdaq Comment Letter asserts that "the bulk of corporate action information is published by the issuer and made available on both the issuer's public site and the SEC Edgar website..."<sup>18</sup>

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<sup>14</sup> Nasdaqtrader.com Third-Party Data License Terms and Conditions:  
<https://www.nasdaqtrader.com/content/AdministrationSupport/Policy/ThirdPartyDataLicenseTermsandConditions.pdf>

<sup>15</sup> Nasdaqtrader.com Copyright, Trademarks, and Disclaimers:  
<https://www.nasdaqtrader.com/trader.aspx?id=copydisclaimmain#:~:text=NEITHER%20NASDAQ%20NOR%20THE%20INFORMATION%20PROVIDERS%20SHALL%20BE%20LIABLE%20IN,SPECIAL%2C%20CONFIDENTIAL%20OR%20INCIDENTAL%20DAMAGES.>

<sup>16</sup> Nasdaqtrader.com U.S. Services Agreement:  
[https://www.nasdaqtrader.com/content/AdministrationSupport/AgreementsTrading/nasdaq\\_access\\_2016agreement.pdf](https://www.nasdaqtrader.com/content/AdministrationSupport/AgreementsTrading/nasdaq_access_2016agreement.pdf)

<sup>17</sup> Proposal at p. 15, FN 44 ("Nasdaq is considering submission of a filing to withdraw the Daily List from the Nasdaq rulebook on a future date.").

<sup>18</sup> Nasdaq Comment Letter at p. 2.

Putting aside the distinction between obtaining “the bulk of corporate action information” and being able to obtain the full set of corporate action information that is necessary to produce a viable commercial product, let’s unpack the rather straightforward “preferred access” enjoyed by Nasdaq.

As of June 30, 2024, 4,004 issuers listed with Nasdaq.<sup>19</sup> Those issuers are required, by rule, to provide – and bear the cost of providing – relevant corporate data to Nasdaq in its capacity as an exchange and self-regulatory organization. By contrast, a vendor needs to expend substantial resources to obtain this data from issuers, generally through a combination of ongoing outreach and persistent monitoring of these 4,004 issuers. That adds up to significant additional infrastructure and manpower in an attempt to replicate what Nasdaq obtains at no or little cost.

Even if a vendor finds a viable way to overcome these disadvantages, under Nasdaq’s rulebook – and contrary to the Nasdaq Comment Letter – Nasdaq requires Nasdaq-listed companies to provide this information to Nasdaq in advance of its release to the public.<sup>20</sup>

Notwithstanding any latency advantage that may exist by virtue of receiving the information prior to public dissemination, Nasdaq, through its rulebook, is able to require issuers to provide the information in the form and manner that Nasdaq specifies well in advance of the time in which it is provided to the public.

As a regulatory matter, of course an exchange will have preferential access to much data, and, out of necessity, significant advance notice of many corporate actions. This is by design and is necessary for an exchange to fulfill its regulatory obligations. However, to the extent an exchange claims that a particular fee or service is constrained by competition, the exchange must demonstrate that a resourceful market participant has actually overcome the regulatory advantages enjoyed by the exchange and succeeded in creating a competitive market such that fees are, in fact, constrained by competition. The Exchange has provided nothing more than hypothetical or speculative ways in which another market participant could potentially compete in the market, but no substantial evidence of competition that constrains pricing. Indeed, the fact that Nasdaq is proposing to double its fees – a step not generally consistent with the thought that fierce competition was just around the corner – leads one to suspect Nasdaq does not anticipate the advent of a competitive market.

## **Is Competition Real?**

To unpack Nasdaq’s assertion that the half-dozen vendors cited by Nasdaq are competing on the provision of Nasdaq corporate actions data, Nasdaq actually captures this difference between vendors and Nasdaq quite succinctly in its Proposal where it notes:

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<sup>19</sup> Nasdaq Form 10-Q (Aug. 6, 2024), available at <https://ir.nasdaq.com/static-files/4a668df0-cd27-4c91-8b90-70eb55496ca7>.

<sup>20</sup> See Nasdaq Rule 5250(b)(1).

Moreover, corporate action information originating from Nasdaq is limited to Nasdaq-listed issuers; Nasdaq has no unique information related to issuers not listed on Nasdaq. Most vendors sell corporate actions information for companies listing on all exchanges.<sup>21</sup>

As Nasdaq notes in the Proposal, the corporate actions product provided by vendors generally consists of corporate filings data from scores of exchanges. To the extent exchange inputs are more costly than they would be at competitive rates, the end compilation is likely more costly. But clearly that compilation product is different from, and not meaningfully competitive with, Nasdaq Corporate Actions.

### **Nasdaq Has Not Provided Sufficient Detail or Justification to Demonstrate That The Proposed Fee Increases Are Consistent with The Exchange Act and The Commission’s Rules Thereunder.**

As we’ve stated in the Bloomberg Comment Letter, the fees for the Daily List product are subject to the fee filing requirements that apply to Self-Regulatory Organizations (“SROs”). A proposed rule of the Exchange, including one to establish or change a fee, must be filed with the Commission along with a statement of the purpose and statutory basis for the proposed rule that is sufficiently detailed and specific to support a finding that the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder.<sup>22</sup>

For a proposed rule change that involves fees, the Exchange Act requires that a proposed rule change must: provide for the equitable allocation of reasonable dues, fees, and other charges;<sup>23</sup> not be designed to permit unfair discrimination;<sup>24</sup> not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act;<sup>25</sup> and be designed to protect investors and the public interest.<sup>26</sup>

Under Commission rules, the Exchange has the burden to demonstrate that its proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder.<sup>27</sup> As set forth in *Susquehanna*, an exchange fee filing must provide sufficient

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<sup>21</sup> Proposal at p. 14.

<sup>22</sup> See Exchange Act Section 19(b) and Exchange Act Rule 19b-4. See also SEC Staff Guidance on SRO Rule Filings Relating to Fees at Section III (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (“SEC Guidance on SRO Fee Filings”).

<sup>23</sup> Exchange Act Sections 6(b)(4).

<sup>24</sup> Exchange Act Section 6(b)(5).

<sup>25</sup> Exchange Act Section 6(b)(8).

<sup>26</sup> Exchange Act Section 6(b)(5).

<sup>27</sup> See SEC Rules of Practice, Rule 700(b)(3) (17 CFR 201.700(b)(3)).

information to enable the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>28</sup>

For a fee filing that lacks evidence that the proposed fee is constrained by significant competitive forces, such as this Proposal, the Exchange must demonstrate that the proposed fees are consistent with the Exchange Act through the production of cost data.

Nasdaq has not offered any information – either in the Proposal or in the Nasdaq Letter – regarding its underlying costs or projected revenues, and thus has not provided the Commission with any information that would enable the Commission to determine that the proposed fees comport with the Exchange Act. There is simply no information providing any indication of how the proposed fees are reasonable in relation to the costs of providing the data.

In the absence of any cost data, the Exchange attempts to hide the ball on the standard for review. Nasdaq suggests that the proposed fees are subject to competitive forces, and thus the Commission has no need for cost data. These arguments regarding competition ignore the reality.

The exchange-generated data contained in the Daily List is generated by the Exchange itself and is therefore not subject to competitive forces, as it is the sole source of that information. There are no substitutes for this data, as the Exchange contends. One cannot assemble the exchange-generated data from other websites, issuers, or other vendors without ultimately obtaining the information from Nasdaq. Market participants seeking this information must either obtain it from Nasdaq directly or obtain it from a vendor or other third-party that ultimately obtains it from Nasdaq. It is clear that competitive forces do not constrain pricing here. Likewise, the barriers to cost-effective acquisition of even the non-exchange-generated data is a substantial competitive hurdle.

The Exchange points to the existence of “competitors” in the market and notes that the proposed fees are set to align within the prevailing market prices for “comparable corporate actions products” offered by those “competitors.”<sup>29</sup> But those alleged competitors do not actually compete with Nasdaq, as they either do not offer a comparable product or they ultimately obtain the information from the Exchange itself. To the extent the Exchange is referring to its customers who purchase the exchange-generated information as competitors in this context, these customers have no ability to constrain pricing in this arrangement through competition – as

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<sup>28</sup> See *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) (“The SEC “shall approve” a self-regulatory organization’s proposed rule change only “if it finds that such proposed rule change is consistent with” provisions of the Exchange Act.”). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, available at <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (declaring that in order for the Commission to “meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition”).

<sup>29</sup> According to Nasdaq, the following vendors offer corporate actions products: S&P Global, LSEG, Quodd, Barchart, Six Financial, Polygon.io, EDI, and FactSet. See Proposal at pp. 7, 9, 13.

Nasdaq is the sole source of the information. These unsubstantiated claims of competition or potential future competition are not substantiated by evidence or other data provided in the filing.

## **Conclusion**

As we have discussed above, Nasdaq has not sufficiently justified its proposed fee increase for the Daily List. In the absence of a competitive market, we believe the Exchange should provide meaningful cost data to justify the proposed increase. None has been provided.

We appreciate the Commission's willingness to consider our comments and would be pleased to discuss any question that the Commission may have with respect to this letter.

Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read "Gregory R. Babyak". The signature is written in a cursive, slightly slanted style.

Gregory Babyak  
Global Head of Regulatory Affairs, Bloomberg L.P.