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VIA ELECTRONIC MAIL

February 5, 2021

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

**Re: Order Instituting Proceedings, Securities Exchange Act Release No. 90885
(January 11, 2021), 86 FR 4142 (January 15, 2021) (File No. 4-757)**

Dear Ms. Countryman:

We write in response to the Commission's Order Instituting Proceedings on the proposed National Market System ("NMS") Plan for Consolidated Equity Market Data ("Proposed NMS Plan" or "CT Plan").¹

As we wrote last November, the Proposed NMS Plan² is fundamentally flawed.³ The voting structure that the Commission ordered to be included in the Plan⁴ exceeds the Commission's authority under the Securities Exchange Act of 1934 (the "Act") as well as the Commission's own regulations, and is arbitrary and capricious in violation of the Administrative Procedure Act ("APA").⁵ We explained our reasoning, and provided responses to a number of

¹ See Order Instituting Proceedings to Determine Whether to Approve or Disapprove a National Market System Plan Regarding Consolidated Equity Market Data, Securities Exchange Act Release No. 90885 (January 11, 2021), 86 Fed. Reg. 4142 (File No. 4-757).

² See Securities Exchange Act Release No. 90096 (October 6, 2020), 85 Fed. Reg. 64565 (October 13, 2020) (File No. 4-757).

³ See Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq, to Vanessa Countryman, Secretary, SEC, re Notice of filing of a National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-90096 (File No. 4-757) (November 12, 2020) ("November Comment Letter"), available at <https://www.sec.gov/comments/4-757/4757-8011769-225419.pdf>; see also Letter from Joan Conley to Vanessa Countryman re Notice of Proposed Order Directing the Exchanges to Submit a New National Market System Plan, Securities Exchange Act Release No. 87906 (January 8, 2020), 85 FED. REG. 2164 (January 14, 2020) (File No. 4-757) ("January Comment Letter") available at <https://www.sec.gov/comments/4-757/4757-6892318-210936.pdf>

⁴ See Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data, Release No. 34-88827 (May 6, 2020), 85 Fed. Reg. 28702 (May 13, 2020) (File No. 4-757) (the "Order"). Capitalized terms used but not defined herein shall have the meanings assigned to them by the Order.

⁵ See 5 U.S.C. § 706.

questions posed by the Commission, in our prior comment letters, which we incorporate herein by reference.⁶

To supplement our prior comments, we would like to draw the Commission's attention to a critical issue of timing raised by the Commission's Final Rule on Market Data Infrastructure,⁷ which was approved in December 2020, after the prior comment period on the Proposed NMS Plan had expired.

The Market Data Infrastructure Rule fundamentally changes how consolidated market data is gathered and disseminated. Among many modifications, the Rule alters the content of data distributed by market data consolidators, and requires that this information be distributed by "competing consolidators and self-aggregators," rather than the current UTP and CTA/CQ Plans.⁸

The Market Data Infrastructure Rule tasks the NMS plan(s)—it does not specify which plan or plans—with supervising or implementing many aspects of the new National Market System. These tasks include:

- (1) Developing the fees for the data content underlying consolidated market data
- (2) The billing and the audit process
- (3) Establishing the multiple installations, single users ("MISU") policy
- (4) Allocating revenue to the SRO participants that is collected for the data content underlying consolidated market data
- (5) Considering additional regulatory, administrative, or self-regulatory organization-specific program data elements that may be included as consolidated market data in the future
- (6) Developing the list of primary listing exchanges
- (7) Developing the monthly performance metrics for competing consolidators
- (8) Assessing the operation of the decentralized consolidation model
- (9) Developing an annual report that assesses competing consolidator performance for provision to the Commission.⁹

⁶ See *supra*, note 3.

⁷ See Final Rule on Market Data Infrastructure, Securities Exchange Act Release No. 90610 (December 9, 2020), ___ Fed. Reg. ___ (File No. S7-03-20) ("Market Data Infrastructure Rule").

⁸ See Market Data Infrastructure Rule at 171

⁹ See *id.* at 342.

Indeed, the “first key milestone” of the Market Data Infrastructure Rule mandates that the NMS plan(s) create an entirely new fee schedule for the provision of consolidated market data to Competing Consolidators and Self-Aggregators, and submit that fee schedule to the Commission for approval 150 days after the Rule takes effect.¹⁰

The Commission’s Order Instituting Proceedings on the proposed CT Plan creates a great deal of uncertainty as to how the Market Data Infrastructure Rule would be implemented. It is not clear, for example, what would happen to the equity data plans’ fee proposal if the Commission approved the CT Plan after the existing plans had already submitted a proposal. Nor is it clear what would happen if the CT Plan, subject to legal challenges filed by this Exchange and others,¹¹ secured Commission approval of the proposal, but was then declared unlawful by the D.C. Circuit.

Moving forward with implementation of the Market Data Infrastructure Rule while the entity charged with monitoring and implementing that Rule remains unresolved would inject serious and unnecessary uncertainty into the market, resulting in confusion, disruption, and wasted resources. The significance of those repercussions is compounded by the fact that the Market Data Infrastructure Rule effectuates, by far, the most substantial restructuring of the securities market since Regulation NMS in 2005.

Nasdaq therefore recommends that the Commission suspend implementation of the Market Data Infrastructure Rule until the body that will implement that Rule has been definitively determined. This suspension will promote the public interest by preventing the introduction of serious and unnecessary uncertainty into the market.¹²

Thank you for the opportunity to comment on this Proposal and please do not hesitate to contact me with any questions.

Sincerely,



Erika Moore
Vice President and Corporate Secretary

cc: Acting Chair Allison H. Lee
Commissioner Hester M. Peirce
Commissioner Elad L. Roisman
Commissioner Caroline A. Crenshaw

¹⁰ See *id.* at 414.

¹¹ See Petition for Review, *The Nasdaq Stock Market LLC v. SEC*, No. 20-1181 (D.C. Cir. June 1, 2020).

¹² Nasdaq is filing concurrently with the submission of this letter a motion asking the Commission to stay the Market Data Infrastructure Rule pending approval of the CT Plan and resolution of the proceedings in the D.C. Circuit challenging the Order mandating the creation of the CT Plan.