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VIA ELECTRONIC MAIL

March 29, 2022

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Securities Exchange Act Release No. 94307 (February 24, 2022), 87 FR 11787 (March 2, 2022) (File No. S7-24-89)

Securities Exchange Act Release No. 94309 (February 24, 2022), 87 FR 11763 (March 2, 2022) (File No. SR-CTA/CQ-2021-03)

Dear Ms. Countryman:

The Nasdaq Stock Market LLC ("Nasdaq" or the "Exchange") appreciates the opportunity to comment on the Order Instituting Proceedings to determine whether to approve or disapprove the Fifty-Second Amendment to the UTP Plan,[1] and the Order Instituting Proceedings to determine whether to approve or disapprove the proposed Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan ("CTA/CQ Plan").[2]

Nasdaq has already submitted a comment letter on the underlying fee proposals, and incorporates that comment letter herein by reference.[3] With this letter, Nasdaq will comment on

1 See Securities Exchange Act Release No. 94307 (February 24, 2022), 87 FR 11787 (March 2, 2022) (File No. S7-24-89) (Order Instituting Proceedings for UTP Plan fees); Securities Exchange Act Release No. 93618 (November 19, 2021), 86 Fed. Reg. 67562 (November 26, 2021) (File No. S7-24-89) (Fifty-Second Amendment to the UTP Plan).

2 See Securities Exchange Act Release No. 94309 (February 24, 2022), 87 FR 11763 (March 2, 2022) (File No. SR-CTA/CQ-2021-03) (Order Instituting Proceedings for CTA/CQ Plan fees); Securities Exchange Act Release No. 93625 (November 19, 2021), 86 FR 67517 (File No. SR-CTA/CQ-2021-03) (proposed Twenty Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan).

3 See Letter from Erika Moore, Vice President and Corporate Secretary, Nasdaq, to Vanessa Countryman, Secretary, SEC, Re: Proposed Fifty-Second Amendment to the UTP Plan, Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan, and Sixteenth Charges Amendment to the Restated CQ Plan (December 17, 2021), available at https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-20110029-264334.pdf. ("First Nasdaq Comment Letter")

two additional questions raised in the Order Instituting Proceedings that Nasdaq has not previously addressed:

- What are commenters' views on whether users should be classified as professionals and non-professionals under the Proposed Amendment?

- What are commenters' views on the non-display fees in the Proposed Amendment?

Two comment letters raised these questions.[4] One commentator said that "the cost of delivering data to a professional and a non-professional are [sic] identical," and "a person's profession alone should [not] dictate the fee they pay for a product."[5] With respect to the Display/Non-Display distinction, that commentator claimed that "[r]elating the value of data to whether or not it's ultimately displayed on a screen lacks any technical justification," and "[t]he cost to transmit data to a device is exactly the same whether the device displays the data or not."[6] That same commenter also said that "the rules that govern display vs. non-display fees have not kept pace with technology, and ambiguity has caused very common use cases such as entitlement-controlled API access to result in confusion, unwarranted penalties and burdensome red tape."[7]

Setting fees according to the value of the data—which is precisely what the Professional/Non-Professional and the Display/Non-Display distinctions accomplish—is efficient, fair, and well-established in the industry both nationally and globally. Moreover, for all of the reasons set forth in the First Nasdaq Comment Letter and summarized below, any alternative based solely on cost is likely to be unworkable.

As we stated in our initial comment letter, setting fees according to the value of the data leads to optimal consumption.[8] Fees that are too low do not allow producers to remain profitable; fees that are too high lead to under-utilization.[9] The alternative proposed by commenters here—to assess the same fees without regard to professional status—means that retail users, who typically do not, for example, have the technical capabilities to run high-speed

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[4] See Letter from Patrick Flannery, Chief Executive Officer, MayStreet to Vanessa Countryman, Secretary, SEC, re File Numbers SR-CTA/CQ-2021-03, SR-CTA/CQ-2021-02, and S7-24-89 (December 17, 2021), available at https://www.sec.gov/comments/s7-24-89/s72489-20109991-264315.pdf ("MayStreet Letter"); Letter from Quinton Pike, Chief Executive Officer, Polygon.io, to Vanessa Countryman, Secretary, SEC, re CTA/CQ/UTP Plan Fee Amendments, Securities Exchange Act Release Nos. 34-93625 (SR-CTA/CQ-2021-03); 34-93618 (S7-23-89), available at https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-9414478-263131.pdf ("Polygon.io Letter").

[5] See Polygon.io Letter

[6] See id.

[7] See id.

[8] See First Nasdaq Comment Letter (citing F. P. Ramsey, A Contribution to the Theory of Taxation, 37 THE ECONOMIC JOURNAL 145 (March 1927), available at https://eml.berkeley.edu/~saez/course131/Ramsey27.pdf (seminal economic article positing that fees for goods produced in an industry with high-fixed costs should be set in accordance with the value that customers place on them)).

[9] See First Nasdaq Comment Letter for an extensive discussion of efficient price-setting.

algorithms in data centers, would be subsidizing the costs of professionals that do. In this case, equal is not fair.

The two categories of fees at issue here, Professional/Non-Professional and Display/Non-Display fees, vary according to the value of the data. Professional fees are higher than Non-Professional fees because Professionals, as a group, realize greater value from the data than Non-Professionals. Non-Professionals are provided a discount to encourage their utilization of the data.

Similar reasoning applies to Display/Non-Display fees. Non-Display fees are charged for data usage by computer algorithms engaged in trading and other tasks. Display fees apply to data usage by human beings. Because computers operate at speeds unattainable by humans, computer usage generally leads to the generation of greater value than human usage, and therefore Non-Display fees are higher than Display fees.

Because Professional and Non-Display users realize greater value from the use of market data than Non-Professional and Display users, applying the same fees to both categories would result either in low-value users subsidizing high-value users, or fees that are not economically sustainable for producers.

Distinguishing between Professional/Non-Professional and Display/Non-Display fees is fair, as well as efficient. Professionals pay higher fees than Main Street retail investors, and algorithms, dark pools and electronic traders pay higher fees than human professionals because they realize greater value from the data.

A number of commenters approved of the low Non-Professional fees proposed by the UTP and CTA/CQ Plans. Low Non-Professional fees democratize markets by allowing retail investors to become "better informed about how markets function," and therefore be "less likely to fall prey to conspiracy mongering 'market is rigged' fallacies."[10] Retail investors should be "able to participate on a level playing field," so that they have "access to the same information which is available to professional traders at affordable prices," and the "creation of a moderately priced non-professional rate" accomplishes this goal. [11] The "a la carte fee structure" which allows market participants "to select from a variety of market data products and pay just for the content that they consume,"[12] incorporates the Professional/Non-Professional distinction as one element in the spectrum of choices.

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[10] See Letter from James J. Angel, Ph.D., Associate Professor of Finance, Georgetown University, to Vanessa Countryman, Secretary, SEC, re File No. SR-CTA/CQ-2021-03 and S7-24-89 (December 21, 2021), available at https://www.sec.gov/comments/s7-24-89/s72489-20110185-264449.pdf.

[11] See Letter from Hubert De Jesus, Managing Director, Global Head of Market Structure and Electronic Trading, BlackRock, et al., to Vanessa Countryman, Secretary, SEC, re Joint Industry Plans; Notice of Filing of the Twenty-Fifth Charges Amendment to the Second Restatement of the CTA Plan and Sixteenth Charges Amendment to the Restated CQ Plan and Fifty-Second Amendment to the UTP Plan (December 16, 2021), available at https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-20109864-264208.pdf. ("BlackRock Letter").

[12] See BlackRock Letter; see also Letter from Adrian Griffiths, Head of Market Structure, MEMX, LLC, to Vanessa Countryman, Secretary, SEC, re: CTA/CQ/UTP Plan Fee Amendments, Securities Exchange Act Release Nos. 34-93625 (SRCTA/CQ-2021-03); 34-93618 (S7-24-89) (November 8, 2021), available at

An alternative to the Professional/Non-Professional, Display/Non-Display distinctions—presumably a purely cost-based fee structure—has not actually been proposed by any commenter. To the degree that it is purely cost-based, however, it will likely be unworkable.

This is true for a number of reasons. Trading platforms produce market data as a joint product with trading execution services, in the same sense that mutton, wool and sheepskin are joint products produced by sheep. Any cost allocation between such joint products is inherently arbitrary and would need to be conducted in accordance with some uniform rubric established by the Commission. That rubric would need to assess the range of functions necessary to produce data—such as data protection, monitoring, distribution, risk management, cybersecurity, infrastructure, regulatory compliance, storage, labor, and controls—and determine the appropriate share of the cost of each to be allocated to data. It would also need to determine the appropriate rate of return on these costs.

This problem is compounded by the fact that the Operating Committee would be required to assemble cost information from different exchanges that have different costs. Yet a cost-based fee structure would need to feature a fee and revenue allocation structure that somehow managed to allow each exchange to cover its costs without also incentivizing exchanges to "gold plate" their cost base, a commonly recognized inefficiency associated with cost-based ratemaking. In light of these intractable problems, we submit that setting fees based on costs is impractical, unworkable, unfair, and inherently arbitrary.

We do not mean to say, however, that these types of distinctions cannot be improved. One commenter suggested that the Operating Committee consider "easier to track proxies for usage based on data already reported by firms e.g., in FOCUS reports or other existing regulatory reporting."[13] Although the commenter did not elaborate on how this would work, presumably this means that FOCUS reports would be used to track professional usage in order to lower the reporting burden on individual firms. This may allow the Operating Committee to track professional usage at lower costs, and may well be worth investigating. Nasdaq is, and will remain, open to improvements that lower administrative burdens. Removing all distinctions based on Professional/Non-Professional usage, however, is neither efficient nor fair.

Thank you for the opportunity to comment on the Orders Instituting Proceedings.

Sincerely,

Erika J Moore

Erika Moore
Vice President and Corporate Secretary

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https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-9403088-262830.pdf (generally supporting a la carte pricing and a fee structure in which non-professional fees are lower than professional fees); Letter from Christopher Solgan, VP, Senior Counsel, MIAX, to Vanessa Countryman, Secretary, SEC, re Twenty-Fifth Charges Amendment to the Sec Restatement of the CTA Plan, Sixteenth Charges Amendment to the Restated CQ Plan and Fifty-Second Amendment to the UTP Plan (January 12, 2022), available at https://www.sec.gov/comments/sr-ctacq-2021-03/srctacq202103-20111858-265116.pdf (supporting low non-professional user fees).

13 See MayStreet Letter.