

February 23, 2024

Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: **Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, File No. S7-30-22, Release No. 34-96494**

Dear Ms. Countryman:

Investors Exchange LLC (“IEX”) is writing to address comments by Nasdaq, Inc. (“Nasdaq”) in a recent letter it submitted<sup>1</sup> regarding the Commission’s proposed changes to update Regulation NMS (the “NMS Proposal”),<sup>2</sup> which is addressed almost entirely to comments by IEX supporting a substantial reduction in the access fee cap set by Rule 610(c).

Faced with a substantial record that amply supports a targeted reduction in tick sizes and a reduction in the access fee cap to 10 mils, from the existing 30-mil cap, Nasdaq’s latest letter resorts to mischaracterizing both the nature and the extent of the comments submitted by IEX and a broad cross section of market participants. Pared down from its rhetoric, Nasdaq’s comment letter boils down to a simple claim: namely, that the Commission has no choice but to limit the change in the fee cap so that it conforms to a specific version that Nasdaq favors, one that it has determined will best serve its own interests, which is not aligned with the interests of investors.

Nasdaq has it wrong. Congress charged the Commission with overseeing the national market system for the benefit of investors and the public interest. Nasdaq is free to defend its own interests. However, the Commission’s appropriate focus is updating the rules to reflect modern trading conditions and promoting fair and efficient markets for investors and all market participants, not safeguarding the business interests of Nasdaq or any other participant.

***Congress vested the Commission with plenary authority to ensure that the national market system puts investor interests first.***

In creating the national market system, Congress and the Commission sought to ensure that the public interest would not be compromised for the sake of narrowly

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<sup>1</sup> See Letter from Brett Kitt, Associate Vice President, Nasdaq, Inc., to Vanessa Countryman, Secretary, SEC, dated February 14, 2024.

<sup>2</sup> See Securities Exchange Act Release No. 34-96494 (December 14, 2022), 87 FR 80266 (December 29, 2022).

focused commercial incentives. The SEC’s proposal to amend Rule 610(c) and recalibrate the access fee cap reflects a reasoned approach to ensuring competition in the markets and the fairness and usefulness of protected quotations in the national market system. As the NMS Proposal reflects, this change is designed to “fulfill the goals of Section 11A of the Exchange Act,” prevent high fees from undermining Regulation NMS’s price protection privileges afforded to exchanges, and “serve to help ensure that orders placed in the national market system reflect the best prices available for all investors.”<sup>3</sup>

Importantly, Nasdaq does not dispute that the SEC has the right to amend Rule 610 to reduce the access fee cap for protected quotations under the Exchange Act, or that such a cap is necessary and appropriate in light of the protected quote rule. It is not contesting that the SEC has plenary authority to lower the cap in light of changes in market conditions. Nor does it argue that a lower cap is not appropriate based on the changes in market conditions that have occurred over the last 19 years. Instead, Nasdaq’s position pared back, is that the SEC may not enact any change to the fee cap other than a specific version that Nasdaq specifically favors (contrary to the view overwhelmingly expressed by investors in their own letters). Everything else in its letter amounts to misdirection, and for the reasons IEX has previously explained, that position has no basis in law or fact.<sup>4</sup> As the D.C. Circuit Court has previously held in upholding the Commission’s rulemaking: Nasdaq’s contention “rests on a fallacy: [Nasdaq] equates competition with their own competitive position.”<sup>5</sup>

***The existing access fee cap has become disproportionate in relation to the trading costs that investors incur in 2024.***

In its latest letter, Nasdaq ignores the fact that the 30 mil fees charged to access protected quotations, set at the maximum level fixed by regulation, have become an outsized share of overall trading costs. As the record reflects, bid-offer spreads and average commission costs, which are primary determinants of overall trading costs, have declined dramatically since the fee cap was set.<sup>6</sup> Access fees have been uniquely

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<sup>3</sup> See Securities Exchange Act Release No. 34-96494 (December 14, 2022) (the “NMS Proposal”), at 8-9.

<sup>4</sup> See, e.g., Nasdaq Optimizing Markets for Today and Tomorrow: A Framework for U.S. Equities Market Reform (“Nasdaq recognizes that if Commission action successfully updates tick sizes and narrows spreads for certain stocks, then existing exchange access fees and rebates may no longer be appropriate. They may even distort trading economics in a manner that undermines the Commission’s goals for competition and Best Execution. Accordingly, we recommend that access fee caps and rebates be adjustable so that they remain reasonably proportionate to the tick size of a security.”). [optimizing-markets-for-today-and-tomorrow \(nasdaq.com\)](https://www.nasdaq.com/optimizing-markets-for-today-and-tomorrow)

<sup>5</sup> See *The Nasdaq Stock Market LLC, et al. v. SEC, No. 21-1100, (D.C. Cir. 2022)*.

<sup>6</sup> See NMS Proposal at 96 (“Market innovations and technological efficiencies have reduced transaction and trading costs (e.g., lower commissions and more narrow bid/ask spreads) in the equities markets”); see also, e.g., Citigroup Letter (3/31/2023) (commenting that a substantial reduction in the access fee cap

impervious to market forces, and as a result they have come to represent a higher component of the overall trading cost that investors must absorb. And because they are the only cost element that is set by regulation, it is readily apparent that only the Commission can act to bring them into alignment with these other cost measures.

***Advancements in technologies have supported greater efficiencies yet access fees have remained fixed at artificially inflated prices.***

The record demonstrates that a reduction in the access fee cap is necessary and appropriate to reflect substantial changes in the marketplace since the fee cap was set 19 years ago. As the Commission has noted, “the market structure and technology available today is vastly different from what was available when Regulation NMS was adopted.”<sup>7</sup> Indeed, at the time that Regulation NMS was initially introduced in 2005, Nasdaq was not yet a registered exchange and much trading was still floor-based.

Nasdaq objects that access fees are not excessive based solely on exchange hardware costs (which it calls the “cost of machines”). Nasdaq is correct that hardware is only one element of exchange costs, but our point was not so limited. Exchanges have been able to benefit not just from increased capabilities of servers and other technology hardware but from quantum leaps in all aspects of message communication, trade processing, and data storage. More than most companies, exchanges have undeniably benefitted from these advances.

***Reducing the access fee cap will prevent distortions in pricing that undermine NMS goals.***

Further, there is an obvious and direct connection between high access fees and the extent to which displayed prices deviate from the true prices at which participants are prepared to trade. The Exchange Act directs the SEC to “assure the prompt, accurate, reliable, and fair collection, processing, distribution, and publication of information with respect to quotations for and transactions . . . and the fairness and usefulness of the form and content of such information.”<sup>8</sup> High access fees and the additional price complexity that results means that quoted prices are less accurate, reliable, and fair representations of the prices at which participants are willing to trade.

***Nasdaq’s allegations of harm related to reduced rebates remain unfounded.***

Nasdaq continues to misrepresent the relationship between access fee reform and rebates and to make unfounded projections of “harm” to investors from reduced

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is warranted as “spreads have narrowed and commissions have decreased considerably since Reg NMS was adopted in 2005”).

<sup>7</sup> See NMS Proposal at 7; see also *The Nasdaq Stock Market LLC, et al. v. SEC*, No. 21-1100, (D.C. Cir. 2022) (discussing that “the securities market has evolved dramatically”).

<sup>8</sup> See 15 U.S.C. 78k-1.

rebates. Tellingly, Nasdaq does not cite to actual investor comments in making its claims, because, as noted, investors have taken a very different view.

In addition, the primary purposes for reducing the fee cap are to relieve cost burdens on participants that must access protected quotations and to reduce the impact of high fees in distorting the accuracy and usefulness of displayed quotations. IEX pointed out that the NMS Proposal does not include a limitation on the amount of rebates exchanges may pay for any class of stocks. This is a simple statement of fact. Nasdaq chooses to use access fees as the exclusive funding source for rebates, but that is a choice, not a mandate.

Further, Nasdaq's projection that reduced rebates, as a collateral effect of lower access fees, will result in market harm is built on conjecture and isolated examples that have no bearing on overall market liquidity and efficiency. For example, Nasdaq points to a short-term boost in trading in "penny stocks" (those trading for less than one dollar per share) on MEMX and MIAX when those two exchanges briefly increased (and then revoked) a new rebate payout for that class of stocks. This says nothing about the use of rebates to attract liquidity generally. And it says nothing about whether rebates at any particular level are needed to support exchange liquidity. It simply demonstrates that it is possible for exchange pricing to pump up trading in penny stocks that are subject to delisting under exchange rules.<sup>9</sup>

More than that, the example helps to demonstrate the distortive and perverse effects that can result from rebates that are outsized and are disproportionate to market spreads. In the cases cited, this "experiment," which was quickly abandoned in three days, involved use of rebates that were equal or greater to the size of the average quoted spread. This "real-world" example thereby underscores the distortive effects that oversized rebates can have on trading economics. It certainly provides no support for the premise that lower access fees will harm market liquidity for any group of securities.<sup>10</sup>

Moreover, Nasdaq's claim of market impact is belied by the fact that the lion's share of all rebate payments is paid for trades in "tick-constrained" stocks, those heavily traded stocks trading at or near the minimum spread. Each of those stocks is traded by dozens of market makers based on market interest and fundamentals. If Nasdaq

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<sup>9</sup> See Alexander Osipovich, *As Trading Frenzies Grip Penny Stocks, Criticism of Nasdaq Grows*, Wall St. J., (Feb. 23, 2024), <https://www.wsj.com/finance/stocks/as-trading-frenzies-grip-penny-stocks-criticism-of-nasdaq-grows-8bd4118b>.

<sup>10</sup> Nasdaq conjures up a presumed cost of \$678 million to "retail traders" (who Nasdaq acknowledges do not predominantly trade on exchanges today), but that figure lacks any reasonable basis. First, Nasdaq indicates that the estimate is based on the total "elimination of fees and rebates," neither of which is under consideration by the Commission. Second, Nasdaq uses "hypothetical" quoted spreads and execution prices without any explanation of how they are derived or how they are related to a reduction in the fee cap to 10 mills, how they would compare to the reduction in the fee cap that Nasdaq favors, or how this estimate is pertinent in any other way.

believes it must pay rebates for stocks for which there is less trading demand, it has not come close to making the case that a 10-mil fee cap would prevent it from making the choice to do so.

Contrary to Nasdaq's suggestion, the fact that IEX offers a flat per share rebate of 4 mils per share does nothing to undercut any of the arguments for an access fee reduction. To the contrary, it helps to demonstrate that liquidity does not depend on the continuation of Nasdaq's pricing model, and that maker-taker exchanges in general could readily adapt to a reduced access fee cap while easily retaining or exceeding the same net capture from transaction fees they receive today.

***Lower access fees by other venues are highly relevant.***

IEX showed that, in comparison to access fees on exchanges that have remained overwhelmingly fixed at the maximum, comparable rates on ATs are much lower, with rates typically at or less than 10 mils per share. Nasdaq objects that this fails to consider the lower "net capture" rate (access fees less rebates) that maker-taker exchanges typically realize. But comparing net capture rates is inapt. Net capture rates say nothing about the high costs to access liquidity that investors bear but rather relate to the economics of exchanges. For example, a pension fund order accessing displayed protected quotations is being charged an access fee that is a disproportionately high percentage of its trading costs. That pension fund does not care that the exchange chose to pay a rebate to the other side of the trade, or the exchange had a certain net capture rate as a result. That fact does not make it any less expensive for the pension fund, or its broker, to access that liquidity.

Moreover, Nasdaq does not explain why it cannot maintain the same net capture rate with an access fee reduction to 10 mils. Furthermore, exchanges with a low net capture rate, unlike ATs, obtain a large portion of their overall revenues from the sale of market data and connectivity and in fact market themselves to analysts based on their ability to exploit these sources. ATs, which do not have that ability, must rely much more heavily on access fees, which are not fixed by regulation but are influenced by market forces. Those fees are therefore relevant in setting an appropriate level for an updated access fee cap.

Nasdaq further argues that some ATs routinely charge fees exceeding 10 mils per share. But this is another apples-to-oranges comparison. The other venues with higher fees cited by Nasdaq are platforms offering "conditional" orders, the ability to trade in large blocks, and other platforms providing specialized services that do not engage in continuous trading of NMS stocks, as exchanges do. Access fees by ATs that do offer continuous trading are, at times, dramatically lower, as IEX previously

noted. And because those fees are affected by market forces and not pegged by regulation, they are highly relevant to the question of where to set an updated fee cap.<sup>11</sup>

Nasdaq alleges that factors other than access fees are exclusively responsible for the trend toward less displayed trading. No doubt, other factors also play a role, but it makes no sense to deny that participants will seek to avoid trading with exchange quotes when they can access liquidity in the same stocks for a substantially lower cost. And in case any further proof were needed, it is provided by the written comments of institutional investors affirming that this factor affects their trading decisions.<sup>12</sup>

***Substantial evidence supports a uniform reduction in the access fee cap.***

In addition to trying to discredit other evidence to reduce the fee cap, Nasdaq seeks to place its own spin on how the comment letters divide on this question. That is also unavailing – the letters speak for themselves. It is inarguably true that institutional investors have overwhelmingly endorsed this change.<sup>13</sup> These include many of the most highly sophisticated managers and funds in the world, which are eminently capable of evaluating and advocating for *their* own interests. As IEX pointed out, institutional investors disproportionately bear the burden of high access fees. In making its own reasoned judgment, it is entirely appropriate for the Commission to give substantial weight to the views of the investors that rely on accessible exchange liquidity and are the participants most adversely affected by high access fees. Various non-investor commenters have also supported a uniform reduction in the fee cap. There are, of course, contrary views, but as IEX also noted, a spectrum of industry participants, including exchanges and industry associations, have over time supported a substantial,

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<sup>11</sup> See, e.g., Blackrock Letter (3/31/2023) (commenting that “under a uniform fee model, we would be supportive of setting the access fee cap at 10 mils” as this “would have the added benefit of aligning exchange fees with prevailing ATS fees and creating a more equitable competitive landscape across trading venues”).

<sup>12</sup> See IEX Comment Letter (October 19, 2023), at 8 n.23, citing Decimus Capital Markets, LLC Letter (Apr. 25, 2016) at 8 (stating that “the prevalence of high access fees in lit markets, as a consequence of the race to the maximum permissible access fee, is one of the chief factors driving order flow off-exchange”). [26529-63.pdf \(sec.gov\)](#); BMO Capital Markets Corp. Letter, March 31, 2023 (supporting a reduced access fee cap given the various concerns the Commission cited in its proposal including, among other things, that the high prices charged to investors drives orders to non-exchange trading centers as market participants seek to avoid higher exchange fees). [s73022-20162896-332617.pdf \(sec.gov\)](#)

<sup>13</sup> Compare with *IEX Comment Letter*, collecting comments and quoting directly from those letters, which all support a substantial reduction in the access fee cap, see, e.g., Citigroup Letter (3/31/2023); Blackrock Letter (3/31/2023); Invesco Ltd. Letter (3/31/23); The Capital Group Companies Letter (3/31/23); Brandes Investment Partners, L.P. Letter (3/31/23); Vanguard Group, Inc. Letter (3/31/23); Ontario Teachers’ Pension Plan Board *et. al* Letter (3/31/23); BMO Capital Markets Corp. Letter (3/31/23); JPMorgan Chase & Co. Letter (3/31/23); XTX Markets Letter (3/31/23); American Securities Association Letter (3/31/23); Council of Institutional Investors (3/30/23); Better Markets Letter (3/31/23). Comment file, [SEC.gov | Comments on S7-30-22.](#)

uniform reduction in the access fee limit, to 10 mils or lower.<sup>14</sup> The NMS Proposal for a 10-mil cap is not, as Nasdaq suggests, rushed or ill-considered, or an arbitrary exercise of authority, but a natural outgrowth of many years of debate and consideration.

Notwithstanding this evidence and support, Nasdaq insists that the reduction in the access fee cap must be done in a segmented way, in strict proportion to the minimum tick size set for each security. In fact, when the cap was set in 2005, neither the Commission nor commenters ever suggested that the cap should be exactly equal to a fixed proportion of the tick size. There is a logical association between tick size and access fees, but there are various other market considerations the SEC needs to account for in updating the access fee cap that Nasdaq ignores.

## **Conclusion**

Nasdaq's latest letter illustrates its motivation – Nasdaq in effect argues that the only permissible change to the access fee cap is, coincidentally, the one version that would best serve Nasdaq's interests, while forcing investors to continue to shoulder the burden of outsized fees. Not surprisingly, investors' comments overwhelmingly disagree with Nasdaq and support the adoption of a substantially reduced access fee. The Commission should see Nasdaq's position for what it is, listen to the investors who bear the burden of outsized access fees and update the rule to best reflect the public interest.

The Commission created a system of protected quotations in order to help ensure that investors could access the best prices that are available in the national market. At the same time, the Commission appropriately limited the fees that exchanges could charge to access these quotations to ensure exchanges did not leverage this regulatory status to overcharge investors. Without question, in the intervening years, the cap set has become seriously antiquated, such that access fees now pose a serious burden and limitation on investors' ability to trade with protected quotations. Ultimately, the Commission has more than adequate basis to update the standard to meet the purpose for which it was designed. In adopting NMS reforms, the Commission must always be guided by its overarching responsibility to serving the public interest.

Sincerely,



John Ramsay  
Chief Market Policy Officer, IEX

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<sup>14</sup> *Id.* See also, e.g., "ICE's Six Recommendations for Reforming Markets," WALL ST. J. (Dec. 18, 2014), available at: [ICE's Six Recommendations for Reforming Markets - WSJ](#) (arguing for a reduction in the access fee cap from \$0.003 to \$0.0005); see also Letter from Stacy Cunningham, President, NYSE, to Brent J. Fields, Secretary, SEC, dated October 2, 2018, avail. at <https://www.sec.gov/comments/s7-05-18/s70518-4470779-175854.pdf>.