



THE NASDAQ STOCK MARKET
8800 BLACKWELL ROAD
ROCKVILLE, MARYLAND 20850

February 11, 2008

Via Email and Overnight Mail

Ms. Nancy M. Morris
Secretary
United States Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SR-NASDAQ-2007-099: Response to Comment Letter

Dear Ms. Morris:

On January 23, 2008, the Securities Industry and Financial Markets Association (“SIFMA”) submitted a comment letter concerning the above-captioned rule filing (the “Filing”)¹ requesting that the Securities and Exchange Commission take the extraordinary step of abrogating a rule change to assess fees supporting regulatory activities of The NASDAQ Stock Market LLC (“Nasdaq”). Nasdaq appreciates the opportunity to explain that SIFMA’s comment letter is factually inaccurate, unsupported by statute or rule, and asks the Commission to act in a manner that is arbitrary and capricious and contrary to public policy, by abrogating a rule change that is in place at multiple national securities exchanges.

SIFMA’s comment letter concerns a December 20, 2007, rule change which revised Nasdaq Rule 7003 to enable Nasdaq to begin charging fees for the registration and transfer/re-licensing of registered representatives (“Registered Representatives”). Nasdaq established a licensing fee of \$55 for Registered Representatives and an additional \$55 fee for the transfer or re-licensing of Registered Representatives (collectively, the “Fees”). Nasdaq filed this proposal for immediate effectiveness with an implementation date of January 1, 2008, pursuant to Section 19(b)(3)(A)(ii)² and Rule 19b-4(f)(2) of the Securities Exchange Act of 1934 (the “Exchange Act”).³

The Fees are directly linked to the regulation of Nasdaq, its members, and its’ members’ registered associated persons. As a national securities exchange, Nasdaq has

¹ See Securities Exchange Act Release No. 57001 (December 20, 2007), 72 FR 74385 (December 31, 2007).

² 15 U.S.C. 78s(b)(3)(A)(ii).

³ 15 U.S.C. 78s(b)(1).

multiple obligations under Section 6 of the Exchange Act to adopt and enforce rules that provide for the proper regulation of its members and their registered associated persons, including rules determining which registered broker or dealer may become a member of Nasdaq and which person may become associated with a member, rules designed to prevent members and their registered representatives from engaging in fraudulent and manipulative acts, and rules providing that members and registered representatives members shall be appropriately disciplined for violating the federal securities laws and Nasdaq rules.

The idea put forward by SIFMA that a fee used for regulation actually serves to harm investors and the public interest is meritless and contrary to reason. Fees such as these enable Nasdaq to maintain its regulatory program which accrues directly to the benefit of average investors by providing them with a safe, predictable place to trade and invest. The fee for initial registrations and transfers of Registered Representatives is directly related to Nasdaq's obligations with respect to the registration, surveillance, and discipline of its members and their registered associated persons. These activities are at the cornerstone of the self-regulatory system the Commission safeguards. In fact, these fees by virtue of Nasdaq's exchange license may only be used to offset regulatory expenses.

To abrogate the Fees would be not only contrary to the Exchange Act and public policy, it would also be arbitrary and capricious. Nasdaq's proposal is based upon the rules of multiple national securities exchanges that impose regulatory fees for the initial registration and transfer of representatives and established such fees via immediately effective rule proposals.⁴ Eliminating these fees would require a Section 19(c) proceeding. Additionally, removing the Nasdaq Fees without also removing the other self-regulatory organizations ("SROs") fees is also inherently arbitrary and capricious.

In their rule filings, these exchanges stated, as did Nasdaq, that these fees satisfied the standard of Section 6(b)(4) of the Exchange Act. Section 6(b)(4) provides that there must be an "equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."⁵ The Fees satisfy this standard because they are apportioned evenhandedly across Nasdaq's membership and are consistent with the principle that such fees relate to the regulatory expense. Moreover, the amount of the Fees is in line with the fees already being charged by many of the other exchanges that also use FINRA's Web-based Central Registration

⁴ The Amex charges a \$60 Initial Registration Fee, a \$40 Transfer/Relicensing Fee and a \$50 Renewal Fee. See Securities Exchange Act Release No. 48066 (June 19, 2003), 68 FR 38409 (June 27, 2003) (SR-AMEX-2003-49); the Philadelphia Stock Exchange, Inc. charges a \$55 Initial Registration Fee, a \$55 Transfer/Relicensing Fee and a \$55 Renewal Fee. See Securities Exchange Act Release No. 53688 (April 20, 2006), 71 FR 24885 (April 27, 2006) (SR-Phlx-2006-24) ("Phlx Filing"); NYSE Arca Inc. (formerly, the Pacific Exchange, Inc.) charges a \$55 Initial Registration Fee, a \$55 Transfer/Relicensing Fee and a \$55 Renewal Fee. See Securities Exchange Act Release No. 51641 (May 2, 2005), 70 FR 24155 (May 6, 2005) (SR-PCX-2005-49); and the Boston Stock Exchange charges a \$60 Initial Registration Fee, a \$40 Transfer/Relicensing Fee and a \$50 Renewal Fee. See Securities Exchange Act Release No. 57152 (January 15, 2008), 73 FR 3767 (January 22, 2008) (SR-BSE-2008-55). See also *infra* note 6.

⁵ See Exchange Act Section 6(b)(4).

Depository⁶ for the registration of registered representatives of member firms and for the transfer or re-licensing of registered representatives.⁷ Finally, as Nasdaq points out in the Filing, it was one of the few SROs that charged membership application and renewal fees for member firms, but did not charge any fees for their Registered Representatives.

SIFMA's comment letter erroneously contends that the Filing does not provide an adequate rationale for the proposed fees. On the contrary, the Filing clearly sets forth the necessary reasons for the Fees and fully complies with the statutory standard for such filings. The Filing states that the Fees are "a reasonable and equitable method of ensuring that the registered representative fees fund a portion of the cost of regulating the Nasdaq market"⁸ and notes that the "overall cost for registered representatives that are Nasdaq members is reasonable as compared with their cost of membership in other SROs."⁹ The American Stock Exchange LLC ("Amex") explained in its filing that "[t]hese fees would offset the costs to the Amex of reviewing and processing all applications."¹⁰ Likewise, the Philadelphia Stock Exchange, Inc. noted in its filing that the express purpose of adopting the fees is "to help offset the Exchange's increased costs to its regulatory oversight and enforcement programs."¹¹

SIFMA's letter contains factual inaccuracies and unsubstantiated assertions. For example, on page three of SIFMA's comment letter, SIFMA incorrectly characterizes the new fee as a "per registrant fee" rather than as a fee on newly Registered Representatives. In fact, the Fees are a one-time charge on newly Registered Representatives or transfers of Registered Representatives to member firms. As a result, SIFMA mistakenly and without substantiation states that the potential cost increase would be over one million dollars for large firms, whereas the actual cost would likely be significantly less, even if a high turnover rate for Registered Representatives is factored into the equation.

Contrary to SIFMA's assertion otherwise, neither Nasdaq nor any other exchange is required to provide a break-down of its regulatory and enforcement costs in order to demonstrate that the Fees are appropriate. The basis for many of SIFMA's inaccurate statements is a misunderstanding of Nasdaq's regulatory process and costs associated therewith. For example, SIFMA incorrectly contends that Nasdaq outsources nearly all of its regulatory functions to another SRO and, therefore, Nasdaq "must be held to a standard of greater transparency and accountability when proposing new fees for its member firms."¹² SIFMA wrongly casts outsourcing of regulatory functions to an independent SRO, which is one of the strengths of our market, in a negative light and, therefore, concluded that it requires greater transparency. Furthermore, there are a number of important functions that Nasdaq does not outsource.

SIFMA ignores the different approaches to regulatory functions performed by

⁶ See, http://www.finra.org/web/groups/reg_systems/documents/regulatory_systems/p005213.pdf.

⁷ See *supra* note 4.

⁸ See Filing at 74385.

⁹ *Id.*

¹⁰ See Securities Exchange Act Release No. 48066 (June 19, 2003), 68 FR 38409 (June 27, 2003) at 38410.

¹¹ See Phlx Filing at 24886.

¹² See SIFMA Comment Letter at p.2

FINRA for common members of both Nasdaq and FINRA (“common members”) pursuant to its agreement under Section 17d-2 of the Act¹³ and to functions Nasdaq outsources to FINRA pursuant to their Regulatory Services Agreement (“RSA”).¹⁴ As indicated in the Rule 17d-2 Order, Nasdaq has been relieved from some regulatory costs for firms in connection with membership and registration rules of common members. On the other hand, as to the RSA which covers firms that are common members, as well as Nasdaq-only members, the RSA governs surveillance, compliance of marketplace and certain general conduct rules. In this regard, Nasdaq incurs heavy regulatory expense and retains regulatory responsibility. Therefore, to the degree that Nasdaq expands the scope of the RSA, its associated costs increase as well.

In addition, Nasdaq’s regulatory costs include not only those associated with the RSA, but also those stemming from internal regulatory and enforcement functions. These functions are performed by the following Nasdaq departments: (i) MarketWatch;¹⁵ (ii) Listing Qualifications;¹⁶ (iii) Office of General Counsel;¹⁷ (iv) Office of Corporate Secretary;¹⁸ and (v) Internal Audit.¹⁹ Each of these departments, other than Internal Audit, reports up to Nasdaq’s chief regulatory officer.

Additionally, Nasdaq will incur further expense in the near future in connection with Nasdaq’s planned participation in the NYSE Regulation/FINRA Insider Trading Program. Due in part to the Securities and Exchange Commission’s determination of a perceived gap largely driven by Nasdaq’s increasing market share of trading in New York Stock Exchange (“NYSE”) and NYSE Arca-listed equity securities, Nasdaq will shortly be entering into a new Rule 17d-2 Agreement with NYSE Regulation. The agreement allocates to NYSE Regulation regulatory responsibility for surveillance, detection, investigation and enforcement of insider trading in such securities by Nasdaq members irrespective of the marketplace where the trading occurred. A separate Rule 17d-2 Agreement with FINRA will cover this for Nasdaq securities.

¹³ 17 CFR 240.17d-2(4). Rule 17d-2(4) states, in relevant part, that any two or more SROs may file with the Commission a plan allocating expenses and responsibilities and that any SRO that is a party to the plan “shall be relieved of responsibility as to any person for whom such responsibility is allocated under the plan to another self-regulatory organization to the extent of such allocation.”

¹⁴ The RSA covers regulatory functions provided by FINRA for firms that are Nasdaq-only members and for marketplace and general conduct rules that FINRA does not have.

¹⁵ MarketWatch conducts real-time market oversight for compliance with Nasdaq issuers’ disclosure obligations and Nasdaq market participant trading activity within the facilities operated by Nasdaq.

¹⁶ The Listing Qualifications Department helps to assure the overall integrity of the market by applying the marketplace rules in a fair and consistent manner such that only qualified companies are allowed to list, or continue to be listed.

¹⁷ The Office of General Counsel is responsible for ensuring that Nasdaq meets all of its SRO responsibilities by providing legal support to all of Nasdaq’s core functions (e.g., matters relating to the marketplace, regulatory policy, technology, proprietary rights, and commercial and corporate matters).

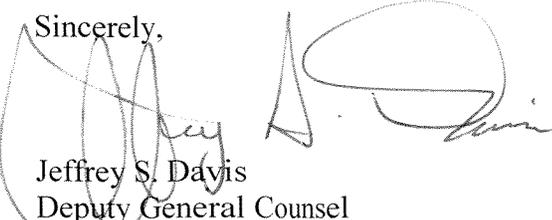
¹⁸ The Office of Corporate Secretary manages and coordinates all governance and business activities of Nasdaq’s Board of Directors and the standing and advisory committees of the Board. Nasdaq views these as regulatory functions that the Board performs for Nasdaq in its capacity as an SRO under the Act.

¹⁹ The Internal Audit Group evaluates internal controls by working closely with Nasdaq core business lines to ensure the company is protected from risks that could affect them.

SIFMA is using the same arguments to delay a pure regulatory fee that it previously has used to challenge numerous market data fee proposals filed by various national securities exchanges.²⁰ It would be inappropriate and arbitrary for the Commission to use this filing, which clearly complies with the statutory standards of the Exchange Act, as a vehicle to address the broad policy issues raised by SIFMA. This filing should be permitted to stand, alongside the similar filings submitted by the other relevant exchanges.

Please call me at 301-978-8484 if you have any further questions or would like to discuss this comment response letter in greater detail.

Sincerely,



Jeffrey S. Davis
Deputy General Counsel
Vice President

cc: The Hon. Christopher Cox, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Kathleen L. Casey, Commissioner
Dr. Erik R. Sirri, Director, Division of Trading and Markets
Robert L. D. Colby, Deputy Director, Division of Trading and Markets
Elizabeth King, Associate Director, Division of Trading and Markets
David Shillman, Associate Director, Division of Trading and Markets
Marlon Paz, Special Counsel to the Director, Division of Trading and Markets
Brian G. Cartwright, General Counsel
Dr. James A. Overdahl, Chief Economist

²⁰ Given SIFMA's approach and the fact that its comment letter containing many factual inaccuracies was sent to each Commissioner, this letter is being distributed to the same individuals.