sifma
Invested in America

Via Email:
November 23, 2016
Secretary
Securities and Exchange Commission
100 F St., NE
Washington, DC 20549

Re: Release No. 34-78713; File No. SR-Nasdaq-2016-120 (Aug. 29, 2016)

Dear Sir or Madam:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the above-referenced rule filing (the "Proposal"). SIFMA notes that the staff has deemed it necessary to take additional time to approve the Proposal until on or before December 1, 2016.[2] Although SIFMA believes the Proposal should be denied, SIFMA wishes to take this opportunity to provide a different perspective from those set forth in previous letters submitted on the Proposal as of today.

SIFMA believes that the Proposal is implementing a service which runs contrary to the purpose of the UTP Securities Information Processor ("UTP"), which is to provide quality market data to the non-professional and professional subscribers at a low cost. The Proposal seeks to separate the UTP to a new third party services network for which Nasdaq will charge a new connectivity fee. Customers who want to receive the UTP feeds must subscribe to the Nasdaq Ultra connectivity feed at a monthly cost to customers of $5,000 for a 10 Gb connection and $2,000 for a 1Gb connection. Nasdaq's new service and effective fee increase raises several issues, all of which are grounded in the fact that broker-dealers are effectively required to purchase SIP data even if they use proprietary data products for trading.

First, SIFMA agrees with BATS that there is a conflict of interest in Nasdaq's roles as both a processor and a plan administrator.[3] However, SIFMA believes that this structural conflict

[1] SIFMA represents these broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $20 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Designation of a Longer Period for Commission Action on Proposed Rule Change to Adopt the Third Party Connectivity Service under Rules 7034(b) and 7051, SEC Release No. 34-79049; File No. SR-Nasdaq-2016-120 (October 5, 2016).

[3] BATS Comment Letter re: SR—Nasdaq-2016-120, dated September 12, 2016; BATS Comment Letter No. 2 re: SR—Nasdaq-2016-120, dated October 12, 2016.

represents only a small portion of the larger problem of anti-competitive forces between the exchanges that customers face when forced to purchase market data from for-profit exchanges. Further, the Proposal is contrary to both the Exchange Act and NMS plans to allow an exchange to appropriate core data to include in a product bundle that also has proprietary elements. In addition to the anti-competitive and monopolistic behavior this evidences, the Commission has never articulated the standard of review that should apply to determine the fairness and reasonableness of the fee for such a hybrid. Please refer to point three below for additional conflict of interest concerns.

Second, the Proposal should be denied because the fees are inconsistent with the decisions of the United States Court of Appeals for the District of Columbia Circuit in *Net Coalition v. SEC.*[4] SIFMA has filed numerous denial of access petitions on connectivity and port fees because such fees fall within the ambit of the *Net Coalition* decisions. According to the Securities Act Amendments of 1975 and the *Net Coalition* decisions, market data fees must be fair and reasonable, represent an equitable allocation of fees, and be nondiscriminatory. Consistent with the *Net Coalition* decisions, the fees must be constrained by competitive forces. However, Nasdaq has failed to demonstrate that these new fees are subject to any competitive forces. This fee is yet another example of the naked, unjustified fee increases imposed by the for-profit exchanges.

Third, BATS contends that the Proposal constitutes a UTP service and fee, and that Nasdaq has not followed the appropriate steps set forth under the UTP Plan to gain approval for such service or fee. SIFMA agrees with BATS that Nasdaq did not take the appropriate steps under the UTP Plan to gain approval. However, even if the Proposal was filed after appropriate approval under the UTP Plan, this procedural, rather than substantive, distinction does not begin to address the problem of market data, the functioning of the plans, or how self-regulatory organization rules are considered and acted upon. Expanding the universe of decision-makers from one exchange family to three exchange families does not correct the problem.

Fourth, Nasdaq provides no reasonable justification for requiring member firms to use a 10Gb connection to receive SIP data. This is a critical issue because Nasdaq is controlling, and profiting from, the access connection to market data that broker-dealers are legally required to purchase. Before forcing members into a 10Gb connection, Nasdaq should demonstrate that the new SIP technology and projected usage requires that much bandwidth. If Nasdaq is going to alter the historical connectivity arrangement, it should give member firms an option to receive just the SIP at whatever bandwidth is necessary.

Fifth, as noted in the comment letter by Virtu Financial, we would agree that "Nasdaq's proposed Third Party Connectivity Service is an expensive solution that is in search of a problem." There is no compelling necessity – either technical or otherwise – that a new and separate connection for access to this data is necessary. While we understand Nasdaq's intent to segregate in certain areas the UTP SIP business from their proprietary data business, the decision to mandate a new connectivity

---

[4] Net Coalition I: 615 F.3d 525 (D.C. Cir. 2010). Net Coalition II: 715 F.3d 342 (D.C. Cir. 2013).

service for the industry must weigh the pros and cons, not just for Nasdaq, but for the whole industry. For Nasdaq, the pros are clear: this new connectivity service establishes a new and lucrative source of revenue that will be highly price inelastic given the need for many participants to access this data. However, for SIFMA members, the benefits are few (if any) and the costs are high. Nasdaq should have given much more consideration for the net cost to the industry. That fact the industry cost was not considered, but Nasdaq's bottom line is yet another illustration of the significant conflicts of interest in play here that need to be addressed.

For the reasons stated above, we respectfully petition the Commission to deny the Proposal.

If you have any questions or need any additional information, please contact me at [redacted] or [redacted].

Sincerely,

/Melissa MacGregor/

Melissa MacGregor
Managing Director and Associate General Counsel