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Invested in America

November 19, 2020

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

Re: Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Lower the Enterprise License Fee for Broker-Dealers *(Release No. 34-90177; File No. SR-NASDAQ-2020-065)*

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] respectfully submits this letter to the U.S. Securities and Exchange Commission ("Commission" or "SEC") to comment on the proposal filed by The Nasdaq Stock Market LLC ("Nasdaq") to lower the enterprise license fee for broker-dealers distributing Nasdaq Basic to internal Professional Subscribers and the enterprise license fee for broker-dealers distributing Nasdaq Last Sale to Professional Subscribers (the "Proposal").[2]

SIFMA supports the reduction in fees that is contemplated by the Proposal. The primary users of Nasdaq Basic are retail brokers who handle order flow based on behalf of retail investors. We are concerned, however, with Nasdaq's use of rationales to support its Proposal that have been rejected by numerous parties over the years.

Nasdaq's Proposal would lower enterprise fees for Nasdaq Basic and Nasdaq Last Sale. These are both "top-of-book" market data products that provide last sale information and best bid and offer information from Nasdaq. These products provide a subset of the core data distributed by the CTA/CQ Plan and the UTP Plan, but with less latency. The Commission has previously emphasized the importance of ensuring that core data is widely available for reasonable fees.[3] The Commission has also stated, among other things, that investors "must have [core data] to

1 SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

2 Exchange Act Release No. 90177 (October 14, 2020), 85 Fed Reg. 66630 (October 20, 2020) ("Proposal"). Capitalized terms used in this letter have the same meaning as they do in the Proposal.

3 *See, e.g.*, *In the Matter of the Application of Sec. Indus. & Fin. Markets Ass'n*, Release No. 34-83755, p.4 (July 31, 2018) ("The Commission , , , seeks to ensure that core data is widely available for reasonable fees."),

participate in the U.S. equity markets," and "preserv[ing] the integrity and affordability of the consolidated data stream" is "one of the Commission's most important responsibilities."[4] Still, SIFMA and many others have previously pointed out that brokers also need faster data streams, even for top-of-book data.[5] Nasdaq and other exchanges have long enjoyed above-competitive prices for their proprietary top-of-book feeds, because many market participants need these feeds, and each exchange has monopoly control over its own high-speed data feed. A reduction in fees for these data streams is certainly appropriate, and we support Nasdaq's effort to lower those fees.

However, we note that the rationales offered by Nasdaq in support of the Proposal have been rebutted in multiple venues over many years and rejected by the Commission and the D.C. Circuit. We are particularly concerned with Nasdaq's assertions (i) that competition with exchanges over top-of-book data sales and with SIP data constrains pricing, and (ii) that "platform competition" constrains the pricing of top-of-book data by limiting the total returns earned by the exchange.

SIFMA and a host of market participants have previously provided information and analysis rebutting the applicability of these justifications in other contexts. The Commission's staff, too, have recommended that the "platform competition" theory is not an adequate basis to conclude that data prices are competitive.[6] The Commission has expressed its concern that proprietary top-of-book data are not subject to competition.[7] Nasdaq's rationale runs contrary to the Commission's views, the staff views, and the evidence accumulated over multiple proceedings.[8] While the Commission should accept a rule change to reduce Nasdaq's fees, overwhelming evidence contradicts Nasdaq's claim that competition constrains those fees.

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4 *Id.*

5 *See, e.g.*, Lawrence R. Glosten, "Economics of the Stock Exchange Business: Proprietary Market Data," p.4 (Jan. 2020); Tr. of the Roundtable on Market Data Products, Market Access Services and Their Associated Fees, pp. 62-65 (comments of Brad Katsuyama and Mehmet Kinak). (Oct. 25, 2018) ("Market Data Roundtable").

6 Division of Trading and Markets, U.S. Securities and Exchange Commission, "Staff Guidance on SRO Filings Related to Fees" (May 21, 2019), available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees.

7 "Indicia that exchanges may not be subject to robust competition include that many broker-dealers state that even in the face of increasing proprietary data fees they feel compelled to buy proprietary data to be able to provide competitive trading strategies for their clients." *Proposed Rule: Market Data Infrastructure*, Release No. 34-88216, p.405 (Feb. 14, 2020).

8 *E.g.* Release No. 34-88216, at 403-05; Release No. 34-89618, at 34-35 (Aug. 19, 2020) (final rule on NMS plan fee amendments, noting that SIP plans and SRO top-of-book feeds are not full competitors); Release No. 34-88827, at 32-33 (May 26, 2020) (order directing new SIP plans, noting that traders need to buy proprietary feeds because the SIP plans lack adequate competition); IEX, "The Cost of Exchange Services" (Jan. 2019) (calculating extreme disparities between the price of data feeds, including Nasdaq Basic and Last Sale, and the estimated cost to produce them); Lawrence R. Glosten, "Economics of the Stock

Nasdaq argues that "All of the top-of-book proprietary products offered by the exchanges are readily substitutable for each other and, in most cases, with the consolidated information offered by the SIPs." [9] But the top-of-book data from one exchange will cover only the trades on that exchange. Many brokers need low-latency data, and they will need it from each exchange.

Nasdaq next argues that total returns earned by the exchanges are constrained by competition from other exchanges' trading platforms, and "this competition powerfully constrains Nasdaq's competitive behavior.[10] SIFMA has demonstrated several times over the years that an exchange's decision to offer multiple products (trading services and market-data products) does not constrain prices in the manner contemplated when a platform facilitates a multi-sided transaction. A study we have provided previously noted that trading on various exchanges can be substitutable, while trade data from various exchanges are not.[11] The prices that exchanges charge for trading are roughly reasonable, while the prices for trading data have in some cases increased significantly in past years with no apparent competition-based reason.

In any event, the Commission has already rejected exchange efforts to "lin[k] … market data fees to trade executions," given that "market data fees must appeal simultaneously to market participants that trade directly on an exchange and those that do not." Indeed, the results presented in the SIFMA Expand Study indicate that aggregate charges for the market-data products regulated by the Exchange Act have only increased as trading platforms have proliferated and trading execution prices have fallen. See [Expand Study] at 2, 6.

Additionally, platform theory is inconsistent with the Exchange Act's requirement that data prices be "fair and reasonable," which in turn protects investors and ensures that market data are widely disseminated. 15 U.S.C. § 78k-1(c)(1)(C); see Evans¶¶14–18 (discussing the sound economic policies supporting Congress's decision to regulate market-data prices to promote price transparency). The basic notion of platform theory is that a trader only needs or wants data from an exchange on which the trader is committed to frequent trading. Section 11A mandates that the Commission foster the availability of data more broadly.

Moreover, under Regulation NMS, a broker must use the best bid or offer across exchanges. The choice where to route an order cannot be based on which exchange gives the broker the best price for market data. Further, a broker must route an order to the appropriate

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Exchange Business: Proprietary Market Data," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3533525; Expand, "An Analysis of Market Data Fees" (Aug. 2018); Letter from Ellen Greene to Vanessa Countryman re: File No. S7-03-20; Market Data Infrastructure Proposed Rule (May 26, 2020); Letter from Ellen Greene to Vanessa Countryman re: File No. 4-729; NYSE Corporate Actions Feed and Exchange Derived Data Policies (Apr. 9, 2020); Market Data Roundtable, at 38-40.

9 Proposal at 13.

10 Proposal at 17.

11 Glosten, at 5.

exchange, on a real-time basis. It is not possible, as a practical matter, for order competition to be tied to a hypothetical competition in data products.

In recent years, SIFMA has seen a plethora of market data price increases and related fee filings. We urge the Commission to continue its efforts in taking the time to thoroughly review these market data-related filings, and we commend the Commission for its recent initiatives focused on the cost and availability of market data. SIFMA believes the Commission should continue to carefully scrutinize SRO fee filings to ensure that the fees comport with the requirements of the Exchange Act.

We support the reduction in fees contemplated by the Proposal given that such reduction ultimately benefits retail investors. We believe the reduction can be approved by the SEC without giving credence to the thoroughly rebutted competition arguments that exchanges have consistently presented and that the Commission has consistently and wisely rejected.

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SIFMA greatly appreciates the Commission's consideration of these comments and would be pleased to discuss them in greater detail. If you have any questions or need any additional information, please contact me at [redacted] or [redacted].

Sincerely,

Ellen Greene

Ellen Greene
Managing Director
Equity and Options Market Structure

cc: Brett Redfearn, Director, Division of Trading and Markets