



December 13, 2024

Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, D.C. 20549-1090

**RE: File Nos. SR-NASDAQ-2024-067; SR-Phlx-2024-57; SR-GEMX-2024-40; SR-BX-2024-049; SR-ISE-2024-52; SR-MRX-2024-43; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services**

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)<sup>1</sup> respectfully submits this comment letter to the U.S. Securities and Exchange Commission (the “Commission”) in response to a series of related rule filings by The Nasdaq Stock Market LLC (“Nasdaq”) and its affiliated exchanges that ultimately will increase by 10% each of the dozens of fees each exchange charges exchange members for exchange connectivity and co-location facilities, subject to certain exceptions described in the latest of these fee filings (“Fee Filing”).<sup>2</sup> For the reasons set forth below, we urge the Commission to suspend the proposed Fee Filing under Section 19(b)(3)(C) of the Securities Exchange Act of 1934 (“Exchange Act”) and issue an order instituting proceedings (“OIP”) to determine whether to approve or disapprove it under the Exchange Act. We further urge the Commission to disapprove the Fee Filing as Nasdaq has not met its burden as a self-regulatory organization (“SRO”) of showing that the proposed fees meet

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<sup>1</sup> 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 one million employees, we advocate on 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>.

<sup>2</sup> See Release No. 34-101690, File No. SR-NASDAQ-2024-067 (Nov. 21, 2024), 89 FR 93731 (Nov. 27, 2024); Release No. 34-101691, File No. SR-Phlx-2024-57 (Nov. 21, 2024) 89 FR 93697 (Nov. 27, 2024); Release No. 34-101688, File No. SR-GEMX-2024-40 (Nov. 21, 2024) 89 FR 93810 (Nov. 27, 2024); Release No. 34-101689, File No. SR-BX-2024-049 (Nov. 21, 2024) 89 FR 93678 (Nov. 27, 2024); Release No. 34-101687, File No. SR-ISE-2024-52 (Nov. 21, 2024) 89 FR 93780 (Nov. 27, 2024); Release No. 34-101686, File No. SR-MRX-2024-43 (Nov. 21, 2024) 89 FR 93685.

the requirements under the Exchange Act that such fees be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition.

As described below, SIFMA has both substantive and procedural concerns regarding Nasdaq's recent immediately effective rule filings to increase its connectivity and co-location fees.<sup>3</sup>

***Nasdaq's filings are not consistent with the Exchange Act and Commission Staff Guidance.***

Nasdaq's series of fee filings, including the most recent of these filings (SR-NASDAQ-2024-067), fail to demonstrate that the increased fees comply with Exchange Act requirements governing SRO fees and are consistent with the 2019 Commission Staff guidance regarding SRO fee filings.<sup>4</sup>

As a threshold matter, throughout the filings Nasdaq fails to clearly and consistently identify its reason for seeking to increase the relevant fees. On one hand, the Exchange asserts that it has made investments in its connectivity and co-location services, resulting in enhanced performance of certain exchange functions. But instead of directly relying on those investments as the basis for the fee increases and explaining the specific costs for these enhancements, Nasdaq also asserts that, like any other company that offers technology products, its fixed costs generally have risen over time as a result of inflation. Therefore, it is not clear from any of the half-dozen related filings whether Nasdaq is raising fees to recoup the costs of investments it has made to improve exchange connectivity and/or co-location facilities or because, even without making any investments, Nasdaq's ongoing cost of connectivity and co-location has increased via inflation. Even if the fee increases are a result of some combination of these factors, Nasdaq's general statements without any connection to the actual costs it has incurred do not demonstrate that its fee increases are consistent with the Exchange Act or Commission staff's fee filing guidance.

Nasdaq also has not otherwise demonstrated that the fee increases are reasonable. The most telling indicator that Nasdaq's fee increases are not reasonable is its attempt, without any

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<sup>3</sup> The Nasdaq Stock Market LLC's series of rule filings are as follows: Release No. 34-99744, File No. SR-NASDAQ-2024-008 (Mar. 15, 2024), 89 FR 20287 (Mar. 21, 2024); Release No. 34-100117, File No. SR-NASDAQ-2024-020 (May 13, 2024), 89 FR 43485 (May 17, 2024); Release No. 34-100512, File No. SR-NASDAQ-2024-032 (July 12, 2024), 89 FR 58453 (July 18, 2024); Release No. 34-100988, File No. SR-2024-053 (Sept. 10, 2024), 89 FR 75623 (Sept. 16, 2024); Release No. 34-101443, File No. SR-NASDAQ-2024-060 (Oct. 25, 2024), 89 FR 86861 (Oct. 31, 2024); Release No. 34-101690, File No. SR-NASDAQ-067 (Nov. 21, 2024). Each of the other five affiliated Nasdaq exchanges (Phlx, GEMX, BX, ISE, and MRX) filed its own series of substantially identical immediately effective rule filings from March through November 2024 and the concerns SIFMA raises in this letter also apply to the Nasdaq affiliates' filings.

<sup>4</sup> The fee increases imposed by the Fee Filing apply equally to dozens of connectivity and co-location fees in General 8, Sections 1 and 2 and General 7, Sections 115 and 130.

explanation, to nearly double the amount of the fee increase as this series of related filings has evolved: from 5.5% in the first four filings to 10% in the last two filings.<sup>5</sup> In determining to essentially double the amount of the fee increases, Nasdaq inadvertently shows that the amount is an arbitrary number not tied to (1) the actual cost of providing exchange connectivity or co-location facilities to exchange members, (2) any purported investments Nasdaq has made to improve these offerings, or (3) any inflation measure, despite Nasdaq's references to two inflation indices in the Fee Filing. Such arbitrary fee increases cannot be deemed reasonable, as required by the Exchange Act.

Specifically, in the first two versions of this fee filing, Nasdaq initially pointed to the Consumer Price Index ("CPI") as the measure of inflation it was relying on to justify the 5.5% fee increases without any direct tie to actual increased costs it was incurring. As further discussed below, Nasdaq repeatedly withdrew the filings after approximately 60 days and replaced them with similar, though slightly changed, filings. As the filings gradually evolved, in the third version of the filing Nasdaq for the first time cited to a second inflation index, the Producer Price Index ("PPI"), to attempt to justify the 5.5% fee increase. Regardless of the measure of inflation referenced in the fee filings, however, Nasdaq did not explain why these measures supported the amounts of the fee increases. For example, in one of the filings the Exchange acknowledged that the initial 5.5% fee increase it imposed was not actually tied to any rate of inflation:<sup>6</sup>

The proposed fees represent a 5.5% increase (and for Remote Hands, a 1% increase) from the current fees, which is far below any of the above-described gauges of inflation since 2010. In addition to being far below cumulative inflation rates since 2010, the Exchange also believes that the proposed 5.5%/1% increase is reasonable because it is comparable to recent inflation rates even for one-year periods. For example, in 2022, the inflation rate, as measured by the CPI, was 8.00% and it was 9.47%, as measured by the PPI. The Exchange is sensitive to the sticker shock that would occur if the Exchange raised its fees by 17% or more than 40% and therefore proposes a more modest increase, similar to that of inflation in recent one-year periods.

Essentially, Nasdaq argued that it should be able to raise its fees by any amount it determines solely because inflation exists in the economy. Nasdaq's explanation, particularly the reference to potential customer "sticker shock" that would occur if Nasdaq used the actual inflation numbers, demonstrates the arbitrariness of the initial 5.5% fee increases and the lack of analysis of the actual cost increases (or cost of capital investments) the Exchange may have experienced throughout the years. This comment, which Nasdaq removed from subsequent

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<sup>5</sup> Nasdaq filed the 10% fee increases as immediately effective but opted to delay implementation until December 1, 2024.

<sup>6</sup> Release No. 34-100988; File No. SR-NASDAQ-2024-053 (Sept. 10, 2024).

filings, reveals Nasdaq's true purpose: increase fees to raise its profit margins on exchange connectivity and co-location facilities in some amount that would not induce "sticker shock" among exchange members and customers.

In the fifth and sixth filings, Nasdaq raised the fee increases from 5.5% to 10%, without even acknowledging that it was abandoning the 5.5% increase and without making any connection to actual costs increases it had incurred.<sup>7</sup> To justify the 10% increase in these filings, Nasdaq more heavily relied on the PPI inflation measure and pointed to a sub-group within the PPI—"Data PPI"—that it asserted aligns with its connectivity and co-location offerings. But we are left to take Nasdaq at its word that the Data PPI industry and product sub-group, out of the more than 500 industry groups and 10,000 product groups covered by the PPI, is the group most relevant to Nasdaq's connectivity and co-location offerings.<sup>8</sup>

Nasdaq's Fee Filing also asserts that it "believes the Data PPI, and significant investments into, and enhanced performance of, the Exchange support the reasonableness of the proposed fee increases."<sup>9</sup> But the Exchange did not explain with any specificity the "significant investments into, and enhanced performance of, the Exchange." Rather, Nasdaq generally states that it "continues to invest in maintaining, improving, and enhancing its connectivity and co-location products, services, and facilities – for the benefit and often at the behest of its customers. Such enhancements include refreshing hardware and expanding Nasdaq's existing co-location facility to offer customers additional space and power."<sup>10</sup> This is not enough detail to determine whether the dozens of fee increases for connectivity and co-location included in the fee filing are reasonable. Increasing dozens of fees by the same percentage across the board, rather than attempting to carefully tailor (and explain) the fee increases of particular offerings based on investments into those offerings, again demonstrates Nasdaq's arbitrary and unreasonable approach to these fee increases.<sup>11</sup>

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<sup>7</sup> It is also not evident from the filing which fee levels Nasdaq plans to raise by 10% - the fee levels in place prior to the initial March 15, 2024 filing or the fee levels in place after the 5.5% increase imposed by the March 15, 2024 filing, which were immediately effective as of that date (i.e., for a total increase of 15.5% from prior fee levels). Although Nasdaq should clarify this point, Exhibit 5 indicates the 10% increase will apply to the fees in place prior to the initial March 15, 2024 filing (i.e., a total increase of 10% from prior fee levels).

<sup>8</sup> In a subsequent filing, Nasdaq notes that other exchanges have not relied on the Data PPI measure to support price increases for market data based on inflation. See SR-NASDAQ-2024-069, at n. 10.

<sup>9</sup> SR-NASDAQ-2024-067.

<sup>10</sup> Although Nasdaq referenced the expansion of its existing co-location facility as part of the investments into its facilities, the filing explicitly noted that the new NY11-4 expansion facility is excluded from the increases included in the fee filing. See SR-NASDAQ-2024-067 at n. 4. The Exchange does not explain if it has made other expansions of co-location facilities that would require it to raise fees to recoup the costs of such expansions.

<sup>11</sup> SIFMA notes that Nasdaq's failure to provide historical information about its costs prevents the exchange from establishing that inflation has negatively affected its ability to continue providing connectivity and co-location at prior fee levels. For example, it is possible Nasdaq's prior fees were set at levels well beyond its costs such that the rate of inflation has yet to catch up.

As Nasdaq is well aware, Nasdaq as an SRO has the burden under the Commission's Rules of Practice "to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder."<sup>12</sup> As the Commission noted in an OIP suspending a Municipal Securities Rulemaking Board fee filing in January 2024:<sup>13</sup>

The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations. Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change. [footnotes omitted]

To assist in complying with these obligations, the Commission staff in 2019 issued guidance to the SROs on information that they could include in fee filings to help demonstrate that filings met the Exchange Act fee requirements.<sup>14</sup>

Contrary to these Exchange Act and rule requirements and related staff guidance, Nasdaq has completely failed in the Fee Filing to provide any detail that would allow the Commission or commenters to determine whether the fee increases imposed in the filings are fair and reasonable and otherwise meet the Exchange Act fee standards. As discussed above, instead of providing concrete examples with actual dollar amounts of how the costs specific to exchange connectivity and co-location facilities have increased, Nasdaq relies on vague descriptions of how inflation has led to general increased costs in related products and services. Nasdaq also does not directly explain in the Fee Filing why the co-location physical cable connections have become more expensive to provide over the past several years, such as by providing details about why maintaining the physical cables is more expensive now versus when the fees were established several years ago. In addition, other than referencing the existence of inflation, Nasdaq provides no explanation of how it arrived at the 5.5% increase, or the subsequent 10% increase, which both appear to be arbitrary without an understanding of the actual costs that led Nasdaq to decide that such increases are warranted and appropriate.

It appears that Nasdaq is unwilling to provide such data to mask the real reason it is seeking the fee increases in the Fee Filing. In particular, Nasdaq appears to be raising fees to increase its profit margin on providing the exchange functions covered by those increases. It appears that Nasdaq has realized that inflation has reduced the profitability of providing such

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<sup>12</sup> See Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

<sup>13</sup> See Release No. 34-99444 (January 29, 2024), 89 FR 7424 (February 2, 2024).

<sup>14</sup> See Commission "Staff Guidance on SRO Rule Filings Relating to Fees" (May 21, 2019), *available at* <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

services and is now seeking to return to those prior profitability levels. Of course, such a reason is not a basis on which to demonstrate that the proposed fees are consistent with the Exchange Act fee standards.

If Nasdaq's 10% fee increases are permitted to be implemented without any Commission suspension or institution of proceedings, SIFMA questions whether Commission staff continue to follow the 2019 Staff Guidance on SRO Rule Filings Relating to Fees. For example, the Commission staff's 2019 guidance states: "When a Fee Filing changes an existing fee, the SRO should clearly identify and discuss in its filing the existing precedent fee in order to make clear the difference between the current fee and the proposed new fee. The SRO should also explain, when relevant, the expected difference between current and proposed fees for different types of market participants, *e.g.*, those with several users or connections as compared to those with few users or connections." As discussed above, Nasdaq's filings are not consistent with the staff's guidance. Nasdaq did not identify and discuss each of the dozens of precedent fees and how they are changing and did not explain the difference between the fees for different types of market participants. The 2019 guidance also states: "If an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs . . . specific information, including quantitative information, should be provided to support that argument." As discussed above, unlike recent fee filings by other exchanges, Nasdaq did not explain or perform any analysis related to its costs.<sup>15</sup>

If the filing moves forward without Commission suspension, it would suggest a change in the Commission staff's policy regarding SRO fee filings. Such a change should be publicly announced along with the rationale for the change and any updated criteria staff are using to evaluate immediately effective SRO fee filings. Without clarity on the substantive factors the Commission and its staff consider when reviewing SRO fee filings, SROs will take inconsistent approaches<sup>16</sup> and the public cannot meaningfully evaluate or comment on the filings.

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<sup>15</sup> See, *e.g.*, Release No. 34-100319, File No. SR-PEARL-2024-25 (June 12, 2024) (including a "Cost Analysis" addressing the "costs associated with compiling and providing the [relevant market data] feeds"); Release No. 34-100806, File No. SR-SAPPHIRE-2024-018 (Aug. 22, 2024) (explicitly citing to the 2019 Commission Staff Guidance and stating that "the Staff Guidance is consistent with the Exchange's view about the type and level of transparency that exchanges should meet to demonstrate compliance with their existing obligations when they seek to charge new fees"); Release No. 34-100793, File No. SR-MEMX-2024-31 (Aug. 21, 2024) (stating that "[p]ursuant to the Options Market Data Analysis, the Exchange calculated the total marginal costs for providing the Options Data Feeds in 2024 at approximately \$307,001. In order to establish fees that are designed to recover the marginal costs of providing the Options Data Feeds with a reasonable profit margin, the Exchange is proposing to modify its Fee Schedule, as described above.").

<sup>16</sup> See *id.*

***Insufficient and incomplete SRO rule filings should result in immediate Commission suspension and the institution of proceedings.***

As noted in footnote 3 of the Fee Filing, Nasdaq's proposal to raise its connectivity and co-location fees has gone through six iterations thus far. On March 15, 2024, Nasdaq filed with the Commission the initial notice that Nasdaq was increasing by 5.5% each of the dozens of exchange connectivity and co-location facilities fees in Nasdaq General 8, Sections 1 and 2 and General 7, Sections 115 and 130. Pursuant to Section 19(b)(3)(A) of the Exchange Act, that rule change was immediately effective when it was filed with the Commission, subject to potential Commission suspension of the rule filing within 60 days pursuant to Section 19(b)(3)(C).<sup>17</sup> The Commission did not suspend the initial rule filing within the 60-day period. As a result, from March 15<sup>th</sup> forward, Nasdaq imposed dozens of fees for connectivity and co-location 5.5% higher than the previous fees.

Approximately every 60 days for the next seven months thereafter, Nasdaq withdrew the prior fee filing and replaced it with a new filing.<sup>18</sup> As discussed above, each new filing was substantially similar to the prior filing, with some incremental changes in each version. Based on the shorter timeframes in which the fifth and sixth filings have been published on the Commission's website and the December 1, 2024 implementation date of the 10% across-the-board fee increases, it appears Nasdaq is getting closer to a final version that it believes will not be suspended. In the meantime, despite this series of obviously incomplete filings (based on Nasdaq's repeated revisions to the initial filing), the 5.5% fee increase has been in place since March 15, 2024.

This practice is not limited to Nasdaq. SIFMA members have observed with increasing frequency exchanges filing immediately effective rule proposals to raise fees for market data or co-location and later withdrawing those filings and replacing them with new filings with little to no substantive difference in the filings.<sup>19</sup> The reason for this practice is not explained in the filings or in any Commission orders. It is SIFMA's understanding, however, that exchanges file immediately effective rule filings and then replace those filings within 60 days to avoid suspension by the Commission during that time. In general, to avoid suspension, we understand that an exchange discusses a fee filing with the Commission staff to determine whether any aspects might cause a Commission suspension.<sup>20</sup> The exchange then withdraws the pending filing before the Commission can suspend it and updates it with a new filing in which the

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<sup>17</sup> 15 U.S.C. § 78s(b)(3).

<sup>18</sup> See *supra* n. 3.

<sup>19</sup> See, e.g., Release No. 34-101627, File No. SR-NYSE-2024-72 at n. 4 (Nov. 14, 2024); Release No. 34-101529, File No. SR-CboeBZX-2024-109 at n. 3 (Nov. 6, 2024).

<sup>20</sup> SIFMA notes that any discussions between the Commission and an exchange do not appear to be documented in the relevant comment/public meeting file.

exchange attempts to address Commission staff concerns. This practice allows SROs to submit what are essentially incomplete fee filings, and then gradually build out the filings over several months as it receives feedback from Commission staff on the grounds for potential suspension and the institution of proceedings. Despite submitting incomplete filings, the increased fees are imposed on exchange members from the date of the initial filing.

If Commission staff believe that an SRO has not met its burden under Section 19(b) of the Exchange Act to explain with specificity “the basis and purpose” of the rule change, including rule changes that are immediately effective, or that a particular rule change is not consistent with the Exchange Act or Commission guidance on fee filing requirements, the Commission should immediately suspend the exchange’s rule filing and institute proceedings to determine whether to approve or disapprove the proposal.<sup>21</sup> An SRO should not be able to game the statutory timeframes by imposing fee increases that are immediately effective for a period of 59 days and then withdrawing the filing and replacing it with a new filing with only incremental changes on the 60<sup>th</sup> day solely to avoid suspension of the filing by the Commission and preserve the exchange’s ability to continue charging the higher fees throughout this process. The Commission should address this practice and take steps to discourage SROs from filing rule changes, particularly immediately effective fee increases, before the filings, including any required details and analysis, are complete.

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<sup>21</sup> For example, the instruction to Form 19b-4 state: “The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the [Exchange] Act and applicable rules and regulations under the [Exchange] Act.”



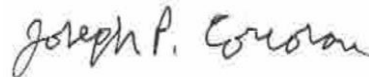
Ms. Vanessa Countryman  
U.S. Securities and Exchange Commission  
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SIFMA appreciates the opportunity to submit this letter to the Commission regarding Nasdaq's Fee Filing. For the reasons set forth above, we urge the Commission to ultimately disapprove the filing after suspending it and issuing an OIP, as Nasdaq has not met its burden of demonstrating that the proposed fees are consistent with the Exchange Act fee requirements. We also urge the Commission to take concrete steps to deter SROs from filing rule changes with immediate effectiveness, and then repeatedly withdrawing and replacing those filings with substantially similar new filings for the sole purpose of avoiding suspension and the institution of proceedings by the Commission. If you have any questions or need any additional information, please contact Ellen Greene at (212) 313-1287 or Joe Corcoran at (202) 962-7383.

Sincerely,



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Joseph Corcoran  
Managing Director and Associate General  
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