

April 24, 2024

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: File No. SR-NASDAQ-2024-016<sup>1</sup>

Dear Ms. Countryman:

The Healthy Markets Association<sup>2</sup> writes to object to another unfounded effort by a registered securities exchange to impermissibly link its fees for data products to customers' trading volumes.

As explained below, the Proposal does not satisfy Commission Rules or the law, and the Commission should suspend it and institute proceedings to disapprove it.

## Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review exchange filings and determine that those filings are consistent with the Exchange Act,<sup>3</sup> including that an exchange's rules:

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<sup>1</sup> *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Encourage Members to Contribute Liquidity to the Exchange by Offering those that Maintain a Particular Minimum Trading Volume Lower Fees for Specified Market Data and Connectivity Products*, SEC, Exch. Act Rel. No. 34-99879, Apr. 1, 2024, available at <https://www.sec.gov/files/rules/sro/nasdaq/2024/34-99879.pdf> (Volume-Linked Data Fees Filing).

<sup>2</sup>The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

<sup>3</sup> See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) ("The SEC "shall approve" a self regulatory organization's proposed rule change only "if it finds that such proposed rule change is consistent with" provisions of the Exchange Act."). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, available at <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (declaring that in order for the Commission to "meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.").

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”<sup>4</sup>
- not be “designed to permit unfair discrimination”;<sup>5</sup>
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;<sup>6</sup> and
- be designed “to protect investors and the public interest.”<sup>7</sup>

Rule 700(b)(3) of the Commission's Rules of Practice clearly establishes that:

Rule 700(b)(3) of the Commission's Rules of Practice states that the “burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.” Rule 700(b)(3) also states that “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.” 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 Exchange Act and the applicable rules and regulations.<sup>8</sup>

In 2017, the Court of Appeals for the District of Columbia Circuit remanded the Commission’s approval of another self-regulatory organization’s rule change, explaining that the Administrative Procedure Act requires the agency to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”<sup>9</sup>

Put simply, the exchange must provide sufficient details to support its filing, and the Commission must examine those details and independently determine that the exchange’s rule meets the requirements of the Exchange Act. While we understand

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<sup>4</sup> 15 U.S.C. § 78f(b)(4).

<sup>5</sup> 15 U.S.C. § 78f(b)(5).

<sup>6</sup> 15 U.S.C. § 78f(b)(8).

<sup>7</sup> 15 U.S.C. § 78f(b)(5).

<sup>8</sup> *Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34–88261, Feb. 21, 2020, available at <https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf> (emphasis added) (citing 17 C.F.R. § 201.700(b)(3)).

<sup>9</sup> *Susquehanna*, at 445 (internal citations omitted).

that this may be difficult, given the often dozens of exchange filings per month, the Commission is nevertheless still obligated to "find" or "determine" that the rule meets the requirements of the Exchange Act.<sup>10</sup>

## Nasdaq Volume-Linked Data Fee Proposal

Nasdaq has decided that, in order to attract more trading volumes, it will raise fees for market data related products on all but its highest volume traders. To its credit, the exchange isn't hiding its objective:

The Exchange proposes to encourage members to contribute liquidity to the Exchange by offering those that maintain a particular minimum trading volume lower fees for specified market data and connectivity products.<sup>11</sup>

While framed as offering discounts, the reality is that the exchange is proposing to raise data product-related fees on all but its highest volume traders.

Specifically, the exchange has proposed that, starting September 1st, it would increase costs on subscribers to its Non-Display Usage data products that don't meet specified average daily volume thresholds. While subscribers that meet the volume thresholds would not see their fees change, those that do not meet the thresholds would see their fees rise as follows:<sup>12</sup>

Number of Subscribers	Current Fee	New Fees
1-39	\$375 per subscriber	\$500 per subscriber
40-99	\$15,000 per firm	\$20,000 per firm
100-249	\$30,000 per firm	\$40,000 per firm
250+	\$75,000 per firm	\$100,000 per firm

The exchange is also proposing to link its fees for 10Gb Ultra and 40Gb connections to average daily volume thresholds. Those that meet the new volume thresholds would have their fees the same as currently. However, those that don't meet the new thresholds would see their fees rise as follows:<sup>13</sup>

Connection Type	Current Fee	New Fees
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<sup>10</sup> *Susquehanna*, at 446.

<sup>11</sup> Volume-Linked Data Fees Filing, at 1.

<sup>12</sup> Volume-Linked Data Fees Filing, at 3.

<sup>13</sup> Volume-Linked Data Fees Filing, at 4.

10Gb Ultra	\$15,825	\$17,800
40Gb	\$21,100	\$23,700

## Analysis

### *The Proposal Is Insufficiently Supported by Relevant Facts and Analysis*

Despite Commission Rules clearly placing the burden on Nasdaq to offer sufficient information with which to conclude Nasdaq has met its burdens under the Exchange Act, Nasdaq has inexplicably failed to offer any meaningful data with which to make that determination – with respect to both its (1) selective fee increase, and (2) tying of market data fees to trading volumes.

The exchange makes no attempt to comply with the law or the Commission staff’s 2019 Fee Filing Guidance,<sup>14</sup> or otherwise provide all of the necessary information for the Commission to effectively evaluate the fees.

#### *The Commission Lacks Sufficient Information to Evaluate the Fee Increases*

Rather than provide the relevant data to support the fee changes, the Proposal instead dedicates significant sections of its analysis to a legal argument claiming that the Commission doesn’t need to look at the data for these specific fees.

Specifically, the Volume-Linked Data Fees Filing boldly asserts that “Nothing in the Act Requires an Examination of Fees in Isolation” and that “Fees Produced in a Competitive Environment are an Equitable Allocation of Reasonable Dues, Fees, and Other Charges.”<sup>15</sup> The Proposal then summarily continues by arguing that “all exchange products” are part of a generally competitive environment. Accordingly, according to the exchange, no more data or analysis is necessary.

Of course, none of that is actual data about the fees themselves,<sup>16</sup> which is what the Commission needs to evaluate.

As an initial matter, while broadly framed as offering a discount to higher volume trading customers, the Proposal would raise significant fees on a swath of customers of Nasdaq’s market data products. The exchange has offered no relevant facts or analysis to support the imposition of the new fees, much less the levels selected.

<sup>14</sup> Staff Guidance on SRO Rule Filings Relating to Fees, SEC, May 21, 2019, *available at* <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees#:~:text=In%20the%20preparation%20of%20a,a%20clear%20and%20comprehensible%20manner.>

<sup>15</sup> Volume-Linked Data Fees Filing, at 7-9.

<sup>16</sup> 15 U.S.C. § 78f(b)(4).

To be blunt, a 33% increase facially appears to be arbitrary, rather than the result of changes to explicit costs and rigorous analysis – or a particularly competitive force.

Further, what is the basis for the fee changes in the first instance, and would those fees, even if they were not linked to trading volumes, be sufficiently “reasonable,” “equitably allocated,” “non-discriminatory,” for example, to satisfy the obligations of the Exchange Act. Did some explicit cost of Nasdaq go up? If so, what was it? And by how much did it rise?

We are puzzled that Nasdaq so boldly declared that it “does not expect any member to be disadvantaged by the proposal.”<sup>17</sup> Any Nasdaq member trading less than the minimum required by the filing would by definition be disadvantaged by having to either pay higher data or connectivity fees, or else having to change its routing in a way that its current volume on Nasdaq suggests is sub-optimal for its business. However, Nasdaq has shared essentially no analysis of how many, what types, and how firms are impacted.

On its face, the rule explicitly charges some customers higher fees because they do not generate sufficient activity in another business of the exchange – trading. Fees would rise by  $\frac{1}{3}$  for Non-Display Usage by any firms that don’t meet the new ADV thresholds. Having a significant cost rise by 33% for some firms and not rising at all for others, creates a massive burden on competition, and discriminates against those who cannot or don’t qualify, as well as other trading venues. In the face of that reality, Nasdaq’s wholly unsupported claim that these fees, in particular, should be permitted because they are somehow part of an overall competitive environment rings hollow.

### *The Commission Lacks Sufficient Information to Evaluate the Linkage of Market Data Costs to Trading Volumes*

There are many complex policy and legal issues that arise in the modern markets, were the Commission to open the door for explicitly tying market data fees to transaction volumes, none of which are raised or even contemplated by Nasdaq in the filing. None of them are comprehensively addressed in the Proposal.

Nasdaq is clearly seeking to establish its controversial “platform” theory that trading products and revenues are inextricably linked to data products and revenues, to such a degree that one should ignore the monopoly pricing on market data, because of the admittedly stiff competition in order routing and executions. Nasdaq has offered no evidence to support how the unprecedented tying of costs from one product (market data) to another product (transactions), in a manner that is explicitly tied to the usage of the latter product, is not violative of the Exchange Act. To the contrary, it expressly discriminates against those firms that choose to not trade directly on Nasdaq, or don’t have the ability to trade in sufficient volumes to qualify for the reduced costs.

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<sup>17</sup> Volume-Linked Data Fees Filing, at 5.

These linkages are fundamentally discriminatory, undue burdens on competition against both smaller volume brokers or those that choose to not trade voluminously at Nasdaq, but also other exchanges, and inequitably allocated. This isn't news. The Commission has thought about some of these issues before, again in response to an unprecedented Nasdaq filing, and determined that it could not make a finding that the linkage of market data costs to trading volumes was consistent with the Exchange Act.

In 2011, Nasdaq filed to offer discounts to its "Depth of Book" data products to firms that met specified trading volumes.<sup>18</sup> At the time, Nasdaq asserted that it was "offering a joint discount on market information and executions because ... The NASDAQ Market Center is a single trading platform that unavoidably produces joint products: execution services and market data."<sup>19</sup>

After receiving objections from the industry, the Commission disapproved of the filing,<sup>20</sup> In doing so, the Commission specifically did "not find" that the rule was consistent with:

- The Exchange Act requirement that exchange rules "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"
- The Exchange Act requirement that exchange rules are "not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;" and
- The Exchange Act requirement that exchange rules "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act;" and
- Section 11A of the Exchange Act and Rule 603 of Regulation NMS, which require the distribution of market data on terms that are not "unreasonably discriminatory."<sup>21</sup>

The Commission further explained that :

***preventing the linking of market data fees to trade executions will help bolster competitive forces in the area of market data, because exchange market data fees must appeal simultaneously to market participants that trade directly on an exchange and those that do not***

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<sup>18</sup> Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees, SEC, Exch. Act Rel. No. 63745, Jan. 20, 2011, available at <https://www.sec.gov/files/rules/sro/nasdaq/2011/34-63745.pdf> (2011 Volume-Linked Data Fee Proposal").

<sup>19</sup>2011 Volume Data Linkage Proposal, at 7 ; see also, *Order Disapproving a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees*, SEC, Exch. Act Rel. No. 65362, at 5, Sept. 20, 2011, available at <https://www.sec.gov/files/rules/sro/nasdaq/2011/34-65362.pdf> ("2011 Disapproval Order").

<sup>20</sup> 2011 Disapproval Order.

<sup>21</sup> 2011 Disapproval Order, at 11-12.

***trade directly on an exchange.*** ... The Commission believes it is important to preserve competitive forces for market data as much as possible.<sup>22</sup>

It continued:

The Commission is similarly concerned about placing an undue burden on competition in the execution services market. NASDAQ's proposal would allow it to use significant discounts on fees for its market data products as an inducement to attract order flow rather than relying on the quality of its transaction services and the level of its transaction fees to compete for orders. NASDAQ argues that any competitor exchange could choose to respond to the proposed pricing by NASDAQ by offering its own discounts on its data products. The Commission also does not believe NASDAQ has demonstrated that the incremental step of linking the pricing of trade executions and market data is an equitable allocation of fees, or is not unfairly or unreasonably discriminatory. As noted above, NASDAQ believes the marketplace is intensely competitive, and argues that competitive forces ensure that its proposal is equitable, fair and not unreasonably discriminatory. NASDAQ's proposal, however, could result in market participants purchasing the same market data from NASDAQ paying different fees depending on the volume of transactions they execute on NASDAQ. NASDAQ's proposal also could result in market participants executing the same volume of transactions on NASDAQ receiving different transaction credits depending on the amount of market data they purchase from NASDAQ. However, exchanges that do not provide market data, or that already do not charge any participant for market data, would not be able to respond to NASDAQ's proposal with a similar pricing scheme.<sup>23</sup>

More recently, another exchange family similarly attempted to explicitly link market data related fees to transaction volumes.<sup>24</sup> In 2019, the Cboe family of exchanges attempted

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<sup>22</sup> 2011 Disapproval Order, at 13 (emphasis added).

<sup>23</sup> 2011 Disapproval Order, at 13-14.

<sup>24</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, SEC, Exch. Act Rel. No. 87304, Oct. 15, 2019, available at <https://www.sec.gov/files/rules/sro/cboe/2019/34-87304.pdf>.





to do that. HMA objected.<sup>25</sup> Rather than battle it out with the Commission staff, the agency, and the courts, Cboe quietly withdrew its filing.<sup>26</sup>

Put simply, Nasdaq has provided essentially no facts relevant to the analysis of its complex, novel fee changes, but has instead argued that the Commission should ignore the absent facts because the overall exchange business is competitive. And it has made these factually vacuous and legally dubious arguments in direct contradiction to the Commission's previous determinations.

## Conclusion

As the Nasdaq Volume-Linked Data Fees Filing is insufficiently supported by facts and analysis provided by the exchange for the Commission to determine that the rule would comply with the law and Commission rules, the Commission should suspend the filing and initiate proceedings to disapprove it.

Further, Nasdaq has offered no more justification for this tying arrangement than it provided in proposing its similar arrangement over a dozen years ago, and the Commission's reasons for rejecting that filing apply equally to this one.

Thank you for your consideration. If you have any questions, please contact me at (202) 909-6138 or [ty@healthymarkets.org](mailto:ty@healthymarkets.org).

Sincerely,

Tyler Gellasch  
President and CEO

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<sup>25</sup> Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Nov. 18, 2019, *available at* <https://www.sec.gov/comments/sr-cboe-2019-082/srcboe2019082-6437608-198687.pdf>.

<sup>26</sup> Letter from Corinne Klott, Cboe to Secretary, SEC, Nov. 26, 2019, *available at* <https://www.sec.gov/comments/sr-cboe-2019-082/srcboe2019082-6482025-199461.pdf>.