

December 27, 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. 34-101839<sup>1</sup>; File No.34-101886<sup>2</sup>; and File No.34-101887<sup>3</sup>

Dear Ms. Countryman:

The Healthy Markets Association<sup>4</sup> writes to object to the above-referenced filings by the Nasdaq family of exchanges (collectively, “Nasdaq Family Inflation Filings”).

The Nasdaq Family Inflation Filings seek to increase the costs for several market data-related products, ostensibly to account for inflation.

The Nasdaq Family Inflation Filings do not provide sufficient information to support a finding by the Commission that the exchanges have met their obligations under the Exchange Act and Commission Rules. Accordingly, the Commission must suspend and initiate proceedings to disapprove them.

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<sup>1</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Certain Fees Based on the Rate of Inflation*, SEC, Exch. Act Rel. No. 34-101839, Dec. 06, 2024, available at <https://www.sec.gov/files/rules/sro/nasdaq/2024/34-101839.pdf> (“Nasdaq Inflation Filing”).

<sup>2</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Certain Fees Based on the Rate of Inflation*, SEC, Exch. Act Rel. No. 34-101886, Dec. 11, 2024, available at <https://www.sec.gov/files/rules/sro/phlx/2024/34-101886.pdf> (“PHLX Inflation Filing”).

<sup>3</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Certain Fees Based on the Rate of Inflation*, SEC, Exch. Act Rel. No. 34-101887, Dec. 11, 2023, available at <https://www.sec.gov/files/rules/sro/bx/2024/34-101887.pdf> (“Nasdaq BX Inflation Filing”).

<sup>4</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>.

# 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>5</sup> including that an exchange's rules:

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”<sup>6</sup>
- not be “designed to permit unfair discrimination”;<sup>7</sup>
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;<sup>8</sup> and
- be designed “to protect investors and the public interest.”<sup>9</sup>

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

The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b-4, the Form is designed to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar

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<sup>5</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.”).

<sup>6</sup> 15 U.S.C. § 78f(b)(4).

<sup>7</sup> 15 U.S.C. § 78f(b)(5).

<sup>8</sup> 15 U.S.C. § 78f(b)(8).

<sup>9</sup> 15 U.S.C. § 78f(b)(5).

rule in place, is not sufficient. Instead, the description of the 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 the self-regulatory organization to provide the information elicited by Form 19b-4 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 rules and regulations issued thereunder that are applicable to the self-regulatory organization.<sup>10</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 us to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "unsupported by substantial evidence." To satisfy the "arbitrary and capricious" standard, "the agency must 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>11</sup>

Put simply, the exchange must provide sufficient details, 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 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>12</sup>

## Background on The Nasdaq Family Inflation Filings

On November 26th, Nasdaq filed the Nasdaq Inflation Filing to increase the costs on ten of its data-related products:

1. Distributor Fees;
2. Short Interest;

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<sup>10</sup> 17 C.F.R. §201.700(b)(3)(emphasis added); accord, *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>.

<sup>11</sup> *Susquehanna*, at 445 (internal citations omitted).

<sup>12</sup> *Susquehanna*, at 446. However, at least when it comes to exchange port fee filings, the Commission has rarely made any such determinations, and yet has simultaneously not frequently disapproved filings for failing to meet the requirements of the Exchange Act and Commission Rules. In fact, almost exactly five years ago, then-Commissioner Robert J. Jackson, Jr. declared that his staff had reviewed all 95 exchange connectivity filings from 2016 through September 2018, and found that not a single one had been rejected by the Commission or staff. Hon. Robert J. Jackson, Jr., *Unfair Exchange: The State of America's Stock Markets*, Sept. 19, 2018, at n.33, available at [https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets#\\_ftn33](https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets#_ftn33).

3. Depth of Book;
4. Distribution Models;
5. FilterView;
6. Nasdaq Last Sale;
7. Nasdaq Share Volume;
8. Nasdaq Basic;
9. Daily Short Volume; and
10. MatchView.<sup>13</sup>

On December 2nd, Nasdaq filed the Nasdaq PHLX Inflation Filing to increase costs on eight of its data-related products:

1. Monthly Administration Fee (for PSX Managed Data Solutions),
2. Monthly Professional Subscriber Fee (for PSX Managed Data Solutions),
3. Monthly Direct Access Fee,
4. Monthly Internal Distributor Fee,
5. Monthly External Distributor Fee,
6. Per Subscriber (Indirect Access)(PSX TotalView),
7. Per Subscriber (Indirect Access) (PSX TotalView), and
8. Enterprise License (PSX TotalView).<sup>14</sup>

Also on December 2nd, Nasdaq filed the Nasdaq BX Inflation Filing to increase the costs on nine of its data-related products:

1. Monthly Direct Access Fee,
2. Monthly Internal Distributor Fee,
3. Monthly External Distributor Fee,
4. Managed Data Solutions Administration Fee,
5. Managed Data Solutions Subscriber Fee,
6. Subscriber fee (Nasdaq)(BX TotalView),
7. Subscriber fee (Non-Nasdaq) (BX TotalView),
8. Non-Display Direct Access ((BX TotalView), and
9. Enterprise License (BX TotalView).<sup>15</sup>

The purported justifications for the Nasdaq Family Inflation Filings is extremely simple: there's been broader macroeconomic inflation since the fees were last set.

Rather than tie any cost increases to the exchanges' own costs of production over time, the exchanges use what they argue is an appropriate proxy, the Producer Price Index for Data Processing and Related Services ("Data Processing PPI").

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<sup>13</sup> Nasdaq Inflation Filing, at 2.

<sup>14</sup> Nasdaq PHLX Inflation Filing, at 7-8.

<sup>15</sup> Nasdaq BX Inflation Filing, at 7-8.

For example, approximately two pages of the brief 14-page release for the Nasdaq BX Inflation Filing are dedicated to explaining the Producer Price Index, and the specific Data Processing PPI in particular.

After selecting the index as an arguable proxy for its own costs, the exchanges then applied the index to the period since each relevant fee was set and created a total proposed percent increase. These total increases range from 8.0% to 16.2%.

The exchanges then divided those total fee increases into three portions, purportedly to lessen the immediate fee hikes on users. Specifically, the fee increases would be divided so that 45 percent of the total increases would occur in 2025. Another 30 percent of the total fee increases would be added in 2026, and the final 25 percent of the total fee increases would be added in 2027.<sup>16</sup>

## Analysis

The exchanges provided almost none of the details needed to understand the markets for each of the twenty-seven data-related products, much less how the changes impact them.

Most importantly, the Nasdaq Family Inflation Filings do not provide commenters and the Commission with the exchanges' actual costs of producing the data-related products.

The filings don't provide commenters and the Commission with details of how many users there are for each product.

The filings similarly failed to provide commenters and the Commission with details regarding how and why market participants use each product, and what competition exists for each product. The exchanges further fail to detail how the fee changes would impact their customers (and their customers' customers), including whether the changes would impede competition, unfairly discriminate, or otherwise negatively impact the consumers of those products in ways that are inconsistent with the Exchange Act.

Oddly, the exchanges noted that message traffic has increased and latencies have decreased since fees were last set. We fail to see the relevance of this information. Did the exchanges make systematic upgrades because of, or in response to, those details that impacted their production costs? If so, what were those costs, and how did the overall costs of production for the exchanges' change?

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<sup>16</sup> Nasdaq Inflation Filing, at 2; Nasdaq PHLX Inflation Filing, at 2; and Nasdaq BX Inflation Filing, at 2.

Rather than meet their statutory burdens, the exchanges simply suggest that the Commission staff should essentially adopt the exchanges' preferred measure of "inflation" and retroactively apply it to their existing products.

This is extremely odd. The exchanges are uniquely aware of their costs of product over time. If they increased, the exchanges could simply say so. If the competitive landscape of the products had changed over time, they could simply say so. They don't.

Instead of providing their actual expenses (which are firmly within the exchanges' possession), the exchanges are asking the Commission and staff to become experts in measures of macroeconomic inflation and adopt their preferred method of inflation as an attenuated \*proxy\* for their actual expenses.

The Commission and its staff – while experienced and talented – are not the expert on inflation. And while we appreciate Nasdaq legal counsel's laudable effort to educate the staff on how the Bureau of Labor Statistics performs its job, these matters are well outside of the Commission's expertise and authority. The Commission is not empowered to ignore the actual costs, competitiveness, and market impacts of exchanges' data-related products.

This approach has been tried before.

For example, the Cboe family of exchanges repeatedly filed, withdrew, and refiled port fee filings that included generalized "inflation" as a purported justification for a fee increase.<sup>17</sup>

As we wrote last year,

The attempt to tie exchange connectivity pricing to macroeconomic inflation levels was laughable the first two times it was made.

But, assuming, *arguendo* that the exchange's pricing for 10Gb connectivity was tied to inflation, then why did the exchange repeatedly hike fees by orders of magnitude greater than inflation for the years from 2010 through today (as the exchange has successively raised rates from \$0 to \$10,000

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<sup>17</sup> See, e.g., *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98390, at 4, Sept. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98390.pdf>. (Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified. Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.").

to \$24,000 to \$48,000 to \$72,000 to \$84,000 to \$90,000 to \$102,000 per year)?

If macroeconomic inflation in the United States was a relevant benchmark for exchange data pricing, then the expected current cost based on the 2010 starting point would be somewhere between \$0 and \$14,000 per year, not \$102,000.<sup>18</sup>

Until recently, Nasdaq, had generally not sought to tie its fees to “inflation,” and rightly so. Nasdaq’s new attempt to raise fees purportedly based upon inflation – rather than its own actual expenses and revenues – is only modestly more sophisticated than Cboe family of exchanges’ efforts last year.<sup>19</sup> Nasdaq has at least selected an arguably more narrowly tailored measure of inflation than Cboe.

However, the Commission isn’t qualified or authorized to choose which is a more “appropriate” substitute for the relevant costs. It needs the actual costs from the exchanges. The exchanges know their costs, and if they want to claim their costs have gone up in recent years, they must provide that data.

Further, the Commission needs to determine that the fees the exchanges seek to impose do “not impose any burden on competition not necessary or appropriate.”<sup>20</sup> The Nasdaq Family Inflation Filings – like the previously withdrawn and suspended Cboe filings – offer no analysis whatsoever related to how the new fees impact the competition between firms who use the impacted products. And while the exchange makes the conclusory assertion that there is no such burden, the Commission cannot simply rely upon that unsupported assertion. Unfortunately, the exchanges have not provided the Commission with sufficient information to draw its own conclusions.

Further, the Commission needs to determine that the fees the exchanges seek to impose are designed to not “permit unfair discrimination between customers, issuers, brokers, or dealers.”<sup>21</sup> Yet, once again, the Nasdaq Family Inflation Filings fail to provide the information needed to make that determination. The Nasdaq Family Inflation Filings

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<sup>18</sup> The cumulative Consumer Price Index increase from 2010 through October 2023 is about 40%. See US Inflation Calculator, CoinNews Media Group, *available at* <https://www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/> (reflecting CPI change from 217 in January 2010 to 308 in October 2023).

<sup>19</sup> Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Oct. 25, 2023, *available at* <https://www.sec.gov/comments/sr-cboeedgx-2023-058/srcboeedgx2023058-280699-685482.pdf> (“The Commission is rightly not tasked with worrying about the cost of milk, lumber, childcare, or Park City vacation rentals – as they don’t have relevance to the exchanges’ costs or implications for its compliance with the Exchange Act’s requirements or Commission Rules. The Exchange Act and Commission Rules dictate that the Commission be provided with sufficient information to know about the exchanges’ actual costs.”).

<sup>20</sup> 15 U.S.C. § 78f(b)(8).

<sup>21</sup> 15 U.S.C. § 78f(b)(5).

– like the previously withdrawn and suspended Cboe filings – do not break down the exchanges’ customers by types or sizes or analyze how they are impacted by the fees.

We note that the Commission has recently expressed concerns with discriminatory pricing by exchanges related to "volume-based exchange transaction pricing," which raise "competitive concerns among exchange members as well as among exchanges."<sup>22</sup> In its release to prohibit some discriminatory pricing practices, the Commission explicitly acknowledged that "lower volume members may find it difficult to compete for customer order flow because they are unable to pass through to customers the favorable exchange transaction pricing or lower commissions that are available to higher-volume members."<sup>23</sup>

Notably, this exact same economic dynamic exists with the high (and rising) fixed costs for data-related products impacted by these changes. On a per-share traded basis, the fixed costs for high volume traders are significantly lower than for low volume traders.

Of course, we aren’t surprised to see Nasdaq attempt to raise fees across its family of exchanges without providing any meaningful data. After all, Cboe charged heightened connectivity fees for over a year based, in part, on a generalized reference to "inflation."

## Conclusion

If the Commission is to fulfill its obligation to ensure that exchange filings are consistent with the Exchange Act, it needs to know significantly more information than the exchanges have provided. The Commission’s determination to ignore the requirements of the law and its own Rules with respect to these filings would not withstand legal challenge. Accordingly, the Commission must suspend the facially deficient Nasdaq Family Inflation Filings and initiate proceedings to disapprove them.

Thank you for your consideration.

Sincerely,



Tyler Gellasch  
President and CEO

Cc: Hon. Gary Gensler, Chair

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<sup>22</sup> *Volume-Based Exchange Transaction Pricing for NMS Stocks*, SEC, Exch. Act Rel. No. 34-98766, at 9, Oct. 18, 2023, available at <https://www.sec.gov/files/rules/proposed/2023/34-98766.pdf>.

<sup>23</sup> *Id.*, at 10.



