



November 20, 2012

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

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File No. SR-NASDAQ-2012-090; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend Rule 4626—Limitation of Liability

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment further on the above-referenced filing, which is a proposed rule change filed by the Nasdaq Stock Market (“Nasdaq”) with the Securities and Exchange Commission (“Commission”).² Nasdaq has proposed to modify its Rule 4626 in an effort to compensate its member firms for the effect of numerous systems and technical malfunctions that Nasdaq experienced during the May 18th, 2012, Initial Public Offering (“IPO”) of Facebook, Inc. (“Facebook”). On August 22, 2012, SIFMA submitted comments in response to the Commission’s initial notice of filing of the proposed rule change.³ Nasdaq submitted a response to comments on September 17, 2012.⁴ The Commission has instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁵

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. 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 Securities Exchange Act Release No. 67507 (July 26, 2012), 77 FR 45706 (August 1, 2012).

³ Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA (August 22, 2012), available at <http://sec.gov/comments/sr-nasdaq-2012-090/nasdaq2012090-6.pdf>.

⁴ Letter from Joan C. Conley, Senior Vice President & Corporate Secretary, Nasdaq (September 17, 2012) (“Nasdaq Response”), available at <http://www.sec.gov/comments/sr-nasdaq-2012-090/nasdaq2012090-14.pdf>.

⁵ Securities Exchange Act Release No. 68115 (October 26, 2012), 77 FR 66197 (November 2, 2012).

SIFMA submits this letter to reiterate certain of its earlier comments and to correct certain points stated in Nasdaq's Response. In its earlier comment letter, SIFMA made three main points:

- SIFMA stated its view that Nasdaq is not entitled to regulatory immunity in connection with the Facebook IPO, because Nasdaq was not acting in its capacity as a self-regulatory organization ("SRO").
- SIFMA requested that *Nasdaq* waive or toll the one-year time limit in Sections 18 and 19 of its Services Agreement in connection with any claims, disputes, controversies, or other matters in question relating to the Facebook IPO while these proceedings are ongoing and until any process approved by the Commission is completed.
- SIFMA requested clarification from Nasdaq that member firms participating in the compensation plan would not be required to release Nasdaq from liability until they have received a final payment amount under the plan.

On the third point, SIFMA appreciates Nasdaq's clarification in its Response that it intends to implement the compensation plan "such that a member will be aware of the results of its claim prior to being required to execute a release."⁶ In response to SIFMA's other two points, however, Nasdaq has presented arguments that need to be corrected.

Regulatory Immunity

SIFMA reiterates the points and arguments on regulatory immunity from its earlier comments, and we request that the Commission treat those arguments as having been restated here. A central point in our earlier letter is that the Securities Exchange Act of 1934 ("Exchange Act") recognizes that national securities exchanges act in two distinct statutory roles: (1) as national securities exchanges, they act as market participants; and (2) as SROs, they act as market regulators. In SIFMA's view, Nasdaq's actions in connection with the Facebook IPO were solely in its role as a market participant, not as a market regulator, because Nasdaq's purpose in competing for the Facebook listing, serving as Facebook's primary exchange, and opening trading in the Facebook IPO was to further its business objectives, not to regulate its members.

In response to this point, Nasdaq incorrectly portrays SIFMA's argument. SIFMA's point is, and remains, that national securities exchanges act *both* as market participants *and* as SROs. In fact, as we stated in our earlier letter, national securities exchanges are SROs *by definition* under Section 3(a)(26) of the Exchange Act. As this applies to Nasdaq's proposed compensation plan, our point is that the doctrine of regulatory immunity does not apply to every action carried out by a national securities exchange. The case law on this point provides exchanges with immunity from lawsuits in limited situations involving the specific discharge of

⁶ Nasdaq Response at 4, n.9

their responsibilities as SROs.⁷ Nasdaq has provided no justification for its claim in the proposed rule change that it acted as a market regulator during the Facebook IPO.

SIFMA requests that, at the very least, any final disposition by Commission on the proposed rule change, whether approval or disapproval, include language stating that the Commission is not making any findings or expressing any opinion with respect to Nasdaq's representations and interpretations on its regulatory capacity in connection with the Facebook IPO. While we recognize that the Commission will be required to make a finding as to whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder, Nasdaq should not be permitted to leverage general conclusions or findings by the Commission on the proposal to support any claims of regulatory immunity.

Time Limitation for Bringing Claims

SIFMA reiterates the points and arguments on the application of Sections 18 and 19 of Nasdaq's Services Agreement from its earlier comments, and we request that the Commission treat those arguments as having been restated here. We continue to believe that the application of that one-year time limitation for bringing claims against Nasdaq in connection with the Facebook IPO is unrealistic given that member firms are unlikely to have certainty on payments under the proposed compensation plan until after May 18, 2013 – the one-year anniversary of the Facebook IPO. Accordingly, as we stated in our earlier comments, Nasdaq should waive or toll that time limitation for claims relating to the Facebook IPO while these proceedings are ongoing and until any process approved by the Commission is completed.

The Nasdaq Response incorrectly states SIFMA's position on this issue. We agree with Nasdaq that the Commission should not interfere with the existing contractual relationships between Nasdaq and its members. It is for that reason that we asked *Nasdaq* to waive the time limitation. SIFMA has not asked and is not asking the Commission to amend Nasdaq's Services Agreement. Rather, Nasdaq itself should waive the time limitation in light of the procedural steps that remain before its proposed compensation plan can be implemented.

⁷ See, e.g., *DL Capital Group, LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 96 (2d Cir. 2005); see also *D'Alessio v. NYSE, Inc.*, 258 F.3d 93, 105 (2d Cir. 2001); *Sparta Surgical Corp. v. National Ass'n of Securities Dealers, Inc.*, 159 F.3d 1209 (9th Cir. 1998); *Barbara v. NYSE*, 99 F.3d 49, 50 (2d Cir. 1996).

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SIFMA appreciates the opportunity to comment further on the proposed modifications to Nasdaq Rule 4626. We look forward to discussing the matter further with the Commission and its staff. If you have any comments or questions, please do not hesitate to contact me at 202-962-7383 or tlazo@sifma.org.

Sincerely,

A handwritten signature in blue ink, appearing to read "Theodore R. Lazo", with a long horizontal flourish extending to the right.

Theodore R. Lazo
Managing Director and
Associate General Counsel

cc: Mary L. Schapiro, Chairman
Luis A. Aguilar, Commissioner
Troy A. Paredes, Commissioner
Elisse B. Walter, Commissioner
Daniel J. Gallagher, Commissioner
Robert W. Cook, Director, Division of Trading and Markets