



March 28, 2025

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

RE: File No. SR-NASDAQ-2025-028; Notice of Filing and Immediate Effectiveness of Proposed Rule Change that Includes the Introduction of New Fees for Sub-\$1.00 Orders Executed in the Opening Cross

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ submits this comment letter to the Securities and Exchange Commission (the “Commission”) in response to The NASDAQ Stock Market LLC’s (“Nasdaq”) March 13th filing that includes the introduction of new uncapped fees of 0.25% of the total dollar volume for Opening Cross Orders in shares priced below \$1.00.² As described below, the Nasdaq filing fails to meet the requirements of the Securities and Exchange Act of 1934 (the “Exchange Act”), which requires exchange fees to be reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition. The Commission should therefore immediately suspend Nasdaq’s filing, which will remain effective until the Commission takes such action. Ultimately, the Commission should disapprove these new fees because they will impose an undue burden on competition, harm retail investors, are contrary to the public interest, and otherwise contravene the Exchange Act standards governing exchange fees.

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 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>.

² Notice of Filing and Immediate Effectiveness of Proposed Rule Change to (i) introduce a new fee credit under Equity 7, Section 118(a)(1) (Fees for Execution and Routing of Orders) and amend the fee schedule; (ii) introduce new fees and credits under Equity 7, Section 118(b), (iii) amend Equity 7, Section 118(e) (Opening Cross) and introduce a new fee credit; and (iv) eliminate the Excess Order Fee credits at Equity 7, Section 118(m) and remove related language in Equity 7, Section 114(d)(1), Release No. 34-102698, File No. SR-NASDAQ-2025-028 (Mar. 19, 2025), 90 FR 13643 (Mar. 25, 2025).

Executive Summary

The Commission should suspend and ultimately disapprove Nasdaq's filing. First, the new fees fail the Exchange Act standards governing exchange fees because they will disproportionately affect and harm retail investors.³ Second, Nasdaq failed to reasonably analyze the effects of the proposed new fees, provide any meaningful justification for the rule change, and otherwise demonstrate to the Commission the filing is consistent with the Exchange Act. Finally, the filing fails to address whether the new fees could incentivize Nasdaq to maintain listings for low-priced issuers that fail to meet the exchange's continued listing requirements. For these reasons, the Commission should immediately suspend Nasdaq's filing, institute proceedings to review it, and ultimately disapprove it because Nasdaq has failed to demonstrate that the new fees meet the requirements of the Exchange Act.

Background

Nasdaq's filing proposes to alter the treatment of executions in sub-\$1.00 securities in the Nasdaq Opening Cross in two ways.⁴ First, Nasdaq currently applies a \$35,000 monthly cap on all fees charged to firms for executing in the Nasdaq Opening Cross, provided that the firm add at least one million shares of liquidity, on average per day, per month.⁵ Nasdaq's filing will remove this cap for executions in sub-\$1.00 securities in the Opening Cross so that there will be no limit on the amount of fees firms pay for these executions. Second, Nasdaq's filing will impose a new 0.25% (25 basis points) charge on the total dollar volume of Opening Cross orders executed in shares priced below \$1.00.

The Commission should disapprove Nasdaq's filing because it is inconsistent with the Exchange Act.

As noted, the Exchange Act requires that the fees of a national securities exchange be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not unduly burdensome on competition.⁶ As a self-regulatory organization ("SRO"), the burden is on Nasdaq "to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder."⁷

³ 15 U.S.C. §§ 78f(b)(4), (5), and (8).

⁴ According to Nasdaq, "[t]he Nasdaq Opening and Closing Crosses are price discovery facilities that cross orders at a single price. The Crosses enable market participants to execute on-open and on-close interest and provide unparalleled transparency into the market open and market close. All nationally-listed securities are eligible for the Crosses." https://nasdaqtrader.com/content/productservices/trading/crosses/openclose_faqs.pdf.

⁵ Nasdaq Rule Equity 7, Section 118(e)(2).

⁶ 15 U.S.C. §§ 78f(b)(4), (5), and (8).

⁷ See Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

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The Commission has consistently explained that cursory analyses and unsupported representations do not satisfy the requirements of the Exchange Act, and the SRO's filings must be sufficiently detailed to support an affirmative Commission finding. Specifically, "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."⁸ The Commission and the courts have similarly made clear that "unquestioning reliance" on an SRO's representations in a proposed rule change are not sufficient basis to approve a rule change.⁹ Nasdaq's filing fails to meet these standards.

To assist exchanges and SROs in complying with these obligations, in 2019 the Commission staff issued guidance specifying the information that should be included in fee filings to help demonstrate that such filings met the Exchange Act fee requirements.¹⁰ Recently, SIFMA has urged the Commission to carefully scrutinize immediately effective exchange fee filings to ensure that they comply with the Exchange Act and the Commission's SRO fee filing guidance.¹¹

Nasdaq's filing fails to meet the requirements of the Exchange Act for several reasons, including as outlined by the SEC staff's 2019 guidance, and should be rejected. First, Nasdaq's representations regarding the legal consistency of the new fees with the Exchange Act fee standards are conclusory. For example, the filing claims that "the new order fee of 0.25% of total dollar volume for Opening Cross Orders that are executed in securities priced below \$1 [] does not impose a burden on competition *because it does not disproportionately favor or disadvantage any particular type of market participant.*"¹² This statement is inaccurate, as SIFMA understands that retail investors are reportedly the most active segment that trades securities priced below \$1.00. As a result, the rule change will disproportionately affect and harm retail investors. Contrary to Nasdaq's representation, the new fee is not equitably allocated, is harmful, and unfairly discriminates against retail investors.

Second, these fees will result in substantially higher transaction costs for stocks priced below \$1.00 than for stocks priced above \$1.00 in the Opening Cross. In response to the Commission's proposal regarding volume-based transaction pricing for NMS stocks, Nasdaq argued that discounts for increased volumes recognize economies of scale and that marginal

⁸ Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Establish the 2024 Rate Card Fees for Dealers and Municipal Advisors Pursuant to MSRB Rules A-11 and A-13, Release No. 34-99444, File No. SR-MSRB-2023-06 (Jan. 29, 2024), 89 FR 7424, 7428 (Feb. 2, 2024).

⁹ Id.

¹⁰ 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>.

¹¹ See, Letter from Ellen Greene and Joseph Corcoran, Managing Directors, SIFMA to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, dated Dec. 13, 2024 (*available at*, <https://www.sec.gov/comments/sr-nasdaq-2024-067/srnasdaq2024067-547315-1568722.pdf>).

¹² 90 FR at 13647 (emphasis added).

costs fall as the volume of a customer's purchase increase.¹³ Nasdaq explained that "this pricing model is recognized to be pro-competitive and pro-consumer, leading firms to provide better products to consumers at lower prices."¹⁴ Nasdaq's rule filing appears to take the opposite approach, increasing fees in an area of the market where volumes in sub-dollar stocks have substantially increased over the past several years and now account for a material portion of the daily share trading volume. Nasdaq's apparent reversal should call into question whether its new fees are, in fact, competitive and in the public interest as its new filing claims.

Third, Nasdaq failed to consider the competitive effects of the rule change. Nasdaq claims that if the change proposed in the filing is unattractive to market participants, "it is likely that the Exchange will lose market share as a result."¹⁵ However, in practice, investors wanting to participate in an opening auction in a Nasdaq-listed security typically do so via the Nasdaq Opening Cross. Nasdaq's filing does not address the pricing power it has with respect to the Opening Cross and therefore it has not demonstrated that there would be no undue burdens on competition resulting from the new fees.

Nasdaq's filing states that the new fee "incentivizes participants by introducing a fair and transparent order fee for participants that execute orders below \$1."¹⁶ Nasdaq should explain what this means and how the proposal would incentivize participants to participate in the Opening Cross. It is more likely that adding a new fee on orders that execute below \$1.00 in the Opening Cross could result in the opposite effect and harm liquidity in the Opening Cross. Similarly, Nasdaq's filing stated that the new fee "ensures alignment with other Nasdaq fee structures," but it does not explain what this means or what other Nasdaq fee structures it is referencing.¹⁷ Nasdaq also did not provide any economic analysis or justification for why it selected the proposed 0.25% rate or why it is applying the charge only to securities below \$1.00. Without this kind of analysis and explanation, Nasdaq cannot demonstrate that the fee is reasonable.

Finally, Nasdaq's filing is internally inconsistent. In a separate section in which Nasdaq established a new credit for sub-\$1.00 executions in the Pre-Market Session and a corresponding charge for such orders that are routed away from Nasdaq and executed elsewhere, Nasdaq's filing stated that these credits and fees will "provide[] market participants with an incentive to contribute liquidity at the start of the trading day, which will benefit overall market efficiency."¹⁸ However, Nasdaq is silent on the anticipated impact to liquidity with respect to the charge for executions in sub-\$1.00 securities in the Opening Cross. Rather, Nasdaq states that the new charge will "enhance clarity, fairness and market efficiency while maintaining a competitive

¹³ <https://www.sec.gov/comments/s7-18-23/s71823-319639-830942.pdf>

¹⁴ Id.

¹⁵ 90 FR at 13647.

¹⁶ 90 FR at 13644.

¹⁷ 90 FR at 13646.

¹⁸ Id.

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pricing structure.”¹⁹ These general assertions are not sufficient to demonstrate that an exchange has met its burden under the Exchange Act.²⁰

Nasdaq did not reasonably consider or analyze the potential harms, undue burdens on competition, or the discriminatory effect of its filing, and therefore it should be rejected under the Exchange Act and the Commission’s rules of practice.

The Commission should disapprove the filing because it could disincentivize Nasdaq from delisting issuers that fall below its listing standards.

As we have stated in previous correspondence, SIFMA and other market participants have observed the increase in trading activity in low-priced securities in recent years. For example, on some trading days, trading in low-priced securities has accounted for nearly 30% of all share volume traded in NMS stocks.²¹ Along with an increase in trading activity, we have observed many issuers with low-priced securities engaging in reverse stock splits in recent years, typically for the purpose of maintaining a \$1.00 bid price to avoid delisting from an exchange. Reverse stock splits create significant financial risks for customers and operational challenges for broker-dealers. Nasdaq and other exchanges have made some changes to their listing rules regarding the ability and timing of issuers to use reverse stock splits to remain listed.²² While SIFMA and other market participants have supported these efforts, we believe the exchanges should adopt more meaningful changes to their listing rules to address the proliferation of exchange-listed companies trading for extended periods below \$1.00 in contravention of their listing rules.²³

Nonetheless, Nasdaq’s current rule filing—which creates a new revenue source for Nasdaq by assessing a charge for executions in sub-\$1.00 securities in the Opening Cross—would appear to provide a revenue incentive to keep these companies listed. Nasdaq should

¹⁹ 90 FR at 13647.

²⁰ 17 CFR 201.700(b)(3)(i) (“A mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient.”).

²¹ See, e.g., Letters from Ellen Greene and Joseph Corcoran, Managing Directors, SIFMA to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission dated July 31, 2024 (*available at*, <https://www.sec.gov/comments/sr-nasdaq-2024-029/srnasdaq2024029-498535-1461442.pdf>) and October 8, 2024 (*available at*, <https://www.sec.gov/comments/sr-nasdaq-2024-045/srnasdaq2024045-527615-1515662.pdf>).

²² See, e.g., Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 2, to Modify the Application of Bid Price Compliance Periods, File No. SR-NASDAQ-2024-029, Release No. 34-101271 (Oct. 7, 2024), 89 FR 82652 (Oct. 11, 2024); Notice of Filing of Proposed Rule Change to Amend Section 802.01C of the NYSE Listed Company Manual (Price Criteria for Capital or Common Stock) to Limit the Use of Reverse Stock Splits to Regain Compliance with the Price Criteria in Certain Circumstances, File No. SR-NYSE-2024-48, Release No. 34-101306 (Oct. 10, 2024), 89 FR 83738 (Oct. 17, 2024).

²³ See, e.g., Petition for Rulemaking on Exchange Listings of Penny Stocks, Letter from Thomas H. Merritt, Deputy General Counsel, Virtu Financial, Inc. to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission (July 15, 2024), *available at* <https://www.sec.gov/files/rules/petitions/2024/petn4-830.pdf>.

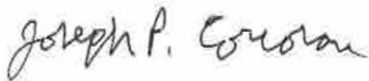
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explain why this incentive, which is at odds with Nasdaq's role as a regulator, is justified under its proposed fee filing.

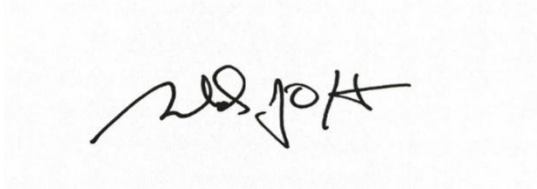
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SIFMA appreciates the opportunity to comment on Nasdaq's fee filing. As discussed above, Nasdaq did not demonstrate that its rule filing to charge a new fee of 0.25% of total dollar volume of executions in sub-\$1.00 stocks in the Nasdaq Opening Cross complies with the Exchange Act. Therefore, the Commission should suspend the rule filing, institute proceedings to review it, and ultimately disapprove it. If you have any questions or need any additional information, please contact Joe Corcoran at (202) 962-7383 or Gerald O'Hara at (202) 962-7343.

Sincerely,



Joseph Corcoran
Managing Director and Associate General
Counsel



Gerald O'Hara
Vice President and Assistant General
Counsel