



April 10, 2024

VIA ELECTRONIC DELIVERY

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

RE: The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services; Release No. 34-99744; File No. SR-NASDAQ-2024-008 (Mar. 15, 2024)

Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services; Release No. 34-99743; File No. SR-Phlx-2024-08 (Mar. 15, 2024)

Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services; Release No. 34-99746; File No. SR-MRX-2024-04 (Mar. 15, 2024)

Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services; Release No. 34-99747; File No. SR-ISE-2024-09 (Mar. 15, 2024)

Nasdaq GEMX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services; Release No. 34-99748; File No. SR-GEMX-2024-05 (Mar. 15, 2024)

Nasdaq BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fees for Connectivity and Co-location Services; Release No. 34-99749; File No. SR-BX-2024-008 (Mar. 15, 2024)

Dear Ms. Countryman:

Virtu Financial, Inc. (“Virtu”)¹ respectfully submits this letter in response to the above-referenced proposed rule changes filed with the Securities and Exchange Commission (the “SEC”

¹ Virtu is a leading financial firm that leverages cutting edge technology to deliver liquidity to the global markets and innovative, transparent trading solutions to its clients. Virtu operates as a market maker across numerous exchanges in the U.S. and is a member of all U.S. registered stock exchanges. Virtu’s market structure expertise, broad diversification, and execution technology enables it to provide competitive bids and offers in over 25,000 securities, at over 235 venues, in 36 countries worldwide.



or “Commission”) by The Nasdaq Stock Market LLC, Nasdaq PHLX LLC, Nasdaq MRX, LLC, Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq BX, Inc. (the “Exchanges”) seeking to amend their fee schedules for connectivity and co-location services (the “Proposals”). Specifically, the Exchanges propose to increase their fees for connectivity and co-location services in General 8, fees assessed for remote multi-cast ITCH (“MITCH”) Wave Ports in Equity 7, Section 115, and certain fees related to Nasdaq Testing Facilities in Equity 7, Section 130 by 5.5%, with certain exceptions.²

Virtu strongly opposes the imposition of these fee increases and urges the Commission to disapprove them. Virtu’s objection to the Proposals is simple and straightforward: the Exchanges have failed to meet their obligation under the Exchange Act of 1934 (the “Exchange Act”) to provide sufficiently detailed information for the Commission and affected market participants to determine whether or not the proposed fees are “fair and reasonable” and not “unfairly discriminatory”.

Beginning in 2017 following the United States Court of Appeals for the District of Columbia’s *Susquehanna Decision*,³ the Commission began applying a heightened review process for exchange fee filings. Under this heightened review process, which was further documented in staff guidance issued in 2019,⁴ in addition to offering persuasive evidence that the proposed fee is constrained by significant competitive forces, SROs also may be required to provide detailed cost-based analysis demonstrating that the fee is fair and reasonable.

The heightened review process that is now mandated by the Commission appropriately sets a higher bar for exchanges to justify increases in fees for exchange connectivity and market data. To meet this higher bar, exchanges need to be substantially more transparent about their underlying costs, which is entirely appropriate for market centers like the Exchanges that enjoy the benefits of order protection. The Proposals fail to meet the statutory standard, as well as the Commission’s own standards for heightened review of fee filings, and should therefore be disapproved.

The Proposals Fail To Provide An Adequate Analysis Of Purportedly Increased Exchange Costs Justifying a Fee Increase

The Proposals fail to offer information concerning cost increases the Exchanges purportedly have experienced sufficient for the Commission and market participants to assess whether the proposed fee increases are fair and reasonable and not unfairly discriminatory.

² The Exchanges are excluding GPS Antenna fees from the Proposal because those fees were recently increased in December of 2023

³ See *Susquehanna International Group, LLP v. Securities & Exchange Commission*, 866 F.3d 442 (D.C. Circuit 2017).

⁴ See 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> (the “Staff Guidance”).

Inflation

The Exchanges' principal argument is that the proposed 5.5% increase is reasonable when compared to inflation of more than 30% since 2015 when the Exchanges last updated many of their co-location and connectivity fees. While we acknowledge that there has been significant inflation in recent years and that for-profit businesses from time to time have to raise their prices in response to pressures caused by inflation, we do not believe that the Exchanges have provided sufficient information to demonstrate: (i) *how* they determined that 5.5% is the appropriate percentage to increase their fees, (ii) *why* this is an appropriate, and thus fair and reasonable, increase, and (iii) *what* specific cost data the Exchanges are relying on to justify a 5.5% increase. To us, it seems as though the Exchanges pulled the 5.5% number out of thin air, thinking that because it is substantially lower than the purported 30% inflation rate since 2015, nobody would ask any questions or contest it. This approach does not meet the heightened standard of review required under the Exchange Act and the Commission's own guidance.

Unsubstantiated Cost Increases

In support of their proposed fee increases, the Exchanges further contend that their costs to provide connectivity and co-location services have increased, including costs related to (i) data center facilities, (ii) hardware and equipment, and (iii) personnel. The Exchanges attribute some of the increased costs they are purportedly experiencing to annual escalation clauses that increase certain costs for the Exchanges, and further note that they are not seeking to recoup all of their cost increases through the proposed fee increases. However, the Exchanges do not provide any specific detail about any of the costs that they claim have risen. For example:

- The Exchanges contend that data center costs have risen. However, they provide no information about what their current data center costs are, or how much they have risen since 2015. Also, the Exchanges fail to provide any information about how many data centers they have, whether they are expanding or building new data centers, whether they are closing any data centers, and how these data points impacted the analysis.
- The Exchanges contend that hardware and equipment costs have risen. But they fail to provide any information about what hardware and equipment costs currently are, or how much they have risen since 2015. Also, technology has evolved substantially since 2015 and, generally speaking, more advanced technology drives efficiency and makes costs go down. The Exchanges have not described how evolving technology has impacted the efficiency of their hardware and equipment nor addressed whether they have achieved cost savings as a result.
- The Exchanges claim that personnel costs have risen. But they provide no information about how many personnel are needed to provide co-location and connectivity services, what roles those personnel play, whether there are more or fewer personnel providing those services since 2015, and how much their personnel costs have risen since 2015.

- The Exchanges claim that they are not seeking to cover the full extent of their cost increases with the Proposals. But this statement is useless without a sufficient explanation of the full extent of their cost increases so that the Commission and market participants can judge the appropriateness of the proposed increases.

Investments in Connectivity and Co-Location Services

Finally, the Exchanges attempt to justify their proposed fee increases by touting their investments in improvements that purportedly enhance the value of their connectivity and co-location services, including by refreshing hardware and expanding their co-location facilities to offer customers additional space and power. However, the Exchanges provide no details about what hardware is being refreshed, which co-location facilities are being added, and, whether the purported investments in technology will address systems malfunctions that the Exchanges have experienced in recent months, including RASH FIX matching engine defects that led to significant system outages in December 2023 and March 2024.

* * *

Virtu appreciates the opportunity to register its objections to the Proposals. Virtu recognizes that the Exchanges are for-profit enterprises that cannot give away their services for free. However, given their unique status as SROs that enjoy many benefits over other market centers, the Exchanges must be held to a high standard in justifying their fees for market connectivity and market data. For example, the Exchanges benefit from order protection under Rule 611, which prohibits exchanges, market makers, and broker-dealers from “trading through” protected quotations for any NMS security. The Exchanges also enjoy unique commercial power over most institutional market participants, who are forced to pay the Exchanges for connectivity and market data to run their businesses and serve their customers. No other participants in our capital markets enjoy such privileges, and therefore the Exchanges are explicitly held to a higher standard under the Exchange Act to justify their fees.



Here, the Exchanges have fallen short of their obligation under the Exchange Act to substantiate that the proposed fee increases are fair, reasonable, and not unduly discriminatory, and the Proposals should therefore be disapproved.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Thomas M. Merritt". The signature is fluid and cursive, with a long horizontal stroke at the end.

Thomas M. Merritt
Deputy General Counsel

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime E. Lizarraga, Commissioner
Dr. Haoxiang Zhu, Director, Division of Trading and Markets