



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-100188; File No. SR-NASDAQ-2024-016]

**Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Increase Fees for Certain Market Data and Connectivity Products and to Maintain the Current Fees for Such Products if Members Meet a Minimum Average Daily Displayed Volume Threshold**

May 21, 2024.

I. Introduction

On March 22, 2024, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change (File Number SR-NASDAQ-2024-016) to increase fees for certain market data and connectivity products and to maintain the current fees for such products if members meet a minimum average daily displayed volume threshold (“Proposal”). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on April 1, 2024.<sup>4</sup> The Commission has received one comment letter on the proposed rule change.<sup>5</sup> Pursuant to Section 19(b)(3)(C) of the Act,<sup>6</sup> the Commission is hereby: (1)

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release No. 99879 (April 5, 2024), 89 FR 24070 (“Notice”).

<sup>5</sup> See Letter from Tyler Gellach, President and CEO, Healthy Markets Association, to Vanessa Countryman, Secretary, Commission, dated April 24, 2024 (“HMA Letter”). Comments received on the Proposal are available at <https://www.sec.gov/comments/sr-nasdaq-2024-016/srnasdaq2024016.htm>.

<sup>6</sup> 15 U.S.C. 78s(b)(3)(C).

temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

## II. Background and Description of the Proposed Rule Change

The Exchange states that the purpose of the proposed rule change is to reward firms that meet a minimum average daily displayed volume with lower fees for Non-Display Usage and the Exchange's 40Gb and 10Gb Ultra high-speed connection to the Exchange.<sup>7</sup> The Exchange explains that Non-Display fees are currently assessed on a per-subscriber<sup>8</sup> or per-firm basis.<sup>9</sup> Monthly fees are \$375 per Subscriber for 1-39 subscribers; \$15,000 per firm for 40-99 subscribers; \$30,000 per firm for 100-249 subscribers; and \$75,000 per firm for 250 or more subscribers.<sup>10</sup> Under the proposed rule change, a member firm that meets the minimum ADV threshold discussed below would continue to pay those fees.<sup>11</sup> The Exchange further states that firms that do not meet the minimum ADV threshold, however, as well as non-member firms, would pay the new monthly fees of \$500 per subscriber for 1-39 subscribers; \$20,000 per firm for 40-99 subscribers; \$40,000 per firm for 100-249 subscribers; and \$100,000 per firm for 250 or more subscribers.<sup>12</sup>

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<sup>7</sup> This proposed rule change was initially filed on March 6, 2024, as SR-Nasdaq-2024-011. On March 20, 2024, that filing was withdrawn and replaced with SR-Nasdaq-2024-015. On March 22, 2024, SR-Nasdaq-2024-015 was withdrawn and replaced with the instant filing due to a technical error. See Notice, 89 FR at 24070.

<sup>8</sup> "Subscriber" is defined as a device or computer terminal or an automated service which is entitled to receive information. See Notice, 89 FR at 24070.

<sup>9</sup> See Notice, 89 FR at 24070.

<sup>10</sup> See id.

<sup>11</sup> See id.

<sup>12</sup> See id. (stating that Non-Display Usage is any method of accessing Nasdaq U.S. information that involves access or use by a machine or automated device without access or use of a display by a natural person and that examples of Non-Display Usage include, but are not limited to: Automated trading; Automated order/quote generation and/or order/quote pegging; Price referencing for use in algorithmic trading; Price referencing for use in smart order routing; Program trading and high frequency trading; Order verification; Automated surveillance programs; Risk management; Automatic order cancellation, or automatic error discovery; Clearing and settlement activities; Account maintenance (e.g., controlling margin for a customer account); and "Hot" disaster recovery). The Exchange also states that, although either top-of-book or depth-of-book data can be used for Non-Display Usage, the Proposal modifies fees for depth-of-book data only. See Notice, 89 FR at 24070 (citing Equity 7, Section 123 (Nasdaq Depth-of-Book data)).

Nasdaq states that it offers customers the opportunity to co-locate their servers and equipment within the Nasdaq Data Center,<sup>13</sup> allowing participants an opportunity to reduce latency and network complexity.<sup>14</sup> Nasdaq offers a variety of connectivity options to fit a firm's specific networking needs, including the high-speed 40Gb and 10Gb Ultra networks.<sup>15</sup> The Exchange further states that all of its colocation and connectivity options offer customers access to any or all Nasdaq exchanges through a single connection.<sup>16</sup>

Nasdaq currently charges members an ongoing monthly fee of \$21,100 for the 40Gb fiber connection and \$15,825 for the 10Gb Ultra connection to the Nasdaq exchanges.<sup>17</sup> Under the proposed rule change, a firm that meets the minimum ADV threshold would continue to pay those fees.<sup>18</sup> Member firms that do not meet the minimum ADV threshold discussed below, as well as non-member firms, would pay the new monthly fee of \$23,700 for the 40Gb fiber connection and \$17,800 for the 10Gb Ultra connection.<sup>19</sup>

The Proposal introduces the new term "Minimum ADV," which will mean the introduction by a member of at least one million shares of added executed displayed liquidity on average per trading day in all securities through one or more of the member's market participant identifiers ("MPIDs") on the Nasdaq Market Center.<sup>20</sup> Average daily volume is calculated as the total volume of shares executed for all added displayed orders in all securities during the trading month divided by the number of trading days in that month, averaged over the six-month period

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<sup>13</sup> See Notice, 89 FR at 24070 (citing Nasdaq Co-Location (CoLo) Services, available at <https://www.nasdaqtrader.com/trader.aspx?id=colo>; Stock Exchange Data Center & Trading, available at <https://www.nasdaq.com/solutions/nasdaq-co-location>).

<sup>14</sup> See Notice, 89 FR at 24070.

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* (citing Securities Exchange Act Release No. 84571 (November 9, 2018), 83 FR 57758 (November 16, 2018) (SR-Nasdaq-2018-086)). Nasdaq also states, as an example, that a firm that is a member of all six Nasdaq exchanges that purchases services in the Nasdaq Data Center such as a 40G fiber connection, cabinet space, cooling fans, and patch cables only purchases these products or services once to use them for all six Nasdaq exchanges. See Notice, 89 FR at 24070.

<sup>17</sup> See Notice, 89 FR at 24070.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

preceding the billing month, or the date the firm became a member, whichever is shorter. New members will be deemed to meet the Minimum ADV for the first month of operation.<sup>21</sup> Minimum ADV excludes sponsored access by a member on behalf of a third party.<sup>22</sup> Nasdaq states that the Minimum ADV threshold was designed to be accessible to all members to promote wide engagement with the Exchange.<sup>23</sup>

Nasdaq states that it does not expect any member to be disadvantaged by the Proposal. Nasdaq is a maker-taker platform and offers rebates to members that offer displayed liquidity.<sup>24</sup> With these rebates, Nasdaq states that no member should have any difficulty posting and executing sufficient displayed liquidity to meet the ADV threshold.<sup>25</sup> Nasdaq further states that the threshold is set at a level that Nasdaq believes any member—even smaller members—should be able to meet without significant effort.<sup>26</sup> Nasdaq states that, because the threshold applies to displayed liquidity only, the Proposal should not impact the Best Execution obligations of any member.<sup>27</sup> Nasdaq believes that, if all members were to meet this threshold, the Proposal would add an incremental 60-80 million shares to Nasdaq’s accessible liquidity.<sup>28</sup> Nasdaq states that non-members that do not post displayed liquidity to the market would pay the higher fees because the non-members do not directly contribute order flow to the Exchange, but nevertheless benefit from that order flow through tighter spreads, better prices, and the other advantages of a more liquid platform.<sup>29</sup>

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<sup>21</sup> See id. at 24070-1.

<sup>22</sup> See id. at 24071.

<sup>23</sup> See id.

<sup>24</sup> See id.

<sup>25</sup> See id.

<sup>26</sup> See id.

<sup>27</sup> See id.

<sup>28</sup> See id.

<sup>29</sup> See id.

### III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,<sup>30</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>31</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

#### A. Exchange Statements In Support of the Proposal

In support of the Proposal, the Exchange states that exchanges, like all trading venues, compete as platforms.<sup>32</sup> All elements of the platform—trade executions, market data, connectivity, membership, and listings—operate in concert.<sup>33</sup> Trade executions increase the value of market data; market data functions as an advertisement for on-exchange trading; listings increase the value of trade executions and market data; and greater liquidity on the exchange enhances the value of ports and colocation services.<sup>34</sup> The Exchange states that the Proposal is designed to promote competition by providing an incentive for members to provide liquidity (therefore attracting investors and increasing the overall value of the platform) through charging lower fees for other platform services (i.e., market data and connectivity).<sup>35</sup> The Exchange states

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<sup>30</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>31</sup> 15 U.S.C. 78s(b)(1).

<sup>32</sup> See Notice, 89 FR at 24071.

<sup>33</sup> See id.

<sup>34</sup> See id. The Exchange also states that it attached to the filing with the Commission a data-based analysis demonstrating how platform competition works entitled “How Exchanges Compete: An Economic Analysis of Platform Competition” as Exhibit 3, explaining that exchanges are multi-sided platforms, whose value is dependent on attracting users to multiple sides of the platform. See id. The Exchange states that issuers need investors, and every trade requires two sides to trade, and to make its platform attractive to multiple constituencies, an exchange must consider inter-side externalities, meaning demand for one set of platform services depends on the demand for other services. See id.

<sup>35</sup> See Notice, 89 FR at 24071.

that this will lead to more displayed liquidity on the Exchange, enhancing and enriching the market data distributed to the industry, which then increases the amount of interest in the platform.<sup>36</sup> The Exchange states that this will also enable it to offer investors a more robust, lower cost-trading experience through tighter spreads and more efficient trading, placing it in a better competitive position relative to other exchanges and trading venues.<sup>37</sup>

1. The Exchange Believes that Fees Produced in a Competitive Environment are an Equitable Allocation of Reasonable Dues, Fees, and Other Charges

The Exchange states that reliance on competitive solutions is fundamental to the Act.<sup>38</sup>

The Exchange further states that significant competitive forces constrain fees, fee levels meet the Act's standard for the "equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities,"<sup>39</sup> unless there is a substantial countervailing basis to find that a fee does not meet some other requirement of the Act.<sup>40</sup> The Exchange states that evidence of platform competition demonstrates that each exchange product is sold in a competitive environment, and its fees will be an equitable allocation of reasonable dues, fees, and other charges, provided that nothing about the product or its fee structure impairs competition.<sup>41</sup>

The Exchange states that Congress directed the Commission to "rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the

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<sup>36</sup> See id.

<sup>37</sup> See id. The Exchange further states that, to the degree that the additional liquidity is moved from off-exchange venues to on-exchange platforms, overall market transparency will improve as well. See id.

<sup>38</sup> See Notice, 89 FR at 24071.

<sup>39</sup> See 15 U.S.C. 78f(b)(4).

<sup>40</sup> See Notice, 89 FR at 24071 (citing U.S. Securities and Exchange 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> ("Fee Guidance") ("If significant competitive forces constrain the fee at issue, fee levels will be presumed to be fair and reasonable, and the inquiry is whether there is a substantial countervailing basis to find that the fee terms nevertheless fail to meet an applicable requirement of the Exchange Act (e.g., that fees are equitably allocated, not unfairly discriminatory, and not an undue burden on competition).")).

<sup>41</sup> The Exchange states that nothing in the Act requires proof of product-by-product competition. See Notice, 89 FR at 24071.

national market system,”<sup>42</sup> and, following this mandate, that the Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets.<sup>43</sup>

The Exchange states that, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and recognized that regulation of the national market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>44</sup> The Exchange further states that, as a result, the Commission has long relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.<sup>45</sup> The Exchanges states that, in 2008, the Commission explained that “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior”<sup>46</sup> and in 2019, that the Commission Staff reaffirmed that “[i]f significant competitive forces constrain the fee at issue, fee levels will be presumed to be fair and reasonable . . . .”<sup>47</sup> The Exchange explains that, accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”<sup>48</sup> The Exchange states that, consistent with the Commission’s longstanding focus on competition, Commission Staff have indicated that they would only look at factors

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<sup>42</sup> See Notice, 89 FR at 24071 (citing NetCoalition v. SEC, 715 F.3d 342, 534-35 (D.C. Cir. 2013); H.R. Rep. No. 94-229 at 92 (1975) (“[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.”)).

<sup>43</sup> See Notice, 89 FR at 24071.

<sup>44</sup> See Notice, 89 FR at 24071 (citing Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”)).

<sup>45</sup> See Notice, 89 FR at 24071.

<sup>46</sup> See Notice, 89 FR at 24071 (citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>47</sup> See Notice, 89 FR at 24071 (citing Fee Guidance).

<sup>48</sup> See id.

outside of the competitive market if a “proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.”<sup>49</sup>

2. The Exchange Believes that Nothing in the Act Requires an Examination of Fees in Isolation

The Exchange states that the Act mandates the “equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities,”<sup>50</sup> further stating that this provision refers generally to “reasonable dues, fees, and other charges” as a whole, not individual fees, and that nothing in the Act requires the individual examination of specific product fees in isolation.<sup>51</sup> The Exchange states that evidence of platform competition is sufficient to show that the product operates in a competitive environment, provided that a proposed rule change does not in and of itself undermine competition.<sup>52</sup> The Exchange finally

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<sup>49</sup> See id. The Exchange states that, in the Fee Guidance, the Staff indicated that “[w]hen reviewing rule filing proposals . . . [it] is mindful of recent opinions by the D.C. Circuit,” including Susquehanna International Group, LLP v. SEC, 866 F.3d 442 (D.C. Cir. 2017). See Notice, 89 FR at 24072. However, the Exchange believes that the D.C. Circuit’s decision in Susquehanna is irrelevant to the Commission’s review of immediately effective SRO fee filings. See id. The Exchange states that Susquehanna involved the Commission’s approval of a rule proposed under Section 19(b)(2) of the Act, not its evaluation of whether to temporarily suspend an SRO’s immediately effective fee filing under Section 19(b)(3). See id. The Exchange believes that a comparison of Sections 19(b)(2) and 19(b)(3) of the Act makes clear that the Commission is not required to undertake the same independent review, and make the same findings and determinations, for Section 19(b)(3) filings that it must for Section 19(b)(2) filings and, Section 19(b)(2) requires the Commission to “find[ ] that [a] proposed rule change is consistent with the” Act before approving the rule. 15 U.S.C. 78s(b)(2)(C)(i). The Exchange states that Section 19(b)(3), by contrast, imbues the Commission with discretion, stating that it “may temporarily suspend” an immediately effective rule filing where “it appears to the Commission that such action is necessary or appropriate.” See id. The Exchange further states that, as the Supreme Court has explained, statutes stating that an agency “may”—but need not—take certain action are “written in the language of permission and discretion.” See id. (citing S. Ry. Co. v. Seaboard Allied Milling, 442 U.S. 444, 455 (1979); see also Crooker v. SEC, 161 F.2d 944, 949 (1st Cir. 1947) (per curiam)). The Exchange believes that the “contrast” between Sections 19(b)(2) and 19(b)(3), the Commission itself has explained, “reflects the fundamental difference in the way Congress intended for different types of rules to be treated” and (“[W]hile the Commission’s authority to suspend a fee under Subsection (3)(C) is permissive, its duties under Subsection (2) are stated in mandatory terms. See Notice, 89 FR at 24072 (citing Brief of Respondent SEC, NetCoalition v. SEC, 715 F.3d 342-43 (D.C. Cir. 2013) (Nos. 10-1421 et al.).”). Thus, the Exchange argues that neither Susquehanna, nor Section 19(b)(3) of the Act, requires the Commission to make independent findings that an immediately effective SRO fee filing such as this one is consistent with the Act and, the Exchange argues that to the degree that the Susquehanna decision is applicable to any Commission action, however, the court held that the Commission is required to “itself find or determine” that a proposal meets statutory requirements, explaining that the Commission is “obligated to make an independent review” of an SRO’s proposal, and not rely solely on the work of the SRO. See Notice, 89 FR at 24072 (citing 866 F.3d at 446).

<sup>50</sup> See 15 U.S.C. 78f(b)(4).

<sup>51</sup> See Notice, 89 FR at 24072.

<sup>52</sup> See id.

states that a determination of whether a proposal permits unfair discrimination between customers, issuers, brokers, or dealers remains a separate product-specific inquiry.<sup>53</sup>

3. The Exchange Believes that the Commission Has Recognized that Exchanges Are Subject to Significant Competitive Forces in the Market for Order Flow

The Exchange states that the fact that the market for order flow is competitive has long been recognized by the courts—citing specifically, the NetCoalition v. Securities and Exchange Commission statement, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers.’”<sup>54</sup>

4. The Exchange Believes that All Exchange Products are Subject to Competition—Not Just Those Directly Related to Order Flow

The Exchange states that competition is not limited to order flow and that data shows that the combination of explicit all-in costs to trade and other implicit costs has largely equalized the cost to trade across venues.<sup>55</sup> The Exchange states that this is a function of the fact that, if the all-in cost to the user of interacting with an exchange exceeds market price, customers can and

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<sup>53</sup> See id.

<sup>54</sup> See NetCoalition, 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)). See also Notice, 89 FR at 24072.

<sup>55</sup> The Exchange states that competition across platforms constrains platform fees and results in “all-in” costs becoming equal across platforms, but that the Staff Guidance on SRO Rule Filings Relating to Fees states that platform competition requires that the “overall *return* of the platform, rather than the *return* of any particular fees charged to a type of customer, . . . be used to assess the competitiveness of the platform’s market,” and that “[a]n SRO that wishes to rely on total platform theory must provide evidence demonstrating that competitive forces are sufficient to constrain the SRO’s aggregate return across the platform.” See Notice, 89 FR at 24072 (citing Fee Guidance Exchange’s emphasis). The Exchange states that it does not know, and cannot determine, whether returns (as opposed to fees) are equalized across platforms, because we do not have detailed cost information from other exchanges. See id. The Exchange believes that an analysis of returns, however, is unnecessary to show that competition constrains fees given that, platform competition can be demonstrated solely by examining costs to users. See id.

do shift their purchases and trading activity to other exchanges, and therefore the exchange must adjust one or more of its fees to attract customers.<sup>56</sup>

The Exchange states that this conclusion is particularly striking given that different exchanges engage in a variety of business models and offer an array of pricing options to appeal to different customer types; specifically, that the largest exchanges operate maker-taker platforms, offering rebates to attract trading liquidity, which allows them to maintain actionable quotes with high liquidity and offer high-quality market data.<sup>57</sup> The Exchange further states that the negative price charged to liquidity providers through rebates is part of the platform because it serves to create features attractive to other participants, including oftentimes tight spreads, actionable and lit quotes, and more valuable market data.<sup>58</sup>

The Exchange states that inverted venues, in contrast, have the opposite price structure—liquidity providers pay to add liquidity, while liquidity takers earn a rebate—these platforms offer less liquidity, but better queue priority, faster fills, and lower effective spreads for investors.<sup>59</sup> The Exchange states that there are a wide range of other pricing models and product offerings among the dozens of lit and unlit trading venues that compete in the marketplace in addition to these examples.<sup>60</sup> The Exchange further states that different strategies among exchanges also manifest in the pricing of other services, such as market data and connectivity.<sup>61</sup> The Exchange states that some exchanges charge for such services, while others charge little or nothing (typically because the exchange is new or has little liquidity), just as some exchanges charge a fee per trade, while others pay rebates.<sup>62</sup>

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<sup>56</sup> See Notice, 89 FR at 24072.

<sup>57</sup> See id.

<sup>58</sup> See id.

<sup>59</sup> See id.

<sup>60</sup> See id.

<sup>61</sup> See id.

<sup>62</sup> See id.

In assessing competition for exchange services, the Exchange explains that “we must consider not only explicit costs, such as fees for trading, market data, and connectivity, but also the *implicit* costs of trading on an exchange[]”; and that “[t]he realized spread, or markout, captures the implicit cost to trade on a platform.”<sup>63</sup> The Exchange further states that considering both the explicit costs charged by exchanges for their various joint products and the implicit costs incurred by traders to trade on various exchanges, the data show that all-in trading costs across exchanges are largely equalized, regardless of different trading strategies offered by each platform for each individual service.<sup>64</sup>

The Exchange states that platform competition has resulted in a competitive environment in the market for exchange services, in which trading platforms are constrained by other platforms’ offerings, taking into consideration the all-in cost of interacting with the platform.<sup>65</sup> The Exchange further states that this constraint is a natural consequence of competition and demonstrates that no exchange platform can charge excessive fees and expect to remain competitive, thereby constraining fees on all products sold as part of the platform.<sup>66</sup> The Exchange finally states that the existence of platform-level competition also explains why some

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<sup>63</sup> The Exchange states that the concept of markout was created by market makers trying to capture the spread while providing a two-sided (bid and offer) market. See Notice, 89 FR at 24072. The Exchange states that, for market makers, being filled on the bid or the offer can cause a loss if the fill changes market prices. See id. (stating as an example, a fill on a market maker’s bid just as the stock price falls results in a “virtual loss,” because the market maker has a long position with a new bid lower than the fill). The Exchange states that negative markouts can be beneficial. See Notice, 89 FR at 24072 (stating as an example, if an institutional investor is working a large buy order, negative markouts represent fills as the market falls, allowing later orders to be placed sooner, and likely at a better price, reducing the opportunity costs as well as explicit cost of building the position). The Exchange further states that data suggests that market participants employ sophisticated analytic tools to weigh the cost of immediate liquidity and lower opportunity costs against better spread capture (lower markouts) and explicit trading costs. See Notice, 89 FR at 24073. The Exchange states that, as discussed in greater detail in its Exhibit 3, the venues with the highest explicit costs—typically inverted and fee-fee venues—have the lowest implicit costs from markouts and vice versa. See id. The Exchange also states that higher positive markouts mean more spread capture, but those venues also tend to have the highest explicit costs, and provide the least liquidity, and positive externalities, to the market. See id.

<sup>64</sup> See Notice, 89 FR at 24073.

<sup>65</sup> See id.

<sup>66</sup> See id.

consumers route orders to the exchange with the highest explicit trading costs even though other exchanges offer free or a net rebate for trading.<sup>67</sup>

5. The Exchange Believes that Exchanges Compete at Both the Platform and Product Level

The Exchange states that its customers are differentiated in the value they place on the different products offered by exchanges and in their willingness to pay for those products.<sup>68</sup> The Exchange believes that this occurs both on a firm-wide and a transaction basis; for example, individual customers “multi-home” on various platforms, and are thus able to route different trades to different platforms to take advantage of favorable economics offered on a trade-to-trade basis.<sup>69</sup>

The Exchange believes that exchanges compete by offering differentiated packages of pricing and products to attract different categories of customer, and that, as in any competitive market, consumers will “vote with their feet,” incentivizing platforms to supply an array of pricing and product offerings that suit diverse consumer needs far more effectively than a uniform, one-size-fits-some rigid product offering.<sup>70</sup> The Exchange further states that if an exchange’s pricing for a particular product gets out of line, such that its total return is boosted above competitive levels, market forces will discipline that approach because competing exchanges will quickly attract customer volume through more attractive all-in trading costs.<sup>71</sup> In addition, the Exchange states that if a particular package of pricing and products is not attractive to a sufficient volume of customers in a particular category, those customers may elect not to

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<sup>67</sup> The Exchange states that empirical evidence also shows that market data is more valuable from exchanges with more liquidity. According to the Exchange, many customers decide not to take data from smaller markets, even though they are free or much lower cost than larger markets. See Notice, 89 FR at 24073.

<sup>68</sup> See Notice, 89 FR at 24073.

<sup>69</sup> See id.

<sup>70</sup> See id.

<sup>71</sup> See id.

purchase the service and that this is why exchanges compete at a product level, as well as based on all-in trading costs.<sup>72</sup>

6. The Exchange Believes that Exchanges Compete with Off-Exchange Trading Platforms in Addition to Other Exchanges

The Exchange states that, as the SEC recently noted in its market infrastructure proposal,<sup>73</sup> the number of transactions completed on non-exchange venues has been growing, and allowing exchanges to compete as platforms will help exchanges compete against non-exchange venues, and, to the degree order flow is shifted from non-exchange to exchange venues, overall market transparency will improve.<sup>74</sup> The Exchange states that exchanges have a unique role to play in market transparency because they publish an array of pre- and post-trade data that non-exchange venues, almost entirely, do not. The Exchange further states that greater transparency benefits non-exchange venues by enabling them to provide more accurate pricing to their customers, and by helping such venues set their own prices, benchmark, analyze the total cost of ownership, and assess their own trading strategies.

The Exchange states that allowing exchanges to compete effectively as platforms has other positive network effects: larger trading platforms offer lower average trading costs; and as trading platforms attract more liquidity, bid-ask spreads tighten, search costs fall (by limiting the number of venues that a customer needs to check to assess the market), and connection costs decrease, as customers have no need to connect to all venues.<sup>75</sup> The Exchanges argues that the whole is therefore greater (in the sense that it is more efficient) than the sum of the parts.<sup>76</sup>

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<sup>72</sup> See id.

<sup>73</sup> See id. (citing Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Price Orders, Securities Exchange Act Release No. 96494 (File No. S7-30-22)).

<sup>74</sup> See Notice, 89 FR at 24073 (stating that non-exchange venues rely on market data distributed by exchanges to set prices and greater transparency allows both exchange and non-exchange venues to operate more effectively and efficiently).

<sup>75</sup> In addition, the Exchange states that its experience shows that fewer customers connect with smaller trading venues than with larger venues. See Notice, 89 FR at 24073.

<sup>76</sup> See Notice, 89 FR at 24073.

The Exchange states that this is not to say that smaller established trading platforms do not have a role to play as they provide specialized services that cater to individual customer needs, but that these specialized services help the smaller exchanges grow by driving liquidity to their platforms, and, if they are successful, achieve the economies of scale that benefit the larger enterprises.<sup>77</sup> The Exchange states that, because the total costs of interacting with an exchange are roughly equal, smaller exchanges offset higher trading costs with lower connectivity, market data, or other fees.<sup>78</sup> The Exchange states that, while the mix of fees will change as exchanges grow, the all-in cost of interacting with the exchange remains roughly the same.<sup>79</sup> The Exchange finally states that acknowledging that exchanges compete as platforms and approving fees expeditiously on that basis will improve the ability of exchanges to compete against non-exchange venues, and, to the degree order flow is shifted to exchanges, both transparency and efficiency will improve.<sup>80</sup>

7. The Exchange States that the Proposed Fees Are Equitable and Reasonable Because They Will Be Subject to Competition

The Exchange states that intent of the Proposal offering member firms an incentive to display liquidity through lower non-display and connectivity fees is to generate a “virtuous cycle,” in which the proposed fee structure will attract more liquidity to the Exchange, making it a more attractive trading venue, and thereby attracting more liquidity.<sup>81</sup> The Exchange states that incentive programs have been widely adopted by exchanges, and are reasonable, equitable, and non-discriminatory because they are open on an equal basis to similarly situated members and provide additional benefits or discounts that are reasonably related to the value to an exchange’s

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<sup>77</sup> See id.

<sup>78</sup> See id.

<sup>79</sup> See id.

<sup>80</sup> See id.

<sup>81</sup> See id.

market quality and activity.<sup>82</sup> The Exchange also states that the Proposal will contribute to market quality because it will help bring new order flow to the Exchange and greater displayed liquidity on the Exchange offers investors deeper, more liquid markets and execution opportunities.<sup>83</sup> The Exchange states that increased order flow benefits investors by deepening the Exchange’s liquidity pool, potentially providing greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency, and lowering spreads between bids and offers and thereby lowering investor costs.<sup>84</sup> The Exchange states that, to the degree that liquidity is attracted from dark venues, that liquidity also increases transparency for the market overall, providing investors with more information about market trends.<sup>85</sup> The Exchange finally states that the Proposal will help members that meet the Minimum ADV threshold maintain lower costs and will benefit them through the many positive externalities associated with a more liquid exchange.<sup>86</sup>

The Exchange states that the competition among exchanges as trading platforms, as well as the competition between exchanges and alternative trading venues, constrain exchanges from charging excessive fees for any exchange products, including trading, listings, ports, and market data.<sup>87</sup> The Exchange also states that the fees that arise from the competition among trading

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<sup>82</sup> See *id.* (citing as examples Securities Exchange Act Release No. 92493 (July 26, 2021), 86 FR 41129 (July 30, 2021) (SR-CboeEDGX-2021-034) (proposal to provide discount to new members that meet certain volume thresholds, noting that “relative volume-based incentives and discounts have been widely adopted by exchanges . . . and are reasonable, equitable and non-discriminatory because they are open on an equal basis to similarly situated members and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange’s market quality and (ii) associated higher levels of market activity . . . .”) and Securities Exchange Act Release No. 53790 (May 11, 2006), 71 FR 28738 (May 17, 2006) (SR-Phlx-2006-04) (“The Commission recognizes that volume-based discounts of fees are not uncommon, and where the discount can be applied objectively, it is consistent with Rule 603. For the same reasons noted above, the Commission believes that the fee structure meets the standard in section 6(b)(4) of the Act in that the proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among the Exchange’s members and issuers and other persons using its facilities.”)).

<sup>83</sup> See Notice, 89 FR at 24074.

<sup>84</sup> See *id.*

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

platforms may be too low because they fail to reflect the benefits to the market as a whole of exchange products and services, allowing other venues to free-ride on these investments by the exchange platforms, increasing fragmentation and search costs.<sup>88</sup> The Exchange believes that, as long as total returns are constrained by competitive forces there is no regulatory basis to be concerned with pricing of particular elements offered on a platform and that regulatory constraints in this environment are likely to *reduce* consumer welfare by constraining certain exchanges from offering packages of pricing and products that would be attractive to certain sets of consumers, thus impeding competition with venues that are not subject to the same regulatory limitations and reducing the benefits of competition to customers.<sup>89</sup>

8. The Exchange Believes that the Proposal Is Not Unfairly Discriminatory

The Exchange states that the Proposal is not unfairly discriminatory and that Non-Display Usage and the Exchange's 40Gb and 10Gb Ultra high-speed connections will be offered to all members and non-members on like terms.<sup>90</sup> The Exchange states that it is also not unfair to charge more to firms that do not directly contribute order flow to the Exchange, but nevertheless benefit from that order flow through tighter spreads, better prices, and the other advantages of a more liquid platform.<sup>91</sup> The Exchange also states that, specifically, the Proposal is not unfairly discriminatory with respect to either members or non-members.<sup>92</sup> The Exchange states that, with respect to members, all members that meet the ADV threshold will be charged lower fees; and with respect to smaller members, Nasdaq offers rebates to members that offer displayed liquidity.<sup>93</sup> The Exchange states that, with these rebates, any member—even smaller members—should have the ability to post sufficient displayed liquidity to meet the ADV threshold.<sup>94</sup>

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<sup>88</sup> See id.

<sup>89</sup> See id.

<sup>90</sup> See Notice, 89 FR at 24074.

<sup>91</sup> See id.

<sup>92</sup> See id.

<sup>93</sup> See id.

<sup>94</sup> See id.

The Exchange states that the Proposal is not unfairly discriminatory with respect to non-member broker-dealers, which include brokers routing trades through members and off-exchange trading platforms that use exchange data to execute trades, because they have the option of becoming members to obtain lower fees under the Proposal, and because they realize the benefits of higher liquidity—including tighter spreads and better prices—and it is not unfair discrimination to charge a higher fee for that benefit.<sup>95</sup> The Exchange further states that the Proposal is not unfairly discriminatory with respect to non-member firms that are not broker-dealers, such as market data vendors and index providers, because they also benefit from the value that the additional liquidity generated by this Proposal will provide to the trading platform.<sup>96</sup> The Exchange states that, incentivizing higher levels of liquidity enhances and enriches the market data distributed to the industry, and increases the overall value of platform and that is not unfair for such parties to pay a higher fee to reflect the greater value of the platform.<sup>97</sup> The Exchange states that discounts for specific categories of market participants are well-established; examples include non-professional fees, broker-dealer enterprise licenses, and a media enterprise license.<sup>98</sup>

#### B. Suspension

To date, the Commission has received one comment letter on the proposed rule change, and the letter opposes the proposed rule change.<sup>99</sup> The commenter states, among other concerns, that the Exchange mischaracterizes the Proposal as a discount instead of a fee increase on some participants, and does not include sufficient or meaningful data or justification to support the fee

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<sup>95</sup> See id.

<sup>96</sup> See id.

<sup>97</sup> See id.

<sup>98</sup> See also id. (citing as an example The Nasdaq Stock Market, Price List – U.S. Equities, available at <http://www.nasdaqtrader.com/Trader.aspx?id=DPUSData> (providing discounts for Non-Professional subscribers for Nasdaq TotalView and other market data products, enterprise licenses for broker-dealers for multiple market data products, and a digital media enterprise license for Nasdaq Basic)).

<sup>99</sup> See HMA Letter, supra n. 5.

increase or the tying of costs from one product (market data) to another product (transactions).<sup>100</sup>

The commenter also states that the Proposal is discriminatory, an undue burden on competition, and inconsistent with a past Commission order disapproving a Nasdaq proposed rule change.<sup>101</sup>

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present Proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.<sup>102</sup> The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."<sup>103</sup>

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;<sup>104</sup> (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>105</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>106</sup>

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the Proposal to increase market data and connectivity fees for participants who do not maintain the minimum average daily displayed volume threshold is

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<sup>100</sup> See *id.* at 4-5.

<sup>101</sup> See *id.* at 5-8 (citing Securities Exchange Act Release No. 65362 (September 20, 2011), 76 FR 59466 (September 26, 2011) (SR-Nasdaq-2011-010) (Order Disapproving a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees)).

<sup>102</sup> See 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

<sup>103</sup> See *id.*

<sup>104</sup> 15 U.S.C. 78f(b)(4).

<sup>105</sup> 15 U.S.C. 78f(b)(5).

<sup>106</sup> 15 U.S.C. 78f(b)(8).

consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>107</sup>

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.<sup>108</sup>

#### IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the Proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>109</sup> and 19(b)(2)(B) of the Act<sup>110</sup> to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>111</sup> the Commission is providing notice of the grounds for possible disapproval under consideration:

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<sup>107</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

<sup>108</sup> For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>109</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>110</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>111</sup> Id. Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;<sup>112</sup>
- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>113</sup> and
- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”<sup>114</sup>

As discussed in Section III above, the Exchange made various arguments in support of the Proposal. There are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposed fees are consistent with the Act and the rules thereunder. The Commission will specifically consider, among other things, whether the Exchange has provided sufficient information to demonstrate that the Exchange is subject to significant competitive forces when setting the proposed market data and connectivity fees in order to justify that those fees are fair and reasonable. The Commission will also consider whether the Exchange has provided sufficient information to demonstrate that tying the proposed market data and connectivity fees to a minimum average daily display volume threshold is not an undue burden on competition or is not unfairly discriminatory.

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days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

<sup>112</sup> 15 U.S.C. 78f(b)(4).

<sup>113</sup> 15 U.S.C. 78f(b)(5).

<sup>114</sup> 15 U.S.C. 78f(b)(8).

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”<sup>115</sup> 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,<sup>116</sup> and 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 Act and the applicable rules and regulations.<sup>117</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>118</sup>

V. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation

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<sup>115</sup> 17 CFR 201.700(b)(3).

<sup>116</sup> See id.

<sup>117</sup> See id.

<sup>118</sup> See 15 U.S.C. 78f(b)(4), (5), and (8).

of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>119</sup>

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the Proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NASDAQ-2024-016 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NASDAQ-2024-016. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

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<sup>119</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NASDAQ-2024-016 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>120</sup> that File No. SR-NASDAQ-2024-016, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>121</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>120</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>121</sup> 17 CFR 200.30-3(a)(57).