to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 811 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 26, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative:* Maxine Bradley; *Comments Due:* December 6, 2024.

9. *Docket No(s).:* MC2025–517 and K2025–515; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 485 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 26, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative:* Jennaca Upperman; *Comments Due:* December 6, 2024.

10. *Docket No(s).:* MC2025–518 and K2025–516; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 486 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 26, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative:* Christoher Mohr; *Comments Due:* December 6, 2024.

11. *Docket No(s).:* MC2025–519 and K2025–517; *Filing Title:* USPS Request to Add Priority Mail & USPS Ground Advantage Contract 487 to the Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* November 26, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3035.105, and 39 CFR 3041.310; *Public Representative:* Jennaca Upperman; *Comments Due:* December 6, 2024.

### III. Summary Proceeding(s)

None. *See* Section II for public proceedings.

This Notice will be published in the **Federal Register**.

**Erica A. Barker,**

*Secretary.*

[FR Doc. 2024–28349 Filed 12–2–24; 8:45 am]

**BILLING CODE 7710–FW–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–101766; File No. SR–NASDAQ–2024–016]**

## Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Disapproving 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

November 26, 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 (''Exchange Act''),[1] and Rule 19b–4 thereunder,[2] a 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 (''Proposal'').[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Exchange Act.[4] The proposed rule change was published for comment in the **Federal Register** on April 5, 2024.[5] The Commission has received comment letters on the proposed rule change and a letter responding to comments from Nasdaq.[6] On May 21, 2024, the Commission issued an order temporarily suspending the proposed rule change pursuant to Section 19(b)(3)(C) of the Exchange Act[7] and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Exchange Act[8] to determine whether to approve or disapprove the proposed rule change.[9] On October 1, 2024, the Commission designated a longer period for Commission action on the proposed rule change.[10] This order disapproves the proposed rule change.

This order disapproves the proposed rule change because, as discussed below, the Exchange has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that the Proposal is consistent with the requirements of Sections 6(b)(4), (b)(5), and (b)(8) of the Exchange Act, in particular the requirements 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,'' not be ''designed to permit unfair discrimination between customers, issuers, brokers, or dealers,'' and ''not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act];'' as well as Section 11A of the Exchange Act and Rules 603(a)(1) and 603(a)(2) of Regulation NMS which, among other things, require the Exchange to distribute market data on terms that are ''fair and reasonable'' and ''not unreasonably discriminatory.''[11]

### II. Description of the Proposed Rule Change and Exchange's Representations

As described in more detail in the Notice and Order Instituting Proceedings, the Exchange proposes to increase non-member and member firm fees for Non-Display Usage[12] of depth-of-book data and the fees for the Exchange's 40Gb and 10Gb Ultra high-speed connections to the Exchange. However, the Exchange proposes to continue to charge the current fees for

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 99879 (April 1, 2024), 89 FR 24070 (''Notice'').

[4] 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).

[5] *See* Notice, *supra* note 3. As part of the Proposal, the Exchange included an Exhibit 3 containing a paper in support of its proposed rule change written by Nasdaq Economic Research. *See* Phil Mackintosh & Michael Normyle, Nasdaq Economic Research, ''How Exchanges Compete: An Economic Analysis of Platform Competition'' (February 2024), *available at https://www.sec.gov/files/rules/sro/nasdaq/2024/34-99879-ex3.pdf* (''Nasdaq Paper'').

[6] Comments received on the Proposal are available at *https://www.sec.gov/comments/sr-nasdaq-2024-016/srnasdaq2024016.htm.* All comments received opposed the proposed rule change.

[7] 15 U.S.C. 78s(b)(3)(C).

[8] 15 U.S.C. 78s(b)(2)(B).

[9] *See* Securities Exchange Act Release No. 100188, 89 FR 46243 (May 28, 2024) (''Order Instituting Proceedings'').

[10] *See* Securities Exchange Act Release No. 101224, 89 FR 81129 (October 7, 2024).

[11] 15 U.S.C. 78f(b)(4), (5), and (8), 15 U.S.C. 78k–1(a)(1)(C)(i)–(iv), 17 CFR 242.603(a)(1) and 17 CFR 242.603(a)(2).

[12] *See* Notice, *supra* note 3, at 24070 (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 providing examples of Non-Display Usage). 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 id.* (citing Equity 7, Section 123 (Nasdaq Depth-of-Book data)).

Non-Display Usage of depth-of-book data and the 40Gb and 10Gb Ultra high-speed connections to member firms that meet a minimum average daily displayed volume (''Minimum ADV''). The Exchange proposes Minimum ADV to mean the introduction by a member firm 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 firm's market participant identifiers (''MPIDs'') on Nasdaq.[13] 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 preceding the billing month, or the date the firm became a member, whichever is shorter.[14] New members will be deemed to meet the Minimum ADV for the first month of operation.[15] Minimum ADV excludes sponsored access by a member on behalf of a third party.[16]

The Exchange currently assesses non-member and member firms Non-Display Usage fees for depth-of-book data on a per-subscriber or per-firm basis with monthly fees of $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.[17] The Exchange currently assesses monthly fees of $21,100 for the 40Gb fiber connection and $15,825 for the 10Gb Ultra connection to the Nasdaq equities and options exchanges.[18] The Exchange proposes to maintain these fees for member firms that meet the Minimum ADV.[19] Under the Proposal, non-member firms and member firms that do not meet the Minimum ADV would pay higher 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.[20] Non-member firms and member firms that do not meet the Minimum ADV would also pay higher monthly fees of $23,700 for the 40Gb fiber connection and $17,800 for the 10Gb Ultra connection.[21]

[13] *See* Notice, *supra* note 3, at 24070.

[14] *See* Notice, *supra* note 3, at 24070–71.

[15] *See* Notice, *supra* note 3, at 24071.

[16] *See* Notice, *supra* note 3, at 24071.

[17] *See* Notice, *supra* note 3, at 24070. ''Subscriber'' is defined as a device or computer terminal or an automated service which is entitled to receive information. *See id.*

[18] *See* Notice, *supra* note 3, at 24070.

[19] *See* Notice, *supra* note 3, at 24070.

[20] *See* Notice, *supra* note 3, at 24070.

[21] *See* Notice, *supra* note 3, at 24070.

The Exchange states that the Minimum ADV is set at a level that any member should be able to meet without significant effort.[22] The Exchange also states that, because the Minimum ADV applies to displayed liquidity only, the proposed rule should not impact the best execution obligations of any member.[23] The Exchange states that, if all its members were to meet the Minimum ADV, the proposed rule would add an incremental 60–80 million shares to Nasdaq's accessible liquidity.[24] The Exchange proposes higher fees for non-members that do not post displayed liquidity to the market because, according to the Exchange, 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.[25]

## III. Discussion and Commission Findings

### *A. Applicable Standard of Review*

Under Section 19(b)(2)(C) of the Exchange Act,[26] the Commission shall approve the proposed rule change of a self-regulatory organization (''SRO'') if the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act and the applicable rules and regulations thereunder; if it does not make such a finding, the Commission shall disapprove the proposed rule change. Additionally, under Rule 700(b)(3) of the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with [the Exchange Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.'' [27] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must be sufficiently detailed and specific to support an affirmative Commission finding.[28] 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 Exchange Act and the applicable rules and regulations issued thereunder that are applicable to the SRO.[29] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change is not sufficient to justify Commission approval of a proposed rule change.[30]

[22] *See* Notice, *supra* note 3, at 24071.

[23] *See* Notice, *supra* note 3, at 24071.

[24] *See* Notice, *supra* note 3, at 24071.

[25] *See* Notice, *supra* note 3, at 24071.

[26] 15 U.S.C. 78s(b)(3)(C).

[27] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[28] *See id.*

In the Order Instituting Proceedings, the Commission expressed concern, among other things, that the Proposal may fail to satisfy the standards under the Exchange Act and the rules thereunder that require market data and connectivity fees to be reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition.[31] In reviewing the proposed rule change, the Commission has analyzed information provided by the Exchange and issues raised by commenters. Based on the information before the Commission, for each of the reasons discussed below (whether viewed independently or in combination), the Commission is unable to find that the Exchange has met its burden to show that the proposed rule change is consistent with the Exchange Act and the applicable rules and regulations thereunder, including Exchange Act Sections 6(b)(4), 6(b)(5), 6(b)(8), 11A and Rules 603(a)(1) and 603(a)(2) of Regulation NMS, and is therefore unable to find that the Proposal is consistent with the Exchange Act.

### *B. The Exchange Has Not Met Its Burden To Demonstrate That the Proposal Is an Equitable Allocation of Reasonable Fees, Is Not Designed To Permit Unfair Discrimination, and Does Not Impose Any Burden on Competition Not Necessary or Appropriate in Furtherance of the Exchange Act*

1. Reasonable Fees and ''Platform Competition''

a. Exchange Statements

As discussed in greater detail in the Notice, Nasdaq states that exchanges, like all trading venues, ''compete as platforms,'' [32] and that all the elements of the platform—trade executions, market data, connectivity, membership,

[29] *See id.*

[30] *Susquehanna Int'l Group, LLP* v. *Securities and Exchange Commission,* 866 F.3d 442, 447 (D.C. Cir. 2017).

[31] *See* Order Instituting Proceedings, *supra* note 9, at 46249.

[32] Nasdaq states that, as explained in the Nasdaq Paper, exchanges are multi-sided platforms, whose value is dependent on attracting users to multiple sides of the platform. *See* Notice, *supra* note 3, at 24071. 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.*

and listings—operate in concert.[33] Specifically, the Exchange states that 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.[34] The Exchange continues that reliance on competitive solutions is fundamental to the Exchange Act, and that where significant competitive forces constrain fees, fee levels meet the Exchange Act's standard for the ''equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities,'' [35] unless there is a substantial countervailing basis to find that a fee does not meet some other requirement of the Exchange Act.[36] The Exchange states that evidence of what it calls ''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.[37]

The Exchange states that the Proposal to increase connectivity and market data fees for firms that do not meet the Minimum ADV is designed to promote competition by providing an incentive for members to provide displayed liquidity, thus attracting investors and increasing the overall interest in and value of the platform, enhancing and enriching the market data distributed to the industry.[38] 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.[39] The Exchange states that nothing in the Exchange Act requires the examination of fees in isolation and that the equitable allocation of reasonable dues, fees, and other charges among members and issuers refers generally to ''reasonable dues, fees, and other charges'' as a whole, not individual fees.[40]

The Exchange states that the fact that the market for order flow is competitive has long been recognized by the courts.[41] In addition, the Exchange

[33] *See* Notice, *supra* note 3, at 24071.

[34] *See* Notice, *supra* note 3, at 24071.

[35] *See* Notice, *supra* note 3, at 24071 and 15 U.S.C. 78f(b)(4).

[36] *See* Notice, *supra* note 3, at 24071 (citing the staff document ''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* (''*Staff 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).'')). Staff documents represent the views of Commission staff and are not a rule, regulation, or statement of the Commission. The Commission has neither approved nor disapproved the content of staff documents, and, like all staff documents, they have no legal force or effect, do not alter or amend the applicable law, and create no new or additional obligations for any person.

[37] *See* Notice, *supra* note 3, at 24071. The Exchange further states that nothing in the Exchange Act requires proof of product-by-product competition, and Congress directed the Commission to ''rely on 'competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.' '' *See id.* (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.'')). The Exchange also states 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 and states that the Commission has highlighted the importance of market forces in determining prices and SRO revenues. *See id.* (citing Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (''Regulation NMS Adopting Release'') (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.''). The Exchange further states that the Commission has long relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory ''[i]f significant competitive forces constrain the fee at issue, fee levels will be presumed to be fair and reasonable . . . .'' *See id.* (citing Staff Fee Guidance). The Exchange also cites to a 2008 Commission Order stating ''[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.'' *See id.* (citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21)). 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'' and states that Commission Staff have indicated that they would only look at factors outside of the competitive market if a ''proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces.'' *See* Notice, *supra* note 3, at 24071. As discussed in Sections III.B.1.c. and III.B.2.c. below, the Commission does not find that Nasdaq has sufficiently demonstrated that the proposed fees are subject to competition. In addition, the Exchange states that, in the Staff 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, *supra* note 3, at 24072. However, the Exchange states that the decision of the U.S. Court of Appeals for the District of Columbia Circuit (''D.C. Circuit'') 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 Exchange 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 states that a comparison of Sections 19(b)(2) and 19(b)(3) of the Exchange 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'' Exchange 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 states that the ''contrast'' between Sections 19(b)(2) and 19(b)(3), ''reflects the fundamental difference in the way Congress intended for different types of rules to be treated'' and ''while 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, *supra* note 3, 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 states that neither *Susquehanna,* nor Section 19(b)(3) of the Exchange Act, requires the Commission to make independent findings that an immediately effective SRO fee filing such as this one is consistent with the Exchange Act and 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 id.* (citing 866 F.3d at 4). When the Commission suspends an immediately effective rule filing, ''Section 19(b)(3) [of the Exchange Act] requires that the Commission institute proceedings to determine whether the proposed rule change should be approved or disapproved under Section 19(b)(2)(B) [of the Exchange Act],'' and the ''Exchange Act's requirements for approving a proposed rule change apply equally, regardless of whether the proposed rule were initially filed pursuant to Section 19(b)(2) or 19(b)(3) [of the Exchange Act].'' *See* Securities Exchange Act Release No. 88493 (March 27, 2020), 85 FR 18617, 18622 (April 2, 2020) (''BOX Order''). Consistent with that approach, the Commission critically evaluated the representations made and conclusions drawn by Nasdaq in the Proposal and determined based on the record that Nasdaq has failed to meet its burden to demonstrate that the Proposal is consistent with the Exchange Act, as set forth in Sections III.B.1.c. and III.B.2.c. below.

[38] *See* Notice, *supra* note 3, at 24071.

[39] *See* Notice, *supra* note 3, at 24071. 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.*

[40] *See* Notice, *supra* note 3, at 24072.

[41] *See* Notice, *supra* note 3, at 24072 (citing *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)) (''No

states that competition is not just limited to order flow.[42] The Exchange states that ''platform competition'' constrains platform fees and results in ''all-in'' costs becoming equal across platforms, and that evidence that ''all-in'' costs to users have equalized is evidence that competition constrains prices ''at a platform level.'' [43] According to the Exchange, because *platform competition can be demonstrated solely by examining and comparing* ''all-in'' costs to users, there is no need for the Exchange to analyze platform returns.[44] Nasdaq states that data presented in the Nasdaq Paper shows that the combination of explicit ''all-in'' costs to trade and other implicit costs has largely equalized the cost to trade across venues.[45] Nasdaq 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 do shift their purchases and trading activity to other exchanges; therefore, an exchange must adjust one or more of its fees to attract customers.[46]

The Exchange states 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.[47] 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.[48] 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.[49] The Exchange further states that different strategies among exchanges also manifest in the pricing of other services, such as market data and connectivity, noting 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.[50]

In assessing competition for exchange services, the Exchange states that both explicit costs, such as fees for trading, market data, and connectivity, and implicit cost of trading on an exchange must be considered, and that ''[t]he realized spread, or markout, captures the implicit cost to trade on a platform.'' [51] 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, as set forth in the Nasdaq Paper, 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.[52] The Exchange states that this serves to show 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.[53] The Exchange further states that this constraint is a natural consequence of competition and 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.[54] The Exchange finally states that the existence of ''platform competition'' also explains why some consumers route orders to the exchange with the highest explicit trading costs even though other exchanges offer free or a net rebate for trading.[55]

The Exchange states that exchange customers are differentiated in the value they place on the different products offered by exchanges and in their willingness to pay for those products on both a firm-wide and a per-transaction

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.' '')).

[42] *See* Notice, *supra* note 3, at 24072.

[43] *See* Notice, *supra* note 3, at 24072, n.22.

[44] *See* Notice, *supra* note 3, at 24072, n.22. Nasdaq states that the Staff Fee Guidance 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 id.* (citing Staff 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 it does not have detailed cost information from other exchanges. *See id.* The statement that the Exchange does not know, and cannot determine, whether returns (as opposed to fees) are equalized across platforms is not relevant given that the Exchange has elected to seek to establish that equal fees (*i.e.,* ''all-in'' costs) across platforms is evidence of competitive constraint on platforms. *See* Section III.B.1.c. *infra* addressing the merit of the Exchange's argument that equal ''all-in'' costs is evidence of competition between platforms. In addition, the Staff Fee Guidance does not state that knowledge of the returns of *other* platforms is needed when using platform theory to demonstrate a competitive environment. Rather, the Staff Fee Guidance highlights relevant evidence regarding a platform's *own* returns. For example, the Staff Fee Guidance states ''[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. In this context, at a minimum an SRO must present data and analysis demonstrating that *its aggregate return* is constrained by competition at the platform level. Examples of relevant data would include evidence of *the SRO's* sources and amounts of revenues, costs, and gross return of the entire platform. More specifically, an analysis of baseline revenues, costs, and profitability (before the proposed fee change) and the expected revenues, costs, and profitability (following the proposed fee change) would provide helpful data and analysis to support a finding that competitive forces are operating on the entire platform.'' *See* Staff Fee Guidance, *supra* note 36 (emphasis added).

[45] *See* Notice, *supra* note 3, at 24072. *See also* Nasdaq Paper, *supra* note 5.

[46] *See* Notice, *supra* note 3, at 24072.

[47] *See* Notice, *supra* note 3, at 24072.

[48] *See* Notice, *supra* note 3, at 24072. The Exchange states that, in contrast, inverted venues 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. *See id.*

[49] *See* Notice, *supra* note 3, at 24072.

[50] *See* Notice, *supra* note 3, at 24072.

[51] 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, *supra* note 3, 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 id.* (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, *supra* note 3, at 24073. The Exchange states that, as discussed in greater detail in the Nasdaq Paper, 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.*

[52] *See* Notice, *supra* note 3, at 24073.

[53] *See* Notice, *supra* note 3, at 24073.

[54] *See* Notice, *supra* note 3, at 24073.

[55] 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, *supra* note 3, at 24073.

basis; for example, individual customers ''multi-home,'' meaning they are customers on multiple platforms, and are thus able to route different trades to different platforms to take advantage of favorable opportunities offered on a trade-to-trade basis.[56] The Exchange states that exchanges compete by offering differentiated packages of pricing and products to attract different categories of customer, and that 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.[57] The Exchange further states that if an exchange misprices a particular product such that its total return is boosted above competitive levels, competing exchanges will quickly attract customer volume through more attractive ''all-in'' trading costs.[58] 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 purchase the service and that this is why exchanges compete at a product level, as well as based on ''all-in'' trading costs.[59]

The Exchange states that the number of transactions completed on non-exchange venues has been growing, that ''allowing exchanges to compete as platforms'' will help exchanges compete against non-exchange venues, and, to the extent order flow is shifted from non-exchange to exchange venues, overall market transparency will improve.[60] 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 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.[61] 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.[62] 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.[63]

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.[64] The Exchange states that the Proposal will help members that meet the Minimum ADV maintain lower costs and will benefit them through the many positive externalities associated with a more liquid exchange.[65]

The Exchange states that smaller established trading platforms 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.[66] The Exchange states that, in line with its claim that 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.[67] 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.[68]

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.[69] The Exchange also states that the fees that arise from the competition among trading 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.[70] The Exchange states 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.[71]

b. Opposing Comments and Exchange Response

All commenters oppose the Proposal.[72] Multiple commenters state that the Exchange mischaracterizes the Proposal as a discount instead of a possible fee increase.[73] Commenters state that the Proposal would raise fees on a number of Nasdaq market data and connectivity products and one commenter states that no Nasdaq member or non-member would benefit from lower fees under the Proposal; instead, some market participants would be charged higher fees.[74] Commenters also state that the Proposal, including the Nasdaq Paper, does not include sufficient or meaningful data or justification to support the fee increase

[56] *See* Notice, *supra* note 3, at 24073.

[57] *See* Notice, *supra* note 3, at 24073.

[58] *See* Notice, *supra* note 3, at 24073.

[59] *See* Notice, *supra* note 3, at 24073.

[60] *See* Notice, *supra* note 3, at 24073 (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) and 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).

[61] *See* Notice, *supra* note 3, at 24074.

[62] *See* Notice, *supra* note 3, at 24074.

[63] *See* Notice, *supra* note 3, at 24074.

[64] In addition, the Exchange states that its experience shows that fewer customers connect with smaller trading venues than with larger venues. *See* Notice, *supra* note 3, at 24073.

[65] *See* Notice, *supra* note 3, at 24074.

[66] *See* Notice, *supra* note 3, at 24073.

[67] *See* Notice, *supra* note 3, at 24073.

[68] *See* Notice, *supra* note 3, at 24073.

[69] *See* Notice, *supra* note 3, at 24074.

[70] *See* Notice, *supra* note 3, at 24074.

[71] *See* Notice, at 24074 (emphasis original). *See also* Letter from John M. Yetter, Vice President and Senior Deputy General Counsel, Nasdaq, to Vanessa Countryman, Secretary, Commission, dated July 19, 2024 (''Nasdaq Response Letter''), at 8.

[72] *See* Letters from Tyler Gellasch, President and CEO, Healthy Markets Association, to Vanessa Countryman, Secretary, Commission, dated April 24, 2024 (''HMA Letter''); Adrian Griffiths, Head of Market Structure, MEMX LLC to Vanessa Countryman, Secretary, Commission, dated June 12, 2024 (''MEMX Letter''); and Ellen Greene, Managing Director, Equities and Options Market Structure and Joseph Corcoran, Managing Director, Associate General Counsel, Securities Industry and Financial Markets Association to Vanessa Countryman, Secretary, Commission, dated May 17, 2024 (''SIFMA Letter'').

[73] *See* HMA Letter, *supra* note 72, at 4; MEMX Letter, *supra* note 72, at 2; SIFMA Letter, *supra* note 72, at 2.

[74] *See* HMA Letter, *supra* note 72, at 4; MEMX Letter, *supra* note 72, at 2–3; SIFMA Letter, *supra* note 72, at 2.

or the tying of costs from one product, market data, to another product, transactions.[75] Commenters disagree with the Proposal's claim that, due to ''platform competition,'' the Commission does not need to look at the data for these specific fees, and state that the Exchange has not offered any relevant facts or analysis to support the imposition of these specific increased fees.[76] One commenter states that the increase of 33% appears to be arbitrary, rather than the result of changes to explicit costs and rigorous analysis,[77] and another commenter states that the Proposal fails to provide an analysis to support the reasonableness of the fee increases.[78] One commenter states that the Exchange has not shared any analysis of how many, what types, and how firms will be impacted by the proposed fee change, which makes it difficult to provide meaningful comment on this aspect of the Proposal.[79]

Commenters also state that the Exchange has not demonstrated that ''platform competition'' constrains the specific market data and connectivity fees subject to the Proposal. One commenter states that the Proposal and the Nasdaq Paper do not address how the fees for the specific products are constrained by ''platform competition,'' how the purported competition impacts the levels at which the Exchange has determined to set the proposed fees for these products, whether there are reasonable substitutes for the relevant products, any revenue or cost analysis to demonstrate the need for the increased fees, or any evidence that the increased fees would not result in supra-competitive profits for the Exchange.[80] This same commenter also states that the evidence offered in the Nasdaq Paper is insufficient to demonstrate that the Exchange has been subject to significant competitive forces in setting the fees. The commenter states that they, along with other market participants, have previously provided evidence that rebuts the argument that ''platform competition'' constrains an exchange's market data fees and demonstrates that an exchange's decision to offer multiple products (trading services and market-data products) does not constrain prices in the manner contemplated when a platform facilitates a multi-sided transaction.[81] The commenter specifically states that it has provided evidence to the Commission that shows that, while trading on various exchanges can be substitutable, trade data from various exchanges is not.[82] The commenter states that the prices that exchanges charge for trading are roughly reasonable, while the prices for trading data have in some cases increased significantly in the past years with no apparent competition-based reason.[83] Another commenter states that the Proposal's reliance on platform theory ignores the Exchange's pricing power for its market data products.[84]

A different commenter states that the data and analysis in the Proposal and the Nasdaq Paper do not establish that ''platform competition'' constrains the Exchange's fees, that competitive forces are sufficient to constrain the Exchange's aggregate return across the platform, or that market participants can avoid purchasing the Exchange's services if the price of those services, either individually or as a whole, is unreasonable.[85] The commenter states that the data provided by the Exchange does not include evidence that would be relevant to demonstrate ''platform competition,'' including evidence of its sources and amounts of revenues, costs, and the gross return of the entire platform.[86] The commenter states that, at most, Nasdaq's analysis shows that certain other large exchange groups may similarly charge unreasonable fees today, free of competitive constraints felt by smaller exchanges with lower fees that Nasdaq largely ignores in its analysis.[87]

The Exchange submitted a Response Letter, which reiterates many of the arguments made in the Proposal.[88] The

[75] *See* HMA Letter, *supra* note 72, at 4–5; MEMX Letter, *supra* note 72, at 3–6; SIFMA Letter, *supra* note 72, at 3–5.

[76] *See* HMA Letter, *supra* note 72, at 4–5; SIFMA Letter, *supra* note 72, at 4–5.

[77] *See* HMA Letter, *supra* note 72, at 5.

[78] *See* SIFMA Letter, *supra* note 72, at 5.

[79] *See* SIFMA Letter, *supra* note 72, at 6. This specific commenter states that the Proposal ''did not include the number or size of members that currently trade in volumes that meet the definition of the proposed term 'Minimum ADV,' how many additional members it would expect to cross the threshold as a result of the [ ] Proposal, or comparison of these statistics at various volume threshold levels.'' *Id.* at 8.

[80] *See* SIFMA Letter, *supra* note 72, at 5.

[81] *See* SIFMA Letter, *supra* note 72, at 4. The commenter cites to two reports, *see* Lawrence R. Glosten, ''Economics of the Stock Exchange Business: Proprietary Market Data'' (January 2020) and Expand & SIFMA, ''An Analysis of Market Data Fees'' (August 2018), *available at https://www.sifma.org/wp-content/uploads/2019/01/Expand-and-SIFMA-An-Analysis-of-Market-Data-Fees-08-2018.pdf.*

[82] *See* SIFMA Letter, *supra* note 72, at 4 (citing Glosten, ''Economics of the Stock Exchange Business; Proprietary Market Data,'' at 4, *supra* note 81).

[83] *See* SIFMA Letter, *supra* note 72, at 4.

[84] *See* HMA Letter, *supra* note 72, at 5.

[85] *See* MEMX Letter, *supra* note 72, at 3. The commenter is another national securities exchange and states that other exchanges, including the commenter, have justified their non-transaction fees by providing detailed financial information to the Commission.

[86] *See* MEMX Letter, *supra* note 72, at 3–4 (citing Staff Fee Guidance, *supra* note 36).

[87] *See* MEMX Letter, *supra* note 72, at 4. The commenter states that the analysis provided by Nasdaq generally reflects the 2021 data related to trading on exchanges operated by the three incumbent exchange groups and one independent exchange with a unique market model (IEX) and that data about the cost of trading on new maker/taker exchanges that compete more directly with the three incumbent exchange groups, including the commenter and MIAX Pearl, LLC, are excluded from various analysis. *Id.* at 4 n.14. Additionally, the commenter states that the data on trading on all three independent U.S. equities exchanges is stale and does not reflect relevant changes made by each of those markets in the last three years. *Id.*

[88] *See* Nasdaq Response Letter, *supra* note 71. In the Response Letter, Nasdaq also raised certain procedural issues. *See id.* at 4, 20–22. The Exchange states that the Commission itself, and not staff acting under delegated authority, must act within the statutorily prescribed timing requirements of the Dodd-Frank Act, or the proposal will be deemed approved. *See id.* at 4 and 21. This argument lacks merit. *See* BOX Order, *supra* note 37, at 18625. The Exchange also states that if staff, under delegated authority, disapprove the proposal prior the statutorily provided time limit, and then the Commission exercises its discretionary right to review, either on its own initiative or upon petition, then the staff's disapproval will not constitute action by the Commission, and thus, unless the Commission makes a final determination of the proposal within the statutory prescribed 240-day period, then the proposal is considered to have been deemed approved. *See* Nasdaq Response Letter, *supra* note 71, at 21–22. Orders issued by delegated authority ''are issued will the full authority of the Commission and are signed by the Secretary's office on behalf of the Commission.'' *See* Securities Exchange Act Release Nos. 93229 (October 1, 2021), 86 FR 55873, 55879 (October 7, 2021) (SR–CboeBZX–2020–053) (''CboeBZX Order'') and 93230 (October 1, 2021), 86 FR 55881, 55887 (October 7, 2021) (SR–CboeBZX–2020–070). Section 4A of the Exchange Act authorizes the Commission to delegate certain functions, including the approval or disapproval of a proposed rule change under Section 19, to a ''division of the Commission,'' 15 U.S.C. 78d–1(a), and the Commission's Rules of Practice are clear that ''an action made pursuant to delegated authority shall have immediate effect and be deemed the action of the Commission.'' *See* Commission Rule of Practice 431(e), 17 CFR 201.431(e). *See also, e.g.,* Rule of Practice 430(c), 17 CFR 201.430(c) (referring to ''a final order entered pursuant to [delegated authority]''); Rule of Practice 431(f), 17 CFR 201.431(f) (giving an order by delegated authority operative effect, even when review has been sought, until a person receives actual notice that it was been stayed, modified, or reversed on review). Furthermore, as the Commission has stated, Congress was aware of the Commission's ability to delegate authority to approve SRO rule filings when the time restrictions in Exchange Act Section 19(b)(2)(D) were enacted; and, to construe Section 19(b)(2), as Nasdaq does, to require Commission review of an order by delegated authority to be completed within 240 days ''would undermine both the specific deadlines set forth in the statute and the Commission's ability to delegate functions'' and such a construction is not necessary to fulfill Congress's purpose in enacting the deadlines to ''streamline'' the rule filing process. *See, e.g.,* BOX Order, *supra* note 37, at 18625–26 and Securities Exchange Act Release No. 82727 (February 15, 2018), 83 FR 7793, 7799 (February 22, 2017).

Exchange states that reliance on competitive solutions is fundamental to the Exchange Act and that the Nasdaq Paper and its supporting evidence demonstrate that the proposed fees are subject to competitive forces and will enhance competition and benefit investors by incentivizing liquidity on the Exchange.[89] The Exchange states that the services in the Proposal are inextricable from the operation of exchanges as a platform and the competitiveness of these fees must be analyzed ''at the platform level'' rather than by positing the existence of a product-by-product market existing in isolation from the platform.[90] The Exchange also again states its belief that the Commission and the courts have expressed a preference for competition over regulatory intervention to determine prices, products, and services in the securities market.[91] The Exchange states 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 consumers.[92] The Exchange also states that its research shows that the combination of ''all-in'' costs to trade and other implicit costs has largely equalized the cost to trade across venues, which demonstrates that competition has helped constrain fees.[93] The Exchange states that allowing ''platform competition'' means that the exchanges will be better able to compete against non-exchange venues, and, to the degree order flow is shifted from non-exchange to exchange venues, overall market transparency is improved which enables non-exchange venues to provide more accurate pricing to their customers, and play their own role in capital formation more efficiently and effectively.[94]

The Exchange states that ''platform competition'' has constrained market data fees over the last two decades, because customers can and routinely do shift their purchases to another national securities exchange in response to competitive pricing alternatives and that fees have been constrained because customers have a choice in market data and connectivity.[95] Nasdaq states that the fact that customers are turning to other sources for their data needs demonstrates that there is a competitive constraint on the fees that an exchange can charge.[96] Nasdaq states that customers similarly have a choice in whether they purchase connectivity services and that of all the customers on the Exchange, only 4% purchase any colocation services at all, and only 22% purchase depth-of-book information.[97]

c. Analysis of ''Platform Competition'' Arguments in the Proposal [98]

As described above, Nasdaq states that exchanges are multi-sided platforms, whose value is dependent on attracting users to multiple sides of the platform.[99] Nasdaq's justification that the Proposal provides for reasonable fees as required by Section 6(b)(4) of the Exchange Act, is that the Exchange is a platform that is subject to competition from other exchanges and trading venues ''at the platform level'' (not just the product level).[100] Nasdaq states that this competition constrains fees for all of the products that the platform produces because the products are sold in a competitive environment (*i.e.,* the competitive platform environment, not necessarily a competitive product environment).[101] Accordingly, Nasdaq states that any fee for a product of its platform is reasonable, ''provided that nothing about the product or its fee structure impairs competition.'' [102]

Nasdaq states that a result of ''platform competition'' is that the ''all-in'' costs (both explicit and implicit costs) for a user to interact with an exchange are largely equal across exchanges because, if an exchange ''exceeds market price'' for its package of products, customers can and do shift their purchases and trading activity to other exchanges.[103] Nasdaq states that ''platform competition'' can be demonstrated by examining the ''all-in'' costs to users and the Nasdaq Paper seeks to demonstrate that the ''all-in'' costs to users are largely equal across platforms.[104] Accordingly, the Proposal relies on the Nasdaq Paper and its analysis of user costs to attempt to demonstrate that competition between exchanges constrains fees and, in turn, that the proposed fees are reasonable.

The Exchange does not explain how equal ''all-in'' user costs to trade across all exchanges establish that the Exchange's fees for the market data and connectivity products subject to the Proposal are subject to competitive constraint. Even assuming that ''all-in'' user costs reflect the prices that users pay, equal ''all-in'' users costs would not be sufficient to establish the presence of sufficient competitive forces that would constrain the level of the Exchange's proposed fees for the market data and connectivity products subject to the Proposal and ensure that such fees are reasonable.[105] This is because a concentrated market where firms have significant market power can also have equal prices.[106] As a result, establishing that prices are equal across firms does not establish the degree of competition between these firms. Accordingly, the Commission agrees with the opposing commenters' statements above that

[89] *See* Nasdaq Response Letter, *supra* note 71, at 1–2.

[90] *See* Nasdaq Response Letter, *supra* note 71, at 5 n.18.

[91] *See* Nasdaq Response Letter, *supra* note 71, at 5.

[92] *See* Nasdaq Response Letter, *supra* note 71, at 8.

[93] *See* Nasdaq Response Letter, *supra* note 71, at 7. The Response Letter also states that ''if the all-in cost to the user of interacting with an exchange—taking into account the amount of liquidity on the exchange—exceeds market price, customers shift purchases away from that exchange, and therefore the exchange must adjust one or more of its fees to attract customers. The 'all-in' cost includes not only explicit costs, such as fees for trading, market data, and connectivity, but also the implicit costs of trading on an exchange.'' *Id.*

[94] *See* Nasdaq Response Letter, *supra* note 71, at 14.

[95] *See* Nasdaq Response Letter, *supra* note 71, at 9, 11. In 2022, for example, Nasdaq reported that the introduction of fees for the five MRX data feeds caused an approximately 15% reduction in the number of customers with access to those feeds. Nasdaq states that it has also had cancellations of BX and PSX data feeds because the liquidity available on those exchanges has been insufficient to support the cost of market data. *Id.*

[96] *See* Nasdaq Response Letter, *supra* note 71, at 11. Nasdaq states that, as an example, 54% (15 out of 28) of market participants report on Form ATS–N that they purchase proprietary real time market data, while the remaining market participants rely on the Securities Information Processors (''SIPs'') for market information. *Id.*

[97] *See* Nasdaq Response Letter, *supra* note 71, at 12. The Exchange states that, while most of their top 25 customers purchase colocation services, that percentage drops below 60% for the next top 25, drops to only about 20% for the next 50, and approaches zero for most other customers. *Id.*

[98] As an initial matter, this proposed fee change would be an increase for all non-members and members who do not attain the required Minimum ADV. The Exchange refers to the proposed rule change as a fee increase in its Response Letter. *See* Nasdaq Response Letter, *supra* note 71, at 4.

[99] *See* Notice, *supra* note 3, at 24071.

[100] *See* Notice, *supra* note 3, at 24072–73.

[101] *See* Notice, *supra* note 3, at 24072.

[102] *See* Notice, *supra* note 3, at 24071.

[103] *See* Notice, *supra* note 3, at 24072.

[104] *See* Notice, *supra* note 3, at 24072, n.22, and Nasdaq Paper, *supra* note 5.

[105] *See also* MEMX Letter, *supra* note 72, at 4 (''[e]ven taken at face value, at most Nasdaq's analysis shows that certain other large exchange groups may similarly charge unreasonable fees today'').

[106] *See, e.g.,* W. Kip Viscusi, Joseph E. Harrington, Jr., & David E.M. Sappington, Economics of Regulation and Antitrust (5th ed. 2018), at 128–130 and 177–178. *See also supra* notes 82–84 and accompanying text (commenters stating that there is a lack of competition for exchange market data products and that Nasdaq has pricing power for its market data products).

Nasdaq has not demonstrated that the specific market data and connectivity fees subject to the Proposal are constrained by competition.[107] Therefore, the Commission finds that Nasdaq has failed to meet its burden under the Exchange Act to demonstrate that the proposed fees are reasonable as required under Section 6(b)(4) of the Exchange Act.

The evidence that Nasdaq provides is flawed in other ways as well. Nasdaq's two-step analysis,[108] which it states shows that competition equalizes ''all-in'' user costs across exchanges, uses a methodology that does not allow those costs to be compared accurately across exchanges. Nasdaq first claims to examine explicit ''all-in'' user costs and finds that these costs vary significantly across exchanges.[109] Nasdaq then adds implicit costs for users to trade on each venue, which Nasdaq claims broadly equalizes costs to the user across venues.[110] Nasdaq's analysis of explicit ''all-in'' user costs across exchanges uses a methodology to determine user costs by taking the annual revenues ''per category'' of costs for each exchange group and dividing by the total number of trades for each exchange group, respectively.[111] This methodology to determine user costs as revenue normalized ''per trade'' (*i.e.,* annual exchange revenue per cost category/total annual trades for the exchange) does not allow for an accurate comparison of an individual trader's ''all-in'' costs across exchanges—where there are potentially very different order flow levels and average order sizes that vary by trader.

As Nasdaq acknowledges, connectivity and data costs are fixed costs [112]—meaning that, all else being equal, these costs will be the same regardless of the number of transactions effected by the trader. First, dividing fixed costs by the number of trades will make these costs for exchanges that execute more trades appear lower than for exchanges that execute fewer trades, even when it is not the case. For example, consider a trader that purchases fiber connections to three exchanges (A, B and C), each of which costs $20,000 per month and are otherwise identical. The trader executes a 100-share order on each exchange. Assume that this is the only trade executed on Exchange A, while Exchange B executes a single additional 9,900-share order from a different trader, and Exchange C executes 99 additional 100-share orders, again from different traders. Following Nasdaq's methodology, this would create the misleading result of connectivity costs (per trade) of $20,000 on Exchange A, $10,000 on Exchange B, and $200 on Exchange C, which does not reflect the fact that the trader paid the same $20,000 to connect to and execute an identical trade on each exchange. Second, since variable costs are typically assessed on a per-share, and not per-trade, basis, Nasdaq's methodology will similarly make user costs for exchanges with a smaller number of trades appear higher, all else equal.[113] Accordingly, Nasdaq's methodology for measuring explicit user costs does not provide for an accurate comparison of such costs across exchanges.[114]

Additionally, Nasdaq draws unsupported conclusions from certain intermediate steps in its reasoning. Many of Nasdaq's arguments conflate the fact that exchanges are able to attract customers despite different business models as evidence that competition constrains ''all-in'' user costs.[115] For example, in reference to ''Table 1: Heatmap of Different Exchange Models and Their Characteristics,'' Nasdaq assumes that the ability of exchanges with different business models and cost structures to attract customers means that all-in costs ''must'' be constrained by competition.[116] However, the ability of an exchange to attract customers to its market data and connectivity products is not evidence of competition for those products; the same result could also hold were the exchange to have market power or be a monopolist for its market data and connectivity products.

Nasdaq then goes on to discuss how different exchanges ''compete'' (*i.e.,* attract customers) despite their vastly different explicit costs, and it concludes that it must be the case that ''all-in'' user costs at some point must equalize (*i.e.,* through implicit costs) [117]—questioning why else a customer would choose to purchase from a more expensive exchange when a cheaper one is available. This discussion ignores the fact that disparate prices are also consistent with certain products of the exchanges simply being different; and potentially different enough such that some products, such as the market data and connectivity products subject to the Proposal, do not even compete. Therefore, this line of reasoning does not provide support for the role Nasdaq presents for implicit costs, which in any case is never empirically demonstrated, as discussed below.

In order for the Exchange to rely on its proposition that ''all-in'' costs to

[107] *See* HMA Letter, *supra* note 72, at 4–5; MEMX Letter, *supra* note 72, at 3–6; SIFMA Letter, *supra* note 72, at 3–5 (stating that ''neither the proposal or the [Nasdaq Paper] demonstrate that platform competition constrains the specific market data and co-located connectivity fees as issue in the [Proposal].'').

[108] *See* Nasdaq Paper, *supra* note 5, at 60.

[109] *See* Nasdaq Paper, *supra* note 5, at 59–60. In an updated version of the analysis, Nasdaq states that instead, using updated data, competition has essentially equalized the explicit ''all-in'' costs of the three largest exchange families. *See* Nasdaq Letter at 11. This analysis does not change the Commission's view that Nasdaq's analysis of ''all-in'' costs is flawed. First, even if explicit costs are ''equalized'' across these three exchanges in 2022, they were shown to vary significantly in the older version of the analysis from 2021. It is not clear whether Nasdaq is showing that the exchange was not subject to the same degree of competition in 2021 and 2022, or if there was a mistake in the 2021 analysis. Comparing the updated analysis to the previous one at the least shows that their results are not particularly robust over time. Additionally, even if the updated figure is the ''correct'' one, there is no evidence that the costs from the updated figures are also equalized once implicit costs are considered.

[110] *See* Nasdaq Paper, *supra* note 5, at 60.

[111] *See* Nasdaq Paper, *supra* note 5, at 60 (Figure 2: 2021 All-In Cost to Trade by Exchange); and Nasdaq Response Letter, *supra* note 71, at 11 (Figure 2: 2002 Estimated All-In Cost to Trade). These categories include revenues related to colocation and ports, data, SIP revenue, and trading, as well as estimated data center costs.

[112] *See, e.g.,* Nasdaq Paper, *supra* note 5, at 71 (referencing ''market data, connectivity, and other fixed costs''); and at 75 (referencing ''the cost of market data and other fixed costs'').

[113] To see this, consider the example from above and assume that each exchange charges a liquidity take fee of $0.001 per share. The trader's actual total transaction cost for each 100-share order would be $0.10 on each exchange. However, Nasdaq's methodology would calculate user transaction costs as $5 on Exchange B (*i.e.,* the exchange's total transaction revenue − $0.001 * 10,000 executed shares = $10 − divided by the number of trades, which is 2).

[114] The issues with using ''per-trade'' costs are illustrated by ''Figure 1: Industry-Wide All-In Cost to Trade'' in the Nasdaq Response Letter which shows a drop in Nasdaq's ''all-in'' cost measure (defined as revenues divided by trades) since 2019 and which Nasdaq states shows that the explicit all-in costs per trade have fallen industry-wide since 2019 (excluding markouts). *See* Nasdaq Response Letter, *supra* note 71, at 10. However, Nasdaq does not acknowledge that this same figure also shows that there was a significant increase in trading volume in 2019. Nasdaq does not address the likelihood that, unless there was a particularly significant drop in revenues beginning in 2019, this ''drop'' in the ratio of revenues to trades was most likely driven by an increase in the number of trades (*i.e.,* the denominator) rather than a decrease in revenues (*i.e.,* the numerator).

[115] *See, e.g.,* Nasdaq Paper, *supra* note 5, at 67 (stating that ''U.S. exchanges operate a number of different platform business models today, and each is able to attract customers and compete,'' and ''how do all these different business models compete unless all-in costs to users are constrained?'').

[116] *See* Nasdaq Paper, *supra* note 5, at 68 (Table 1: Heatmap of Different Exchange Models and Their Characteristics).

[117] *See also* Nasdaq Paper, *supra* note 5, at 60, stating that ''implicit costs explain how venues with far higher explicit costs manage to compete with seemingly much cheaper venues'' and at 61, stating that ''[t]aking all explicit costs to trade into account, however, reveals significant differences across exchanges . . . Such a sizeable disparity suggests that there is another factor that keeps these exchanges in competition.''

users being equal across exchanges implies that there is competition between exchanges that constrains fees across exchange products, the Exchange must at least establish that the ''all-in'' costs to users across exchanges are in fact largely equal. The Exchange claims to have demonstrated that users' ''all-in'' costs are largely equal across trading venues,[118] including explicit costs related to connectivity, data, and transactions in its discussion, as well as implicit transaction costs, as measured by realized spreads.[119] Nasdaq states that ''[d]emonstrating that exchanges compete at the platform level, and that [']all-in['] costs to the user are already constrained by that competition, requires a two-step analysis.'' [120] First, Nasdaq claims to analyze the ''all-in'' explicit costs for the user to trade across exchanges, which Nasdaq states vary significantly.[121] Second, Nasdaq claims to analyze the implicit costs for a user to trade on each venue, which Nasdaq states broadly equalizes the costs to users across venues.[122] Nasdaq's claim that ''all-in'' costs to users are largely equal across exchanges, which Nasdaq claims is a sign of competition between platforms constraining fees for the market data and connectivity products subject to the Proposal, cannot be verified by the supplied data. This is because the Exchange's figures do not combine all of the costs the Exchange claims are relevant to a user's decision to trade on a given exchange.[123] For example, in the Nasdaq Paper, ''Figure 2: 2021 All-In Cost to Trade by Exchange'' [124] includes data, connectivity, and explicit transaction costs, but not implicit transaction costs; ''Figure 3: Per-Trade Markouts and Net Transaction Fees by Exchange,'' [125] ''Figure 4: All-In Trading Costs by Venue,'' [126] and ''Table 1: Heatmap of Different Exchange Models and Their Characteristics'' [127] include explicit and implicit transaction costs but not data or connectivity costs; ''Figure 6: Maker-Taker Venues Have Most Time at NBBO and Highest value data'' [128] and ''Figure 7: The SIP incentive structure rewards venues that contribute most to the NBBO'' [129] purport to establish a link between data fees and transaction volumes, showing a large variation in data-related fees and revenues across trading venues, but do not combine this with information about other costs.[130] The Exchange has not provided a figure that combines all costs, both implicit and explicit and both transaction-related and data/connectivity-related, that the Exchange itself states are part of a user's decision to participate on a trading venue. It is also not clear how the figures provided by Nasdaq should be combined,[131] or whether the figures provided by Nasdaq are calculated using the same units.[132]

Because Nasdaq has not sufficiently demonstrated that ''all-in'' costs to users across exchanges are in fact largely equal, which Nasdaq claims is the fundamental basis for its finding that it is subject to competition for all of its joint platform products, the Commission is unable to find that Nasdaq has met its burden to demonstrate that the proposed fees are reasonable as required by Section 6(b)(4) of the Exchange Act.

2. Equitable Allocation of Reasonable Fees, Unfair Discrimination, and Burden on Competition

a. Exchange Arguments

The Exchange states that the proposed fees are equitable and reasonable because they will be subject to competition.[133] The Exchange states that the Proposal is not unfairly discriminatory and that Non-Display Usage of depth-of-book data and the Exchange's 40Gb and 10Gb Ultra high-speed connections will be offered to all members and non-members on like terms.[134] 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 market quality and activity.[135] The Exchange also states that the Proposal is not unfairly discriminatory with respect to either members or non-members as it is 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.[136] The Exchange states that all members that meet the ADV threshold will be charged lower fees and Nasdaq offers rebates to members that offer displayed liquidity.[137] 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.[138] The Exchange also states that the Proposal is not unfairly discriminatory with respect to non-members that are broker-dealers because they have the option of becoming members to obtain the lower fees, 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.[139] The Exchange further states that the Proposal is not unfairly

[118] *See, e.g.,* Notice, *supra* note 3, at 24072 (stating that ''[d]ata shows that the combination of explicit all-in costs to trade and other implicit costs has largely equalized the cost to trade across venues.'') and Nasdaq Paper, *supra* note 5, at 60 (stating that ''it is clear . . . that all-in costs to users are roughly equal across exchanges.''), and at 81 (stating that ''[a]s we have shown . . . , platform competition has already resulted in rough equalization of all-in costs for users across exchange venues.'').

[119] *See, e.g.,* Notice, *supra* note 3, at 24072, and Nasdaq Paper, *supra* note 5, at 59 (stating that ''[c]ustomers consider the all-in cost for them to trade at each venue, including the explicit costs of trading, connectivity, membership, and data,'' and that ''implicit costs to trade cannot be overlooked in assessing competition.'').

[120] *See* Nasdaq Paper, *supra* note 5, at 59.

[121] *See* Nasdaq Paper, *supra* note 5, at 59.

[122] *See* Nasdaq Paper, *supra* note 5, at 60.

[123] *See* Nasdaq Paper, *supra* note 5, at 60–72.

[124] *See* Nasdaq Paper, *supra* note 5, at 60 (Figure 2: 2021 All-In Cost to Trade by Exchange).

[125] *See* Nasdaq Paper, *supra* note 5, at 62 (Figure 3: Per-Trade Markouts and Net Transaction Fees by Exchange).

[126] *See* Nasdaq Paper, *supra* note 5, at 65 (Figure 4: All-In Trading Costs by Venue).

[127] *See* Nasdaq Paper, *supra* note 5, at 68 (Table 1: Heatmap of Different Exchange Models and Their Characteristics).

[128] *See* Nasdaq Paper, *supra* note 5, at 70 (Figure 6: Maker-Taker Venues Have Most Time at NBBO and Highest value data).

[129] *See* Nasdaq Paper, *supra* note 5, at 71 (Figure 7: The SIP incentive structure rewards venues that contribute most to the NBBO).

[130] Similarly, Nasdaq included in its response letter a ''Figure 1: Industry-Wide All-In Cost to Trade'' that purports to show changes in industry-wide explicit costs to trade over time, during the period from 2017–2021, but does not include implicit costs, and furthermore does not allow for a comparison of costs across individual exchanges. Nasdaq Response Letter, *supra* note 71, at 10.

[131] Nasdaq's implicit cost analysis and explicit cost analysis do not clearly reflect the costs incurred by similar groups of traders so cannot be combined. For example, while the connectivity and market data costs in Figure 2 are presumably incurred by all traders that connect to the exchange, the analysis of realized spreads in Figure 3 only considers the estimated fees/rebates paid by a ''large market marker.'' *See id.* Furthermore, as Nasdaq acknowledges, ''markouts,'' *i.e.,* realized spreads, measure the theoretical profitability from the perspective of a liquidity provider, which represents a cost to the liquidity taker. *See* Nasdaq Paper, *supra* note 5, at 61 n.35. As such, they reflect a cost incurred by one group of market participants on an exchange, but the theoretical profits of another group.

[132] For example, while Figure 2, Figure 3, and Table 1 are presented in units of ''mils'' (*i.e.,* 1/1,000th of a dollar); Figure 4 is presented in basis points (*i.e.,* 0.01 percentage points). *See* Nasdaq Paper, *supra* note 5, at 60–72. In addition, while Figures 2 and 3 are presented ''per trade,'' it is not clear whether Table 1 and Figure 4 are presented per trade or per share. *See id.*

[133] *See* Notice, *supra* note 3, at 24074.

[134] *See* Notice, *supra* note 3, at 24074.

[135] *See* Notice, *supra* note 3, at 24073.

[136] *See* Notice, *supra* note 3, at 24074.

[137] *See* Notice, *supra* note 3, at 24074.

[138] *See* Notice, *supra* note 3, at 24074.

[139] *See* Notice, *supra* note 3, at 24074.

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.[140] The Exchange states that discounts for specific categories of market participants are well-established, and include non-professional fees, broker-dealer enterprise licenses, and a media enterprise license.[141]

b. Opposing Comments and Exchange Response

Multiple commenters state that the Proposal is unfairly discriminatory, as well as an undue burden on competition, and inconsistent with a past Commission order disapproving a similar Nasdaq proposed rule change.[142] One commenter states that the Proposal is an example of Nasdaq leveraging its market power to reduce competition ''by offering discounts on overpriced services'' to Nasdaq members who route order flow to Nasdaq.[143]

One commenter states that any Nasdaq member trading less than the proposed Minimum ADV would be disadvantaged by having to pay higher connectivity fees or by having to alter its order routing in a way that the current volume on Nasdaq suggests would be sub-optimal for business, creating a massive burden on competition, and discriminating against those who cannot or do not qualify, as well as other trading venues.[144] Another commenter states that non-members will always pay higher fees as well as members who do not meet the threshold, which benefits the larger members on the Exchange, and the Exchange itself, at the expense of smaller members and non-members and creates a significant competitive imbalance in the markets for the relevant market data and connectivity services.[145] Another commenter similarly states that the Proposal is an undue burden on competition and discriminates against those who are not members or who cannot meet the Minimum ADV as market data and connectivity are indispensable to broker-dealers and other market participants.[146]

In response, Nasdaq states that there is nothing inherently unfair or discriminatory about offering different prices to different categories of customers based on the type or quantity of the service purchases, including providing incentives to certain customers to direct more order flow to an exchange.[147] Nasdaq further states that offering pricing incentives to attract customer orders is procompetitive behavior and states that Commission ''has approved differential pricing on numerous prior occasions.'' [148] Nasdaq states that a prohibition against all differential pricing would suppress competition and harm buyers because the sellers would likely respond by not making any price cuts at all to avoid the cost of extending them to all buyers, which would in effect establish an artificial price floor.[149] Nasdaq states that differentiation and variation in product offerings are hallmarks of competition and beneficial to customers and consumer welfare.[150] Nasdaq also states that the Minimum ADV is reasonable because the burden on any member is expected to be minor and such a burden is offset by the significant benefit to all market participants of more efficient trading and lower costs.[151]

Nasdaq reiterates that the Proposal is neither unfairly discriminatory to a non-member broker-dealer because the non-member broker-dealers have the option of becoming members to obtain the proposed lowered fee and they also realize the benefits of more liquidity on the exchange, nor to non-member firms that are not broker-dealers since those non-members also benefit from the additional liquidity expected by the Proposal.[152] Finally, Nasdaq states that the Proposal does not place an undue burden on competition and that providing discounts is not anti-competitive,[153] and that bundled discounts are also pro-competitive.[154]

---

[140] *See* Notice, *supra* note 3, at 24074.

[141] *See also* Notice, *supra* note 3, at 24074 (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)).

[142] *See* HMA Letter, *supra* note 72, at 6–8 and SIFMA Letter, *supra* note 72, at 3 (both citing portions of 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) (''NASDAQ–2011–010 Disapproval Order'') (specifically citing the Commission statements that ''[t]he Commission also does not believe NASDAQ has demonstrated that the incremental step of linking the pricing of trade executions and market data is an equitable allocation of fees, or is not unfairly or unreasonably discriminatory . . . exchanges that do not provide market data, or that already do not charge any participant for market data, would not be able to respond to NASDAQ's proposal with a similar pricing scheme,'' ''preventing the linking of market data fees to trade executions will help bolster competitive forces in the area of market data, because exchange market data fees must appeal simultaneously to market participants that trade directly on an exchange and those that do not trade directly on an exchange . . . . The Commission believes it is important to preserve competitive forces for market data as much as possible,'' and ''The Commission is similarly concerned about placing an undue burden on competition in the execution services market. NASDAQ's proposal would allow it to use significant discounts on fees for its market data products as an inducement to attract order flow rather than relying on the quality of its transaction services and the level of its transaction fees to compete for orders. NASDAQ states that any competitor exchange could choose to respond to the proposed pricing by NASDAQ by offering its own discounts on its data products.''). *See also* MEMX Letter, *supra* note 72, at 5–8 (further questioning why the Exchange would file such a similar proposal to the one that was disapproved in 2011, and states that the Proposal may be a pre-emptive response to anticipated changes to Regulation NMS and its market structure rules limiting transaction-based incentives as it would potentially preserve the ability for incumbent exchanges to influence market participant routing behavior and stating that the Proposal ''offers a potential end run around such changes by allowing larger incumbent exchanges to provide 'incentives' through increasing fees charged for related services and then 'discount[ing]' those fees for firms that meet specified volume thresholds'' which would ''preserve the ability for incumbent exchanges to influence market participant routing behavior in a world where explicitly transaction-based incentives are more difficult to offer due to regulatory constraints'' and ''[s]maller exchanges that price their services fairly, as required by the [Exchange] Act, would not be able to provide comparable incentives as the incentives are predicated on charging excessive fees that are then reduced for market participants that route order flow to the exchange implementing the fee instead of one of many competitive execution venues.'').

[143] *See* MEMX Letter, *supra* note 72, at 2.

[144] *See* HMA Letter, *supra* note 72, at 5. This same commenter states that ''[i]n the face of that reality, Nasdaq's wholly unsupported claim that these fees, in particular, should be permitted because they are somehow part of an overall competitive environment rings hollow.'' *Id.*

[145] *See* SIFMA Letter, *supra* note 72, at 3 and 5 (also stating that there is not sufficient information or analysis provided in the Proposal to overcome these concerns).

[146] *See* MEMX Letter, *supra* note 72, at 5–6 (also stating that the fact that the Minimum ADV required is low does not make the Proposal any less unfairly discriminatory or anti-competitive).

[147] *See* Nasdaq Response Letter, *supra* note 71, at 15.

[148] *See* Nasdaq Response Letter, *supra* note 71, at 16–17. Nasdaq states that Commission ''has acknowledged that exchanges can offer different prices to 'particular classes of subscribers' based on market conditions such as 'their economic circumstances and their needs for and use of . . . information.' '' *Id.* at 17 (citing Concept Release, Regulation of Market Information Fees and Revenues, 64 FR 70613, 70630 (December 17, 1999).

[149] *See* Nasdaq Response Letter, *supra* note 71, at 16.

[150] *See* Nasdaq Response Letter, *supra* note 71, at 17.

[151] *See* Nasdaq Response Letter, *supra* note 71, at 19.

[152] *See* Nasdaq Response Letter, *supra* note 71, at 19–20.

[153] *See* Nasdaq Response Letter, *supra* note 71, at 20 (stating that courts are wary about claims that offering discounts is anti-competitive because lower prices benefit customers regardless of how those prices are set, as long as they are above predatory levels).

[154] *See* Nasdaq Response Letter, *supra* note 71, at 20.

c. Analysis of Arguments Regarding Equitable Allocation, Unfair Discrimination, and Burden on Competition Not Necessary or Appropriate

Nasdaq proposes to increase fees for certain market data and connectivity products and to maintain the current fees for such products if members meet the Minimum ADV. The Proposal would thereby link the level of Nasdaq trading volume (*i.e.,* executed displayed volume) to the level of fees for Nasdaq market data and connectivity products. In disapproving a prior Nasdaq proposal to link market data pricing to transaction volume, the Commission cited its previous statement that the Exchange Act precludes exchanges from adopting terms for market data distribution that unfairly discriminate by favoring participants in an exchange's market or penalizing participants in other markets.[155] Nasdaq has not demonstrated that the incremental step of linking the pricing of market data and connectivity to Nasdaq trading volume (*i.e.,* the Minimum ADV) is an equitable allocation of fees as required by Section 6(b)(4) of the Exchange Act, is not unfairly discriminatory as required by Section 6(b)(5) of the Exchange Act, and is consistent with Section 11A of the Exchange Act and Rules 603(a)(1) and 603(a)(2) of Regulation NMS which, among other things, require the Exchange to distribute market data on terms that are ''fair and reasonable'' and ''not unreasonably discriminatory.'' Nasdaq states that the marketplace is intensely competitive, and states that competitive forces ensure that the Proposal is equitable and not unfairly discriminatory. The Proposal would result in market participants paying different fees for the same market data from Nasdaq depending on the amount of their executed displayed volume on the Exchange.[156] Thus, the Proposal adopts terms for market data distribution that unfairly discriminate by favoring participants in an exchange's market or penalizing participants in other markets.[157]

The Commission is concerned that the Proposal would result in an inequitable allocation of fees and unfairly discriminate against market participants who are users of market data and connectivity but are not significant users of execution services and do not meet the Minimum ADV requirement, and thus would not qualify for the lower market data and connectivity fees. This could include, for example, market participants who divide their liquidity provision among multiple exchanges that trade NMS stocks, or that utilize market data but do not trade on Nasdaq, and thus do not provide sufficient executed displayed volume to Nasdaq to qualify for the lower market data fees. In this regard, the Commission is concerned that linking market data and connectivity fees to executed displayed volume would essentially allow Nasdaq to charge significantly higher fees for market data and connectivity to market participants that choose to provide liquidity at other exchanges, by charging them more than those Nasdaq members that meet the Minimum ADV on Nasdaq. By requiring market participants to become members of the Exchange (and then meet the Minimum ADV) to receive the proposed pricing benefit for market data and connectivity, the Proposal would penalize market participants for not being a member of the Exchange and thus the Proposal would adopt terms for market data distribution that would unfairly discriminate against those market participants that cannot or will not become members of the Exchange.

Nasdaq has not demonstrated that the incremental step of linking the pricing of market data and connectivity to Nasdaq trading volume (*i.e.,* the Minimum ADV) would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act as required by Section 6(b)(8) of the Exchange Act. As discussed above, Nasdaq states it currently faces intense ''competition as a platform,'' and that its proposal is providing an incentive for members who provide a requisite level of liquidity lower fees for market data and connectivity.[158] Nasdaq states that ''[p]roviding discounts is not anti-competitive'' and states its view that ''courts have also deemed 'bundled' discounts, like the Proposal, to be pro-competitive.'' [159] Nasdaq acknowledges, however, that a bundled discount might harm competition 'when it is offered by firms holding or on the verge of gaining monopoly power in the relevant market.' '' [160] However, Nasdaq has not adequately articulated why the linking of market data and connectivity fees to the Minimum ADV will not negatively impact the competition that exists today in the market for order flow. The Proposal would allow Nasdaq to use a significant discount on the fee for its market data product as an inducement to attract liquidity rather than relying on the quality of its transaction services to compete for displayed liquidity. As discussed above, Nasdaq fails to demonstrate that its market data and connectivity products are subject to competitive forces, and preventing the linking of market data fees to executed displayed volume will help prevent exchanges from using their advantages in the area of market data to reduce competitive forces in the market for order flow.[161]

## IV. Conclusion

For the reasons set forth above, the Commission does not find that the proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Sections 6(b)(4), 6(b)(5), 6(b)(8), and 11A of the Exchange Act and with Rules 603(a)(1) and 603(a)(2) of Regulation NMS thereunder.

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Exchange Act,[162] that File No. SR–NASDAQ–2024–016, be and hereby is, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[163]

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2024–28258 Filed 12–2–24; 8:45 am]

**BILLING CODE 8011–01–P**

[155] *See* NASDAQ–2011–010 Disapproval Order, *supra* note 142. ''[A]n exchange proposal that seeks to penalize market participants for trading in markets other than the proposing exchange would present a substantial countervailing basis for finding unreasonable and unfair discrimination and likely would prevent the Commission from approving an exchange proposal.'' *See* Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74791 (December 9, 2008) (SR–NYSEArca–2006–21) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data), vacated and remanded by *NetCoalition* v. *SEC,* No. 09–1042 (D.C. Cir. 2010) but on other grounds.

[156] The Commission agrees with the commenter who states that the absence of an analysis of how many, what types, and how firms will be impacted by the proposed fee change makes it difficult to evaluate the proposed Minimum ADV threshold. *See* SIFMA Letter, *supra* note 72, at 6. This specific commenter states that the Proposal ''did not include the number or size of members that currently trade in volumes that meet the definition of the proposed term 'Minimum ADV,' how many additional members it would expect to cross the threshold as a result of the [ ] Proposal, or comparison of these statistics at various volume threshold levels.'' *Id.*

[157] *See supra* note 155.

[158] *See* Notice, *supra* note 3, at 24071.

[159] *See* Nasdaq Response Letter, *supra* note 71, at 20.

[160] *See* Nasdaq Response Letter, *supra* note 71, at 20.

[161] *See supra* notes 82–84 and accompanying text (commenters stating that there is a lack of competition for exchange market data products and that Nasdaq has pricing power for its market data products).

[162] 15 U.S.C. 78s(b)(3)(C).

[163] 17 CFR 200.30–3(a)(12).