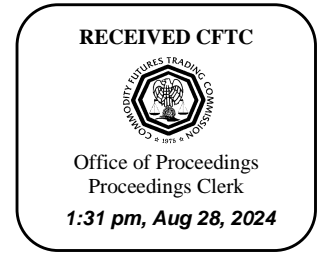


**UNITED STATES OF AMERICA**  
**Before the**  
**COMMODITY FUTURES TRADING COMMISSION**



\_\_\_\_\_) )  
**In the Matter of:** ) )  
 ) )  
**Nasdaq Futures, Inc.,** ) )  
 ) )  
**Respondent.** ) )  
\_\_\_\_\_) ) **CFTC Docket No. 24-20**

**ORDER INSTITUTING PROCEEDINGS PURSUANT TO  
SECTION 6(c) AND (d) OF THE COMMODITY EXCHANGE ACT, MAKING  
FINDINGS, AND IMPOSING REMEDIAL SANCTIONS**

**I. INTRODUCTION**

The Commodity Futures Trading Commission (“Commission”) has reason to believe that from approximately July 2015 through July 2018 (the “Relevant Period”), Nasdaq Futures, Inc. (“Respondent” or “NFX”) violated Sections 5(d)(2), 5(d)(7), 5(d)(12), and 6(c)(2) of the Commodity Exchange Act (“Act”), 7 U.S.C. §§ 7(d)(2), 7(d)(7), 7(d)(12), 9(2), and Commission Regulations 38.150, 38.154(c), 38.400, 38.401(b), 38.650, 38.651, 38.4(b), and 40.6, 17 C.F.R. §§ 38.150, 38.154(c) 38.400, 38.401(b), 38.650, 38.651, 38.4(b), 40.6 (2023). Therefore, the Commission deems it appropriate and in the public interest that public administrative proceedings be, and hereby are, instituted to determine whether Respondent engaged in the violations set forth herein and to determine whether any order should be issued imposing remedial sanctions.

In anticipation of the institution of an administrative proceeding, Respondent has submitted an Offer of Settlement (“Offer”), which the Commission has determined to accept. Without admitting or denying any of the findings or conclusions herein, Respondent consents to the entry of this Order Instituting Proceedings Pursuant to Section 6(c) and (d) of the Commodity Exchange Act, Making Findings, and Imposing Remedial Sanctions (“Order”); and acknowledges service of this Order.<sup>1</sup>

<sup>1</sup> Respondent consents to the use of all the findings of fact and conclusions of law in this Order in this proceeding and in any other proceeding brought by the Commission or to which the Commission is a party or claimant, and agrees that they shall be taken as true and correct and be given preclusive effect therein, without further proof. Respondent does not consent, however, to the use of this Order, or the findings or conclusions herein, as the sole basis for any other proceeding brought by the Commission or to which the Commission is a party or claimant, other than: a proceeding in bankruptcy or receivership; or a proceeding to enforce the terms of this Order. Respondent also does not consent to the use of the Offer or this Order, or the findings or conclusions in this Order, by any other party in any other proceeding.

## II. FINDINGS

The Commission finds the following:

### A. SUMMARY

During the Relevant Period, NFX operated as a designated contract market (“DCM”) that focused on energy commodity futures contracts. To support trading on the newly operating exchange, NFX offered various incentive programs designed to give program participants a financial stake in the success of the exchange, promote liquidity, and lower trading costs.

One such program, the Designated Market Maker (“DMM”) program, was disclosed to the public and Commission as an incentive program that would pay a fixed monthly stipend to market makers. However, NFX also provided volume-based payments to DMM program participants; this component of the DMM program paid certain market participants based on the amount of trades each of these participants executed on the NFX exchange. NFX did not properly establish, monitor, or enforce this component of the DMM program and did not disclose it to the Commission or the public, as required by the Act and Commission Regulations. As such, NFX violated certain Core Principle obligations required of it as a DCM. Further, NFX made false and misleading statements to the Commission about the existence of these volume-based payments.

In December 2015, NFX’s regulatory service provider recommended that NFX reach out to three market makers on the NFX exchange regarding certain September 2015 trading activity in a particular contract. NFX did not act on this recommendation, nor is there any record of NFX documenting its decision not to act on it.

### B. RESPONDENT

**Nasdaq Futures, Inc.** is incorporated in Delaware. NFX was registered with the Commission as a DCM during the Relevant Period, a designation that was formally vacated on September 16, 2020 at NFX’s request.

### C. FACTS

The NFX exchange launched as a new venture in late July 2015, offering energy futures contracts for trade by market participants. The NFX exchange launched with several incentive programs designed to attract market makers and others to the exchange, and these initial incentive programs were fully disclosed to the Commission, as required, and posted on the NFX website for the public to review. Following the NFX exchange’s launch, some DMM program participants did not meet anticipated market-making targets. As a result, NFX then approached other DMM program participants to undertake broader and enhanced market-making obligations, with NFX increasing the compensation of certain DMM program participants beyond the amounts of the original stipends and making a portion of their compensation based on their executed trade volume.<sup>2</sup> Unlike the prior incentive programs, the volume-based component of

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<sup>2</sup> During the Relevant Period, NFX offered another incentive program, a revenue and profit-sharing program known as the Founding Participants (“FP”) program, which was designed to reward participants for the volume of trades

the DMM program was never submitted to the Commission consistent with the Act and Commission Regulations. NFX rule submissions to the Commission regarding NFX incentive programs omitted or explicitly denied the existence of a volume-based incentive as part of the DMM program.<sup>3</sup> NFX reasonably should have known such omissions and denials were false and misleading at the time NFX made these submissions to the Commission. In addition, the existence of the volume-based component of the DMM program was never published on NFX's website for market participants and prospective market participants to review. Further, NFX did not disclose the existence of the volume-based component of the DMM program to its internal legal and compliance personnel or its regulatory service provider.

In December 2015, NFX's regulatory service provider recommended that NFX reach out to three DMM program participants regarding certain September 2015 trading activity in a particular contract. However, NFX did not reach out to these market participants or document why it did not.

In late 2016, the Commission's Division of Market Oversight ("DMO") began conducting a Rule Enforcement Review ("RER") of NFX's operations. As part of this RER, several senior members of NFX's compliance and legal teams were interviewed by DMO staff. Although NFX was aware of the topics that would be covered during the RER interviews, NFX did not take appropriate steps to ensure that its employees were knowledgeable as to those topics. Accordingly, the NFX employees who were interviewed had never been advised of and were not aware of the volume-based payments to certain DMM program participants. DMO staff specifically questioned these NFX employees about whether NFX's DMM program paid participants for trade volume. In response, these NFX employees repeatedly stated that there was no volume-based component to the DMM program, including by representing to Commission staff that "our incentive programs are not volume based at all." NFX reasonably should have known such statements were false and misleading at the time NFX made those statements.

### III. LEGAL DISCUSSION

#### **A. NFX Violated Section 5(d)(2) and 5(d)(12) of the Act and Regulations 38.150, 38.650, and 38.651 by Failing to Disclose the Volume-Based Component of the DMM Program.**

Section 5(d)(2) of the Act, 7 U.S.C. § 7(d)(2), and its implementing Regulation 38.150, 17 C.F.R. § 38.150 (2023) ("Core Principle 2"), requires DCMs to "establish, monitor, and enforce compliance with the rules of the contract market." Section 5(d)(12) of the Act, 7 U.S.C. § 7(d)(12), and its implementing Regulation 38.650, 17 C.F.R. § 38.650 (2023) ("Core Principle 12"), requires a DCM to "establish and enforce rules" to, in relevant part, promote fair and equitable trading on the contract market." Similarly, Regulation 38.651 states, in relevant part, "[A DCM] must have and enforce rules that are designed to promote fair and equitable trading." 17 C.F.R. § 38.651 (2023).

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they executed or cleared. Although the FP program was properly disclosed to the Commission and published on NFX's website, the FP program was separate and distinct from the DMM program.

<sup>3</sup> Over the course of the Relevant Period, NFX made multiple submissions about the DMM program to the Commission. However, none of those submissions disclosed the volume-based component of the DMM program consistent with the requirements of the Act and Commission Regulations.

NFX failed to disclose the existence of the volume-based component of the DMM program to its internal compliance personnel, its regulatory service provider, the Commission, and the public. To comply with the mandates of Sections 5(d)(2) and 5(d)(12) of the Act and Regulations 38.150, 38.650, and 38.651, a DCM's compliance personnel (and a DCM's regulatory service provider, if the DCM uses the services of a regulatory service provider consistent with Commission Regulations) must be aware of the material terms of the DCM's incentive programs. This conduct violated Core Principles 2 and 12 (Sections 5(d)(2) and 5(d)(12) of the Act) and Regulations 38.150, 38.650, and 38.651.

**B. NFX Violated Section 6(c)(2) of the Act by Submitting False and Misleading Statements of Material Fact to the Commission.**

6(c)(2) of the Act, 7 U.S.C. § 9(2), forbids:

[A]ny person to make any false or misleading statement of a material fact to the Commission, including in any registration application or any report filed with the Commission under this chapter, or any other information relating to a swap, or a contract of sale of a commodity, in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or to omit to state in any such statement any material fact that is necessary to make any statement of a material fact made not misleading in any material respect, if the person knew, or reasonably should have known, the statement to be false or misleading.

As set forth herein, NFX made material statements to the Commission that NFX reasonably should have known were false and misleading. These false and misleading statements included denials and omissions of the existence of volume-based incentives contained within the DMM program in self-certified rules submitted by NFX to the Commission, as well as similar misstatements made by NFX employees to Commission staff during DMO's RER of NFX's incentive programs. Further, as set forth herein, these false and misleading statements are material because they concerned important aspects of the Commission's oversight of the DCM. Thus, NFX violated Section 6(c)(2) of the Act, 7 U.S.C. § 9(2).

**C. NFX Violated Regulations 38.4(b) and 40.6 by Failing to Properly Submit DCM Rules to the Commission or Rule Amendments to the Commission and by Failing to Publish Them on NFX's Website.**

Regulation 38.4(b), 17 C.F.R. § 38.4(b) (2023), requires a DCM, for rules not voluntarily submitted for prior Commission approval pursuant to Regulation 38.4(a), 17 C.F.R. § 38.4(a) (2023), to submit each of the DCM's rules and subsequent amendments thereto "to the Commission with a certification that the rule [or] rule amendment . . . complies with the Act or rules thereunder pursuant to the procedures of § 40.6 of this chapter . . ."<sup>4</sup> Regulation 40.6,

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<sup>4</sup> Regulation 38.4(b) provides an exception from the self-certification process requirement for rules and rule amendments that a DCM voluntarily submits for Commission approval pursuant to Regulation 38.4(a) and

17 C.F.R. § 40.6 (2023), details the “conditions” a DCM must satisfy “prior to implementing any rule,” including, among other things: filing a rule submission with the Commission “not later than the open of business on the business day that is 10 business days prior to the [DCM’s] implementation of the rule or rule amendment” that includes: “[t]he text of the rule (in the case of a rule amendment, deletions and additions must be indicated);” “[a] certification by the [DCM] that the rule complies with the Act and the Commission’s regulations thereunder;” and a “concise explanation and analysis of the operation, purpose, and effect of the proposed rule or rule amendment and its compliance with applicable provisions of the Act, including core principles, and the Commission’s regulations thereunder.” Regulation 40.6 also requires the DCM to provide “a certification that the [DCM] posted a notice of pending certification with the Commission and a copy of the submission, concurrent with the filing of a submission with the Commission, on the [DCM’s] website.”

NFX’s original rule filings for its DMM program did not state that the program would include volume-based payments for certain market makers. Further, after NFX provided certain DMM participants with volume-based payments, NFX failed to submit new program rules or rule amendments to the Commission that disclosed the volume-based payments. NFX also failed to publish on its website program rules or rule amendments showing that the DMM program was issuing volume-based payments to certain market makers. As a result, NFX failed to provide the requisite information via the rule filings and self-certification process above, and therefore violated Regulations 38.4(b) and 40.6.

**D. NFX Violated Section 5(d)(7) of the Act and Regulations 38.400 and 38.401(b) by Failing to Provide Accurate and Complete Information.**

Section 5(d)(7) of the Act, 7 U.S.C. § 7(d)(7), (“Core Principle 7”), obligates a DCM to “make available to market authorities, market participants, and the public accurate information concerning . . . the rules, regulations, and mechanisms for executing transactions on or through the facilities of the [DCM]; and the rules and specifications describing the operation of the [DCM’s] electronic matching platform; or trade execution facility.” *See also* Regulation 38.400, 17 C.F.R. § 38.400 (2023) (implementing Core Principle 7 and restating same requirements).

Regulation 38.401(b) states:

With respect to any communication with the Commission, and any information required to be transmitted or made available to market participants and the public, including on its Web site or otherwise, a designated contract market must provide information that it believes, to the best of its knowledge, is accurate and complete, and must not omit material information.

17 C.F.R. 38.401(b) (2023).

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Regulation 40.5, 17 C.F.R. § 40.5 (2023). This exception is not relevant here as NFX did not submit to the Commission for voluntary approval any rules or rule amendments related to the pay-for-volume incentive.

As discussed above, NFX failed to disclose to the Commission that certain market makers in its DMM program received volume-based payments with respect to trading in certain contracts on NFX's exchange.

By failing to publish information about the volume-based payments on NFX's website (either in the form of separate rules or amendments to existing rules), the information that was published on NFX's website was rendered incomplete, inaccurate, and omitted material information. Therefore, NFX failed to provide required information "to market authorities, market participants, and the public" in a way that was "accurate and complete" to the best of NFX's knowledge, in violation of Section 5(d)(7) of the Act and Regulations 38.400 and 38.401(b).

**E. NFX Violated Regulation 38.154(c) by Failing to Document Where Its Action Differed from Its Regulatory Service Provider's Recommendation.**

Regulation 38.154(c), 17 C.F.R. § 38.154(c) (2023), requires a DCM to "document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the designated contract market chose a different course of action."

In December 2015, NFX's regulatory service provider recommended that NFX reach out to three NFX market makers regarding certain September 2015 trading activity in a particular contract. NFX, however, did not follow its regulatory service provider's recommendation to contact these participants, nor did NFX document that its actions differed from those recommended by its regulatory service provider or its rationale for that divergence, as is required by Regulation 38.154(c). As such, NFX violated 17 C.F.R. § 38.154(c).

**IV. FINDINGS OF VIOLATION**

Based on the foregoing, the Commission finds that, during the Relevant Period, NFX violated Sections 5(d)(2), 5(d)(7), 5(d)(12), and 6(c)(2) of the Act, 7 U.S.C. §§ 7(d)(2), 7(d)(7), 7(d)(12), 9(2), and Commission Regulations 38.150, 38.154(c), 38.400, 38.401(b), 38.650, 38.651, 38.4(b), and 40.6, 17 C.F.R. §§ 38.150, 38.154(c) 38.400, 38.401(b), 38.650, 38.651, 38.4(b), 40.6 (2023).

**V. OFFER OF SETTLEMENT**

Respondent has submitted the Offer in which it knowingly and voluntarily and without admitting or denying the findings and conclusions herein:

- A. Consents to the resolution of this matter in an administrative proceeding;
- B. Acknowledges service of this Order;
- C. Admits the jurisdiction of the Commission with respect to all matters set forth in this Order and for any action or proceeding brought or authorized by the Commission based on violation of or enforcement of this Order;

- D. Waives:
1. The filing and service of a complaint and notice of hearing;
  2. A hearing;
  3. All post-hearing procedures;
  4. Any and all rights or defenses that Respondent has or might have for the matter to be adjudicated in a federal district court in the first instance, including any associated right to a jury trial;
  5. Judicial review by any court;
  6. Any and all objections to the participation by any member of the Commission's staff in the Commission's consideration of the Offer;
  7. Any and all claims that it may possess under the Equal Access to Justice Act, 5 U.S.C. § 504, and 28 U.S.C. § 2412, and/or the rules promulgated by the Commission in conformity therewith, Part 148 of the Regulations, 17 C.F.R. pt. 148 (2022), relating to, or arising from, this proceeding;
  8. Any and all claims that it may possess under the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, tit. II, §§ 201–53, 110 Stat. 847, 857–74 (codified as amended at 28 U.S.C. § 2412 and in scattered sections of 5 U.S.C. and 15 U.S.C.), relating to, or arising from, this proceeding; and
  9. Any claims of Double Jeopardy based on the institution of this proceeding or the entry in this proceeding of any order imposing a civil monetary penalty or any other relief, including this Order;
- E. Agrees solely for purposes of the waiver of any and all rights under the Equal Access to Justice Act specified in subparagraph 7 above, that the Commission is the prevailing party in this action;
- F. Stipulates that the record basis on which this Order is entered shall consist solely of the findings contained in this Order to which Respondent has consented in the Offer; and
- G. Consents, solely on the basis of the Offer, to the Commission's entry of this Order that:
1. Makes findings by the Commission that Respondent violated Sections 5(d)(2), 5(d)(7), 5(d)(12), and 6(c)(2) of the Act, 7 U.S.C. §§ 7(d)(2), 7(d)(7), 7(d)(12), 9(2), and Commission Regulations 38.150, 38.154(c), 38.400, 38.401(b), 38.650, 38.651, 38.4(b), and 40.6, 17 C.F.R. §§ 38.150, 38.154(c) 38.400, 38.401(b), 38.650, 38.651, 38.4(b), 40.6 (2023);
  2. Orders Respondent to cease and desist from violating Sections 5(d)(2), 5(d)(7), 5(d)(12), and 6(c)(2) of the Act, 7 U.S.C. §§ 7(d)(2), 7(d)(7), 7(d)(12), 9(2), and

Commission Regulations 38.150, 38.154(c), 38.400, 38.401(b), 38.650, 38.651, 38.4(b), and 40.6, 17 C.F.R. §§ 38.150, 38.154(c) 38.400, 38.401(b), 38.650, 38.651, 38.4(b), 40.6;

3. Orders Respondent to pay a civil monetary penalty in the amount of twenty-two million dollars (\$22,000,000), plus any post-judgment interest within thirty days of the date of entry of this Order; and
4. Orders Respondent to comply with the conditions and undertakings consented to in the Offer and as set forth in Part VI of this Order.

Upon consideration, the Commission has determined to accept the Offer.

## **VI. ORDER**

### **Accordingly, IT IS HEREBY ORDERED THAT:**

- A. Respondent shall cease and desist from violating Sections 5(d)(2), 5(d)(7), 5(d)(12), and 6(c)(2) of the Act, 7 U.S.C. §§ 7(d)(2), 7(d)(7), 7(d)(12), 9(2) (2023), and Commission Regulations 38.150, 38.154(c), 38.400, 38.401(b), 38.650, 38.651, 38.4(b), and 40.6, 17 C.F.R. §§ 38.150, 38.154(c) 38.400, 38.401(b), 38.650, 38.651, 38.4(b), 40.6 (2023).
- B. Respondent shall pay a civil monetary penalty in the amount of twenty-two million dollars (\$22,000,000) (“CMP Obligation”) within thirty days of the date of the entry of this Order. If the CMP Obligation is not paid in full within thirty days of the date of entry of this Order, then post-judgment interest shall accrue on the CMP Obligation beginning on the date of entry of this Order and shall be determined by using the Treasury Bill rate prevailing on the date of entry of this Order pursuant to 28 U.S.C. § 1961.

Respondent shall pay the CMP Obligation and any corresponding post-judgment interest by electronic funds transfer, U.S. postal money order, certified check, bank cashier’s check, or bank money order. If payment is to be made other than by electronic funds transfer, then the payment shall be made payable to the Commodity Futures Trading Commission and sent to the address below:

MMAC/ESC/AMK326  
Commodity Futures Trading Commission  
6500 S. MacArthur Blvd.  
HQ Room 266  
Oklahoma City, OK 73169  
9-amc-ar-cftc@faa.gov

If payment is to be made by electronic funds transfer, Respondent shall contact the Federal Aviation Administration at the above email address to receive payment instructions and shall fully comply with those instructions. Respondent shall accompany payment of the CMP Obligation with a cover letter that identifies Respondent and the name and docket number of this proceeding. Respondent shall simultaneously transmit copies of the cover letter and the form of payment to the Chief Financial Officer,

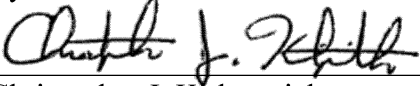


Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW, Washington, D.C. 20581, and to Charles Marvin, Deputy Director, Commodity Futures Trading Commission, 2600 Grand Boulevard, Suite 210, Kansas City, MO 64108.

- C. Respondent shall comply with the following conditions and undertakings set forth in the Offer:
1. **Public Statements:** Respondent agrees that neither it nor any of its successors and assigns, agents, or employees under its authority or control shall take any action or make any public statement on behalf of Respondent denying, directly or indirectly, any findings or conclusions in this Order or creating, or tending to create, the impression that this Order is without a factual basis; provided, however, that nothing in this provision shall affect Respondent's: (i) testimonial obligations; or (ii) right to take legal positions in other proceedings to which the Commission is not a party. Respondent and its successors and assigns shall comply with this agreement, and shall undertake all steps necessary to ensure that all of its agents and/or employees under its authority or control understand and comply with this agreement.
  2. **Cooperation, in General:** Respondent shall cooperate fully and expeditiously with the Commission, including the Commission's Division of Enforcement and any other governmental agency or any self-regulatory organization, in this action, and in any current or future Commission investigation or action related thereto. Respondent shall also cooperate in any investigation, civil litigation, or administrative matter related to, or arising from, this action.
  3. **Partial Satisfaction:** Respondent understands and agrees that any acceptance by the Commission of any partial payment of Respondent's CMP Obligation shall not be deemed a waiver of its obligation to make further payments pursuant to this Order, or a waiver of the Commission's right to seek to compel payment of any remaining balance.
  4. **Change of Address/Phone:** Until such time as Respondent satisfies in full its CMP Obligation as set forth in this Order, Respondent shall provide written notice to the Commission by certified mail of any change to its telephone number and mailing address within ten calendar days of the change.

**The provisions of this Order shall be effective as of this date.**

By the Commission.



Christopher J. Kirkpatrick  
Secretary of the Commission  
Commodity Futures Trading Commission

Dated: August 28, 2024