



JOHN A. ZECCA
EXECUTIVE VICE PRESIDENT
CHIEF LEGAL OFFICER & CHIEF
REGULATORY OFFICER
805 KING FARM BLVD
ROCKVILLE, MD 20850
P: +1 301 978 8400

VIA ELECTRONIC MAIL

April 7, 2020

The Honorable Jay Clayton, Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: Proposed Rule on Market Data Infrastructure (Release No. 34-88216; File No. S7-03-30, RIN 3235-AM61)

Dear Chairman Clayton:

On April 3, 2020, Commissioner Lee issued a statement (the “Statement”) of her views regarding the appropriate regulatory priorities of the Securities and Exchange Commission (“SEC” or “Commission”) during the pendency of the COVID-19 pandemic.¹ In her Statement, Commissioner Lee urged the Commission to extend by 60 days the public comment periods for its pending rulemakings, including the Proposed Rule on Market Data Infrastructure (the “Proposed Rule”).² Nasdaq, Inc. (“Nasdaq”) writes to express its support for Commissioner Lee’s assessment that, as much as is possible, the attention and resources of the Commission and the industry should be focused upon managing the crisis and its mitigating effects. Accordingly, Nasdaq wishes to echo Commissioner Lee’s call for the Commission to grant the public, at a minimum, an additional 60 days past the current May 26, 2020 deadline to file comments to the Proposed Rule or that the Commission otherwise pause the rulemaking altogether during the pendency of the COVID-19 pandemic.

If enacted, the Proposed Rule would fundamentally transform the structure of the U.S. equities markets, not only with respect to the existing regime for consolidating and distributing market data, but also with respect to core components of the national market system, including order protection and best execution. The potential ramifications of the Proposed Rule are profound, not only for Nasdaq and other national securities exchanges, but also for all other manner of market participants, including issuers, broker-dealers, proprietary trading firms, market technology firms, and, of course, investors. As such, Nasdaq has good reason to expect

¹ See Commissioner A. Lee, *Statement on Regulatory Priorities and COVID-19*, dated April 3, 2020, at <https://www.sec.gov/news/public-statement/statement-lee-regulatory-priorities-covid-19-2020-04-03>.

² See Securities Exchange Act Release No. 34-88216 (February 14, 2020), 85 FR 16726 (March 24, 2020).

that the Proposed Rule will generate substantial interest in filing public comments. Nasdaq notes that Regulation NMS garnered more than 700 comments when first proposed in February 2004 — so many, in fact, that the Commission both extended the 60 day public comment period for another month and then re-proposed the rule later that year, after which it received approximately 1,500 comments. This Proposed Rule is at least as formidable of a document as was Regulation NMS. It comprises more than 600 pages of complex discussions and analyses, and it solicits comment on more than 300 separate questions.

Even under ordinary circumstances, a proposed rule of such major significance, complexity, and length would reasonably require far more than 60 days within which to draft and submit informed and thoughtful comment letters. Indeed, an extension is justified for that reason alone. However, we are no longer facing ordinary circumstances.

Instead, during the pendency of this rulemaking, Nasdaq, the Commission, public companies, and the entirety of the financial services industry all find themselves grappling with an unprecedented, severe, and crippling global crisis. As this crisis unfolds, and as it wracks the financial markets with repeated bouts of extreme volatility, Nasdaq is focused on its charge to keep its markets running and to do so in a fair and orderly manner. Fortunately, Nasdaq, along with the other U.S. equities and options markets, have performed their critical functions throughout the crisis without interruption. At the same time that we have done so, however, we have also been working to understand and manage the impact of this crisis on our businesses. Most importantly, we have acted even as our employees work from their homes and attend to their own health as well as to the care and well-being of their families.

Meanwhile, many brokers and public companies that also stand to be impacted by this rulemaking are struggling to maintain their operations during this crisis. As they and their employees also confront health concerns, quarantines, shutdowns and teleworking arrangements, as well as severe economic disruptions, costs, and uncertainties, their present capacities to focus on this rulemaking are, at best, diminished. In particular, Nasdaq notes that many small, regional brokers, which tend to serve retail investors, may not have the resources to consider the Proposed Rule while they service their customers remotely in a highly-volatile market. And yet, the input of both public companies and small brokers are invaluable to this rulemaking.

Under these extraordinary conditions, Nasdaq is concerned that it and other interested parties will be strained in their ability to file comments to the Proposed Rule by May 26. Indeed, Nasdaq is concerned that many comments filed by that date will not be as comprehensive in responding to the Commission's many questions as they would be otherwise, and that they will not exhibit the care and consideration that comments to major rulemakings typically elicit, that the Commission has come to expect, and that the notice-and-comment process depends on. It is also likely that some interested parties will lack the time or resources to file any comments whatsoever to the Proposed Rule during the pendency of the crisis.³

³ While the Commission issued the proposed rule on February 14, 2020 — before the crisis began in earnest in the United States- the Federal Register did not publish the proposed rule, and accordingly, its comment period did not commence, until March 24, 2020 — when the crisis was in full-swing. Nasdaq submits that it is typical for the public to wait until a comment period commences before beginning to draft comment letters. Many individuals or smaller companies do not even become aware of rulemaking proposals

Nasdaq appreciates the fact that the Commission — along with every branch, department, and agency of the Federal Government — has acted swiftly and decisively in other contexts to provide relief to regulated entities during this crisis. The Commission has taken actions, including extending or delaying comment periods on other pending Commission rulemakings and granting issuers and broker-dealers relief from existing rules and regulations,⁴ which are enabling exchanges, broker-dealers, and public companies — as well as the Commission itself — to focus on fighting the deadly virus and preserving functioning capital markets.⁵ Nasdaq respectfully submits that the Commission should grant similar relief from the Proposed Rule, by either pausing the rulemaking indefinitely during the pendency of the crisis, or at the very least by extending its comment period by a minimum of 60 days, as advocated by Commissioner Lee.⁶

until the Federal Register publishes them. Even if some commenters had begun drafting comment letters early, the onset of the crisis likely disrupted their efforts. Thus, the fact that the Commission announced the rule prior to the onset of the crisis does not diminish the need for the Commission to pause the rulemaking or to extend the period for public comments.

⁴ See SEC, *SEC Coronavirus (COVID-19) Response*, dated March 17, 2020, at <https://www.sec.gov/sec-coronavirus-covid-19-response> (“Certain of the Commission’s proposed actions have comment periods that will expire in March. We understand that challenges associated with COVID-19 may delay the completion and submission of some comment letters. The Commission and staff have historically considered comments submitted after a comment period closes but before adoption of a final rule or order, consistent with the Commission’s Informal and Other Procedures (17 C.F.R. 202.6). For each of the pending items listed below, the Commission will not take final action before April 24th in order to allow commenters additional time if needed.”); see also Division of Trading and Markets, No Action Letter; Consolidated Audit Trail Reporting, dated March 16, 2020, at <https://www.sec.gov/divisions/marketreg/mr-noaction/2020/consolidated-audit-trail-reporting-031620.pdf> (extending industry compliance period for Consolidated Audit Trail reporting due to the fact that “disruptions as a result of COVID-19 have placed new stresses and competing priorities on the infrastructure and staff required to implement the Consolidated Audit Trail”); Order Under Section 36 of the Securities Exchange Act of 1934 Granting Exemptions From Specified Provisions of the Exchange Act and Certain Rules Thereunder, Securities Exchange Act Release No. 34-88318 (March 4, 2020), 85 FR 13680 (March 9, 2020) (order exempting public companies from certain disclosure filing requirements during the COVID-19 crisis); SEC, Press Release, *Agencies Will Consider Comments on Volcker Rule Modifications Following Expiration of Comment Period*, April 2, 2020, at <https://www.sec.gov/news/press-release/2020-79>.

⁵ See Chairman J. Clayton, *The Deep and Essential Connections Among Markets, Businesses, and Workers and the Importance of Maintaining those Connections in our Fight Against COVID-19*, March 24, 2020, at <https://www.sec.gov/news/public-statement/statement-clayton-covid-19-2020-03-24> (recognizing that “the continuing, orderly operation of our markets is an essential component of our national response to, and recovery from, COVID-19”).

⁶ Nasdaq notes that public interest groups, associations of state and local governments, and public officials have similarly requested that federal agencies pause their rulemaking

Nasdaq understands that the Commission has invested considerable time and effort in drafting the Proposed Rule, and that the Commission likely has a strong desire to proceed with it apace. Nevertheless, a rushed rule that does not incorporate public input fully is likely to be flawed, as a matter of both administrative procedure and substance.⁷ Nasdaq hopes that the Commission will agree that a proposal of this magnitude cannot afford to have such flaws, and that a delay that helps avoid them is worth pursuing.

Sincerely,



John Zecca

Executive Vice President and Chief Legal Officer

cc: Commissioner Hester M. Peirce
Commissioner Elad L. Roisman
Commissioner Allison H. Lee
Brett Redfearn, Director of the Division of Trading and Markets

proceedings during the pendency of the COVID-19 crisis. See Letter from Amnesty Int'l, et al., to Mr. Russel T. Vought, Director, Office of Management and Budget, dated March 19, 2020, at <https://www.amnestyusa.org/our-work/government-relations/advocacy/extension-of-public-comments-amid-covid-19-pandemic/>; see also National Governors Association, et al., to President Donald J. Trump, dated March 20, 2020, at <https://www.nga.org/letters-nga/state-and-local-government-organizations-seek-pause-on-public-comments-on-rulemaking-processes/>; Letter from Sens. C. Van Hollen and S. Brown to Chairman J. Clayton, dated March 17, 2020, available at <https://www.banking.senate.gov/newsroom/minority/brown-demands-hud-and-independent-financial-regulators-cess-non-coronavirus-related-rulemaking-during-this-public-health-emergency>.

⁷ See N. Carolina Growers' Ass'n, Inc. v. United Farm Workers, 702 F.3d 755, 770 (4th Cir. 2012) (holding that due to the brevity of the comment period, the agency failed to provide a meaningful opportunity to comment); Prometheus Radio Project v. FCC, 652 F.3d 431, 453 (3d Cir. 2011); Cal. v. United States Dep't of Interior, 381 F. Supp.3d 1153, 1176-77 (N.D.Cal. March 29, 2019) (invalidating repeal of rule due, in part, to the brevity of the agency comment period).