

June 15, 2020

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

**Re: File No. S7-03-20**

Dear Ms. Countryman:

The Chief Regulatory Officers (“CROs”) of the national securities exchanges operated by Nasdaq Stock Market, LLC, Nasdaq BX, Inc., Nasdaq PHLX LLC, Nasdaq ISE, LLC, New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, NYSE Chicago, Inc. and NYSE National, Inc. (each an “SRO”), respectfully submit this letter to the U.S. Securities and Exchange Commission (“Commission”) to comment on the regulatory implications of the proposed amendments to the national market system (“NMS”) for the collection, consolidation, and dissemination of quotation information for NMS stocks (the “Proposal” or “Proposed Rule”).<sup>1</sup>

Regulation is an essential ingredient of the domestic success and global stature of U.S. equities markets. Vigilant and effective regulation imbues our markets with safety and reliability, forming the bedrock for investors’ confidence in our markets. It is, therefore, part of each of our SRO’s core missions – just as it is part of the Commission’s mission – to protect investors that rely upon our markets to be fair and transparent. As CROs, our highest responsibility and priority is to develop, implement and enforce a regulatory program that safeguards investors and ensures compliance with regulations. In that capacity, we have closely reviewed the changes proposed by the Commission and their potential effects on our regulatory programs.

The recent months of extreme and unprecedented market volatility is evidence that our current systems are very resilient and stable. Market wide circuit breakers were triggered four times during the month of March,<sup>2</sup> which also tested our limit up limit down (“LULD”) guardrails. As expected, our regulatory systems preformed impeccably, highlighting the painstaking efforts

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<sup>1</sup> See Securities Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020) (File No. S7-03-20) (“Release”).

<sup>2</sup> See Phil Mackintosh, “Markets Enter the Eye of the Coronavirus Storm” April 2, 2020, available at <https://www.nasdaq.com/articles/markets-enter-the-eye-of-the-coronavirus-storm-2020-04-02>; Akane Otani, “Circuit Breaker Halts Stock Trading for First Time Since 1997” March 9, 2020, available at <https://www.wsj.com/articles/traders-closely-watching-circuit-breakers-thresholds-11583761223>.

## Joint CRO Statement

June 15, 2020

Page 2 of 6

that we have taken over the years to ensure their optimal performance. Therefore, we strongly encourage the Commission to not take any actions that could imperil investor protection by jeopardizing the functionality of our regulatory systems as the nation navigates through these unstable times fighting the COVID-19 pandemic.

Moreover, we are surprised and concerned by the Commission's limited analysis of the Proposal's potential downstream impacts on the regulation of U.S. markets, particularly those resulting from multiple competing consolidators and self-aggregators, as this analysis appears incomplete. In particular, the Proposed Rules fail to consider fully the effects on surveillance and compliance with investor protection rules – including order protection, best execution, the prohibition on locked and crossed markets, as well as obligations imposed by the LULD Plan and Rule 201 of Regulation SHO – that would ensue from replacing a single, unified multiple national best bid and best offer (“NBBO”) with multiple best bids and offers (“MBBOs”). Each of these investor protection rules involves the measurement of trading behavior relative to a unified NBBO. By shifting to a competing consolidator model with potentially many SIPs operating independently of each other and creating non-uniform market data sets because they will not receive and process data from multiple sources in the same way,<sup>3</sup> the Proposal would cause a dramatic shift to the surveillance and enforcement of these rules and it would create significant risk to investors and expense to trading firms and SROs that have invested in surveillance and compliance systems. The Proposal would also harm investors and degrade market quality by making it more difficult to identify violations of those rules and potentially making it easier for firms engaging in rule violations to avoid detection.

The markets have historically operated with the certainty that one consolidated NBBO serves as the benchmark for price discovery and the guidepost for broker-dealers in satisfying their best execution obligations. Although, as the Commission notes,<sup>4</sup> currently broker dealers oftentimes aggregate market data from different sources, there is an obligation to verify that the executions have satisfied the “gold source” NBBO. This enables the SROs and FINRA to monitor best execution obligations as there is one official snapshot of the market at any given time. Conversely, under the proposal, competing consolidators will generate MBBOs that likely will be different, creating confusion for broker-dealers and SROs in determining whether best execution obligations have been violated.

In addition to best execution concerns, replacing the NBBO with MBBOs will have a dramatic impact on regulated firms as SROs would need to validate with each firm whether its conduct violated an investor protection rule given the MBBO the firm relied upon at a given time. Unless an SRO subscribes to every competing consolidator and self-aggregator's data feed, the

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<sup>3</sup> As market data will not be received in the same time sequence across the competing consolidators and self-aggregators from the exchanges and FINRA because of geographic dispersion, with trading in nanoseconds, it is highly likely that different data sets will be produced by the non-exclusive SIPs.

<sup>4</sup> See Release supra, n.1 at 16761.

## Joint CRO Statement

June 15, 2020

Page 3 of 6

SRO's surveillance team may not have the same information as a broker-dealer in order to evaluate whether that broker-dealer's trade violated its best execution obligations. Yet even with every feed, regulators would need to know which specific feed a particular trader used or face the same issues outlined above. As a result, the Proposal will make it more difficult for investigators to do their jobs, potentially impacting market quality and investor protection.

By allowing competing consolidators to distribute market data that is likely to produce differentiated NBBOs, the Proposal also risks increasing the burden on brokers due to an upsurge in false positives. In addition, conflicting MBBOs will cause regulators to launch more investigations and demand more data from firms to justify what in fact could be legitimate trades. The increase in regulatory resources spent tracking down false positives, in turn, will delay and detract from our ability to stop bad actors. It is also possible that the data set relied on by SROs may produce false negatives, which would be even more damaging. In sum, the ambiguity inherent in the Commission's Proposed Rules will make it challenging for our SROs to conduct accurate surveillance and consistently enforce the rules.

For example, replacing the single "gold source" NBBO will not only eliminate the possibility of capturing market prices for any single moment in time, it also will impact surveillances that identify deficiencies in brokers' market access controls as well as fraud and manipulation surveillance. If brokers are able to rely on one of many multiple market data sources, no two sources will look the same and regulators' alerts will be based on different data feeds consolidating orders and trades in a different sequence due to latency in how those orders were received by the different consolidators. In other words, the perspective of the market for the regulator will be different from that of market participants depending on which MBBO they use. This has significant implications for investor protection: bad actors thrive in the shadows and rapidly exploit loopholes and inefficiencies.

We also have similar NBBO fragmentation concerns related to the proposed new mandates placed upon listing exchanges pursuant to the proposed definition of regulatory data. The new regulatory data requirements placed upon listing exchanges give no consideration to the latency differentials that listing exchanges are likely to encounter while satisfying the proposed regulatory data provisions related to LULD and Reg SHO. It is all but certain that competing consolidators will be positioned at different locations, which will prevent them from simultaneously receiving the same market data information. Consequently, listing exchanges are likely to experience a delay in identifying the moment an LULD halt or a Reg SHO restriction is triggered, which may result in executed trades that violate the LULD Plan and Reg SHO. These latency issues will make it difficult for SROs to surveil and determine with certainty that a market participant intentionally violated the LULD or Reg SHO rule. The Commission also fails to provide clarification as to whether an SRO can reasonably rely on a limited number of data feeds to conduct their surveillance or whether the Commission is proposing to place an undue burden on SROs by forcing them to purchase market data feeds from all consolidators and self-aggregators in order to surveil for compliance with the price bands and reference prices.

Joint CRO Statement

June 15, 2020

Page 4 of 6

Throughout the Proposal, hundreds of questions are posed to commenters, but none solicited feedback from SROs on the Proposal's impact on surveillance, any increased risk to investor protection, or whether reprogramming our systems to accommodate the proposed rules would create any burdens or complications for us. In fact, we have serious concerns about the extensive undertaking of reprogramming our systems to comply with and surveil for compliance with the order protection and the locked and crossed rules. In addition, the introduction of different round lot sizes based on stock price would require further complex reprogramming for dynamic adjustments both in the matching engine and in the surveillance program. For locked cross and trade through surveillance it would almost be fruitless to have any monitoring at all as it would be impossible to verify the trade through alerts due to the usage of multiple different competing consolidator views of the market at the same time. Yet, for these false positives, a surveillance analyst still would need to contact the broker dealer to request the data used to determine the NBBO at the time of order execution, which places an enormous burden both on broker dealers to produce the data and surveillance analysts in reviewing a high number of likely false positive alerts.

We support and encourage the Commission's efforts to meaningfully evaluate and consider improvements to key components of the national market system. However, no action should undermine the sound regulation of our markets, which have a well-earned reputation for integrity. We ask the Commission to delay adoption of these proposals in order to conduct a more in-depth analysis of the impact that its proposed changes will have on an SRO's ability to effectively perform its critical regulatory function and, ultimately, to ensure that any final rule does not negatively impact the integrity of our capital markets.

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Joint CRO Statement  
June 15, 2020  
Page 5 of 6

Thank you for your consideration of our comments. Please feel free to contact us with any questions.

Sincerely,

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Joint CRO Statement

June 15, 2020

Page **6** of **6**

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