

November 18, 2016

Via Electronic Submission

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

COMMENT LETTER ON THE REGULATORY FLEXIBILITY ACT

Re: **List of Rules to be Reviewed under the Regulatory Flexibility Act**
(Release No. 33-10209; File No. S7-21-16)

Dear Mr. Fields,

Bloomberg, LP ("BLP") and Bloomberg Tradebook LLC appreciate the opportunity to comment on the above-captioned notice of rules ("Notice") to be reviewed under the Regulatory Flexibility Act (the "RFA"), under which the U.S. Securities and Exchange Commission ("SEC" or "Commission") is reviewing and inviting public comment on certain rules, including Regulation NMS ("Reg NMS"). We thank Commissioner Piwowar for bringing the RFA and the opportunity to review Reg NMS to the public's attention.¹

BLP is the global business and financial information and news leader, and gives influential decision makers a critical edge by connecting them to a dynamic network of information, people and ideas. The company's strength - delivering data, news and analytics through innovative technology quickly and accurately - is at the core of the Bloomberg Professional® service, which provides real time financial information to more than 325,000 subscribers globally. The comments on Reg NMS set forth herein are based on BLP's deep expertise in equity market structure, with substantial input from BLP's wholly-owned broker-dealer subsidiary, Bloomberg Tradebook LLC ("Tradebook") whose customers are qualified institutional investors, hedge funds and broker-dealers. Tradebook is an SEC registered broker-dealer and a member of the Financial Industry Regulatory Authority, Inc. ("FINRA").

¹ See Commissioner Piwowar's public statement dated September 15, 2016 available at: <https://www.sec.gov/news/statement/piwowar-statement-list-of-rules-regulatory-flexibility-act.html>.

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I. Background: RFA and Reg NMS

The RFA, codified at 5 U.S.C. 600-611, requires an agency to review its rules that have a significant economic impact upon a substantial number of small entities within ten years of the publication of such rules as final.² The purpose of the review is "to determine whether such rules should be continued without change, or should be amended or rescinded...to minimize any significant economic impact of the rules upon a substantial number of such small entities."³ The RFA sets forth specific considerations that must be addressed in the review of each rule:

- the continued need for the rule;
- the nature of complaints or comments received concerning the rule from the public;
- the complexity of the rule;
- the extent to which the rule overlaps, duplicates or conflicts with other federal rules, and, to the extent feasible, with state and local governmental rules; and
- the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.⁴

The SEC, as a matter of policy, reviews all final rules that it published for notice and comment to assess not only their continued compliance with the RFA, but also to assess generally their continued utility. When the SEC implemented the RFA in 1980, it stated that it "intend[ed] to conduct a broader review [than that required by the RFA], with a view to identifying those rules in need of modification or even rescission."⁵ The list of rules proposed by the SEC in the Notice is therefore broader than that required by the RFA, and may include rules that do not have a significant economic impact on a substantial number of small entities. The rules and forms listed in the Notice are scheduled for review by staff of the Commission during the next 12 months.

The list includes Reg NMS, which was finalized in 2005 and intended at the time to "modernize and strengthen the regulatory structure of the U.S. equity markets." Reg NMS contains (i) an Order Protection Rule, which reinforces the fundamental principle of obtaining the best price for investors when such price is represented by automated quotations that are immediately accessible; (ii) an Access Rule, which promotes fair and non-discriminatory access to quotations displayed by NMS trading centers through a private linkage approach; (iii) a Sub-Penny Rule, which establishes a uniform quoting increment of no less than one penny for quotations in NMS stock equal to or greater than \$1.00 per share; and (iv) amendments to the Market Data Rules and joint industry plans that allocate plan revenues to self-regulatory organizations for their contributions to public price discovery and promote wider and more efficient distribution of market data.

² 5 U.S.C. 610(a).

³ Id.

⁴ 5 U.S.C. 610(c).

⁵ Securities Act Release No. 6302 (Mar. 20, 1981), 46 FR 19251 (Mar. 30, 1981).

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II. 12 Years Later: It is time for the agency to complete a holistic review of Reg NMS

For the following reasons detailed herein, we respectfully request that the Commission take advantage of this important opportunity to undertake a holistic review of Reg NMS.

First, we believe the Commission should evaluate Reg NMS in its entirety with a view toward the continued need for each rule, and then evaluate how the rules interplay with one another, and assess their effects on the marketplace. At the time Reg NMS was adopted by the Commission in 2005, the dissenting Commissioners made clear their belief that Reg NMS was crafted upon "unfounded assumptions about how markets and investors should interact."⁶ Since 2005, there have been calls to reexamine elements of Reg NMS to determine whether the assumptions were indeed misguided.⁷ Separately, since the adoption of Reg NMS, U.S. equity market structure has changed significantly. Equity markets today are complex, highly automated, and dispersed among a number of trading centers.⁸ The Commission has noted that certain trading strategies and related technologies employed in today's markets were not contemplated by the Commission or commenters in 2005.⁹

Second, the public has demonstrated significant interest in reforming Reg NMS. In January 2010, nearly five years after the implementation of Reg NMS, the Commission issued a Concept Release on Market Structure (the "Concept Release") as part of a broad review of equity market structure.¹⁰ The Commission solicited public comment to evaluate whether market structure rules have kept pace with, among other things, changes in trading technology and practices.¹¹ BLP was supportive of the Concept Release in 2010 and submitted a comment letter to the Commission addressing many important issues, including *inter alia*, transparency, market data, and order handling issues.¹² In 2013, BLP submitted a second comment letter expanding upon some of the issues initially raised in its 2010 comment letter.¹³ In total, the Commission received 302 responses to the Concept Release, with 218 comments submitted in 2010 and another 84 comments submitted in subsequent years.¹⁴ The Staff also documented over 120 Concept Release meetings with the public. Since 2010, the Staff has devoted significant time and resources to this issue, and the public has demonstrated significant and continued interest. To

⁶ See "Dissent of Commissioners Cynthia A. Glassman and Paul S. Atkins to the Adoption of Regulation NMS" at 2 <https://www.sec.gov/rules/final/34-51808-dissent.pdf>.

⁷ Daniel M. Gallagher, Remarks to the Georgetown University Center for Financial Markets and Policy Conference on Financial Markets Quality, September 16, 2014.

⁸ See Disclosure of Order Handling Information Proposed Rule at 9 (Exchange Act Release No. 34-78309, File No. S7-14-16).

⁹ Commission Interpretation Regarding Automated Quotations Under Regulation NMS at 2, Release No. 34-78102; File No. S7-03-16.

¹⁰ See Release No. 34-61358; File No. S7-02-10, RIN 3235-AK47, Concept Release on Equity Market Structure at <https://www.sec.gov/rules/concept/2010/34-61358.pdf>

¹¹ Concept Release at 1.

¹² See Ray Tierney, May 7, 2010 at <https://www.sec.gov/comments/s7-02-10/s70210-176.pdf>

¹³ See Ray Tierney and Gary Stone, June 28, 2013 at <https://www.sec.gov/comments/s7-02-10/s70210-406.pdf>

¹⁴ The public's comments on Concept Release on Equity Market Structure can be found at <https://www.sec.gov/comments/s7-02-10/s70210.shtml>

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date, however, the Commission has not issued any further information or provided any additional insight into this topic.

The 74-page Concept Release was to be the cornerstone of the Commission's equity market structure review. Since 2010, the Commission has done very little on the issues that need to be addressed. We believe now would be an appropriate time to revisit these issues through a holistic review of Reg NMS. As noted earlier, the holistic review must encompass whether individual Reg NMS rules continue to be necessary, and how they are interacting with one another, along with their resulting effects on the equity markets.

Third, Reg NMS is a complex rule that is leading to an overly complex market structure. The Commission previously recognized "that market structure issues are complex and require a broad understanding of statutory requirements, economic principles, and practical considerations."¹⁵ As of 2016, there were 12 registered exchanges, more than 40 ATSSs, and over 200 over-the-counter ("OTC") market-makers.¹⁶ The Commission has made numerous references to the markets being complex in rulemaking and public statements.

In addition to the above, technological and market developments have caused the Commission to "reinterpret" aspects of Reg NMS. For example, instead of engaging in rulemaking, the Commission recently interpreted the term "immediate" under Reg NMS Rule 600(b)(3) to approve The Investors' Exchange LLC's ("IEX") application to register as an exchange by avoiding the rulemaking process and a Reg NMS review, and instead issued guidance. In reinterpreting the term, the Commission has created an additional layer of complexity on top of an already complex regulation. Additionally, new exchange rules and changes to existing rules filed with the Commission, including new order types, co-location services, and proprietary market data fees, strike at the very heart of fairness and add to the complexity of the market. Given this complexity, it is appropriate to examine whether the framework of Reg NMS is achieving an appropriate balance between investor protection, maintaining fair, orderly and efficient markets, and the facilitation of capital formation.

Fourth, it would be appropriate for the Commission to evaluate how the rules overlap, duplicate, or conflict with existing rules. One notable conflict, given the reliance on NMS plans since 2005, is Rule 608 of Reg NMS, which allows for the filing and amendment of national market system plans, and predates the SEC's "Current Guidance on Economic Analysis in SEC Rulemakings."¹⁷ This guidance addresses rulemaking but not NMS plans. Thus, in reviewing and approving the plans, the Commission is not required to conduct a cost-benefit analysis, and this may lead to negative effects in the marketplace.

Finally, Congress has passed significant legislation -- the most significant financial legislation since the New Deal -- with the Dodd-Frank Act mandating multiple layers of new regulation.

¹⁵ See Release No. 34-61358; File No. S7-02-10, RIN 3235-AK47, Concept Release on Equity Market Structure at 8 <https://www.sec.gov/rules/concept/2010/34-61358.pdf>

¹⁶ Id.

¹⁷ See https://www.sec.gov/divisions/riskfin/rsfi_guidance_econ_analy_secrulemaking.pdf.

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Since 2005 the Commission has engaged in a significant number of rulemaking efforts in addition to those that were an outgrowth of the Dodd-Frank Act. We urge the Commission to evaluate Reg NMS against Commissioner Gallagher's "Crazy Quilt Chart of Regulation" that displays the multitudinous rules adopted since July 2010 that are applicable to a financial services holding company.¹⁸ We believe that the RFA provides an opportunity for the Commission to conduct an assessment of the cumulative effect and overall efficiency of the Reg NMS rules.

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Thank you very much for your consideration. Please do not hesitate to contact Michelle Bond at [REDACTED] or [REDACTED] if you would like any additional information.

Respectfully submitted,



Ray Tierney
Global Head of Bloomberg Tradebook and
Bloomberg's Sell Side Equity Order Management System



Greg Babyak
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Gary Stone
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¹⁸ See <https://www.sec.gov/news/statement/crazy-quilt-chart-of-regulation.html>. Note that this chart is not updated on a going-forward basis.