



**JOHN A. ZECCA**  
EXECUTIVE VICE PRESIDENT  
CHIEF LEGAL &  
REGULATORY OFFICER  
1100 NEW YORK AVE., NW  
SUITE 310, EAST TOWER  
WASHINGTON, DC 20005  
P: +301-978-8400

May 14, 2020

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20549

Re: Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles; (File No. S7-24-15)

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq") appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or "Commission") Use of Derivatives by Registered Investment Companies and Business Development Companies Rule Proposal<sup>1</sup> (the "SEC Proposal") and to engage productively with the Commission and with the exchange-traded product ("ETP") industry to help maintain a level playing field for ETPs. Nasdaq has an expansive footprint in the ETP ecosystem, which includes ETP listings, trade execution and reporting platforms, ETP options and indexing services. Consequently, Nasdaq feels that it is important to participate in any efforts to improve the ETP regulatory landscape and appreciates the Commission's efforts made with the intent to strengthen investor protection through the SEC Proposal.

Nasdaq believes transparency-based initiatives promote stronger investor protections by informing and empowering investors to make more educated investment decisions. Nasdaq considers transparency as crucial to the foundation of the public markets and vital to an investor's ability to make an informed financial decision. As Nasdaq previously stated in its

---

<sup>1</sup> Use of Derivatives by Registered Investment Companies and Business Development Companies; Required Due Diligence by Broker-Dealers and Registered Investment Advisers Regarding Retail Customers' Transactions in Certain Leveraged/Inverse Investment Vehicles, Securities Exchange Act Release No. 87607 (Nov. 25, 2019), 85 FR 4446 (Jan. 24, 2020), available at <https://www.sec.gov/rules/proposed/2019/34-87607.pdf>.

comment letter<sup>2</sup> on the Commission's Exchange-Traded Funds Rule Proposal,<sup>3</sup> we support efforts to augment investor protections and to enhance the regulation of ETPs.

Among the approximately 2,400 listed ETPs there are many different investment strategies represented that bring value to a diverse set of investor portfolios. For example, publicly available trading activity data for leveraged and inverse ETPs, reflects Covid-19 related market volatility and shows that these products were used heavily. Daily trading figures for the 22 trading days in March 2020 show that about \$500 billion was traded in leveraged and inverse ETPs, while the total creation/redemption activity showed net *inflows* of approximately \$8 billion for the entire month. Nasdaq believes that the relative scale of daily trading to net inflows demonstrates that many educated investors are using these products as part of their portfolio strategies. Additionally, the daily trading volume of leveraged and inverse ETPs illustrates that they are a widely-used component of the overall market ecosystem used to provide liquidity (*e.g.*, portfolio hedging), particularly during times of market stress.

Nasdaq believes that the many different ETP structures that represent various investment strategies, including leveraged and inverse ETPs, have a role to play within the ETP ecosystem and requests that the Commission keep in mind the potential for unintended consequences. For example, the SEC Proposal if adopted as proposed, may lead the broker-dealer community to create complex operational and compliance programs. Additionally, it may create confusion arising from overlapping regulations between the SEC Proposal, Regulation Best Interest ("Reg BI"),<sup>4</sup> FINRA's suitability rule,<sup>5</sup> and FINRA's Heightened Supervision of Complex Products.<sup>6</sup> As a result, these consequences ultimately may lead to some broker-dealers deciding to eliminate all client access to useful investment products, regardless of the level of the investor's financial sophistication or the value these products could bring them. This would remove an important

---

<sup>2</sup> See Letter from Thomas A. Wittman, Executive Vice President, Nasdaq Inc., on Commission's Exchange-Traded Funds Rule Proposal (Sep. 28, 2018), available at <https://www.sec.gov/comments/s7-15-18/s71518-4451170-175713.pdf>.

<sup>3</sup> See Securities Exchange Act Release No. 33-10515; IC-33140 (June 28, 2018), 83 FR 37332 (July 31, 2018) (File No. S7-15-18).

<sup>4</sup> Reg BI establishes for broker-dealers a "best interest" standard of conduct that requires before the broker-dealer recommends a product to retail investors that it has a reasonable basis to believe the recommendation is in the best interest of the customer, while taking into account the customer's investment profile. Also, that the recommendation does not place the broker-dealer's interest ahead of the customer. Regulation Best Interest: The Broker-Dealer Standard of Conduct, Securities Exchange Act Release No. 86031 (June 5, 2019), 84 FR 33318 (July 12, 2019).

<sup>5</sup> See FINRA Rule 2111.

<sup>6</sup> See FINRA Regulatory Notice 12-03, Heightened Supervision of Complex Products, which may include leveraged and inverse ETPs and covers whether a product should be subject to heightened supervisory and compliance procedures.

Ms. Vanessa Countryman  
May 13, 2020  
Page 3

investing tool from the hands of sophisticated retail investors relying on these products in their brokerage accounts (*e.g.*, portfolio hedging) and, in turn, may unintentionally cause them financial harm.

Nasdaq has taken significant actions as an exchange to address ETP transparency and continues to be a passionate advocate for a healthy and vibrant ETP industry and looks forward to working closely with both the Commission and the ETP community to develop appropriate investor protections. As the number and complexity of ETPs continues to grow, Nasdaq calls on the entire ETP industry to come together with targeted and effective investor protections around a transparency principle to protect the interests of all ETP investors. Investor confidence in all aspects of the capital markets is paramount and critical to ensuring its long-term viability.

Sincerely,

A handwritten signature in black ink, appearing to read "John Zecca", with a long horizontal flourish extending to the right.

John Zecca  
Executive Vice President  
Chief Legal &  
Regulatory Officer  
Nasdaq, Inc.

cc: Chairman Jay Clayton  
Commissioner Hester M. Peirce  
Commissioner Elad L. Roisman  
Commissioner Allison Herren Lee  
Director Dalia Blass, Division of Investment Management