

MEMO# 32513

June 5, 2020

Nasdaq Petitions DC Circuit Court of Appeals to Review SEC's NMS Governance Final Order and Motion for Stay with SEC

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June 5, 2020 TO: Equity Markets Advisory Committee RE: Nasdaq Petitions DC Circuit Court of Appeals to Review SEC's NMS Governance Final Order and Motion for Stay with SEC

On June 1, Nasdaq filed a petition with the U.S. Court of Appeals for the DC Circuit requesting a review of the SEC's final order to reform National Market System (NMS) governance.[\[1\]](#) The final order, which the SEC unanimously adopted on May 6, directs the SROs—the equity exchanges and FINRA—to submit a new Consolidated NMS Equity Data Plan that consolidates the three existing Equity Data Plans and changes the governance structure by allowing non-SRO entities to participate on the operating committee.[\[2\]](#)

Nasdaq also submitted to the SEC a motion to stay the final order pending resolution of the petition for review.[\[3\]](#) In its stay motion, Nasdaq argues that its petition for review with the DC Circuit is likely to succeed because (i) the final order is inconsistent with the Exchange Act, which specifies that SROs are responsible for jointly implementing the NMS, not non-SRO entities; (ii) and the mandatory governance structure divests SROs of their ability to “act jointly” in operating a new consolidated equity data plan.[\[4\]](#)

Pursuant to DC Circuit order, Nasdaq will be required to file supplemental documents to the petition for review by July 6, 2020.

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endnotes

[\[1\]](#) Petition for Review, The Nasdaq Stock Market LLC, et. al v. SEC, No. 20-1181 (D.C. Cir. June 1, 2020).

[2] See ICI Memorandum No. 32453, SEC Issues Final Order to Reform NMS Equity Data Plan Governance (May 11, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32453.

[3] Motion for Stay of NMS Governance Order by the Nasdaq Stock Market LLC, Nasdaq BX, Inc. and Nasdaq PHLX LLC (June 3, 2020), *available at* <https://www.sec.gov/rules/sro/nms/2020/34-88827-motion-for-stay-060320.pdf>.

[4] Nasdaq also argues that (i) it would suffer irreparable harm without a stay; (ii) a stay would cause no harm to others; and (iii) a stay would promote the public interest.

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