

December 9, 2019

Via Electronic Filing

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

**Re: Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee
Amendments, Securities Exchange Act Release No. 87193; File No. S7-15-19¹**

Dear Ms. Countryman:

We are submitting this comment letter on behalf of the Operating Committees of the CTA Plan, CQ Plan, UTP Plan, and OPRA Plan (collectively, the "Plans") and the Plans' Participants and Members² (collectively, "Participants") regarding the Securities and Exchange Commission's ("SEC's" or "Commission's") proposal (the "Proposal") to amend Rule 608 of Regulation NMS ("Rule 608") under the Securities and Exchange Act of 1934 ("Exchange Act"). The Proposal would require amendments by national market system plans ("NMS Plans") that establish or change a fee or other charge to be subject to standard approval procedures contained in Rule 608(b)(1) and (2)³ rather than be immediately effective upon submission, subject to SEC abrogation.

The Participants believe that the amendments to Rule 608 should incorporate the following three improvements: (1) amendments filed by NMS Plans must be promptly published by the Commission; (2) the Commission must act on NMS Plan amendments within specified time periods; and (3) should the Commission neither approve nor disapprove NMS Plan amendments within such time periods, such amendments would be deemed approved. In order to incorporate these three improvements into Rule 608, the Participants respectfully request that the Commission modify its Proposal, as detailed in the Appendix attached to this letter, to include (i) amendments to Rule 608(b)(1) and (2) to more closely align its deadlines with the timeframes that govern proposed rule changes by self-regulatory organizations ("SROs") in Exchange Act

¹ Securities Exchange Act Release No. 87193 (October 1, 2019), 84 Fed. Reg. 54794 (Oct. 11, 2019) ("Proposal").

² The Participants of the CTA, CQ, and UTP Plans are Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Nasdaq BX, Inc., Nasdaq ISE, LLC, Nasdaq PHLX, Inc., The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. The Members of the OPRA Plan are BOX Options Exchange LLC, Cboe BZX Options Exchange, Inc., Cboe C2 Options Exchange, Inc., Cboe EDGX Options Exchange, Inc., Cboe Options Exchange, Inc., Miami International Securities Exchange, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, Nasdaq Stock Market LLC, NYSE American LLC, and NYSE Arca, Inc.

³ 17 CFR § 242.608.

Section 19(b)⁴ and Rule 19b-4(1)⁵ and (ii) add standards to govern the basis for the rejection of an NMS Plan amendment similar to the standard imposed by Section 19(b)(10).⁶

1. Overview of the Commission's Proposal

The Proposal would rescind a provision set forth in Regulation NMS Rule 608(b)(3)(i) ("Fee Exception") that permits an NMS Plan amendment to be effective upon filing if it establishes or changes a fee or other charge ("Proposed Fee Change"), subject to SEC abrogation within 60 days, and would instead require the Proposed Fee Change to be subject to the standard Commission approval procedure for NMS Plan amendments. Rule 608(b)(1) and (2) sets forth the standard procedure for amending an NMS Plan.⁷ Pursuant to this procedure, a proposed NMS Plan amendment cannot become effective until the amendment has been published, the public has had an opportunity to comment, and the Commission has approved the amendment by order.

The Commission states in its proposing release that it believes that the proposed rescission of Rule 608(b)(3)(i) provides investors and other market participants an opportunity to provide their views about a Proposed Fee Change prior to the time they are charged a new or changed fee. The Commission further states that the Proposal is intended to help ensure that NMS Plan fees meet statutory requirements under the Exchange Act, including that they are fair and reasonable, before they go into effect.

2. Current Rule 608 and the Proposal

The Participants believe that Rule 608 should be improved to facilitate a more expeditious and transparent review process by the Commission. Because Rule 608 does not mandate timeframes for Commission publication and review of NMS Plan amendments, certain important NMS Plan proposed amendments—designed to enhance the governance and structure of the national market system—have been unpublished for long periods of time. At present, NMS Plan fee filings are immediately effective. The Proposal would require that fee filings only be approved by the Commission after an opportunity for public comment, which would allow market participants to weigh in on proposed changes that would affect them and for the Commission to consider these comments before the fees become effective. In order to facilitate these goals, the Participants believe that a more structured approach would be beneficial so that NMS Plan amendments are subject to specific timelines for publication and Commission action.

The Participants believe that the Proposal would be meaningfully improved by adopting rule-based deadlines by which the Commission would be required to act for NMS Plan amendments, mirroring the requirements currently specified in Section 19(b) of the Exchange Act and Rule 19b-4 thereunder for proposed rule changes of SROs. Section 19 of the Exchange Act was amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-

⁴ 15 U.S.C. § 78s(b)(2).

⁵ 17 CFR § 240.19b-4.

⁶ 15 U.S.C. § 78s(b)(10).

⁷ 17 CFR § 242.608(b)(1), (2).

Frank Act”).⁸ The legislative history of the Dodd-Frank Act states that the changes to Section 19 of the Exchange Act were designed to “encourage the SEC to employ a more transparent and rapid process for consideration of rule changes.”⁹ At that time, SROs noted that the process under the prior version of Section 19, without specific deadlines by which the SEC was required to act, “delay[ed] transparency and public input.”¹⁰ The Participants believe that the current process of SEC review of an NMS Plan amendment is subject to some of the same concerns that existed for SRO rule filings prior to the Dodd-Frank Act amendments to Section 19—regardless of whether it is a fee or substantive amendment.

For instance, Rule 608 presently contains no requirement that the Commission publish an NMS Plan amendment for comment within a certain timeframe after the NMS Plan posts the amendment on its website. In contrast, Section 19(b)(2)(E) of the Exchange Act requires an SRO’s proposed rule change to be published by the Commission within 15 days of the date on which the SRO publishes notice of the proposed rule change on a publicly accessible website, and if “the Commission fails to send the notice for publication thereof within such 15 day period,” then the date of publication of an SRO proposed rule change is deemed to be the date on which the website publication was made.¹¹ Additionally, Rule 608 does not presently describe what happens to a filing if the Commission fails to act within prescribed deadlines. In contrast, Section 19(b)(2)(D) of the Exchange Act provides that a proposed rule change shall be deemed to have been approved if the Commission does not approve or disapprove the proposed rule change within the prescribed timeframe.¹²

The Participants believe that adding these and other requirements modeled on Section 19 of the Exchange Act to Rule 608 for NMS Plan amendments would greatly increase transparency, public comment, and more efficient review and action on NMS Plan amendments. The addition of a deemed publication date is particularly important: while Rule 608 requires the Commission to act to approve or disapprove a proposed NMS Plan amendment within a certain number of days from the publication of the notice of filing,¹³ that time period never starts to run if the Commission does not publish notice of the filing. This means that an NMS Plan amendment can remain at the Commission for an indefinite period of time before being published, thereby delaying the start of the 120- to 180-day period for the Commission to act on the NMS Plan amendment.

This shortcoming with Rule 608 has, in some instances, significantly delayed action on important Plan amendments. To cite a few examples:

⁸ Pub. L. No. 111-203, 124 Stat. 1833 (July 21, 2010).

⁹ See S. Rep. No. 111-176, at 106 (2010).

¹⁰ *Id.*

¹¹ 15 U.S.C. § 78s(b)(2)(E).

¹² 15 U.S.C. § 78s(b)(2)(D).

¹³ Rule 608(b)(2) states that the Commission must approve an NMS Plan amendment within 120 days of the date of publication of the notice of filing of an amendment to an NMS Plan. 17 CFR § 242.608(b)(2). The Commission may take up to 180 days before approving an NMS Plan amendment, if it finds such longer period to be appropriate and publishes the reasons for so finding or with the consent of the NMS Plan amendment sponsors. See *Id.*

- On July 5, 2019, the CTA/CQ and UTP Participants submitted to the Commission amendments to the CTA, CQ, and UTP Plans to make mandatory a conflicts of interest disclosure designed to provide transparency to the public regarding potential conflicts of interest. Although this amendment received widespread support among the Participants and the CTA, CQ, and UTP Plan Advisory Committee, the amendments have not yet been published by the Commission for public comment after more than five months.
- On September 10, 2019, the CTA/CQ and UTP Participants submitted to the Commission amendments to the CTA and UTP Plans that would resolve certain ambiguities within the Plans' language regarding reporting of last sale price reports in an eligible security during a regulatory halt. Again, despite widespread support among the Participants and the CTA and UTP Plan Advisory Committee, these amendments also have not yet been published by the Commission for public comment after three months.
- On September 22, 2015, the Members of the OPRA Plan submitted to the Commission three separate amendments to the OPRA Plan to (1) revise the structure and amount of OPRA's fees for "Non-Display" use of OPRA data, (2) establish OPRA's Professional Subscriber Device-Based Fee, and (3) revise the description of one of OPRA's Redistribution Fees. Even though the changes in OPRA's Fee Schedule were effective January 1, 2016, the Commission did not publish notice of the amendments for public comment until April 12, 2016, seven months after the proposals were filed and four months after the changes became effective.

In the Proposal, the Commission estimates that the median time it takes for it to process an NMS Plan amendment is 70.5 days.¹⁴ However, that estimate fails to consider the issues noted above. In particular, by focusing on the median instead of the mean, the estimate does not account for the cases where the Commission's processing of amendments has been significantly delayed, as in the examples above.¹⁵ Further, the Participants believe that the metric may not be fully reflective of the anticipated times to process an NMS Plan amendment under the Proposal.

As was the case with the Dodd-Frank Act's amendments to Section 19 of the Exchange Act, the Participants believe that explicit deadlines for Commission action for NMS Plan amendments would result in a more transparent and rapid process for consideration of NMS Plan amendments.

The Participants have also observed that, unlike in the SRO rulemaking context, the Division of Trading and Markets has delegated authority to either approve proposed NMS Plan amendments

¹⁴ The Commission also notes that "the estimate based on historical data may not reflect the time periods going forward" because the "historical data necessarily reflects the substance of the particular amendments, the comments received on those amendments, and other factors that can affect the timing of the Commission action." See Proposal, 84 FR at 54799 n.56.

¹⁵ The Commission explained its reliance on the median length of time before an NMS Plan amendment is published by acknowledging that the mean would be skewed by some of the NMS Plan amendments that waited several months for publication. See Proposal, 84 FR at 54801 n. 71 ("The Commission preliminarily believes that the average is not an informative estimate for these measures because the sample size is small and contains extreme outliers.").

or extend the approval period, but not to publish notices when NMS Plan amendments are filed, which may also contribute to the length of timeframes for SEC action on proposed NMS Plan amendments.¹⁶ The Participants believe there is an incongruity in providing delegated authority for the staff to approve, but not publish for notice and comment, NMS Plan amendments. Therefore, the Participants request the Commission also act to provide delegated authority to provide notice of NMS Plan amendments.

3. Recommended Improvements to Rule 608

The Participants recommend that the Commission amend the current Proposal to include the series of controls, described above and in the attached Appendix, to the Commission's review of NMS Plan amendments. These recommendations are designed to provide more transparency to the Commission's consideration of NMS Plan amendments and foster more expeditious public input into these amendments. In the Appendix to this letter, we have provided some steps that we believe the Commission should take to improve Rule 608. These steps are not an exhaustive list but are intended to provide some guidance as to the actions the Commission should take to improve the NMS Plan amendment review process.

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We appreciate this opportunity to comment on the Commission's Proposal. Please do not hesitate to contact Howard Kramer at [REDACTED] or Robert Wilcox at [REDACTED] with any questions.

Respectfully Submitted,

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¹⁶ See 17 CFR § 200.30-3(a)(42).

Appendix – Proposed Changes to Rule 608

Timeframe for Publication and Approval of Proposed NMS Plan Amendments

1. If, after filing a proposed amendment to any effective national market system plan with the Commission, an NMS Plan publishes a notice of such filing of such proposed plan amendment, together with the terms of substance of the filing or a description of the subjects and issues involved, on the NMS Plan's website, the Commission shall send notice of the proposed NMS Plan amendment to the Federal Register for publication within 15 days of the date on which such website publication was made.¹⁷
 - a. If the Commission fails to send the notice for publication within the 15-day period, then the date of publication will be deemed to be the date on which such website publication was made.¹⁸
 - b. All amendments received by the Secretary on or before 5:30 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, on a business day, shall be deemed filed on that business day. All filings received by the Secretary after 5:30 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed filed on the next business day.¹⁹
2. An NMS Plan must publish its proposed plan amendment on its website within two business days after the filing of the plan amendment with the Commission.²⁰
3. Except as provided in Section (4), within 45 days after the date of publication in the Federal Register of a proposed NMS Plan amendment under Rule 608, the Commission shall:
 - a. By order, approve or disapprove the proposed NMS Plan amendment; or
 - b. Institute proceedings as described in Section (5) to determine whether a proposed NMS Plan amendment should be disapproved.²¹
4. The Commission may extend the 45-day review period by an additional 45 days if:
 - a. The Commission determines that a longer period is appropriate and publishes the reasons for such determination; or
 - b. The NMS Plan consents to a longer period of review.²²

¹⁷ Cf. 15 U.S.C. § 78s(b)(2)(E)

¹⁸ Cf. *Id.*

¹⁹ Cf. 17 CFR 240.19b-4(k).

²⁰ Cf. 17 CFR 240.19b-4(l).

²¹ Cf. 15 U.S.C. § 78s(b)(2)(A)(i).

²² Cf. 15 U.S.C. § 78s(b)(2)(A)(ii).

5. *Proceedings.* If the Commission does not approve or disapprove a proposed NMS Plan amendment within 45 days (or 90 days if the review period is extended) and instead institutes proceedings to determine whether the proposed plan amendment should be disapproved, the Commission shall provide:
 - a. Notice of the grounds for disapproval under consideration; and
 - b. An opportunity for a hearing, to be concluded no later than 180 days after the date of publication of the NMS Plan amendment in the Federal Register.²³
6. The Commission may extend the 180-day period to conclude proceedings by an additional 60 days if:
 - a. The Commission determines that a longer period is appropriate and publishes the reasons for such determination; or
 - b. The NMS Plan consents to a longer period of review.²⁴
7. The proposed NMS Plan amendment will be deemed to have been approved if the Commission does not approve or disapprove the proposed NMS Plan amendment within the specified timeframes set forth above.²⁵
8. The Division of Trading and Markets has delegated authority to both publish notices of proposed NMS Plan amendments filed by the NMS Plans and to approve such NMS Plan amendments.²⁶

Standards Governing the Rejection of a Proposed NMS Plan Amendment

1. The Commission must notify Participants within seven business days of receipt by the Commission whether a proposed NMS Plan amendment does not comply with the required form of an NMS Plan amendment, which can be extended to 21 days if the Commission determines that the proposed NMS Plan amendment is unusually lengthy and is complex or raises novel regulatory issues.²⁷

²³ Cf. 15 U.S.C. § 78s(b)(2)(B)(i).

²⁴ Cf. 15 U.S.C. § 78s(b)(2)(B)(ii)(II).

²⁵ Cf. 15 U.S.C. § 78s(b)(2)(D).

²⁶ Cf. 17 CFR § 200.30-3(a)(12).

²⁷ Cf. 15 U.S.C. § 78s(b)(10).