

November 7, 2013

Ms. Elizabeth Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: Request for Temporary Exemption from SEC Rule 613(a)(1) of
Regulation NMS under the Securities Exchange Act of 1934**

Dear Ms. Murphy:

FINRA and the eighteen registered national securities exchanges (collectively, the “SROs”) respectfully request that the Securities and Exchange Commission (“Commission” or “SEC”) grant a temporary exemption, pursuant to its authority under Section 36 of the Securities Exchange Act of 1934 (“Act”), from the application of paragraph (a)(1) of Rule 613 of Regulation NMS (“Rule 613”) with respect to the joint filing by the SROs of a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository (“CAT NMS Plan”).¹ Rule 613(a)(1) requires that the SROs “jointly file on or before 270 days from the date of publication of the [Rule 613] Adopting Release in the *Federal Register* a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository as required by [Rule 613].”² The Adopting Release for Rule 613 was published in the *Federal Register* on August 1, 2012.³ On February 7, 2013, the SROs requested a temporary exemption from the deadline specified in Rule 613(a)(1),⁴ and on March 7, 2013, the Commission provided the SROs with a temporary exemption until December 6, 2013.⁵ For the

¹ See 17 CFR 242.613(a)(1).

² *Id.*

³ Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) (“Adopting Release”).

⁴ See Letter from Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA, to Elizabeth Murphy, Secretary, SEC, dated February 7, 2013 (“Request Letter”).

⁵ See Securities Exchange Act Release No. 69060 (March 7, 2013), 78 FR 15771 (March 12, 2013).

reasons set forth below, the SROs request that the Commission provide a further temporary exemption to the SROs from the deadline specified in Rule 613(a)(1) until September 30, 2014.

Background and Discussion

Rule 613 requires the SROs to jointly file a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository. As adopted, Rule 613 “expand[ed] the set of solutions that could be considered by the SROs for creating, implementing, and maintaining a consolidated audit trail and [provided] the SROs with increased flexibility in how they choose to meet the requirements of the adopted Rule.”⁶ As the Commission noted in the Adopting Release, because of this expanded solution set, “the adopted Rule now requires the SROs to provide much more information and analysis to the Commission as part of their NMS plan submission.”⁷ For example, Rule 613 requires the CAT NMS Plan to include the SROs’ analysis of the CAT NMS Plan’s costs and impact on competition, efficiency, and capital formation (including cost estimates for the proposed solution, and a discussion of the costs and benefits of alternative solutions considered but not proposed); the SROs’ process in developing the CAT NMS Plan (including a discussion of the costs, benefits, and rationale for the choices made in developing the CAT NMS Plan); information about the implementation of the Plan; and milestones for the creation of the consolidated audit trail.⁸ Rule 613 also requires that the CAT NMS Plan include a discussion of “[t]he process by which the [SROs] solicited views of their members and other appropriate parties regarding the creation, implementation, and maintenance of the consolidated audit trail, a summary of the views of such members and other parties, and how the [SROs] took such views into account in preparing the [CAT NMS Plan].”⁹

The Commission stated in the Adopting Release that these detailed requirements are “intended to ensure that the Commission and the public have sufficiently detailed information to carefully consider all aspects of the NMS plan ultimately submitted by the SROs.”¹⁰ The Commission expressed its expectation that “the SROs will seriously consider various options as they develop the NMS plan to be submitted to the Commission for its consideration.”¹¹

⁶ Adopting Release at 45725.

⁷ *Id.* See also Adopting Release at 45789.

⁸ See 17 CFR 242.613(a).

⁹ See 17 CFR 242.613(a)(1)(xi).

¹⁰ Adopting Release at 45725.

¹¹ Adopting Release at 45789.

As described in the Request Letter, the SROs concluded that the publication of a request for proposal (“RFP”) soliciting bids from interested parties to serve as the plan processor for the consolidated audit trail was necessary prior to filing the CAT NMS Plan to ensure that potential alternative solutions to creating the consolidated audit trail can be presented and considered by the SROs and that a detailed and meaningful cost/benefit analysis can be performed, both of which are required considerations to be addressed in the CAT NMS Plan.¹² To that end, the SROs published an RFP on February 26, 2013, and 31 firms submitted an intent to bid in response.¹³

Since the publication of the RFP, potential bidders and members of the public, including broker-dealer members of the SROs, have expressed interest in the process by which the SROs will review and evaluate bids, narrow down the list of bids, use those bids in formulating the CAT NMS Plan, and, ultimately, select the plan processor. The SROs also solicited views from potential bidders regarding whether they preferred knowing the review, evaluation, and selection process in advance of submitting their bids and whether that process could influence either a decision regarding whether to submit a bid or the contents of a bid. Many potential bidders indicated that knowing the process by which the SROs will choose the plan processor is important to finalizing their bid. They also generally expressed the view that providing bidders with four weeks between approval of a selection process and the submission deadline for the bids is an appropriate timeframe to allow bidders to make any changes to their bid in light of the approved evaluation and selection process.

For these reasons, the SROs submitted a national market system plan to the SEC in August that would govern both the process for SRO review of the bids submitted in response to the RFP and the procedure for evaluating the bids and, ultimately, selecting the plan processor (“Selection Plan”). The Selection Plan is intended to govern how the SROs will proceed with formulating and submitting the CAT NMS Plan—and, as part of that process, reviewing, evaluating, and narrowing down the bids submitted in response

¹² The SROs also stated in the Request Letter that more time was needed to solicit public comments on portions of the draft CAT NMS Plan. The SROs have made significant progress on this effort. The SROs created a CAT Development Advisory Group in March 2013 to provide the SROs with more direct and detailed views from SRO members, industry groups, and other interested members of the public. The SROs also published selected questions regarding the CAT NMS Plan for public comment on April 22, 2013. Comments received in response to the questions are available on the SROs’ joint web site at www.catnmsplan.com.

¹³ Since that time, seven firms have formally notified the SROs of their intent to withdraw as primary bidders. An updated list of these firms is available at www.catnmsplan.com.

to the RFP—and ultimately choosing the plan processor. The Selection Plan also sets forth the manner in which the SROs have sought to mitigate potential conflicts of interest raised by the fact that SROs, or affiliates of SROs, may also be bidders seeking to serve as the plan processor or may be included as part of a bid. The Selection Plan seeks to mitigate these potential conflicts of interest by allowing all SROs to participate meaningfully in the process of creating the CAT NMS Plan and choosing the plan processor while imposing requirements to ensure that the participation is independent and that the process is fair and transparent.

At the time the SROs submitted the Selection Plan to the SEC, the SROs noted that they anticipated that bids would be required to be submitted approximately four weeks after the SEC's approval of the Selection Plan. The SROs also estimated that it would take approximately seven months from receipt of the bids to review and evaluate the bids, perform the in-depth and thorough analysis noted above that is required by Rule 613, and draft the CAT NMS Plan for submission to the SEC. Because the content of the bids is critical to the analysis needed to draft the CAT NMS Plan, the SROs estimate that seven months following receipt of the bids is necessary to ensure that they can fully address the considerations enumerated in Rule 613, including a discussion of the costs and benefits of not only the proposed solution(s) but also of the alternative solutions considered but not proposed as the solution in the CAT NMS Plan, so that the Commission and the public have sufficiently detailed information to carefully consider all aspects of the CAT NMS Plan ultimately submitted by the SROs.¹⁴ If the Selection Plan is not approved, bidders will need time to finalize their bids, and the SROs will need additional time to develop an alternative process for reviewing and evaluating bids, formulating the CAT NMS Plan, and selecting the plan processor. In light of this estimated timeframe, the SROs are requesting a further temporary exemption from Rule 613(a)(1) until September 30, 2014.

Request for Temporary Exemption

Section 36 of the Act grants the Commission the authority, with certain limitations, to “conditionally or unconditionally exempt any person, security, or transaction . . . from any provision or provisions of [the Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”¹⁵

Currently, the SROs believe that a temporary exemption from the deadline for filing the CAT NMS Plan contained in Rule 613(a)(1) until September 30, 2014, is necessary and appropriate in the public interest and is consistent with the protection of investors. As described above, the temporary exemption is necessary to allow the SROs

¹⁴ See Adopting Release at 45725.

¹⁵ 15 U.S.C. § 78mm(a)(1).

adequate time to review and evaluate the bids submitted in response to the RFP published in February 2013 pursuant to the process set forth in the Selection Plan, and because the content of the bids is critical to the analysis needed to draft the CAT NMS Plan, the SROs estimate that seven months following receipt of the bids is necessary to ensure that they can fully address the considerations enumerated in Rule 613 such that the Commission and the public have sufficiently detailed information to carefully consider all aspects of the CAT NMS Plan.

The extension is necessary and appropriate regardless of whether the Commission approves the Selection Plan. In addition to the time needed for the Commission to consider the Selection Plan, as noted above, the SROs estimate that, if the Selection Plan is approved, it will take approximately seven months from the time bids are received to submit the CAT NMS Plan. If the Selection Plan is not approved, bidders will need time to finalize their bids, and the SROs will need additional time to develop an alternative process for reviewing and evaluating bids, formulating the CAT NMS Plan, and selecting the plan processor.

As noted in the Request Letter, the consolidated audit trail will fundamentally alter the way market surveillance is conducted and, as the Commission observed, "should substantially enhance the ability of the SROs and the Commission to oversee today's securities markets and fulfill their responsibilities under the federal securities laws."¹⁶ The SROs believe that the timeline outlined above will lead to a significantly better and more informed process and, as a result, the proposed solution will be the result of a more meaningful and careful analysis.

The SROs therefore respectfully request that, pursuant to Section 36 of the Act, the Commission grant the SROs a temporary exemption from the deadline contained in Rule 613(a)(1) for filing the CAT NMS Plan until September 30, 2014. The SROs will continue to provide the Commission with regular updates, including any potential changes in the above timeline, as the RFP process unfolds or other issues arise. If there are any questions concerning this request, please contact me at 202-728-8484 or any other individual representing an SRO as part of the consortium working to implement Rule 613.

Sincerely,



Robert L.D. Colby

¹⁶ Adopting Release at 45726.