

**SECURITIES AND EXCHANGE  
COMMISSION****17 CFR Parts 200, 201, 240, and 242**

[Release No. 34–89618; File No. S7–15–19]

RIN 3235–AM56

**Rescission of Effective-Upon-Filing  
Procedure for NMS Plan Fee  
Amendments and Modified Procedures  
for Proposed NMS Plans and Plan  
Amendments****AGENCY:** Securities and Exchange  
Commission.**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (“Commission” or “SEC”) is amending Regulation NMS under the Securities Exchange Act of 1934 (“Exchange Act”) to rescind a provision that allows a proposed amendment to a national market system plan (“NMS plan”) to become effective upon filing if the proposed amendment establishes or changes a fee or other charge. As a result of rescinding the provision, such a proposed amendment instead will be subject to the procedures under which there must be an opportunity for public comment and Commission approval by order prior to effectiveness. The Commission also is amending its regulations to require that proposed NMS plans and proposed amendments to existing NMS plans be filed with the Commission by email, and is amending its regulations to modify the procedures applicable to the Commission’s handling of proposed NMS plans and plan amendments, including fee amendments. Finally, the Commission is adopting amendments to its rules of practice regarding disapproval proceedings and its delegations of authority to the Director of the Division of Trading and Markets (“Division”).

**DATES:** Effective November 16, 2020.**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:** The Commission is: (1) Rescinding and reserving paragraph (b)(3)(i) of 17 CFR 242.608 (Rule 608 of Regulation NMS) under the Exchange Act, and thereby eliminating the effective-upon-filing exception for proposed NMS plan amendments to establish or change a fee or other charge collected on behalf of all the plan participants in connection with access to, or use of, any facility

contemplated by the plan or amendment (including changes in any provision with respect to distribution of any net proceeds from such fees or other charges to the participants) (“NMS plan fee amendment”); (2) adopting amendments to 17 CFR 242.608(a)(1) (Rule 608(a)(1)) to require that proposed NMS plans and plan amendments be filed with the Commission by email; (3) adopting amendments to 17 CFR 242.608(b)(1) and (2) (Rule 608(b)(1) and (2)) to modify the procedure applicable to Commission action on a proposed NMS plan or plan amendment; (4) adopting modifications in 17 CFR 201.700 and 701 (Commission Rules of Practice 700 and 701); (5) adopting an updated cross-reference in 17 CFR 240.19b–4(g) (Rule 19b–4(g)); (6) amending 17 CFR 200.30–3 (Rule 30–3) to delegate authority to the Division Director to publish notice of the filing of a proposed NMS plan amendment, to notify plan participants that a proposed NMS plan or plan amendment does not comply with 17 CFR 242.608(a) (Rule 608(a)) or plan filing requirements in other sections of Regulation NMS and 17 CFR 240, subpart A, to determine that a proposed NMS plan or plan amendment is unusually lengthy and complex or raises novel regulatory issues and inform the NMS plan participants of such determination, to institute proceedings to determine whether a proposed NMS plan or plan amendment should be disapproved, to provide the NMS plan participants notice of the grounds for disapproval under consideration, to extend for a period not exceeding 240 days from the date of publication of notice of the filing of a proposed NMS plan or plan amendment the period during which the Commission must issue an order approving or disapproving the proposed NMS plan or plan amendment and determine whether such longer period is appropriate and publish the reasons for such determination; (7) amending Rule 30–3 to remove delegated authority from the Division Director to approve a proposed NMS plan amendment and to extend a time period that will no longer exist under Rule 608(b) as amended; and (8) amending Rule 30–3 to relocate within the rule existing delegations of authority to the Division Director to summarily abrogate a proposed NMS plan amendment put into effect upon filing with the Commission and require that such amendment be refiled in accordance with paragraph (a)(1) of Rule 608 and reviewed in accordance with paragraph (b)(2) of Rule 608, and to put a proposed plan amendment into effect summarily upon publication of notice

and on a temporary basis not to exceed 120 days.

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**I. Introduction**

On October 1, 2019, the Commission proposed to amend Rule 608 under Regulation NMS to rescind paragraph (b)(3)(i) and thereby eliminate the effective-upon-filing exception for NMS plan fee amendments.<sup>1</sup> Rule 608 under Regulation NMS sets forth requirements for the filing and amendment of NMS plans. Rule 608(a) provides that any two

<sup>1</sup> Securities Exchange Act Release No. 87193, 84 FR 54794 (Oct. 11, 2019) (“Proposing Release” or “Proposal”).

or more self-regulatory organizations (“SROs”), acting jointly, may file a new proposed NMS plan or a proposed amendment to an existing NMS plan by submitting to the Secretary of the Commission the text of the plan or amendment along with extensive supporting information.<sup>2</sup> Rule 608(b) addresses the effectiveness of proposed NMS plans and plan amendments, and sets forth a procedure for Commission action in paragraphs (b)(1) and (b)(2). Among other things, this procedure precludes a proposed NMS plan amendment from becoming effective until after an opportunity for public comment and Commission approval by order.

Paragraph (b)(3)(i) of Rule 608, however, has provided for NMS plan fee amendments an exception to the standard procedure since Rule 608 was adopted in 1981 (the “Fee Exception”).<sup>3</sup> Under the Fee Exception, a NMS plan fee amendment could be put into effect upon filing with the Commission, before comments could be submitted and without Commission approval.<sup>4</sup> Consequently, the Fee Exception allowed the SROs, as NMS plan participants that constitute the NMS plan operating committees and vote to approve plan amendments, to begin charging new or altered NMS plan fees to a wide range of market participants prior to an opportunity for public comment and without Commission action.<sup>5</sup>

<sup>2</sup> As discussed in the Proposal, Section 11A of the Exchange Act directs the Commission to facilitate the creation of a national market system for qualified securities. 15 U.S.C. 78k-1(a). Proposing Release, *supra* note 1, at 54794.

<sup>3</sup> Proposing Release, *supra* note 1, at 54796–97. Paragraph (b)(3)(iii) of Rule 608 provides that the Commission may summarily abrogate an immediately effective amendment within 60 days after filing and require it to be refiled as not immediately effective if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.

<sup>4</sup> While a NMS plan fee amendment was deemed effective upon filing, the required substance of the fee amendment is the same as what is required for a proposed NMS plan amendment that is not immediately effective. See Rule 608(a).

<sup>5</sup> The Fee Exception has been available for NMS plans that charge or intend to charge fees. Currently, these are: (i) The NMS plans that govern the facilities through which registered securities information processors (“SIPs”) collect, consolidate, and distribute real-time market information (also known as “core data”); and (ii) the plan that governs the consolidated audit trail (“CAT”). The participants in these plans are all SROs. The Proposing Release sets forth additional background concerning the core data plans and the CAT plan, those plans’ fee-setting process, Rule 608 of Regulation NMS and the Fee Exception, and pre-

After considering the comments received on the Proposal to rescind the Fee Exception,<sup>6</sup> the Commission has determined that the Fee Exception is no longer appropriate for today’s national market system and should be rescinded. As a result, NMS plan fee amendments will be subject to the procedure set forth in Rule 608(b)(1) and (2), and there must be an opportunity for public comment and Commission approval by order before the fees can become effective. The Commission also has decided to amend Rule 608(a)(1) to require that proposed new NMS plans and plan amendments be filed with the Commission by email, and to modify the procedure set forth in Rule 608(b)(1) and (2) for the Commission’s handling of proposed new NMS plans and proposed amendments to existing NMS plans, including NMS plan fee amendments. As discussed below, the modified procedure sets forth a new process and timeframes for Commission publication of notice and for subsequent Commission action. In addition, the Commission is adopting amendments to Commission rules of practice and delegations of authority.

## II. Rule Amendments

### A. Rescission of the Fee Exception

The Commission proposed to rescind the Fee Exception based on several factors, many of which were echoed by commenters. As discussed in the Proposal and by commenters, NMS plan fees have a broad effect on a wide range of market participants, and the total revenues derived from NMS plans’ fees are substantial.<sup>7</sup> In addition, non-SRO

Proposal comments and petitions regarding the Fee Exception. See Proposing Release, *supra* note 1, at 54795–99.

<sup>6</sup> Comments received on the Proposal are available on the Commission’s website, available at <https://www.sec.gov/comments/s7-15-19/s71519.htm>.

<sup>7</sup> Proposing Release, *supra* note 1, at 54798; Letter from Dennis M. Kelleher, President and CEO, and Lev Bagramian, Senior Securities Policy Advisor, Better Markets Inc., to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“Better Markets Letter”), at 3; Letter from Greg Babyak, Global Head of Regulatory Affairs, Bloomberg L.P., to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“Bloomberg Letter”), at 2; Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors, to Vanessa Countryman, Secretary, Commission, dated December 5, 2019 (“CII Letter”), at 2–3; Letter from Dorothy M. Donohue, Deputy General Counsel, Securities Regulation, Investment Company Institute, to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“ICI Letter”), at 1–2; Letter from Rich Steiner, Head of Client Advocacy and Market Innovation, RBC Capital Markets, to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“RBC Capital Markets Letter”), at 3. As noted in the Proposal, the total revenues generated by fees charged by the core data plans totaled more than

market participants, including investors, broker-dealers, data vendors and others, are required to pay the fees charged by NMS plans to obtain core data, as well as critical market information that is not available from sources other than the core data NMS plans, such as regulatory data required by the National Market System Plan to Address Extraordinary Market Volatility (“LULD” plan) and administrative messages.<sup>8</sup> Further, the exchange SROs have demutualized in the time since Rule 608 (and the Fee Exception) was adopted in 1981, resulting in less opportunity for SRO members to influence a NMS plan fee amendment before it is filed with the Commission.<sup>9</sup> There also are potential conflicts of interest for exchange SROs in setting NMS plan fees for core data,<sup>10</sup> and for SRO participants in the CAT plan in setting fees that industry members must pay for the costs of the CAT system.<sup>11</sup> Moreover, even if the

\$500 million in 2017. Proposing Release, *supra* note 1, at 54798. The total revenues generated by fees charged by the core data plans totaled more than \$500 million in 2018 as well. Both the 2017 and 2018 amounts are derived from audited financial statements for the CTA/CQ and Nasdaq/UTP plans, and from summary financial information for the OPRA plan.

<sup>8</sup> Proposing Release, *supra* note 1, at 54798–99; Better Markets Letter at 2–3; Bloomberg Letter at 2–3, 5; Letter from Ray Ross, Chief Technology Officer, Clearpool Group, to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“Clearpool Letter”), at 3; Letter from Joanna Mallers, Secretary, FIA Principal Trading Group, to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“FIA Principal Traders Letter”), at 1; Letter from Derrick Chan, Head of Equities Trading and Sales, Fidelity Capital Markets, to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“Fidelity Letter”), at 2 and n. 3; ICI Letter at 1; Letter from Theodore D. Lazo, Managing Director, Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, Commission, dated December 6, 2019 (“SIFMA Letter”), at 1–2. Commenters also stated that the core data plans are monopolistic providers of market-wide services and there is no market competition that can be relied upon to set competitive prices. Better Markets Letter at 3; Bloomberg Letter at 2, 5; CII Letter at 2, 3; Clearpool Letter at 3; Fidelity Letter at 3; Letter from Mark D. Epley, Executive Vice President and Managing Director, General Counsel, and Jennifer W. Han, Associate General Counsel, Managed Funds Association, to Vanessa Countryman, Secretary, Commission, dated December 6, 2019 (“MFA Letter”), at 3; RBC Capital Markets Letter at 2.

<sup>9</sup> Proposing Release, *supra* note 1, at 54799; Letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Vanessa Countryman, Secretary, Commission, dated December 12, 2019 (“Healthy Markets Letter”), at 10.

<sup>10</sup> Proposing Release, *supra* note 1, at 54799–802; Better Markets Letter at 3–4; Bloomberg Letter at 5; CII Letter at 3–4; Clearpool Letter at 3; Fidelity Letter at 3; Healthy Markets Letter at 1, 4–5; RBC Capital Markets Letter at 2.

<sup>11</sup> Proposing Release, *supra* note 1, at 54798; FIA Principal Traders Letter at 1–2; Fidelity Letter at 3. On August 29, 2019, the operating committee for CAT NMS, LLC filed an immediately effective NMS plan amendment that created a new Delaware

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Commission ultimately abrogates a NMS plan fee amendment, the Fee Exception allows the new or altered fee to be effective during the time between its filing and abrogation.<sup>12</sup>

Commenters that supported the Proposal also criticized the Fee Exception, stating that it does not facilitate informed and meaningful public comment,<sup>13</sup> discourages market participants from submitting comments on NMS plan fee amendments,<sup>14</sup> provides too much autonomy to SIP operators,<sup>15</sup> and provides an inadequate opportunity for investors and market participants to prepare for a new or altered NMS plan fee before it is charged.<sup>16</sup> Commenters stated that, instead, NMS plan fee amendments should become effective only after public notice, an opportunity for comment, and Commission approval.<sup>17</sup> They stated that this procedure will: (i) Create a more meaningful comment process;<sup>18</sup> (ii) impose the financial and

limited liability company, named Consolidated Audit Trail, LLC, for the purposes of conducting activities related to the CAT plan. See Securities Exchange Act Release No. 87149 (Sept. 27, 2019), 84 FR 52905 (Oct. 3, 2019). The CAT plan currently allows the operating committee of Consolidated Audit Trail, LLC to establish funding for Consolidated Audit Trail, LLC, including establishing an allocation of its related costs among SRO participants and SRO members that is consistent with the Exchange Act. See Proposing Release, *supra* note 1, at 54796 and n. 17, 54798.

<sup>12</sup> Proposing Release, *supra* note 1, at 54799; Bloomberg Letter at 3; Fidelity Letter at 4; RBC Capital Markets Letter at 4. One commenter stated that this can cause disruption and attendant costs. RBC Capital Markets Letter at 4.

<sup>13</sup> Better Markets Letter at 1–3; Bloomberg Letter at 4, 7; Clearpool Letter at 2; Healthy Markets Letter at 8. Two commenters stated that the effective-upon-filing process has made it difficult for the Commission to evaluate if proposed NMS plan fee amendments comply with the Exchange Act and Commission rules. Better Markets Letter at 2–3; Healthy Markets Letter at 7.

<sup>14</sup> Better Markets Letter at 3; MFA Letter at 2–3; RBC Capital Markets Letter at 3. One commenter stated that market participants are discouraged from commenting on NMS plan fee amendments because, given the Commission's history of abrogating less than one out of ten fee amendments, they have little confidence that their after-the-fact feedback will persuade the Commission to abrogate the fee amendment and assess whether the fees are necessary or appropriate in the public interest. Better Markets Letter at 3. Another commenter stated that market participants are likely to perceive NMS plan fee amendments that are subject to an effective-upon-filing procedure as a *fait accompli*, and be less willing to spend time to submit comments or raise concerns. MFA Letter at 2–3.

<sup>15</sup> Bloomberg Letter at 4; ICI Letter at 2.

<sup>16</sup> Bloomberg Letter at 3; Clearpool Letter at 2; Fidelity Letter at 3–4; Healthy Markets Letter at 10; RBC Capital Markets Letter at 4.

<sup>17</sup> Better Markets Letter at 3; Bloomberg Letter at 1–3, 6; CII Letter at 2–3; Clearpool Letter at 1–2; FIA Principal Traders Letter at 1; Fidelity Letter at 2; Healthy Markets Letter at 7–9; ICI Letter at 2; MFA Letter at 2; RBC Capital Markets Letter at 2–4; SIFMA Letter at 1.

<sup>18</sup> Better Markets Letter at 3; Bloomberg Letter at 2, 5; Clearpool Letter at 2; FIA Principal Traders

operational costs of fee changes only after notice, comment, and an affirmative Commission disposition, which will help mitigate the risk of unwarranted fee changes, avoid complications with refunds should an application be withdrawn or subsequently denied, and more appropriately place the cost of delay in imposing a new fee on the filer;<sup>19</sup> (iii) more properly allocate administrative burdens such that agency action is necessary to approve, rather than abrogate, a NMS plan fee amendment;<sup>20</sup> (iv) provide greater assurance that NMS plan fees are fair and reasonable before they go into effect;<sup>21</sup> and (v) provide advanced notice and time to plan for a fee change,<sup>22</sup> which should help facilitate more fair, orderly and efficient markets.<sup>23</sup>

The Commission continues to believe that a NMS plan fee amendment should not become effective—and SRO plan participants should not be able to charge new or altered fees to investors, broker-dealers, and others—until after the public has had an opportunity to comment on the NMS plan fee amendment. By changing the timing of effectiveness, commenters will have an opportunity to provide their views about a NMS plan fee amendment prior to the time they are charged a new or altered NMS plan fee, and the Commission will have an opportunity to consider commenters' views before a NMS plan fee amendment becomes effective. The Commission believes that this is an appropriate adjustment to the comment process for NMS plan fee amendments in light of how broadly

Letter at 1; Fidelity Letter at 3; Healthy Markets Letter at 8; MFA Letter at 2–3; RBC Capital Markets Letter at 3–4; SIFMA Letter at 1.

<sup>19</sup> RBC Capital Markets Letter at 3–4.

<sup>20</sup> Bloomberg Letter at 3–6.

<sup>21</sup> Bloomberg Letter at 5; CII Letter at 2; ICI Letter at 2; MFA Letter at 1–3; RBC Capital Markets Letter at 3.

<sup>22</sup> Bloomberg Letter at 3; ICI Letter at 2; RBC Capital Markets Letter at 3–4.

<sup>23</sup> RBC Capital Markets Letter at 4. Some commenters made suggestions regarding NMS plan governance and transparency that are outside the scope of this rulemaking. See Better Markets Letter at 5–6; Bloomberg Letter at 7–8; Clearpool Letter at 3 n. 6; Fidelity Letter at 4; Healthy Markets Letter at 5–6; ICI Letter at 2–3. In addition, some commenters made suggestions regarding what substantive information should be set forth in NMS plan fee amendments, and guidance that the Commission should provide in that regard. See MFA Letter at 3–4; Healthy Markets Letter at 11. The Commission is not adopting amendments to the required substance of proposed NMS plan amendments. As discussed in the Proposal, the rescission of the Fee Exception does not change any requirements regarding the substantive information that must be set forth in NMS plan fee amendments pursuant to paragraph (a) of Rule 608 and the relevant provisions of the Exchange Act. Proposing Release, *supra* note 1, at 54798.

NMS plan fees affect market participants.

In response to a request for comment in the Proposal, commenters addressed a potential alternative approach where the Commission could modify Rule 608(b)(3) such that a NMS plan fee amendment is not effective immediately upon filing, but becomes effective automatically some time period (e.g., 60 or 90 days) after filing if the Commission does not abrogate the filing.<sup>24</sup> Several commenters criticized this alternative approach as suffering from the same defects as the effective-upon-filing procedure.<sup>25</sup> Another commenter believed the alternative would be inappropriate because Commission review and approval by order should be required before a NMS plan fee is effective, given the lack of competition for NMS plan fees.<sup>26</sup> One commenter stated that the alternative would be acceptable and would achieve substantially the same goals as the Proposal.<sup>27</sup>

The Commission is not adopting this alternative approach. While the alternative approach included a comment period and Commission abrogation, if necessary, prior to the effectiveness of a NMS plan fee amendment, the Commission has decided to rescind the Fee Exception and to adopt the requirement of Commission approval by order before a NMS plan fee amendment can become effective. The Commission does not believe that any proposed NMS plan fee should be imposed on the public without an affirmative Commission determination that the fee meets the relevant requirements of the Exchange Act and rules thereunder. This is what will occur under the procedure set forth in Rule 608(b)(1) and (2), as amended, which is being modified from the Proposal as discussed below.

### *B. Modified Procedure for Proposed NMS Plans and Plan Amendments*

#### 1. Amendments to Rule 608

In the Proposing Release, the Commission requested comment on whether the existing procedure for notice, comment and Commission

<sup>24</sup> See Proposing Release, *supra* note 1, at 54799, 54804–05; see also Bloomberg Letter at 4 n. 8; Clearpool Letter at 2–3 n. 5; Healthy Markets Letter at 8–9; MFA Letter at 3; RBC Capital Markets Letter at 4–5; Fidelity Letter at 4; Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, The Nasdaq Stock Market LLC, to Vanessa Countryman, Secretary, Commission, dated December 10, 2019 (“Nasdaq Letter”), at 2, 4–5.

<sup>25</sup> Bloomberg Letter at 4 n. 8; Clearpool Letter at 2–3 n. 5; Healthy Markets Letter at 8–9; MFA Letter at 3; RBC Capital Markets Letter at 4–5.

<sup>26</sup> Fidelity Letter at 4.

<sup>27</sup> Nasdaq Letter at 2, 4–5.

action in Rule 608(b)(1) and (2) would be appropriate for NMS plan fee amendments if the Fee Exception were rescinded.<sup>28</sup> The Commission also asked whether the time periods in Rule 608 for Commission action should be longer or shorter for NMS plan fee amendments, whether any other aspects of the Rule 608 procedure should be modified for NMS plan fee amendments, and what issues or improvements relating to Rule 608 procedures commenters would recommend that the Commission address or undertake to ensure that NMS plan fee amendments are not unduly delayed.<sup>29</sup>

Two commenters recommended that the Commission incorporate into Rule 608 procedures for Commission action on proposed NMS plan amendments that mirror the procedures for individual SRO rule filings under Section 19(b) of the Exchange Act.<sup>30</sup> They stated that, under these Section 19(b) procedures, a SRO rule filing is “deemed approved” if the Commission does not act within the specified timeframe for final action.<sup>31</sup> These commenters also stated that it is particularly important to add a deadline for the Commission to publish notice of a proposed NMS plan amendment, and provided examples of proposed NMS plan amendments that were not published until several months after their submission to the Commission or had not yet been published several months after submission.<sup>32</sup> They also criticized the Commission’s estimate that the median time for processing a proposed NMS plan amendment is 70.5 days, stating that median times are less affected than mean times by outlier cases when the Commission’s processing of amendments has been

significantly delayed.<sup>33</sup> These commenters believed that explicit deadlines for Commission action on proposed NMS plan amendments would result in a more transparent and expeditious process.<sup>34</sup>

One commenter opposed incorporating a deemed approved provision into Rule 608.<sup>35</sup> This commenter believed that Commission inaction resulting in a proposed NMS plan amendment being deemed approved would be inconsistent with judicial precedent and public policy, and stated that Section 11A of the Exchange Act does not explicitly authorize the deemed approved provision found in Section 19(b).<sup>36</sup> Similarly, another commenter stated that it would not be appropriate for NMS plan fee amendments to become automatically effective if the Commission does not take specific action, and that Commission approval by order should be required before a NMS plan fee amendment can become effective.<sup>37</sup>

The Commission has decided to adopt a modified procedure for Commission action on all proposed new NMS plans and plan amendments, including NMS plan fee amendments.<sup>38</sup> This procedure is largely patterned on the current statutory requirements in Section 19(b) for Commission review of SRO proposed rule changes, but with modifications that reflect the particular nature of proposed new NMS plans and plan amendments. As discussed in the Proposal, Section 11A(a)(3)(B) of the Exchange Act, which governs Rule 608 and NMS plans, does not mandate any specific procedures for Commission action.<sup>39</sup> It instead broadly authorizes the Commission to require SROs to act jointly with respect to matters relating to the national market system.<sup>40</sup>

Pursuant to that authority, the Commission may adopt (and has adopted in the past) procedures in Rule 608 that are appropriate for handling proposed NMS plans and plan amendments,<sup>41</sup> and the Commission may determine what, if any, elements of the Section 19(b) process for SRO rule filings are appropriate to incorporate into the Rule 608 procedures for proposed NMS plans and plan amendments.<sup>42</sup>

The current timeframes in Rule 608(b) for Commission action begin to run on the date of publication of notice of the filing of a national market system plan or an amendment to an effective national market system plan. In other words, after plan participants file a proposed NMS plan or plan amendment with the Commission, the Commission must thereafter publish notice of the filing in the **Federal Register** in order for the current time periods in Rule 608(b) to begin.<sup>43</sup> But, as commenters pointed out, Rule 608(b) currently does not set forth a timeframe for the Commission to publish notice after it has received a filing, and therefore there is no specified date when the time periods that are included in current Rule 608(b) are to begin. In addition, Rule 608(b) currently does not include a requirement for the Commission to issue an order disapproving a proposed NMS plan or plan amendment for which the Commission does not make the finding necessary for approval.

In Section 19(b) of the Exchange Act, Congress enacted a procedure for Commission publication of notice of and action on individual SRO rule

<sup>41</sup> See Proposing Release, *supra* note 1, at 54796; see also Securities Exchange Act Release No. 17580 (Feb. 26, 1981), 46 FR 15866 (Mar. 10, 1981) (adopting Rule 11Aa3-2, the predecessor to Rule 608) (“Rule 11Aa3-2 Adopting Release”).

<sup>42</sup> As discussed in the Proposing Release, when the Commission adopted Rule 11Aa3-2 (the predecessor to Rule 608) in 1981, it rejected the argument of some commenters that the procedures for NMS plan amendments under Section 11A should incorporate the same procedures specified in Section 19 for rule changes by individual SROs. See Proposing Release, *supra* note 1, at 54797; Rule 11Aa3-2 Adopting Release, *supra* note 41, at 15868 (noting that the legislative history “indicates that Congress viewed the Commission’s authority in Section 11A(a)(3)(B) as distinct from its authority contained in Section 19 or any other provision of the Act.”). Although Congress did not mandate procedures for NMS plan amendments, Rule 11Aa3-2, as adopted in 1981, included all three of the effective-upon-filing exceptions that currently are in Rule 608 and that were similar to the effective-upon-filing exceptions in Section 19 in effect at that time. See Proposing Release, *supra* note 1, at 54797; Rule 11Aa3-2 Adopting Release, *supra* note 41.

<sup>43</sup> This effectively means that “starting the clock” on the Commission’s time to act on a proposed NMS plan or plan amendment does not occur until the Commission publishes notice of the filed plan or amendment.

<sup>28</sup> Proposing Release, *supra* note 1, at 54799.

<sup>29</sup> *Id.* at 54799–800.

<sup>30</sup> Letter from Howard Kramer and James Dombach, Murphy & McGonigle, Robert B. Wilcox, Jr. and Chris L. Bollinger, Schiff Hardin LLP, on behalf of the Operating Committees of the CTA Plan, CQ Plan, UTP Plan, and OPRA Plan, and the Plans’ Participants and Members, to Vanessa Countryman, Secretary, Commission, dated December 9, 2019 (“Operating Committees Letter”); Nasdaq Letter. The Nasdaq Letter stated that it did not object to the Proposal provided that its recommended modifications are implemented. Nasdaq Letter at 2–4.

<sup>31</sup> Operating Committees Letter at 1, 7; Nasdaq Letter at 1–3 (concurring with the Operating Committees Letter).

<sup>32</sup> Operating Committees Letter at 3–4; Nasdaq Letter at 2–3. The Operating Committees also suggested that the Division be granted delegated authority to publish notice of proposed NMS plan amendments, stating that the Division already has delegated authority to approve or extend the time to approve proposed NMS plan amendments, but not to publish notice when proposed NMS plan amendments are filed. Operating Committees Letter at 4–5.

<sup>33</sup> Operating Committees Letter at 3–4; Nasdaq Letter at 3. See Proposing Release, *supra* note 1, at 54799–801. As discussed *infra*, the Commission agrees with these commenters and, for completeness, the Commission is revising its analysis to present estimates of both the average and median times related to NMS plan fee amendments. See *infra* note 117.

<sup>34</sup> Operating Committees Letter at 2–5; Nasdaq Letter at 3.

<sup>35</sup> Healthy Markets Letter at 9.

<sup>36</sup> *Id.*

<sup>37</sup> Fidelity Letter at 4 and n. 6.

<sup>38</sup> As discussed *infra*, proposed plan amendments that are solely administrative, technical or ministerial remain effective-upon-filing pursuant to Rule 608(b)(3)(ii) and (iii), but they are subject to the modified notice publication process.

<sup>39</sup> See Proposing Release, *supra* note 1, at 54796–97. Commenters agreed with the Commission’s analysis that Congress did not intend Section 19(b) to cover NMS plan fees or to treat NMS plans as analogous to individual SRO rules. Better Markets Letter at 4–5; Bloomberg Letter at 6–7 n. 14.

<sup>40</sup> See 15 U.S.C. 78k-1(a)(3)(B).

filings that has proved workable in that context. In the past ten years, the Commission has received and processed thousands of SRO rule filings that were subject to the notice publication (and rejection) procedure in Section 19(b).<sup>44</sup> In addition, Section 19(b) sets forth certain requirements for SRO rule filings that, if applied to proposed NMS plans and plan amendments, would modify the above-noted aspects of the Rule 608(b) procedure. Importantly, and as pointed out by commenters, the Section 19(b) process ensures that the “clock” will begin to run on the Commission’s time to act on a SRO rule filing and provides for certainty of approval or disapproval of a SRO rule filing within a specified timeframe that is lacking in Rule 608(b). This is because Section 19(b) of the Exchange Act sets forth a deadline for the Commission to publish notice of a SRO rule filing, with a default notice publication date if the Commission fails to meet that deadline,<sup>45</sup> and requires that the Commission issue a disapproval order if it does not make the finding necessary to approve a SRO rule filing.<sup>46</sup> Section 19(b) also authorizes the Commission to institute proceedings on a SRO rule filing, which is a useful intermediate procedural step by which the Commission can highlight issues and seek additional public comment that focuses on those issues. Neither Section 11A of the Exchange Act nor current Rule 608(b) sets out a process to institute proceedings or procedural detail like that set forth in Section 19(b) of the Exchange Act.

The Commission believes that a modified procedure for proposed new NMS plans and plan amendments that incorporates these aspects of Section 19(b) would be workable and beneficial. On average, roughly one proposed new NMS plan is filed with the Commission every five years, and roughly 13 proposed plan amendments are filed with the Commission per year<sup>47</sup>—a small fraction of the number of SRO rule

filings that are filed with the Commission. Thus, the Commission expects the volume of proposed NMS plans and plan amendments under Rule 608(b) as amended to be manageable. In addition, ensuring that the “clock” begins on the Commission’s time to act and requiring that the Commission disapprove, by order, a proposed NMS plan or plan amendment that it cannot approve will result in a more transparent and efficient process for handling proposed NMS plans and plan amendments. It will enable plan participants to more accurately project, at the time of filing, the maximum time by which they will receive affirmative Commission approval or disapproval of a proposed NMS plan or plan amendment. It will also help assure all market participants that the Commission will act within a specified timeframe. As a result, plan participants and other market participants should be better able to prepare for potential new NMS plans or changes in existing plan requirements.

Moreover, adopting a process for instituting proceedings, which could include seeking additional public comment, would facilitate Commission review of a complex proposed NMS plan or plan amendment and consideration of particular issues relevant to the Commission’s determination whether to approve to disapprove such proposed plan or amendment. Further, as a result of the Commission’s rescission of the Fee Exception,<sup>48</sup> proposed fee amendments will be subject to the procedural modifications that the Commission is incorporating into Rule 608(b)(1) and (2). These modifications are based on Section 19(b).

While commenters suggested applying the Section 19(b) procedures only to proposed plan amendments,<sup>49</sup> the Commission believes that it is appropriate to incorporate into amended Rule 608(b) similar requirements for both proposed new NMS plans and plan amendments. The Commission believes improved transparency and efficiency are important for both proposed new NMS plans and proposed plan amendments. Paragraphs (1) and (2) of current Rule 608(b) set forth the same procedural requirements for proposed NMS plans and plan amendments that are not effective upon filing, and the Commission believes it is also important to enhance the Commission’s procedure for handling proposed new NMS plans.

Accordingly, as described in more detail below, the Commission is

adopting amendments to Rule 608(b) to incorporate elements of the Section 19(b) process that will enhance the Commission’s procedure for handling both proposed NMS plans and plan amendments. In light of differences between SRO rule filings and proposed NMS plans and plan amendments, the Commission is not incorporating every aspect of the Section 19(b) procedure into amended Rule 608(b), and the Commission is adopting certain timeframes for Commission action under amended Rule 608(b) that differ from what is required by Section 19(b).

#### a. Procedure for Notice Publication Under Rule 608(b)(1) as Amended

A new procedure for Commission publication of notice of the filing of proposed NMS plans and plan amendments is set forth in amendments to paragraph (b)(1) of Rule 608. New paragraphs (b)(1)(i) and (ii) of Rule 608 provide the time periods for the Commission to send notice of the filing of a proposed new NMS plan and a proposed plan amendment, respectively, to the **Federal Register**.

Specifically, under Rule 608(b)(1)(i), the Commission must send the notice of the filing of a proposed NMS plan to the **Federal Register** within 90 days of the business day on which such plan was filed with the Commission pursuant to paragraph (a) of Rule 608. If the Commission fails to send the notice to the **Federal Register** within such 90-day period, then the date of publication shall be deemed to be the last day of such 90-day period. Rule 608(b)(1)(i) therefore specifies a timeframe for the publication of notice of a new NMS plan and a default notice publication date if the Commission fails to act by the deadline. In so doing, Rule 608(b)(1)(i), unlike current Rule 608(b)(1), ensures for all NMS plans filed with the Commission that notice will be published in a specified timeframe.

The timeframe and default publication date differ, however, from what is set forth in Section 19(b) for SRO proposed rule changes. Under Section 19(b), if, after filing a proposed rule change with the Commission, the SRO publishes notice of the proposed rule change, together with the substantive terms of such proposed rule change, on a publicly accessible website, the Commission is required to send the notice to the **Federal Register** within 15 days of the date on which such website publication was made. If the Commission fails to send the notice for publication within such 15-day period, then the date of publication is

<sup>44</sup> See 15 U.S.C. 78s(b)(2)(E) and 78s(b)(10)(B). SRO rule filings become subject to the notice publication procedure in Section 19(b) upon filing with the Commission, but the Commission does not publish notice of filings that are rejected under Section 19(b)(10)(B) or withdrawn by the SRO prior to the noticing deadline in Section 19(b)(2)(E).

<sup>45</sup> See 15 U.S.C. 78s(b)(2)(E).

<sup>46</sup> See 15 U.S.C. 78s(b)(2)(A)(i), (b)(2)(B)(ii), and (b)(2)(C)(ii).

<sup>47</sup> These proposed plan amendments include amendments that are solely administrative, technical or ministerial, which remain effective-upon-filing under Rule 608(b)(3)(ii) and (iii). See *supra* note 38 and *infra* Section II.B.1.a and note 63. The Commission estimates that, on average, roughly eight to nine proposed plan amendments that are not effective-upon-filing, including fee amendments, will be filed each year.

<sup>48</sup> See *supra* Section II.A.

<sup>49</sup> Operating Committees Letter; Nasdaq Letter.

deemed to be the date on which such website publication was made.<sup>50</sup>

In the context of a proposed new NMS plan, while the Commission believes that the concept of a notice publication deadline and default publication date in the event of Commission failure to meet the deadline are beneficial, the Commission does not believe that a 15-day deadline, or the default to a website publication date if that deadline is missed, are workable. In order to send notice of a SRO rule filing to the **Federal Register** within the 15-day deadline mandated by Section 19(b), the Commission generally reproduces the proposed rule change filed by the SRO in a **Federal Register**-compliant format without including observations, questions, and requests for comment, in addition to what the SRO has filed. The publication of notice of a new NMS plan, in contrast, may require more time because new plans present more substance for review and typically raise a greater number of issues than would be the case for a SRO rule filing or a proposed amendment to an existing plan. As a result, the Commission may want to add material to the notice of a proposed new plan that is designed to facilitate informed public comment on the proposal, which is an integral aspect of the Commission's review of a new NMS plan. For example, the Commission added detailed requests for comment to the notice of the proposed NMS plan to implement a tick size pilot program.<sup>51</sup> The Commission anticipates it would need more than 15 days to prepare such additional material before sending notice of a proposed new NMS plan to the **Federal Register**. The Commission believes that 90 days both gives a sufficient amount of time for the Commission to complete such efforts and improves the current Rule 608(b) process for proposed new NMS plans by providing certainty and transparency regarding timeframes for Commission action. In addition, the 90-day timeframe for the Commission to send notice of a new NMS plan to the **Federal Register** will result in faster publication of the notice in the **Federal Register** than the average publication time under the current rule.<sup>52</sup>

A default notice publication date based on the date of plan participants' website posting, as in Section 19(b), would not be appropriate for proposed

new NMS plans. Rule 608(a)(8) currently does not require website posting of a new NMS plan until after the plan has been approved and becomes effective. The Commission does not believe it would be appropriate to require website posting of a proposed new NMS plan prior to that time, as it could require the creation of a website for a proposed plan that is not yet and may never become effective, which could confuse market participants as to which NMS plans actually are effective at any given time.<sup>53</sup> The Commission believes, however, that it is important to provide certainty and transparency regarding the date on which the time periods for Commission action subsequent to notice publication will begin to run. Therefore, the Commission has adopted the default notice publication provision in paragraph (b)(1)(i) of amended Rule 608(b), pursuant to which the publication of notice of a new NMS plan is deemed to have occurred on the last day of the 90-day notice period if the Commission fails to send the notice to the **Federal Register** by the end of that period.

Similar to what will occur under Rule 608(b)(1)(i) for proposed new NMS plans, Rule 608(b)(1)(ii) will ensure for all proposed plan amendments filed with the Commission that notice will be published in a specified timeframe and that the time periods for Commission action subsequent to notice publication will be triggered. However, the noticing deadline and default notice publication date in paragraph (b)(1)(ii) differ from paragraph (b)(1)(i) by more closely following the requirements set forth in Section 19(b) for SRO rule filings. Specifically, under Rule 608(b)(1)(ii), the Commission must send the notice of the filing of a proposed NMS plan amendment to the **Federal Register** within 15 days of the business day on which such proposed amendment was posted on a plan website or a website designated by plan participants after being filed with the Commission. If the Commission fails to send the notice to the **Federal Register** within such 15-day period, then the date of publication shall be deemed to be the business day on which the plan participants posted notice of the proposed plan amendment on a plan website or a website designated by plan participants. These notice publication procedures in Rule

608(b)(1)(ii) apply to all proposed plan amendments, including solely administrative, technical, or ministerial plan amendments that remain effective-upon-filing under Rule 608(b)(3)(ii) and (iii).

Unlike for proposed new NMS plans, the noticing deadline for proposed NMS plan amendments in paragraph (b)(1)(ii) is measured from the date of website posting. Paragraph (b)(1)(ii) also defaults the notice publication date to the business day of such website posting if the Commission does not send the notice of the filing of the proposed plan amendment to the **Federal Register** within the deadline in paragraph (b)(1)(ii). Since website posting of proposed plan amendments within two business days of their filing is an existing requirement under Rule 608(a)(ii), these provisions impose no new burdens on plan participants and are not likely to confuse other market participants already familiar with the fact that plan participants post proposed plan amendments on their websites prior to the amendments becoming effective. Moreover, a similar framework exists, and has been workable, in the SRO rule filing context: SROs are required to post rule filings on their websites within two business days after their filing,<sup>54</sup> such website posting is a condition to triggering the 15-day noticing deadline for SRO rule filings,<sup>55</sup> and the notice publication date defaults to the business day of website posting if the Commission does not send notice of the SRO rule filing to the **Federal Register** within the 15-day deadline.<sup>56</sup> This framework was requested by commenters,<sup>57</sup> and would be workable and familiar to plan participants and market participants in the context of proposed plan amendments; the Commission believes that it is appropriate to adopt it in this context.

In addition, unlike in the context of proposed new NMS plans, the Commission believes that a 15-day notice deadline is workable in the context of proposed plan amendments because the process of publishing notice of proposed plan amendments generally need not go beyond reproducing materials provided by the plan

<sup>54</sup> See Rule 19b-4(l). Such website posting typically occurs on the same day as filing and SROs must inform the Commission if that does not occur. *Id.* As discussed *infra* in Section II.B.1.d, the Commission is amending Rule 608(a)(8)(ii) to add a similar requirement that plan participants inform the Commission if website posting of a proposed plan amendment does not occur on the same business day as filing.

<sup>55</sup> See Section 19(b)(2)(E).

<sup>56</sup> *Id.*

<sup>57</sup> Operating Committees Letter at 6; Nasdaq Letter.

<sup>50</sup> See 15 U.S.C. 78s(b)(2)(E).

<sup>51</sup> See Securities Exchange Act Release No. 73511 (Nov. 3, 2014), 79 FR 66423 (Nov. 7, 2014).

<sup>52</sup> See *infra* Section IV.B.2, where the Commission estimates that the average and median time it currently takes to publish notice of proposed new NMS plans in the **Federal Register** are 163.8 days and 76.5 days, respectively.

<sup>53</sup> While an existing SRO's proposed rule changes are required to be posted on the SRO's website within two business days of filing and are typically website posted on the same day as filing (see Rule 19b-4(l)), there is no such requirement for applications to become a new SRO, such as a Form 1 application to become a registered national securities exchange.

participants, similar to publishing notice of SRO rule filings. As discussed above, the Commission believes that proposed amendments to existing plans typically are more limited in substance than proposed new plans and therefore typically do not require the Commission to add statements to facilitate public comment.<sup>58</sup> A 15-day noticing time period would be substantially shorter than the current average and median timeframes in which the Commission publishes notice of proposed plan amendments.<sup>59</sup> Commenters requested a 15-day time period, and the Commission believes that it will be able to publish notice of proposed plan amendments within the requested 15-day time period. The 15-day noticing time period will provide market participants faster notice, via the **Federal Register**, of a proposed plan amendment that has been filed with the Commission, and will cause the “clock” to start on the Commission’s time to act more promptly after such filing.

The Commission also is adopting new paragraphs (b)(1)(iii) and (b)(1)(iv) under Rule 608. Paragraph (b)(1)(iii) is generally based on Section 19(b)(10) for Commission review of SRO rule filings, and provides that a proposed NMS plan or plan amendment that does not comply with relevant filing requirements has not been filed with the Commission for purposes of Rule 608(b)(1).<sup>60</sup> Specifically, if the Commission informs the plan participants within seven business days of the business day of receipt by the Commission of a proposed NMS plan or plan amendment that the plan or amendment does not comply with paragraph (a) of Rule 608 or plan filing requirements in other sections of Regulation NMS and 17 CFR 240, subpart A, the plan or amendment is deemed not filed with the Commission.<sup>61</sup> The seven-business-day

rejection period is extended to 21 days if the Commission informs the plan participants that the proposed NMS plan or plan amendment is unusually lengthy and is complex or raises novel regulatory issues. If the filing is deemed not made due to such rejection, the time period for the Commission to publish notice does not begin again until a new proposed NMS plan or plan amendment is filed pursuant to paragraph (a) and is not rejected.<sup>62</sup> New paragraph (b)(1)(iv) under Rule 608 mirrors relevant portions of Rule 19b-4(b)(2) and (k), and defines “business day” and when a filing has been received by the Commission or website posting has occurred on a given business day for purposes of Rule 608.

#### b. Procedure for Commission Action Subsequent to Notice Publication Under Rule 608(b)(2) as Amended

A modified procedure for Commission action following publication of notice of the filing of proposed NMS plans and plan amendments that are not immediately effective is set forth in amendments to paragraph (b)(2) of Rule 608.<sup>63</sup> Under new paragraph (b)(2)(i) of Rule 608, within 90 days of the date of notice publication, or within such longer period as to which the plan participants consent, the Commission shall, by order, approve or disapprove the proposed NMS plan or plan amendment, or institute proceedings to determine whether the proposed NMS plan or plan amendment should be disapproved. Such proceedings will be conducted pursuant to 17 CFR 201.700 and 701,<sup>64</sup> and shall include notice of the grounds for disapproval under consideration and opportunity for hearing and shall be concluded within 180 days of notice publication. At the conclusion of such proceedings the Commission shall, by order, approve or disapprove the proposed NMS plan or plan amendment.<sup>65</sup> The time for

608 requires compliance with plan filing requirements contained in any other section of Regulation NMS and 17 CFR 240, subpart A. For example, proposed amendments to transaction reporting plans must comply with Rule 601 of Regulation NMS, in addition to Rule 608(a).

<sup>62</sup> As discussed *supra*, the noticing time period for a proposed NMS plan amendment that is filed with the Commission is measured from the business day of website posting by the plan participants.

<sup>63</sup> Solely administrative, technical, or ministerial plan amendments remain effective-upon-filing under Rule 608(b)(ii) and (iii) and are not subject to Rule 608(b)(2), as amended, unless they are abrogated.

<sup>64</sup> As discussed *infra* in Section II.B.2, the Commission is modifying Rules 700 and 701 to incorporate proposed NMS plans and plan amendments into those rules.

<sup>65</sup> Though in a proceeding to determine whether to disapprove a proposed NMS plan or plan

conclusion of such proceedings may be extended for up to 60 days (thus allowing proceedings to conclude up to 240 days from the date of notice publication) if the Commission determines that a longer period is appropriate and publishes the reasons for such determination or the plan participants consent to the longer period. In addition, under new paragraph (b)(2)(ii) of Rule 608, the time for conclusion of proceedings may be extended for an additional period of up to 60 days beyond the 240-day period set forth in paragraph (b)(2)(i) (thus allowing proceedings to conclude up to 300 days total from the date of notice publication) if the Commission determines that a longer period is appropriate and publishes the reasons for such determination or the plan participants consent to the longer period.<sup>66</sup>

Paragraph (b)(2)(i) adopts certain elements from Section 19(b), namely, requiring that the Commission approve or disapprove a proposed new NMS plan or plan amendment, by order, within a specified timeframe, and enabling the Commission to institute proceedings and to extend the time for the conclusion of those proceedings. These are modifications to the existing Rule 608(b) procedure. By requiring disapproval by order if the Commission cannot make the finding necessary to approve, which is currently not required by Rule 608(b), the amended rule will provide more certainty regarding when final Commission action—whether approval or disapproval—must occur. And by authorizing the institution of proceedings, which currently is not provided for under Rule 608(b), the amended rule gives the Commission a way to seek additional public input that could help the Commission determine whether proposed NMS plans and plan amendments should be approved or disapproved. In addition, the 180-day

amendment the Commission is required to publish notice of its grounds for disapproval under consideration, the Commission can ultimately either disapprove or approve the proposed NMS plan or plan amendment following conclusion of the proceedings. See Securities Exchange Act Release No. 63723 (Jan. 14, 2011), 76 FR 4066, 4067 n. 17 (Jan. 24, 2011).

<sup>66</sup> As discussed *infra* in Section II.B.3, the Division Director will have delegated authority to extend the time for conclusion of such proceedings from 180 days to a period not exceeding 240 days from the date of publication of notice of the filing of a proposed NMS plan or plan amendment, as set forth in paragraph (b)(2)(i) of Rule 608. The Division Director will not have delegated authority to further extend the time for conclusion of such proceedings for an additional 60 days to a period not exceeding 300 days from the date of publication of notice of the filing of a proposed NMS plan or plan amendment, as set forth in paragraph (b)(2)(ii) of Rule 608.

<sup>58</sup> The Commission could issue a supplemental request for comment after publishing notice of the proposed plan amendment. In addition, the Commission will have the ability to institute proceedings on a proposed plan amendment under Rule 608(b) as modified, which provides an opportunity for the Commission to seek additional comment. See Rule 608(b)(2)(i).

<sup>59</sup> See *infra* Section IV.B.2, where the Commission estimates that the average and median time it takes to publish notice in the **Federal Register** of non-immediately effective proposed NMS plan amendments are 65.5 days and 38 days, respectively.

<sup>60</sup> See also 17 CFR 240.0-3(a) (“[t]he date on which papers are actually received by the Commission shall be the date of filing thereof if all of the requirements with respect to the filing have been complied with . . .”).

<sup>61</sup> Paragraph (a) of Rule 608 sets forth the information that must accompany and be described in all proposed NMS plans or plan amendments filed with the Commission. Paragraph (a)(7) of Rule



period from the date of notice publication for such proceedings, and the availability of an extension of that period up to 240 days from the date of notice publication, as requested by commenters, are the same as what is set forth in Section 19(b) for SRO rule filings. The Commission believes these time periods would be appropriate for proposed NMS plans and plan amendments based on the Commission's experience with SRO rule filings, where 180 days has generally provided a sufficient amount of time to conclude proceedings and 240 days has been appropriate in more complex cases.

The 90-day time period for initial Commission action, and the availability of the additional extension of the time to conclude proceedings up to 300 days from the date of notice publication, are different from what is set forth in Section 19(b). Commenters suggested that, consistent with the Section 19(b) process for SRO rule filings, initial Commission action with regard to NMS plan amendments occur within 45 days of notice publication with the availability of a 45-day extension (for a total of 90 days).<sup>67</sup> In addition, under Section 19(b), the Commission cannot take longer than 240 days from the date of notice publication to approve or disapprove a SRO rule filing.<sup>68</sup> The Commission, however, anticipates needing more than 45 days following notice publication to act initially, and potentially needing more than 240 days following notice publication to act finally, on proposed new NMS plans and plan amendments because they can be complex and have far-reaching effects on a wide range of market participants, many of which are not SRO members. Whereas a SRO rule filing applies to a single SRO's rules, a proposed new NMS plan or plan amendment involves all SROs that are plan participants and implicates the manner in which they collectively act with regard to the national market system, in which many non-SRO members, such as retail investors, participate.

The Commission believes that providing 90 days after notice publication for initial Commission action (*i.e.*, approval, disapproval, or institution of proceedings) is more appropriate than the Section 19(b) approach as well as other potential timeframes for initial Commission action, such as the pre-existing 120-day timeframe in Rule 608(b). The 90-day timeframe is the same timeframe that applies when the initial 45-day deadline

is extended by 45 days under the Section 19(b) approach requested by commenters, and it provides enhanced efficiency and conservation of Commission resources by eliminating the discretionary procedural step of extending a 45-day period to 90 days. The Commission believes that, if it instead were to adopt timeframes identical to those in Section 19(b), it would need to take such a procedural step routinely for proposed NMS plans and plan amendments. Nevertheless, the Commission believes that it typically would be possible to take initial action on proposed NMS plans and plan amendments following notice publication sooner than the 120-day deadline currently set forth in Rule 608(b), and the Commission expects that 90 days from notice publication typically will be an appropriate amount of time for such action. By requiring initial Commission action within 90 days instead of 120 days, the Commission believes that Rule 608(b)(2), as amended, will more effectively balance the Commission's need to allocate sufficient time for it to consider and initially act upon a proposed NMS plan or plan amendment with commenters' request for a backstop for such action of 90 days from notice publication.

The Commission likewise believes that allowing an additional extension to the Commission's final deadline to approve or disapprove, of up to 60 days, for a total of up to 300 days from the date of notice publication, is an appropriate way to balance the Commission's expectation that it will potentially need more time for its final disposition of a proposed NMS plan or plan amendment than the corresponding 240-day timeframe for SRO rule filings in Section 19(b) with commenters' request that Section 19(b)'s 240-day timeframe be incorporated into Rule 608(b). The Commission believes that up to 60 days is a reasonable amount for a potential extension for final Commission action because it will provide the Commission with flexibility when it needs more time to fully consider complex and significant proposed NMS plans and plan amendments. In addition, while the Commission's estimates are lower than 300 days for the average length of time that currently passes from the date of notice publication to Commission approval of a proposed plan or plan amendment,<sup>69</sup> the lack of a specified

time period in current Rule 608(b) for publishing notice provided an opportunity for plan participants to address issues in a proposed plan or plan amendment before notice publication and thereby reduced the amount of time subsequent to notice publication that the Commission needed to determine whether to approve a proposed plan or amendment. The new noticing deadlines under amended Rule 608(b)(1) may largely prevent such an opportunity.

Moreover, while 300 days is a longer period from notice publication than the 180-day period currently set forth in Rule 608(b), this difference will be mitigated by the fact that, under the current rules, there is no requirement that notice publication, and hence the start of the 180-day "clock," occur within a specified amount of time after a proposed NMS plan or plan amendment is filed with the Commission, as commenters pointed out.<sup>70</sup> As a result, the time from filing (as distinguished from notice publication) to final Commission action may be unpredictable under the current rule, and might be significantly longer than 180 days, depending on the date on which the Commission publishes notice.<sup>71</sup> This can occur because, in addition to not specifying timeframes for the Commission to publish notice, Rule 608(b) currently does not deem notice to be published in the absence of Commission publication within a specified timeframe. This will change, however, under Rule 608(b) as amended. In conjunction with the new notice publication deadlines and default notice publication provisions in amended Rule 608(b)(1), the outside deadline of up to 300 days from notice publication for Commission approval or

are 62.0 days and 44.5 days, respectively, from the date of their publication in the **Federal Register**, and the average and median time it currently takes to approve proposed new NMS plans are 204.8 days and 181 days, respectively, from the date of their publication in the **Federal Register**. Notably, these figures are average and median times that encompass all proposed new NMS plans and plan amendments within a particular period. In determining the Rule 608 timeframes by which Commission action is required, however, the Commission must consider the time it will need to appropriately review the most complex proposals that are likely to generate significant public comment.

<sup>70</sup> See Operating Committees Letter at 3–4; Nasdaq Letter at 1–2.

<sup>71</sup> See *infra* Section IV.B.2, where the Commission estimates that the average and median total time it currently takes to approve proposed new NMS plans are 368.5 days and 338 days, respectively, from the date they are filed with the Commission, and the average and median total time it currently takes to approve proposed NMS plan amendments that are not immediately effective are 127.6 days and 86 days, respectively, from the date they are filed with the Commission.

<sup>67</sup> Operating Committees Letter; Nasdaq Letter.

<sup>68</sup> See 15 U.S.C. 78s(b)(2)(B).

<sup>69</sup> See *infra* Section IV.B.2, where the Commission estimates that the average and median time it currently takes to approve proposed NMS plan amendments that are not immediately effective



disapproval may result in faster final Commission action as measured from the time of filing than the current process in some cases,<sup>72</sup> and in all cases will provide a more transparent and definite timeframe for final Commission action.

The Commission does not believe that it would be appropriate to add a provision to Rule 608 that would result in a proposed NMS plan or plan amendment being deemed approved in the absence of affirmative Commission action, particularly given that, contrary to SRO proposed rule filings, Congress has not mandated such treatment of proposed NMS plans or plan amendments. The Commission expects to approve or disapprove, by order, all proposed NMS plans and plan amendments within the new timeframes specified in amended Rule 608(b). As discussed above, NMS plans and plan amendments are different from an individual SRO rule filing because they implicate the manner in which SRO plan participants collectively act with regard to matters concerning the entire national market system whereas a SRO rule filing applies to a single SRO's rules. Accordingly, the Commission is not adopting a "deemed approved" provision similar to that in Section 19(b).<sup>73</sup>

#### c. Filing of NMS Plans and Amendments Thereto Under Rule 608(a)(1) as Amended

Rule 608(a)(1) currently states that any two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan by submitting the text of the plan or amendment to the Secretary of the Commission, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of Rule 608. NMS plan participants typically satisfied the Rule 608(a)(1) filing requirement through paper submission to the Secretary of the Commission.

The Commission is amending Rule 608(a)(1) to replace the current requirement that proposed NMS plans and plan amendments be filed with the Secretary of the Commission with a new requirement that they be filed with the Commission by email. Specifically, the amended rule requires plan participants to file by email the text of the proposed NMS plan or plan amendment and the

other information required by Rule 608(a) directly to an email address used solely for the purpose of filing plans and plan amendments that is monitored by Division staff responsible for handling NMS plan filings. Only filings made by email will satisfy the amended Rule 608(a) filing requirement; paper filings will no longer be permitted. For purposes of satisfying the filing requirement, all filings must be emailed to the Commission in a format compatible with a commonly used word processing program. The required email address will be provided on the Commission's website at [www.sec.gov](http://www.sec.gov). Requiring filing with the Commission by email will modify the current filing process to promote more efficient filing by plan participants, as well as the receipt and handling of filed materials by Division staff. Email filing particularly will facilitate Division staff's timely preparation of the notice of proposed plan amendments in order to meet the 15-day noticing deadline.

#### d. Additional Aspects of Amended Rule 608

The Commission is not modifying the finding set forth in Rule 608(b)(2) that the Commission must make to approve a new proposed NMS plan or any proposed NMS plan amendment, including any NMS plan fee amendment. To account for potential Commission disapproval of proposed NMS plans or plan amendments, however, the Commission is modifying Rule 608(b)(2) to provide that the Commission shall disapprove a proposed NMS plan or plan amendment if the Commission does not make the finding that is required for approval, and that such disapproval shall be by Commission order. This language is based on Exchange Act Section 19(b)(2)(C). The Commission also is modifying Rule 608(a)(8)(ii), which addresses website posting of proposed NMS plan amendments, to account for potential Commission rejection or disapproval of such amendments. This modification to Rule 608(a)(8)(ii), along with the previously existing provision relating to the withdrawal of a proposed NMS plan amendment, means that a proposed plan amendment that is withdrawn, rejected or disapproved must be removed from the plan website or designated website.

In addition, the Commission is amending Rule 608(a)(8)(ii) to mirror Rule 19b-4(l) for SRO rule filings in requiring that plan participants inform the Commission of the business day on which they posted to the appropriate website a proposed plan amendment if such website posting does not occur on

the same business day as filing.<sup>74</sup> Put another way, unless the Commission is informed otherwise by the plan participants, the website posting is calculated as having occurred on the same business day as filing for purposes of determining when the 15-day noticing time period expires.<sup>75</sup>

Further, the Commission is not removing from Rule 608(b)(2) language that states that the Commission may approve a NMS plan or proposed NMS plan amendment "with such changes or subject to such conditions as the Commission may deem necessary or appropriate." According to one commenter, this language should be removed because it would contravene the Administrative Procedure Act ("APA")<sup>76</sup> for the Commission to act consistent with this language without first undertaking notice and comment rulemaking.<sup>77</sup> The Commission does not, however, believe that such Commission action pursuant to Rule 608(b)(2) is inconsistent with the APA. First, this provision has been part of Rule 608 since Rule 608 was first proposed in 1979 and adopted in 1981, and was itself adopted pursuant to notice-and-comment rulemaking.<sup>78</sup> Moreover, any amendments initiated by the Commission to an effective NMS plan pursuant to Rule 608 are made through notice and comment rulemaking.<sup>79</sup> And the Commission's approval of a NMS plan amendment initiated by plan participants with changes or conditions as specified in Rule 608(b)(2) is subject to the procedural protections governing the approval process. Among other things, the proposed NMS plan amendment itself—along with any questions or issues that the Commission may choose to raise in the notice of the proposal—is subject to notice and comment.

<sup>74</sup> As noted *supra* in Section II.B.1.a, Rule 608(a)(8)(ii) already requires that plan participants ensure that any proposed plan amendments are posted on a plan website or a designated website no later than two business days after their filing with the Commission. Rule 19b-4(l) contains an identical requirement for SRO rule filings.

<sup>75</sup> The Commission also is amending Rule 608(a)(8)(i) and (a)(8)(ii) to replace the term "website" with "website."

<sup>76</sup> 5 U.S.C. 551 *et seq.*

<sup>77</sup> Nasdaq Letter at 2-4.

<sup>78</sup> See Securities Exchange Act Release No. 16410 (Dec. 7, 1979), 44 FR 72606 (Dec. 14, 1979) (proposing Rule 11Aa3-2, the predecessor to Rule 608); Rule 11Aa3-2 Adopting Release, *supra* note 41.

<sup>79</sup> Rule 608(a)(2) continues to provide that the Commission may propose an amendment to any effective NMS plan, and Rule 608(b)(2) continues to provide that promulgation of an amendment to a NMS plan initiated by the Commission shall be by rule.

<sup>72</sup> *Id.*

<sup>73</sup> See Section 19(b)(2)(D).

## 2. Amendments to Rules of Practice 700 and 701

Commission Rule of Practice 700 currently sets forth procedures for conducting proceedings that are instituted for individual SRO proposed rule changes pursuant to Section 19(b) and Rule 19b-4, and Rule of Practice 701 addresses the issuance of a Commission order after proceedings for individual SRO proposed rule changes have been initiated.<sup>80</sup> The Commission is adopting amendments to these rules to set forth the procedures for conducting proceedings that have been initiated for proposed NMS plans or plan amendments under new paragraph (b)(2)(i) of Rule 608. The procedures that apply to proceedings for individual SRO proposed rule changes under Rules 700 and 701 are not being changed, although the organization of the Rules is changing.<sup>81</sup>

Where Rule 700 explicitly references individual SRO proposed rule changes, the Commission has added references to proposed NMS plans or plan amendments in those paragraphs or added new paragraphs that replicate the existing substantive language to make them applicable to proposed NMS plans or plan amendments. Specifically, the Commission has amended Rule 700(b)(1) to state that, if the Commission initiates proceedings to determine whether a proposed NMS plan or plan amendment (which are collectively defined as a “NMS plan filing” for purpose of Rule 700) should be disapproved, it shall provide notice to the NMS plan participants, as well as other interested parties, by publication in the **Federal Register** of the grounds for disapproval under consideration. Similarly, the Commission has amended Rule 700(b)(1)(iii) to state that the Commission shall serve a copy of the grounds for disapproval under consideration to the NMS plan participants by serving notice to the contact person for the NMS plan.

Likewise, the Commission has amended Rule 700(b)(2) to state that the grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission has instituted proceedings, including areas in which the Commission may have questions or may need to solicit additional information on the NMS plan filing. The

Commission also has amended Rule 700(b)(3) to add a new paragraph (ii) stating that the burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and rules and regulations thereunder is on the plan participants that filed the NMS plan filing. This language does not create any new burden for NMS plan participants, but rather sets forth the existing burden that applies to NMS plan participants under Rule 608(a), which provides that two or more SRO plan participants, acting jointly, may file a NMS plan or propose an amendment to an effective NMS plan. The burden also is substantively the same as that currently set forth in Rule 700(b)(3) for a SRO in the context of a SRO’s proposed rule change, which is being relocated without substantive modifications to new paragraph (i) of Rule 700(b)(3) as a result of the amendment to the rule to incorporate NMS plan filings.

The Commission also has amended the following provisions in Rule 700 in order to replicate for NMS plan filing proceedings the procedures applicable to SRO proposed rule change proceedings: (i) Rule 700(c)(1), by referencing NMS plan filings in paragraph (c)(1) and adding new paragraph (ii) regarding the conduct of hearings and opportunity to submit written statements; (ii) Rule 700(c)(3), by adding new paragraph (ii) regarding rebutting any comments received during proceedings; (iii) Rule 700(c)(4), by adding new paragraph (ii) regarding a failure to respond to any comment received; and (iv) Rule 700(d), by referencing NMS plan filings in paragraph (d)(1) regarding the filing of papers with the Commission and paragraph (d)(2) regarding the public availability of materials received, and by adding new paragraph (d)(3)(ii) regarding the record before the Commission.<sup>82</sup>

Where paragraphs of Rule 700 do not explicitly reference individual SRO proposed rule changes (such as paragraph (b)(2), among others), as a result of other amendments being made to Rule 608(b)(2)(i),<sup>83</sup> the language in those paragraphs of Rule 700 applies to NMS plan filings as well as individual SRO proposed rule changes without the

need to add explicit references to each type of proposal.<sup>84</sup>

## 3. Amendments to Delegations of Authority in Rule 30-3

The Commission is revising the delegations of authority to the Division Director in conjunction with the modifications that the Commission is adopting to Rule 608.<sup>85</sup> These revisions are intended to conserve Commission resources and increase the effectiveness and efficiency of the Commission’s process for handling proposed NMS plans and plan amendments. Congress has authorized such delegation by Public Law 87-592, 76 Stat. 394, 15 U.S.C. 78d-1(a), which provides that the Commission “shall have the authority to delegate, by published order or rule, any of its functions to . . . an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business or matter.”

Accordingly, the Commission is amending its rules, by adding new paragraph (a)(85) to Rule 30-3, to delegate authority to the Division Director to perform certain procedural steps up to but not including approval or disapproval. Under this delegation, the Division Director (or, under his or her direction, such persons as might be designated from time to time by the Chairman of the Commission) is authorized to perform the following actions: (1) To publish notice of the filing of a proposed amendment to an effective NMS plan; (2) to notify NMS plan participants that a proposed NMS plan or plan amendment does not comply with paragraph (a) of Rule 608 or plan filing requirements in other sections of Regulation NMS and 17 CFR 240, subpart A, and to determine that a proposed NMS plan or plan amendment is unusually lengthy and complex or raises novel regulatory issues and to inform the NMS plan participants of such determination; (3) to institute proceedings to determine whether a proposed NMS plan or plan amendment should be disapproved; (4) to provide the NMS plan participants notice of the grounds for disapproval under consideration; and (5) to extend for a period not exceeding 240 days from the date of publication of notice of the filing

<sup>80</sup> 17 CFR 201.700 and 701.

<sup>81</sup> Because existing Rule 701 explicitly references individual SRO proposed rule changes, the Commission has amended Rule 701 to add a new paragraph that replicates the language of the existing rule except that the new paragraph applies to proposed NMS plans and plan amendments.

<sup>82</sup> In connection with these amendments, where the Commission added new paragraphs (ii) to incorporate NMS plan filings, the Commission relocated without changes existing text regarding SRO proposed rule changes to new paragraphs (i).

<sup>83</sup> Rule 608(b)(2)(i) states, among other things, that proceedings to determine whether a NMS plan fee amendment should be disapproved will be conducted pursuant to Rules 700 and 701.

<sup>84</sup> The Commission also is amending the title of Rule 700, which currently references the initiation of proceedings for SRO proposed rule changes, so that it also references proposed NMS plans and plan amendments. Relatedly, the Commission is making a conforming amendment to Rule 19b-4(g), which cross-references the current title of Rule 700 in a parenthetical, to add proposed NMS plans and plan amendments to the cross reference.

<sup>85</sup> 17 CFR 200.30-3.

of a proposed NMS plan or plan amendment the period during which the Commission must issue an order approving or disapproving the proposed NMS plan or plan amendment and determine whether such longer period is appropriate and publish the reasons for such determination.<sup>86</sup> In addition, new paragraph (a)(85) retains the delegations of authority to the Division Director: (i) To summarily abrogate, pursuant to Rule 608(b)(3)(iii), a proposed NMS plan amendment put into effect upon filing with the Commission (*i.e.*, a solely administrative, technical or ministerial plan amendment that remains effective-upon-filing under Rule 608(b)(3)) and require that such amendment be refiled in accordance with Rule 608(a)(1) and reviewed in accordance with Rule 608(b)(2); and (ii) pursuant to Rule 608(b)(4), to put a proposed plan amendment into effect summarily upon publication of notice and on a temporary basis not to exceed 120 days.<sup>87</sup> Notwithstanding these delegations, the Division Director may submit any matter he or she believes appropriate to the Commission. Furthermore, any action taken by the Division Director pursuant to delegated authority would be subject to Commission review as provided by Rules 430 and 431 of the Commission's Rules of Practice, 17 CFR 201.430–201.431 and 15 U.S.C. 78d–1(b).

In addition, the Commission is rescinding the existing delegations of authority to the Division Director to approve proposed NMS plan amendments set forth in paragraphs (a)(27) and (29) of Rule 30–3 by deleting and reserving those paragraphs.<sup>88</sup> Further, the Commission is deleting language from paragraph (a)(42) of Rule 30–3 that currently provides delegated

<sup>86</sup> These delegations of authority to the Division Director do not include the authority to publish notice of filing of a proposed new NMS plan pursuant to paragraph (b)(1)(i) of Rule 608 or to further extend the time for the conclusion of proceedings up to an additional 60 days—for a period not exceeding 300 days from the date of publication of notice of filing of a proposed NMS plan or plan amendment—as set forth in paragraph (b)(2)(ii) of Rule 608. Any publication of notice of a proposed new NMS plan pursuant to paragraph (b)(1)(i) of Rule 608 and any extension of the time for the conclusion of proceedings pursuant to paragraph (b)(2)(ii) of Rule 608 must be done by the Commission itself and not by staff via delegated authority.

<sup>87</sup> These are not new delegations of authority—they are currently encompassed by paragraph (a)(29) of Rule 30–3. The Commission is retaining these delegations of authority, and in light of the deletion of paragraph (a)(29) as discussed *infra*, the Commission has relocated them to and made them explicit in new paragraph (a)(85).

<sup>88</sup> Paragraph (a)(27) of Rule 30–3 also currently contains a delegation of authority to grant exemptions pursuant to Rule 601 that is now obsolete and being deleted.

authority to the Division Director to extend to 180 days from the date of notice publication the Commission's time to consider a proposed NMS plan or plan amendment, as this 180-day extension has been replaced by the modified timeframes and extensions set forth in Rule 608(b) as amended.<sup>89</sup>

#### 4. Administrative Matters Common to Amendments to Rules of Practice and Delegations of Authority

The Commission finds, in accordance with the APA,<sup>90</sup> that the amendments to Rules of Practice 700 and 701 and to the Commission's delegations of authority in Rule 30–3 relate solely to agency organization, procedures or practices. Accordingly, these rule amendments are not subject to the provisions of the APA requiring notice, opportunity for public comment, and publication. The Regulatory Flexibility Act,<sup>91</sup> therefore, does not apply. Similarly, because these rules relate to “agency organization, procedure or practice that does not substantially affect the rights or obligations of non-agency parties,” analysis of major status under the Small Business Regulatory Enforcement Fairness Act is not required.<sup>92</sup> The rule amendments also do not contain any new collection of information requirements as defined by the Paperwork Reduction Act of 1995, as amended (“PRA”).<sup>93</sup> Rather, the amendments to Rules 700 and 701 govern procedures for conducting proceedings that are instituted for a proposed NMS plan or plan amendment, and the amendments to Rule 30–3 govern internal Commission procedures regarding whether Commission staff has the authority to act on behalf of the Commission with respect to proposed NMS plans and plan amendments. The required scope of information that NMS plan participants must file is established in Rule 608(a), other sections of Regulation NMS, and 17 CFR 240, subpart A, and it is not being amended. The rule amendments do not contain any additional collection of information requirements beyond what is already required.

#### III. Paperwork Reduction Act

The Commission continues to believe that the rescission of the Fee Exception would not impose any new, or revise

<sup>89</sup> Paragraph (a)(42) of Rule 30–3 also currently delegates authority to the Division Director to grant or deny exemptions from Rule 608, and that delegation is being retained.

<sup>90</sup> 5 U.S.C. 553(b)(3)(A).

<sup>91</sup> 5 U.S.C. 601 *et seq.*

<sup>92</sup> 5 U.S.C. 804(3)(C).

<sup>93</sup> 44 U.S.C. 3501 *et seq.*

any existing, collection of information requirement as defined by the PRA.<sup>94</sup> No commenter addressed whether or not the rescission of the Fee Exception would impose any new, or revise any existing, collection of information requirement as defined by the PRA. Further, the Commission believes that the amendments to Rule 608(a)(1) to require email filing for the estimated 13 annual filings is a non-material change to the current PRA estimate for Rule 608. Any future change in the estimated PRA burden will be reflected in the next three-year update. Further, the modified procedures for Commission action on proposed NMS plans and plan amendments under Rule 608(b)(1) and (2) also do not impose any new, or revise any existing, collection of information requirement as defined by the PRA.<sup>95</sup> Accordingly, the Commission is not submitting this amendment to the Office of Management and Budget for review under the PRA.<sup>96</sup>

#### IV. Economic Analysis

##### A. Introduction

Section 3(f) of the Exchange Act requires the Commission, whenever it engages in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action would promote efficiency, competition, and capital formation.<sup>97</sup> In addition, Section 23(a)(2) of the Exchange Act requires the Commission, when making rules under the Exchange Act, to consider the impact such rules would have on competition.<sup>98</sup> Exchange Act Section 23(a)(2) prohibits the Commission from adopting any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The discussion below addresses the likely economic effects of the rule, including the likely effects of the rule on efficiency, competition, and capital formation.

As discussed above, the Commission is adopting amendments that rescind the Fee Exception and subjects NMS

<sup>94</sup> 44 U.S.C. 3501 *et seq.* See also Proposing Release, *supra* note 1, at 54800.

<sup>95</sup> As stated *supra* in Section II.B.4, the required scope of information that NMS plan participants must file is established in Rule 608(a), other sections of Regulation NMS, and 17 CFR 240, subpart A, and it is not being amended. The amendments to Rule 608(b) do not contain any additional collection of information requirements beyond what is already required.

<sup>96</sup> 44 U.S.C. 3507(d) and 5 CFR 1320.11.

<sup>97</sup> 15 U.S.C. 78c(f).

<sup>98</sup> 15 U.S.C. 78w(a)(2).

plan fee amendments to the standard procedure of Rule 608(b)(1) and (2), which requires public notice, an opportunity for public comment, and Commission action by order before a NMS plan fee amendment can become effective.<sup>99</sup> The Commission is also amending Rule 608(a)(1) to require that proposed new NMS plans and plan amendments be filed with the Commission by email, instead of with the Office of the Secretary, typically using a paper-based filing process.<sup>100</sup> Additionally, the amendments modify the procedures and timeframes set forth in Rule 608(b)(1) and (2) for Commission publication of notice and subsequent Commission actions for proposed new NMS plans and proposed amendments to existing NMS plans.

As discussed below, the Commission believes rescinding the Fee Exception will benefit market participants by eliminating a potential disincentive for persons to provide comments on NMS plan fee amendments, which could make additional information available that could help the Commission evaluate whether a NMS plan fee amendment complies with the Exchange Act. Even if rescinding the Fee Exception does not improve the robustness of the comment process, the Commission believes it will help protect market participants from having to pay fees that the Commission may later determine do not comply with the Exchange Act, since fees will not become effective unless approved by the Commission. Additionally, the Commission believes rescinding the Fee Exception will benefit SRO members and subscribers of SIP data by providing them with earlier notice and more time to plan and prepare before they are subject to a new or altered NMS plan fee. However, the Commission also believes that rescinding the Fee Exception will impose costs on SROs if the process delays the implementation of a NMS plan fee increase because SROs will no longer receive the incremental revenue they would have earned if NMS plan fee amendments were immediately effective. Similarly,

there may be costs on SRO members and subscribers of SIP data if the process delays the implementation of a NMS plan fee decrease because they would no longer benefit from the incremental cost savings.

Furthermore, the Commission believes that the modifications to the procedures and timeframes for Commission publication of notice and subsequent Commission actions for proposed new NMS plans and plan amendments will increase the transparency and improve the efficiency of the process for handling proposed new NMS plans and proposed amendments to existing NMS plans by decreasing the time it takes for them to be published in the **Federal Register**, as well as the average total time it takes for the Commission to act on them relative to the date they are initially filed.<sup>101</sup> The Commission acknowledges that increasing the maximum timeframe for the Commission to act after publication in the **Federal Register** might have a negative impact on efficiency for some proposed new NMS plans or plan amendments, but does not believe that this effect will be significant.

The Commission is making changes to the economic analysis it made in the Proposing Release.<sup>102</sup> These changes address the Commission's modifications to the procedures and timeframes for Commission publication and action for proposed new NMS plans and proposed amendments to existing NMS plans as well as comments related to the Commission's economic analysis in the Proposing Release.<sup>103</sup>

Wherever possible, the Commission has quantified the likely economic effects of the amendments. However, most of the costs, benefits, and other economic effects discussed are inherently difficult to quantify. Therefore, much of our discussion is

<sup>101</sup> The Commission estimates that the average total amount of time it takes the Commission to act on a proposed new NMS plan or plan amendment, relative to the time it is initially filed, may decrease. See *infra* note 203 and accompanying text. However, the Commission acknowledges that the total time it takes for the Commission to act on some individual proposed new NMS plans or plan amendments may increase.

<sup>102</sup> See Proposing Release, *supra* note 1, at 54800.

<sup>103</sup> See *supra* Section II.B.

qualitative in nature. Our inability to quantify certain costs, benefits, and effects does not imply that such costs, benefits, or effects are less significant.

#### B. Baseline

The Commission has assessed the likely economic effects of the amendments, including benefits, costs, and effects on efficiency, competition, and capital formation, against a baseline that consists of the existing regulatory process for NMS plan fee amendments in practice, the existing procedure and timeframes for proposed new NMS plans and plan amendments that are filed under Rule 608(b)(1) and (2) and are not immediately effective upon filing, the regulatory procedures and timeframes for SRO rule filings that are not immediately effective under Section 19(b)(2) of the Exchange Act, the structure of the market for core data and aggregated market data products, and the structure of the market for trading services in NMS securities.

#### 1. NMS Plan Fee Amendments

There are currently a total of five NMS plans that either charge fees or could charge fees and have filed NMS plan fee amendments under the Fee Exception. These consist of the CAT Plan along with four NMS plans that govern the collection and dissemination of core data: The CTA Plan, the CQ Plan, the Nasdaq/UTP Plan, and the OPRA Plan.<sup>104</sup>

<sup>104</sup> See Proposing Release, *supra* note 1, at 54795–96. On May 6, 2020, the Commission issued an order directing the SROs to file a new, single NMS plan with a new governance structure that would govern the collection and dissemination of core data for NMS stocks (“New Consolidated Data Plan”). See Securities Exchange Act Release No. 88827 (May 6, 2020), 85 FR 28702 (May 13, 2020) (“Governance Order”). This would replace the three existing NMS plans that currently govern the collection and dissemination of core data for NMS stocks: The CTA Plan, the CQ Plan, and the NASDAQ/UTP Plan. The Governance Order states that the CTA Plan, the CQ Plan, and the Nasdaq/UTP Plan will continue to be responsible for the consolidation and dissemination of core data for NMS stocks and that the fees for core data will continue to be governed by the provisions of these plans, until the New Consolidated Data Plan is ready to assume responsibility for the dissemination of core data for NMS stocks and fees of the New Consolidated Data Plan have become effective.

<sup>99</sup> See *supra* Section II.A and Section II.B.1.

<sup>100</sup> See *supra* Section II.B.1.c.

The SROs approve all NMS plan fee amendments.<sup>105</sup> This can create potential conflicts of interest for the SROs, because their duties administering NMS plans that either charge or could charge fees could potentially come into conflict with other products the SROs sell or costs they incur as part of their businesses.<sup>106</sup> The exchange SROs have a potential conflict of interest with respect to the administration of the four NMS plans that set fees for core data because they vote to set SIPs' fees and also own and control the dissemination of all equity and option market data and also individually set the prices of some of the proprietary data products certain market participants may in some circumstances use as substitutes for SIP data.<sup>107</sup> Additionally, the SROs have potential conflicts of interest with respect to allocating costs related to the CAT Plan because both SRO participants and Industry Members are responsible for paying fees related to the CAT Plan; however, the CAT Operating Committee, whose voting participants are all SROs, decides how these fees should be split.<sup>108</sup>

The Commission's notice and comment process is one of the only ways market participants have to express their views on NMS plan fee amendments.<sup>109</sup> However, under the current process, market participants do not have the opportunity to comment

before NMS plan fee amendments become effective.<sup>110</sup>

Because NMS plan fee amendments are effective upon filing, fees in connection with a NMS plan can be charged immediately upon filing with the Commission.<sup>111</sup> In some cases, SRO members or subscribers to core data plans may not be given adequate time to plan for a new or altered fee before it is implemented.<sup>112</sup> Some commenters agreed that market participants may not receive adequate notice about NMS plan fee increases before they are charged.<sup>113</sup> Additionally, one commenter argued that NMS plan fee amendments being effective upon filing can lead to unclear rules that need clarification after the fact.<sup>114</sup>

At any time within 60 days of the filing of a NMS plan fee amendment, the Commission may summarily abrogate the amendment and require that the amendment be re-filed pursuant to the standard procedure of Rule 608(b)(1)

<sup>110</sup> See Proposing Release, *supra* note 1, at 54798–99.

<sup>111</sup> SRO participants must post a proposed amendment to a NMS plan on their website no later than two business days after the filing of the proposed amendment with the Commission. See Rule 608(a)(8)(ii).

<sup>112</sup> The Commission estimates the average and median time it takes NMS plans to begin charging new fees pursuant to NMS plan fee amendments are 66.3 days and 62.5 days, respectively, after filing with the Commission. See *infra* note 120 and accompanying text. However, a few NMS plan fee amendments give significantly less notice before beginning to charge new fees. See, e.g., Securities Exchange Act Release Nos. 69157 (Mar. 18, 2013), 78 FR 17946 (Mar. 25, 2013) and 69361 (Apr. 10, 2013), 78 FR 22588 (Apr. 16, 2013). Comments submitted in response to NMS plan fee amendments and in connection with the Roundtable on Market Data and Market Access (“Roundtable”) that was hosted by SEC staff in October 2018 stated that in some instances market participants did not receive enough notice regarding NMS plan fee changes. See, e.g., Letter from Peter Moss, Managing Director, Trading, Financial and Risk, Thomson Reuters (May 7, 2013) at 1–2, available at <https://www.sec.gov/comments/s7-24-89/s72489-34.pdf> (“Moss Letter”) (commenting on the need to “make necessary changes to billing systems and to notify clients of the changes”); Letter from Kimberly Unger, Esq., CEO and Executive Director, The Security Traders Association of New York, Inc., New York, New York (Apr. 10, 2013) at 2, available at <https://www.sec.gov/comments/sr-ctacq-2013-01/ctacq201301-2.pdf> (“Unger Letter”); Letter from Ira D. Hammerman, Senior Managing Director & General Counsel, SIFMA (Mar. 28, 2013) at 6–7, available at <https://www.sec.gov/comments/s7-24-89/s72489-31.pdf> (“Hammerman Letter”) (commenting on the need of “professionals and their firms, as well as market data vendors, to alter their systems and business plans”); Letter from Marcy Pike, SVP, Enterprise Infrastructure, Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Oct. 26, 2018) at 6, available at <https://www.sec.gov/comments/4-729/4729-4566044-176136.pdf> (“Fidelity Letter II”).

<sup>113</sup> See Bloomberg Letter at 3; Clearpool Letter at 2; Fidelity Letter at 4; Healthy Markets Letter at 10; RBC Capital Markets Letter at 4.

<sup>114</sup> See Bloomberg Letter at 7.

and (2).<sup>115</sup> However, because NMS plan fee amendments are immediately effective-upon-filing, market participants can be charged a new or altered fee before comments can be submitted and before the Commission can evaluate whether to abrogate a NMS plan fee amendment.<sup>116</sup>

Table 1 shows information on the number of NMS plan fee amendments filed under Rule 608(b)(3)(i) since 2010 for each of the NMS plans that either charge fees or could charge fees.<sup>117</sup> Since 2010, the Commission estimates an average of 3.8 NMS plan fee amendments have been filed each year. The Commission estimates the average and median time it takes the Commission to notice a NMS plan fee amendment on its website are 57.0 days and 25.5 days, respectively, from the time it is filed.<sup>118</sup> The Commission estimates that the average and median time it takes to publish notice of a NMS plan fee amendment in the **Federal Register** are 62.9 days and 31.5 days, respectively.<sup>119</sup> The Commission estimates the average and median time it takes a NMS plan to begin charging new fees pursuant to NMS plan fee

<sup>115</sup> See Proposing Release, *supra* note 1, at 54796.

<sup>116</sup> The input of commenters is an important part of the Commission's review of NMS plan fee amendments, and the Commission generally does not abrogate a NMS plan fee amendment prior to reviewing the comments. See Proposing Release, *supra* note 1, at 54798.

<sup>117</sup> In the Proposing Release, the Commission stated that it preliminarily believes that the median value was the most appropriate measure to estimate times related to NMS plan fee amendments because the average was not an informative estimate for these measures since the sample size was small and contained extreme outliers. See Proposing Release, *supra* note 1, at 54801, n. 71. Two commenters stated that estimates based on median values may not be fully reflective of the anticipated times to process a NMS plan amendment under the Proposal because the estimate does not account for the cases where the Commission's processing of certain amendments had been significantly delayed. See Operating Committees Letter at 4; Nasdaq Letter at 3. The Commission agrees that the median value does not provide information on the times where the Commission's processing of certain NMS plan fee amendments have been significantly delayed. For completeness, the Commission is revising its analysis to present estimates of both the average and median times related to NMS plan fee amendments.

<sup>118</sup> Statistics on the number of days it takes the Commission to notice a NMS plan fee amendment and the number of days it takes the Commission to notice a withdrawn NMS plan fee amendment were determined from NMS plan fee filing amendments to the CAT Plan, the CTA Plan, the CQ Plan, the Nasdaq/UTP Plan, and the OPRA Plan filed under Rule 608(b)(3)(i) between 2014 and 2019. The Commission chose this five-year lookback time-period to calculate these measures because it reflects a current snapshot of the timeframes under which the Commission provides notices of NMS plan fee amendments and withdrawn NMS plan fee amendments. NMS plan amendments are available at <https://www.sec.gov/rules/sro/nms.htm>.

<sup>119</sup> See *supra* note 118.

<sup>105</sup> See Proposing Release, *supra* note 1, at 54796.

<sup>106</sup> See Proposing Release, *supra* note 1, at 54798–99 and *infra* Section IV.B.4. Some commenters agreed with this assessment. See Better Markets Letter at 1, 3–4; Bloomberg Letter at 2; CII Letter at 4; Clearpool Letter at 1; FIA Letter at 1–2; Fidelity Letter at 2, 3; Healthy Markets Letter at 1, 5; ICI Letter at 3; RBC Capital Markets Letter at 2.

<sup>107</sup> See *infra* Section IV.B.4. Some commenters agreed that the exchange SROs have a potential conflict of interest with respect to the administration of the four NMS plans that set fees for core data. See Better Markets Letter at 1, 3–4; Bloomberg Letter at 2; Clearpool Letter at 1; Fidelity Letter at 3; Healthy Markets Letter at 1.

<sup>108</sup> See Proposing Release, *supra* note 1, at 54796. Two commenters agreed that the SROs have potential conflicts of interest with respect to allocating costs related to the CAT Plan. See FIA Letter at 1–2; Fidelity Letter at 3. One commenter stated that Industry Members under the CAT Plan have no alternative but to pay the required fees. See MFA Letter at 4.

<sup>109</sup> Industry members and other market participants also sit on the Advisory Committees to NMS plans and can express their views during Operating Committee meetings. However, they cannot vote on NMS plan fee amendments. See Proposing Release, *supra* note 1, at 54796. Non-SRO members would serve as voting members on the Operating Committee of the New Consolidated Data Plan. See *supra* note 104. One commenter agreed that the comment process is one of the only ways market participants have to express their views on NMS plan fee amendments. See Clearpool Letter at 2.

amendments are 66.3 days and 62.5 days, respectively, after filing with the Commission.<sup>120</sup> Table 1 also contains information on how many of the NMS plan fee amendments were abrogated by the Commission or withdrawn by the NMS plan after receiving comments from market participants. For cases in which the Commission abrogates a NMS plan fee amendment, the Commission estimates the average and median time the NMS plan fee amendment is effective before the Commission abrogates the NMS plan fee amendment

are 57.7 days and 57 days, respectively.<sup>121</sup> No NMS plan fee amendments that have been abrogated by the Commission have been refiled under the standard procedure.<sup>122</sup> For cases in which a NMS plan withdraws a NMS plan fee amendment, the Commission estimates the average and median time that the NMS plan fee amendment is effective before the NMS plan withdraws the filing are 47.3 days and 46.5 days, respectively.<sup>123</sup> The Commission estimates the average and median time it takes the Commission to

notice the withdrawal of a NMS plan fee amendment are 40.0 days and 34 days, respectively.<sup>124</sup> When a NMS plan refiles a withdrawn NMS plan fee amendment, it is refiled on an immediately effective basis. The Commission estimates the average and median time it takes a NMS plan to refile a withdrawn NMS plan fee amendment are 143.3 days and 175 days, respectively, from the time the initial NMS plan fee amendment was withdrawn.<sup>125</sup>

TABLE 1—INFORMATION ON NMS PLAN FEE AMENDMENTS UNDER RULE 608(b)(3)(i)

Year	Number filed				Number abrogated				Number withdrawn			
	CTA/CQ	NASDAQ/UTP	OPRA	CAT	CTA/CQ	NASDAQ/UTP	OPRA	CAT	CTA/CQ	NASDAQ/UTP	OPRA	CAT
2010	2	0	1	.....	0	0	0	.....	0	0	0	.....
2011	0	2	4	.....	0	0	0	.....	0	0	0	.....
2012	0	0	2	.....	0	0	0	.....	0	0	0	.....
2013	3	3	1	.....	0	0	0	.....	2	2	0	.....
2014	2	1	2	.....	0	0	0	.....	0	0	0	.....
2015	0	0	0	.....	0	0	0	.....	0	0	0	.....
2016	0	0	5	0	0	0	0	0	0	0	0	0
2017	2	1	2	1	0	0	0	1	2	0	0	0
2018	1	2	0	1	1	1	0	0	0	0	0	1
2019	0	0	0	0	0	0	0	0	0	0	0	0
Total	10	9	17	2	1	1	0	1	4	2	0	1

This table shows the number of NMS plan fee amendments filed under Rule 608(b)(3)(i) of Regulation NMS, the number of NMS plan fee amendments that were abrogated by the Commission, and the number of NMS plan fee amendments that were withdrawn by the NMS plan each year from 2010–2019 for the following NMS plans: The CTA and CQ Plans, the NASDAQ/UTP Plan, the OPRA Plan, and the CAT Plan. NMS plan fee amendments to the CTA and CQ Plans are included in one category because fee changes to both NMS plans are included in the same filing. Source: This table was compiled from NMS plan rule filings available at <https://www.sec.gov/rules/sro/nms.htm>.

Since 2010, the four NMS plans that govern core data have filed a total of 36 NMS plan fee amendments under Rule 608(b)(3)(i). Two of these filings were abrogated by the Commission and six were withdrawn by the SRO participants.

Since 2017, the CAT Plan has filed two NMS plan fee amendments under Rule 608(b)(3)(i) to establish the allocation of funding for the CAT. One of these fee filings was abrogated by the Commission and one was withdrawn by the SRO participants.

2. Procedures and Timeframes for NMS Plans and NMS Plan Amendments Filed Under Rule 608(b)(1) and (2)

As discussed in detail above, the Commission has modified the procedures and timeframes under Rule 608(b)(1) and (2) for Commission actions on proposed new NMS plans and proposed amendments to existing NMS plans.<sup>126</sup> As a result of this change, the Commission has updated its economic baseline to discuss and provide statistics on the timeframes for Commission actions for proposed new NMS plans and plan amendments that

are not immediately effective upon filing and filed under the existing procedures of Rule 608(b)(1) and (2).

SROs, as plan participants, file proposed new NMS plans and proposed amendments to NMS plans, including NMS plan fee amendments, with the Secretary of the Commission, typically using a paper-based filing process.<sup>127</sup> As discussed in detail in the Electronic 19b–4 Adopting Release, the Commission believes that paper-based filing process can be less efficient and more costly than electronic filing.<sup>128</sup> For example, a paper-based filing requires

<sup>120</sup> Statistics on the number of days it takes a NMS plan to begin charging a new fee are based on dates determined from NMS plan fee filing amendments to the CTA Plan, the CQ Plan, the Nasdaq/UTP Plan, and the OPRA Plan filed under Rule 608(b)(3)(i) between 2010 and 2019. NMS plan fee amendments that contained policy changes and did not alter or impose a fee or fee cap were not included in this calculation. These statistics do not include NMS plan fee amendments to the CAT Plan. NMS plan amendments are available at <https://www.sec.gov/rules/sro/nms.htm>.

<sup>121</sup> Statistics on the number of days it takes the Commission to abrogate a NMS plan fee filing were determined from NMS plan fee filing amendments to the CAT Plan, the CTA Plan, the CQ Plan, the Nasdaq/UTP Plan, and the OPRA Plan filed under Rule 608(b)(3)(i) between 2010 and 2019. NMS plan amendments are available at <https://www.sec.gov/rules/sro/nms.htm>.

<sup>122</sup> See Proposing Release, *supra* note 1, at 54796.

<sup>123</sup> Statistics on the number of days it takes a NMS plan to withdraw a NMS plan fee amendment were determined from NMS plan fee filing amendments to the CAT Plan, the CTA Plan, the CQ Plan, the Nasdaq/UTP Plan, and the OPRA Plan filed under Rule 608(b)(3)(i) between 2010 and 2019. Note these statistics do not include the Twenty-fourth amendment to the CTA Plan and the Fifteenth amendment to the CQ Plan. See Securities Exchange Act Release No. 84194 (Sept. 18, 2018), 83 FR 48356 (Sept. 24, 2018). These amendments withdraw fee changes from the Twenty-second amendment to the CTA Plan and the Thirteenth amendment to the CQ Plan, which was challenged by Bloomberg and stayed by the Commission on July 31, 2018. See *In the Matter of the Application of Bloomberg L.P.*, Securities Exchange Act Release No. 83755 at 3 (July 31, 2018), available at <https://www.sec.gov/litigation/opinions/2018/34-83755.pdf>

(“Bloomberg Order”). NMS plan amendments are available at <https://www.sec.gov/rules/sro/nms.htm>.

<sup>124</sup> See *supra* note 118.

<sup>125</sup> Some refiled NMS plan fee amendments were modified but remained substantially similar to the withdrawn fee changes. See, e.g., Securities Exchange Act Release No. 82071 (Nov. 14, 2017), 82 FR 55130 (Nov. 20, 2017). Other refiled NMS plan fee amendments were modified in response to comments. See, e.g., Securities Exchange Act Release No. 70953 (Nov. 27, 2013), 78 FR 72932 (Dec. 4, 2013).

<sup>126</sup> See *supra* Section II.B.1.

<sup>127</sup> See *supra* Section II.B.1.c.

<sup>128</sup> See Securities Exchange Act Release No. 50486 (Oct. 4, 2004), 69 FR 60287, 60297 (Oct. 8, 2004) (File No. S7–18–04) (“Electronic 19b–4 Adopting Release”).

filers to devote time and incur costs related to printing, copying, and mailing filed materials.

Rule 608(b)(1) requires the Commission to publish notice of the filing of any NMS plan, or any proposed amendment to any effective NMS plan, and provide interested persons an opportunity to submit written comments.<sup>129</sup> However, it does not specify a timeframe in which the Commission is required to publish notice of the filing.<sup>130</sup> The Commission estimates that the average and median time it takes to publish notice of proposed NMS plan amendments in the **Federal Register** that are filed under Rule 608(b)(1) and are not immediately effective are 65.5 days and 38 days, respectively.<sup>131</sup> The Commission estimates that the average and median time it takes to publish notice of proposed new NMS plans in the **Federal Register** are 163.8 days and 76.5 days, respectively. However, the Commission acknowledges that it can take significantly longer to publish notice of some proposed new NMS plans and plan amendments.<sup>132</sup>

Rule 608(b)(2) specifies a 120 day timeframe from the date of publication of notice in the **Federal Register** for the Commission to approve a proposed new NMS plan or plan amendment.<sup>133</sup> The Commission may extend this timeframe an additional 60 days, up to 180 days from the date of publication, if it finds such a longer review period to be appropriate and publishes its reasons for so finding, or if the sponsors of the proposal consent to a longer review period. The Commission estimates that the average and median time it takes to approve proposed NMS plan amendments that are not immediately effective are 62.0 days and 44.5 days, respectively, from the date of their

publication in the **Federal Register**.<sup>134</sup> The average and median time it takes to approve proposed new NMS plans are 204.8 days and 181 days, respectively, from the date of their publication in the **Federal Register**.<sup>135</sup> The Commission estimates that 95 percent of proposed NMS plan amendments and 25 percent of proposed new NMS plans were approved within 120 days of being published in the **Federal Register**. The Commission estimates that the average and median total time it takes to approve proposed NMS plan amendments that are not immediately effective are 127.6 days and 86 days, respectively, from the date they are filed with the Commission. The average and median total time it takes to approve proposed new NMS plans are 368.5 days and 338 days, respectively, from the date they are filed with the Commission.

### 3. Procedures and Timeframes for SRO Rule Changes Filed Under Section 19(b)(2)

As discussed in detail above, the Commission has modified Rule 608(b) to include procedures for all Commission actions on proposed new NMS plans and proposed amendments to existing NMS plans that are patterned on Section 19(b), with some modifications of the Section 19(b) timeframes that the Commission believes are appropriate in light of differences between SRO rule filings and proposed NMS plans and plan amendments.<sup>136</sup> As a result of this change, the Commission has updated its economic baseline to discuss the procedures and provide statistics on the timeframes for Commission actions for SRO rule changes that are not immediately effective upon filing and are filed under Section 19(b)(2) of the Exchange Act.<sup>137</sup>

Rule 19b-4(b)(1) mandates that SROs electronically file proposed changes to SRO rules with the Commission on Form 19b-4.<sup>138</sup> The Commission believes that electronically filing SRO rule changes is more efficient and less costly than a paper-based filing process.<sup>139</sup>

Section 19(b)(2) mandates specific timeframes for the Commission to notice and approve or disapprove SRO proposed rule changes that are not immediately effective upon filing.<sup>140</sup> If a SRO files a proposed rule change with the Commission and publishes a notice of the filing of the proposed rule change, together with the substantive terms of the proposed rule change, on a publicly accessible website, then Section 19(b)(2) requires the Commission to send notice of the SRO proposed rule change to the **Federal Register** for publication within 15 days of the notice being published on the website.<sup>141</sup> The Commission is required to approve, disapprove, or institute proceeding to determine if the SRO proposed rule change should be disapproved within 45 days of the date of publication in the **Federal Register**.<sup>142</sup> If the Commission institutes proceedings, then it must provide the SRO that filed the proposed rule change notice of the grounds for disapproval under consideration and an opportunity for hearing, which must be concluded not later than 180 days after the date of publication. If the Commission institutes proceedings, then it must issue an order approving or disapproving the proposed rule change no later than 180 days after the date of

the SRO. Under Section 19(b)(3), these changes are immediately effective upon filing. However, the Commission may suspend one of these SRO rule changes within 60 days of the date the SRO rule change is filed with the Commission, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act. If the Commission does suspend a SRO rule change, then it shall institute proceedings under Section 19(b)(2)(B) to determine whether the proposed SRO rule change should be approved or disapproved. See 15 U.S.C. 78s(b)(2) and 15 U.S.C. 78s(b)(3).

<sup>138</sup> See 17 CFR 240.19b-4.

<sup>139</sup> See *supra* note 128.

<sup>140</sup> The timeframes discussed in Section 19(b)(2) do not apply to SRO fee changes, which are immediately effective upon filing. See *supra* note 137.

<sup>141</sup> If the Commission fails to send notice of the SRO proposed rule change to the **Federal Register** within 15 days, then the date of publication is deemed to be the date on which the website publication was made.

<sup>142</sup> The Commission may extend its review period another 45 days if it determines that a longer period is appropriate and publishes the reasons for such determination; or if the SRO that filed the proposed rule change consents to the longer period.

<sup>129</sup> Rule 608(b)(1) also states that no NMS plan, or NMS plan amendment, shall become effective unless approved by the Commission. See Rule 608(b)(1). An exception currently exists under Rule 608(b)(3) for NMS plan fee amendments and other types of NMS plan amendments that are immediately effective upon filing with the Commission. See Proposing Release, *supra* note 1, at 54796.

<sup>130</sup> See *supra* Section II.B.1.

<sup>131</sup> Statistics on the number of days it takes to publish notice of proposed new NMS plans and plan amendments in the **Federal Register** that are not immediately effective and filed under Rule 608(b)(1) are based on proposed new NMS plans and proposed amendments to effective NMS plans filed between 2010 and 2020. NMS plans and NMS plan amendments are available at <https://www.sec.gov/rules/sro/nms.htm>.

<sup>132</sup> See, e.g., Securities Exchange Act Release No. 72820 (Aug. 12, 2014), 79 FR 48779 (Aug. 18, 2014) and 77123 (Feb. 11, 2016), 81 FR 8264 (Feb. 18, 2016), which took 301 days and 178, respectively, to be published in the **Federal Register**.

<sup>133</sup> See Rule 608(b)(2).

<sup>134</sup> Statistics on the number of days it takes the Commission to approve proposed new NMS plans and plan amendments that are not immediately effective under Rule 608(b)(2) are based on proposed new NMS plans and proposed amendments to effective NMS plans filed between 2010 and 2020. NMS plans and NMS plan amendments are available at <https://www.sec.gov/rules/sro/nms.htm>.

<sup>135</sup> Extensions of time agreed to by plan participants caused average and median times for Commission approval of proposed new NMS plans to be greater than 180 days. See, e.g., Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012).

<sup>136</sup> See *supra* Section II.B.1.

<sup>137</sup> Section 19(b)(2) sets forth the procedures and timeframes for Commission action for most SRO rule changes, unless they: (i) constitute a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO; (ii) establish or change a due, fee, or other charge imposed by the SRO; or (iii) are concerned solely with the administration of



publication in the **Federal Register**.<sup>143</sup> If the Commission fails to institute or conclude proceedings within the specified time period, then the SRO proposed rule change shall be deemed to have been approved by the Commission.

Pursuant to Section 19(b)(10)(B), a SRO proposed rule change has not been received by the Commission if the Commission notifies the SRO within seven business days after the date of receipt that such proposed rule change does not comply with the Commission's rules relating to the required form of a proposed rule change.<sup>144</sup>

The Commission estimated average and median timeframes for Commission actions for SRO proposed rule changes that were not immediately effective upon filing and filed under Section 19(b)(2).<sup>145</sup> The average and median time it takes the Commission to send notice of a SRO proposed rule change to the **Federal Register** are 10.6 days and 12 days, respectively.<sup>146</sup> The average and median time it takes the Commission to publish a SRO proposed rule change in the **Federal Register** are 16.5 days and 17 days, respectively. The average and median time it takes the Commission to approve or disapprove a SRO proposed rule change after it was published in the **Federal Register** are 69.7 days and 44 days, respectively.<sup>147</sup> The Commission estimates that 60.8 percent of SRO proposed rule changes were either approved or disapproved by

the Commission within a 45 day time period of being published in the **Federal Register**, 27.7 percent were either approved or disapproved within a 45 to 90 day time period, 3.1 percent within a 90 to 180 day time period, and 8.5 percent within a 180 to 240 day time period.<sup>148</sup> If the Commission extends its review for a SRO proposed rule change beyond the initial 45 day period,<sup>149</sup> the average and median time it takes the Commission to approve or disapprove the SRO proposed rule change are 119.5 days and 89 days, respectively, from the time it was published in the **Federal Register**.

#### 4. Market for Core and Aggregated Market Data Products

Under the CTA Plan, the CQ Plan, the Nasdaq/UTP Plan, and the OPRA Plan, core data is collected, consolidated, processed, and disseminated by the SIPs.<sup>150</sup> NMS plan operating committees, which are composed of the SROs, set the fees the SIPs charge for core data.<sup>151</sup> Any revenue earned by the SIPs, after deducting costs, is split among the SROs.<sup>152</sup> The total revenues generated by fees charged by the core data plans totaled more than \$500 million in 2018.<sup>153</sup> Fees for core data are paid by a wide range of market participants, including investors, broker-dealers, data vendors, and others.<sup>154</sup> One Roundtable commenter submitted an analysis that showed SIP data fees went up by five percent between 2010 and 2018.<sup>155</sup>

The Commission believes that the SIPs have significant market power in the market for core and aggregated market data products and are monopolistic providers of certain information,<sup>156</sup> which means that for all such products they would have the market power to charge supracompetitive prices.<sup>157</sup> One reason the SIPs have significant market power is that, although some market data products are comparable to SIP data and could be used by some core data subscribers as substitutes for SIP data in certain situations, these products are not perfect substitutes and are not viable substitutes across all use cases.<sup>158</sup> For example, in the equity markets, some market data aggregators buy direct depth of book feeds from the exchanges and aggregate them to produce products similar to the equity market SIPs.<sup>159</sup> However, these products do not provide market information that is critical to some subscribers and only available through the SIPs, such as LULD plan price bands and administrative messages.<sup>160</sup> Additionally, some SROs

broker-dealer spent on CTA data varied based on the type of broker-dealer. They found that the average amount of money spent on CTA data by retail broker-dealers declined by four percent between 2010 and 2017, but the average amount spent by institutional broker-dealers increased by seven percent. See Letter from Melissa MacGregor, Managing Director and Associate General Counsel and Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA (Oct. 24, 2018) at 21–28, available at <https://www.sec.gov/comments/4-729/4729-4559181-176197.pdf>.

<sup>156</sup> See Proposing Release, *supra* note 1, at 54799. See also *infra* note 160.

<sup>157</sup> Some commenters agreed that the core data plans are monopolistic providers of market-wide services and market competition cannot be relied upon to set competitive prices. See Better Markets Letter at 3; Bloomberg Letter at 2, 5; CII Letter at 2–3, 4–5; Clearpool Letter at 3; Fidelity Letter at 3, 4; MFA Letter at 3; RBC Capital Markets Letter at 2. One of these commenters stated that “exchanges generate revenue from the SIP plans, plus additional (unshared) revenue from their proprietary data fees, they have no incentive whatsoever to cannibalize their own revenue streams by positioning them as more competitively priced alternatives to core data.” See Bloomberg Letter at 2 and n. 4.

<sup>158</sup> Some commenters stated that proprietary data products sold by some SROs do not represent viable, competitively priced alternatives to the core data distributed by the NMS plan processors. See Bloomberg Letter at 2, n. 4; Clearpool Letter at 3; CII Letter at 4–5; Healthy Markets Letter at 11.

<sup>159</sup> The feeds produced by market data aggregators offer additional features, such as lower latency, but usually cost more than SIP data. See Equity Market Structure Roundtables: Roundtable on Market Data and Market Access October 25, 2018 Transcript, available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf> (“Oct. 25 Tr.”), at 126:20–129:8 (statement of Mr. Skalabrin).

<sup>160</sup> See Proposing Release, *supra* note 1, at 54799. Three commenters agreed that certain regulatory information, such as LULD price bands, is only available through the SIPs. See Better Markets

<sup>143</sup> The Commission may extend the proceedings another 60 days if it determines that a longer period is appropriate and publishes the reasons for such determination; or if the SRO that filed the proposed rule change consents to the longer period.

<sup>144</sup> The Commission can extend the deadline for the time period it can reject the filing of a SRO proposed rule change to 21 days after the date of receipt if the Commission determines that the proposed rule change is unusually lengthy and is complex or raises novel regulatory issues and the Commission informs the SRO that filed the proposed rule change of such determination not later than seven business days after the date of receipt. See 15 U.S.C. 78s(b)(10)(B).

<sup>145</sup> The sample the Commission examined consisted of 1,016 SRO proposed rule changes filed under Section 19(b)(2) of the Exchange Act in which the Commission issued an order either approving or disapproving the proposed rule change between 2015 and 2019. The sample does not include SRO fee changes, which are immediately effective upon filing under Section 19(b)(3). See *supra* note 137.

<sup>146</sup> See *supra* note 141 and accompanying text.

<sup>147</sup> The Commission estimates that 98.2 percent of SRO proposed rule changes were approved by the Commission and 1.8 percent were disapproved. The average and median time it took the Commission to complete its review of a SRO proposed rule change that was approved were 66.8 days and 44 days, respectively, after it was published in the **Federal Register**. The average and median time it took the Commission to complete its review of a SRO proposed rule change that was disapproved were 232.8 days and 239 days, respectively, after it was published in the **Federal Register**.

<sup>148</sup> See *supra* notes 142 and 143 and accompanying text.

<sup>149</sup> See *supra* note 142.

<sup>150</sup> See Proposing Release, *supra* note 1, at 54795.

<sup>151</sup> See Proposing Release, *supra* note 1, at 54796.

<sup>152</sup> FINRA rebates a portion of the SIP revenue it receives back to its members. See FINRA Rule 7610B, available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/7610b>.

One Roundtable commenter estimated that from 2013 to 2017, through the Nasdaq/UTP plan, the FINRA/Nasdaq TRF gave 83 percent of SIP revenue it received to broker-dealers. See Letter from Thomas Wittman, Executive Vice President, Head of Global Trading and Market Services and CEO, Nasdaq Stock Exchange (Oct. 25, 2018) at 19, available at <https://www.sec.gov/comments/4-729/4729-4562784-176135.pdf>.

<sup>153</sup> See *supra* note 7. A number of commenters agreed that revenues generated from core data fees are substantial. See, e.g., Better Markets Letter at 1, 3; Clearpool Letter at 1; Fidelity Letter at 2; MFA Letter at 2; RBC Capital Markets Letter at 3; SIFMA Letter at 1.

<sup>154</sup> A number of commenters agreed that fees for core data are paid by a wide range of market participants. See, e.g., CII Letter at 2; ICI Letter at 1; Bloomberg Letter at 2. Three commenters also stated that broker-dealers and funds ultimately pass these fees on to investors. See Better Markets Letter at 3; Bloomberg Letter at 2; CII Letter at 2.

<sup>155</sup> The commenter's analysis examined changes in the fees that some broker-dealers paid for CTA data between 2010 and 2018. The analysis also found that the change in the total amount each

offer top of book data feeds, which may be considered by some to be viable substitutes for SIP data for certain applications.<sup>161</sup> However, in the equity markets, broker-dealers typically rely on the SIP data to fulfill their obligations under Rule 603 of Regulation NMS, *i.e.*, the “Vendor Display Rule,” which requires a broker-dealer to show a consolidated display of market data in a context in which a trading or order routing decision can be implemented.<sup>162</sup>

The purchase of SIP data or proprietary market data from all exchanges, either directly or indirectly, is necessary for all market participants executing orders in NMS securities.<sup>163</sup> SROs have significant influence over the prices of most market data products.<sup>164</sup> For example, the exchanges individually set the pricing of the depth of book data that they sell to market data aggregators and broker-dealers that self-aggregate who in turn generate consolidated data. At the same time, SROs collectively, as participants in the national market system plans, decide what fees to set for SIP data.<sup>165</sup> Although market data aggregators might compete with the SIPs by offering products that provide core data for the equity markets, they ultimately derive their data from the exchanges’ direct proprietary data feeds, whose prices are set by the exchanges, a subset of SROs.<sup>166</sup>

Letter at 3; Bloomberg Letter at 5; ICI Letter at 1. One commenter stated that broker-dealers need access to core data to meet their regulatory obligations including but not limited to receipt of LULD plan price bands and information relating to regulatory halts and market-wide circuit breakers. See Fidelity Letter at 2 and n. 3.

<sup>161</sup> See Proposing Release, *supra* note 1, at 54802.

<sup>162</sup> See Proposing Release, *supra* note 1, at 54799. Two commenters agreed that broker-dealers typically use core data to meet their regulatory obligations under the Vendor Display Rule. See Bloomberg Letter at 3; Fidelity Letter at 2. Some commenters stated that broker-dealers need access to core data to meet their regulatory obligations. See Better Markets Letter at 2–3; Bloomberg Letter at 2–3, 5; Clearpool Letter at 1, 3; FIA Principal Traders Letter at 1; Fidelity Letter at 2 and n. 3; ICI Letter at 1, 2; SIFMA Letter at 1–2.

<sup>163</sup> For example, Rule 611(a) of Regulation NMS requires trading centers to establish policies and procedures to prevent trade-throughs. In order to prevent trade-throughs, executing broker-dealers need to be able to view the protected quotes on all exchanges. They can fulfill this requirement by using SIP data, proprietary data feeds offered by the SROs, or a combination of both.

<sup>164</sup> Two commenters agreed that SROs have significant influence over the prices of market data. See CII Letter at 2, 3, 4–5; Clearpool Letter at 3.

<sup>165</sup> Currently, the Commission can abrogate NMS plan fee amendments for core data. See Rule 608(b)(3)(iii); see also Proposing Release, *supra* note 1, at 54796. The Commission can also suspend SRO fee changes filed under Section 19(b)(3). See 15 U.S.C. 78s(b)(3); see also *supra* note 137.

<sup>166</sup> Pursuant to Section 19(b) of the Exchange Act and Rule 19b–4 thereunder, SROs must file with the Commission proposed rules, in which they set

## 5. Current Structure of the Market for Trading Services in NMS Securities

The Commission described the structure of the market for trading in NMS securities, as of that time, in the Notice and the CAT Plan Approval Order.<sup>167</sup> While the Commission’s analysis of the state of competition in the Notice is fundamentally unchanged, the market for trading services in options and equities currently consists of 24 national securities exchanges, all of which are participants to NMS plans, as well as off-exchange trading venues including broker-dealer internalizers and 34 NMS Stock ATSS,<sup>168</sup> which are not participants in NMS plans.<sup>169</sup> The 24 exchanges are currently controlled by eight separate entities; four of which each operate a single exchange.<sup>170</sup>

Broker-dealer internalizers and ATSS subscribe to SIP data as well as other proprietary data products offered by the exchanges, but also compete with them for order flow in NMS securities.<sup>171</sup> Additionally, FINRA rebates a portion of the SIP revenue it receives back to broker-dealer internalizers and ATSS based on the trade volume they

prices for their direct feed data. Those prices can vary depending on the type of end user.

<sup>167</sup> See Securities Exchange Act Release No. 77724 (Apr. 27, 2016), 81 FR 30614 (May 17, 2016) (File No. 4–698) (“Notice”), Section IV.G.1.a; and Securities Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“CAT Plan Approval Order”), Section V.G.1.

<sup>168</sup> As of July 13, 2020, 34 NMS Stock ATSS are operating pursuant to an initial Form ATS–N. A list of NMS Stock ATSS, including access to initial Form ATS–N filings that are effective, can be found at <https://www.sec.gov/divisions/marketreg/form-ats-n-filings.htm>.

<sup>169</sup> Members from some ATSS or broker-dealer internalizers may serve on the Advisory Committees of some NMS plans, but they would not be able to vote on NMS plan amendments. See *supra* note 109. Non-SRO members would serve as voting members on the Operating Committee of the New Consolidated Data Plan. See *supra* note 104.

<sup>170</sup> Cboe Global Markets, Inc., controls Cboe Exchange, Inc., Cboe C2 Exchange, Inc., Cboe BZX Exchange, Inc., Cboe BYX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGA Exchange, Inc.; Miami International Holdings, Inc. controls Miami International Securities Exchange LLC, MIAX Emerald, LLC, and MIAX PEARL, LLC; Nasdaq, Inc. controls Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX, LLC, and The Nasdaq Stock Market LLC; Intercontinental Exchange, Inc. controls New York Stock Exchange, LLC, NYSE Arca, Inc., NYSE American LLC, NYSE Chicago, Inc., and NYSE National, Inc. The three entities that control a single-exchange are IEX Group, Inc., which controls Investors’ Exchange LLC; BOX Holdings Group LLC, which controls BOX Exchange LLC; LTSE Group, Inc., which controls Long-Term Stock Exchange, Inc.; and MEMX Holdings LLC, which controls MEMX, LLC.

<sup>171</sup> See *supra* Section IV.B.4. One commenter agreed that for-profit SROs set the price for core data that broker-dealers have a regulatory obligation to purchase and SROs also compete directly with their broker-dealer customers for order flow. See Fidelity Letter at 3.

report.<sup>172</sup> The CAT NMS Plan Approval Order discusses how the CAT funding model and the allocation of fees between SRO participants and Industry Members could affect competition in the market for trading services in options and equities.<sup>173</sup>

## C. Economic Effects

In the Proposing Release the Commission stated that, overall, it believed the rescission of the Fee Exception would not have significant economic effects for the following reasons: (1) On average, there are very few proposed NMS plan fee changes each year, which the Commission expects to continue to be the case; (2) the existing filing procedure already allows for Commission abrogation of NMS plan fee amendments that do not comply with the Exchange Act, therefore the impact of the proposed amendments on the fees paid by market participants would have largely been restricted to the two to six month Commission review period, because a fee change that is effective under the current procedure would not be effective under the proposed amendments unless it was approved by the Commission; (3) the SIPs have significant market power in the market for core and aggregated market data products and are monopolistic providers of certain information, so the proposed amendments would have had a minimal effect on the SIPs’ pricing models; and (4) the proposed amendments were a procedural change and would not have affected the contents of the SIP data or comparable products.<sup>174</sup>

Several commenters suggested the proposed amendments could have additional economic effects beyond the ones the Commission discussed in the Proposing Release.<sup>175</sup> The Commission has modified its analysis of the economic effects of the adopted amendments to address these comments as well as to address Commission modifications to the procedures and timeframes for Commission publication of notice and subsequent Commission actions for proposed new NMS plans and plan amendments that are not immediately effective upon filing.<sup>176</sup>

<sup>172</sup> See *supra* note 152.

<sup>173</sup> See CAT Plan Approval Order, *supra* note 167, at 84882–84. One commenter agreed that SROs compete with broker-dealers and are also charged with allocating costs between SROs and Industry Members for the CAT, in which broker-dealers are required to participate by regulation. See Fidelity Letter at 3.

<sup>174</sup> See Proposing Release, *supra* note 1, at 54803.

<sup>175</sup> See, *e.g.*, Better Markets Letter at 3; Bloomberg Letter at 2, 6; CII Letter at 2–3.

<sup>176</sup> See *supra* Section II.B.

While the Commission continues to believe the proposed amendments would not have significant economic effects for the reasons discussed above, the Commission believes that the economic benefits from the adopted amendments will be more significant than those discussed in the Proposing Release.<sup>177</sup> After considering input from commenters,<sup>178</sup> the Commission now believes that the benefits of rescinding the Fee Exception will no longer be restricted to the Commission review period, during which a fee change is effective under the current procedure, but will not be effective under the adopted amendments. Instead, the Commission believes that the benefits will be greater because the Commission believes that rescinding the Fee Exception will eliminate a potential disincentive for persons to provide comments on NMS plan fee amendments, which could make additional information available that could help the Commission evaluate if NMS plan fee amendments comply with the Exchange Act. Additionally, the Commission believes that the modifications to Rule 608(b) will increase the transparency and improve the efficiency of the process for handling new NMS plans and proposed amendments to existing NMS plans (including fee amendments).

Below, the Commission analyzes the economic effects of the amendments, including the benefits, costs, and effects on efficiency, competition, and capital formation in more detail.

#### 1. Benefits

The Commission believes that rescinding the Fee Exception will provide a number of benefits, including, among other things: Eliminating a potential disincentive for persons to provide comments on NMS plan fee amendments, which could make additional information available that could help the Commission evaluate whether a NMS plan fee amendment complies with the Exchange Act; helping protect market participants from having to pay fees that the Commission may later determine do not comply with the Exchange Act; and providing SRO members and subscribers of SIP data with earlier notice and more time to plan and prepare before they are subject to a new or altered NMS plan fee. Additionally, the Commission believes the modifications to Rule 608(b) will increase the transparency and improve the efficiency of the process for

handling proposed new NMS plans and plan amendments.

#### a. Rescission of the Fee Exception

In response to commenters, the Commission has updated its analysis and now believes that rescinding the Fee Exception will benefit market participants by eliminating a potential disincentive for persons to provide comments on NMS plan fee amendments. To the extent there is additional public comment, this could, in turn, enhance regulatory efficiency if it provides additional information that assists the Commission in evaluating whether some NMS plan fee amendments comply with the Exchange Act.

As discussed above, some commenters stated that the Fee Exception discourages market participants from commenting on NMS plan fee amendments.<sup>179</sup> Some commenters stated this lack of public comment has made it difficult for the Commission to evaluate if NMS plan fee amendments comply with the Exchange Act and Commission Rules.<sup>180</sup> The Commission acknowledges it is possible that the Fee Exception may discourage market participants from commenting on NMS plan fee amendments.

Two commenters stated that allowing an opportunity, before NMS plan fee amendments could become effective, for public comment and Commission approval by order would encourage market participants to comment on NMS plan fee amendments.<sup>181</sup> One commenter stated that this would provide the Commission with more information at an earlier point in the agency decision-making process.<sup>182</sup> Several commenters stated that the amendments would assist in the Commission's assessment of whether a NMS plan fee amendment meets the requirements of the Exchange Act before they go into effect.<sup>183</sup> The Commission believes, to the extent that rescinding the Fee Exception encourages more market participants to comment, it may provide the Commission with more information at an earlier stage in its decision-making process about the impact of a NMS plan fee amendment on market participants before the fee goes into effect. This additional

information could help the Commission evaluate if a NMS plan fee amendment complies with the Exchange Act, which could enhance regulatory efficiency.

If rescinding the Fee Exception helps the Commission evaluate whether NMS plan fee amendments comply with the Exchange Act, then it might affect the fees charged by NMS plans. One commenter stated that the Proposal is unlikely to have a significant immediate effect on the cost of core data, since the Proposal does not decrease, or otherwise amend, any particular fee currently in existence.<sup>184</sup> This commenter also stated that over time the Proposal should result in simpler, clearer, and more reasonably priced fees.<sup>185</sup> The Commission agrees with this commenter and believes that rescinding the Fee Exception may not have a significant immediate impact on the price of core data or other fees charged by NMS plans, but over a longer time period rescinding the Fee Exception could have a limited effect on the fees charged by NMS plans if it helps the Commission evaluate whether NMS plan fee amendments comply with the Exchange Act. However, the Commission is unable to estimate the long-term effects rescinding the Fee Exception will have on fees charged by NMS plans, because it would depend on the nature of future NMS plan fee amendments.

Even if rescinding the Fee Exception does not encourage more market participants to comment on NMS plan fee amendments, the Commission believes it will still help protect market participants from having to pay fees that the Commission may later determine do not comply with the Exchange Act.<sup>186</sup> Currently, NMS Plans could begin charging market participants fees immediately upon filing that the Commission may later determine do not comply with the Exchange Act and decide to abrogate.<sup>187</sup> The new process is designed to help ensure that changes to NMS plan fees and charges could not be immediately imposed and market participants would not have to pay fees (even temporarily) that the Commission may later determine do not comply with the Exchange Act.

To the extent NMS plans currently refund fees that are subsequently

<sup>179</sup> See *supra* note 14.

<sup>180</sup> See *supra* note 13.

<sup>181</sup> See Better Markets Letter at 3; MFA Letter at 3.

<sup>182</sup> See Bloomberg Letter at 5.

<sup>183</sup> See Better Markets Letter at 3; Bloomberg Letter at 2, 6; CII Letter at 2–3; Clearpool Letter at 3; Fidelity Letter at 3; ICI Letter at 2; MFA Letter at 1, 3; RBC Capital Markets Letter at 2–3, 4; SIFMA Letter at 1.

<sup>184</sup> See Bloomberg Letter at 8.

<sup>185</sup> See Bloomberg Letter at 5.

<sup>186</sup> Several commenters agreed that rescinding the Fee Exception will help protect market participants from NMS plan fee amendments that are ultimately found to not meet the requirements of the Exchange Act. See Bloomberg Letter at 3; CII Letter at 2, 3; FIA Letter at 2; MFA Letter at 1, 2; RBC Capital Markets Letter at 1; SIFMA Letter at 1–2.

<sup>187</sup> See *supra* Section IV.B.1.

<sup>177</sup> See Proposing Release, *supra* note 1, at 54803.

<sup>178</sup> See *infra* note 183.

abrogated or withdrawn,<sup>188</sup> the benefit of the additional protection rescinding the Fee Exception offers to market participants from having to pay fees that the Commission may later determine do not comply with the Exchange Act may be limited, because market participants would already receive refunds. One commenter stated that, under the current process, there could be complications associated with refunding NMS plan fees that are abrogated.<sup>189</sup> This commenter also pointed out that rescinding the Fee Exception will help market participants avoid complications with refunds should a NMS plan fee amendment be withdrawn or subsequently be denied, because NMS plan fee amendments will only be imposed on market participants after notice, comment, and an affirmative determination by the Commission that the fee change conforms to the requirements of the Exchange Act.<sup>190</sup> To the extent NMS plans currently refund fees that are subsequently abrogated or withdrawn, rescinding the Fee Exception may provide a benefit to market participants by helping them avoid complications associated with refunds for NMS plan fee amendments that would have been abrogated.

Additionally, the Commission believes that rescinding the Fee Exception will benefit market participants because they will no longer incur costs from having to challenge NMS plan fee changes that the Commission would later abrogate. Two commenters stated the immediate effectiveness of NMS plan fee amendments can create significant costs for market participants to challenge fee changes, even if the changes are later suspended or abrogated.<sup>191</sup> One of these commenters stated that it invested significant resources challenging a NMS plan fee amendment in order to prepare and lodge a stay application with the Commission, and prepare its business and customers in the event the Commission decided not to take immediate action before the new fees took effect.<sup>192</sup> The Commission acknowledges that NMS plan fee amendments being immediately effective upon filing can create costs for market participants to challenge fee changes. Under the new process, NMS plan fee amendments would not become effective unless they are approved by

the Commission. Therefore, market participants will not need to incur the costs of challenging NMS plan fee amendments that the Commission may later determine do not comply with the Exchange Act.

The Commission believes that rescinding the Fee Exception will provide SRO members and subscribers of SIP data with earlier notice and more time to plan and prepare before they are subject to a new or altered NMS plan fee.<sup>193</sup> Because NMS plan fee amendments will not become effective until after they are subject to public comment and approved by the Commission, SRO members and subscribers to SIP data will receive earlier notice regarding NMS plan fee amendments before they go into effect. In cases where SRO members and subscribers to SIP data may not previously have received adequate notice, they will now have more time to plan and prepare before they are subject to a new or altered NMS plan fee. For example, under the amendments, third party vendors of SIP data will learn about potential fee changes to a type of SIP fee (e.g., non-displayed fees) earlier, which might give them more time to make adjustments (e.g., changes to fee schedules, billing systems, categorization of customers) and notify their clients before they are subject to the fee changes. Additionally, the Commission believes the notice and comment period for NMS plan fee filings before they become effective will benefit market participants by providing them an opportunity to comment and seek clarifications on NMS plan fee amendments before they become effective, which will help them to plan and prepare before they are subject to a new or altered NMS plan fee.<sup>194</sup>

The Commission believes that SRO members and subscribers of SIP data might benefit from the delay caused by the notice and comment process pursuant to Rule 608 if a NMS plan fee

amendment increased a NMS plan fee, because they would not have to pay the increased fee until the Commission approved the fee change and it became effective.<sup>195</sup> Similarly, SROs might benefit by earning incremental revenue if the process delays a NMS plan fee decrease.

#### b. Modified Procedures for Proposed New NMS Plans and Plan Amendments

Two commenters stated that applying the timeframes and procedures of Section 19(b)(2) to NMS plan amendments would increase transparency and provide for more efficient review of NMS plan amendments.<sup>196</sup> As discussed above,<sup>197</sup> the Commission is adopting amendments to the Rule 608(b) procedure for handling proposed NMS plans and plan amendments that are patterned on Section 19(b), but with some modifications of the Section 19(b) timeframes that the Commission believes are appropriate in light of differences between SRO rule filings and proposed NMS plans and plan amendments.<sup>198</sup> Additionally, the Commission is requiring that proposed new NMS plans and plan amendments be filed with the Commission by email, instead of with the Office of the Secretary, typically using a paper-based filing process.<sup>199</sup>

The Commission believes that the modifications to the procedures and timeframes for Commission actions to the notice and consideration process for proposed new NMS plans and plan amendments under Rule 608(b), along with the requirement that they be filed with the Commission by email, will increase the transparency and improve the efficiency of the notice and consideration process for proposed new NMS plans and plan amendments. Two commenters believe that the current

<sup>195</sup> A delay in a NMS plan fee increase would also impose a corresponding cost on SROs, while a delay in a NMS plan fee decrease would impose a cost on SRO members and subscribers of SIP data. See *infra* Section IV.C.2.a (discussing incremental revenue and costs of delayed NMS plan fees).

<sup>196</sup> See Operating Committees Letter at 3–5; Nasdaq Letter at 1, 3. As discussed in detail above, these two commenters stated that the standard filing procedure for NMS plan amendments can delay transparency and public input into proposed NMS plan amendments because it does not mandate a timeframe in which the Commission must notice a proposed NMS plan amendment. See *supra* note 32 and accompanying text and *infra* note 200 and accompanying text.

<sup>197</sup> See *supra* Section II.B.1.

<sup>198</sup> As described in detail above, commenters advocated for the application of the Section 19(b) process to proposed plan fee amendments. However, the Commission is extending the modified procedures to all proposed plan amendments and proposed new NMS plans. See *id.*

<sup>199</sup> See *supra* Section II.B.1.c.

<sup>188</sup> The Commission is not aware of the occurrence of any refunds.

<sup>189</sup> See RBC Capital Markets Letter at 3–4.

<sup>190</sup> See RBC Capital Markets Letter at 3.

<sup>191</sup> See Bloomberg Letter at 6–7; RBC Capital Markets Letter at 4.

<sup>192</sup> See Bloomberg Letter at 6.

<sup>193</sup> See *supra* Section IV.B.1. Several commenters agreed that rescinding the Fee Exception would provide market participants with advance notice and more time to plan for a fee change. See Bloomberg Letter at 3, 5; ICI Letter at 2; RBC Capital Markets Letter at 4.

<sup>194</sup> Several commenters agreed that commenting on NMS plan fee amendments before they become effective would bring greater transparency to the fee proposal process and help market participants seek clarification with respect to NMS plan fee amendments before they become effective. See CII Letter at 2; MFA Letter at 2. One way NMS plans could issue clarification on NMS plan fee amendments is by responding to comments on the proposed fee amendment, which would be included in the comment file. Additionally, rescinding the Fee Exception provides NMS plans the opportunity to amend their NMS plan fee amendments in response to issues raised by commenters before they become effective.

lack of specified timeframes for noticing proposed new NMS plans and plan amendments have delayed the consideration of some proposed new NMS plans and plan amendments.<sup>200</sup> The Commission believes that the new timeframes for the Commission to send notice to the **Federal Register**, along with the requirement that they be filed with the Commission by email, will alleviate these commenters' concerns and improve the efficiency of the process for handling proposed new NMS plans and plan amendments by increasing the speed with which they are sent to and published in the **Federal Register**.<sup>201</sup> This will also provide more

<sup>200</sup> Two commenters stated that the current lack of specified timeframe in which the Commission is required to publish notice of the filing of proposed amendments to NMS plans can result in what one commenter called "unwarranted delays" and delay transparency and public input into proposed NMS plan amendments. See Nasdaq Letter at 1; Operating Committees Letter at 2–3. These commenters also gave examples of proposed NMS plan amendments in which there was a significant delay in publishing notice of the proposed amendments in the **Federal Register**. See *supra* note 32 and accompanying text. One of these commenters also stated that this has led to uncertainty and inefficiency in NMS plan operations, and hampered the ability of the SROs to manage the plans. See Nasdaq Letter at 2.

<sup>201</sup> The Commission estimates that, under modified Rule 608(b), the average time it will take the Commission to send notice of a NMS plan amendment to the **Federal Register** will be 10.6 days, which is less than the 15 day requirement under modified Rule 608(b)(1). The Commission based this estimate on the average time it historically takes the Commission to send notice of SRO proposed rule changes filed under Section 19(b)(2) to the **Federal Register**, because the required timeframes are the same, 15 days. See *supra* note 146 and accompanying text. The Commission estimates that, under modified Rule 608(b), the average time it will take to publish notice of a NMS plan amendment in the **Federal Register** will be 16.5 days. The Commission reached this estimate by adding the expected average time (10.6 days) required to send notice of a NMS plan amendment to the **Federal Register** under modified Rule 608(b) and the average time (5.9 days) required for the **Federal Register** to publish the notice (10.6 days + 5.9 days = 16.5 days). This estimate is shorter than both the Commission's estimate of the average time of 62.9 days required under the current procedures to publish notice of NMS plan fee amendments in the **Federal Register**, and the average time of 65.5 days required to publish notice of proposed NMS plan amendments that are not immediately effective upon filing in the **Federal Register**. See *supra* notes 119 and 131 and accompanying text.

The Commission estimates that, under modified Rule 608(b), the average time it will take the Commission to send notice of a proposed new NMS plan to the **Federal Register** will be 90 days, the maximum timeframe the Commission has under modified Rule 608(b) to send notice of a proposed new NMS plan to the **Federal Register**. The Commission chose the maximum time allowed because it believes the publication of notice of a new NMS plan may involve significant input from the Commission and it was a conservative approach that represents the upper bound of the amount of time this would take. See *supra* Section II.B.1.a. The Commission estimates that, under modified Rule 608(b), the average time it will take to publish

certainty to NMS plan participants and market participants regarding the timeframes for noticing proposed new NMS plans and plan amendments.

The Commission also believes that faster publication in the **Federal Register** will improve efficiency by decreasing, on average, the total time it takes for the Commission to act on a proposed new NMS plan or plan amendment from the time it is initially filed.<sup>202</sup> The Commission estimates, under the amended rule, the average total time it will take to act on proposed NMS plan amendments and proposed new NMS plans will be 78.5 days and 343.9 days, respectively, from the date they are filed with the Commission.<sup>203</sup>

a proposed new NMS plan in the **Federal Register** will be 95.9 days. The Commission reached this estimate by adding the expected average time (90 days) required to send notice of a proposed new NMS plan to the **Federal Register** under modified Rule 608(b) and the average time (5.9 days) required for the **Federal Register** to publish the notice, (90 days + 5.9 days = 95.9 days). This estimate is shorter than the Commission's estimate of the average time of 163.8 days required under the current procedures to publish notice of proposed new NMS plans. See *supra* note 131 and accompanying text.

<sup>202</sup> The Commission acknowledges that the increasing the maximum timeframe for the Commission to act on a proposed new NMS plan or plan amendment from the date of publication in the **Federal Register** could increase the total time it takes for the Commission to act on some individual proposed new NMS plan or plan amendment from the time it is initially filed. This is discussed *infra*, in Section IV.C.2.b.

<sup>203</sup> The Commission estimates that, under modified Rule 608(b), the average total time it will take the Commission to act on a proposed NMS plan amendment from the date it is filed with the Commission will be 78.5 days. The Commission reached this estimate by adding the expected average time (16.5 days) required to publish notice of a proposed NMS plan amendment in the **Federal Register** and the expected average time (62.0 days) it will take the Commission, under modified Rule 608(b), to act on a proposed NMS plan amendment from the time it is published in the **Federal Register**, (16.5 days + 62.0 days = 78.5 days). See *supra* note 201 for a discussion of the Commission's estimate of the average time it will take to publish notice of a proposed NMS plan amendment. The Commission estimates that, under the modified Rule 608(b), the average time it will take to act on a proposed NMS plan amendment from the time it is published in the **Federal Register** will be 62.0 days, which is equal to the average time it has historically taken under the current procedures. See *supra* note 134 and accompanying text.

The Commission estimates that, under modified Rule 608(b), the average total time it will take the Commission to act on a proposed new NMS plan from the date it is filed with the Commission will be 343.9 days. The Commission reached this estimate by adding the expected average time (95.9 days) required to publish notice of a proposed new NMS plan in the **Federal Register** and the expected average time (248 days) it will take the Commission, under modified Rule 608(b), to act on a proposed new NMS plan from the time it is published in the **Federal Register**, (95.9 days + 248 days = 343.9 days). See *supra* note 201 for a discussion of the Commission's estimate of the average time it will take to publish notice of a proposed new NMS plan.

The Commission determined its estimate of the average time it will take, under modified Rule

This is shorter than the Commission's estimate of the average total time it takes under the current procedures to act on proposed NMS plan amendments and proposed new NMS plans, which are 127.6 days and 368.5 days, respectively.<sup>204</sup>

The Commission believes that adopted Rule 608(b)(1)(ii), requiring the Commission to provide notice of any non-compliant filing of a proposed new NMS plan or plan amendment to plan participants within seven business days of receiving the filing, will also improve the efficiency of the process by reducing the time it takes for NMS plan participants to identify and correct any deficiencies and refile the proposed new NMS plan or plan amendment.

The Commission believes that increasing the maximum timeframe the Commission has to act on a proposed new NMS plan or plan amendment from 180 to 300 days from the date of publication in the **Federal Register** may improve the Commission's evaluation of certain proposed new NMS plans or plan amendments that are particularly complex.<sup>205</sup> This longer timeframe may improve the Commission's evaluation of such proposed new NMS plans or plan amendments by giving the Commission the option to take more time, if it is

608(b), for the Commission to act on a proposed new NMS plan from the time it is published in the **Federal Register** by using historical data on the time it took the Commission to approve proposed new NMS plans filed between 2010 and 2020 from the time they were published in the **Federal Register**. For the historical NMS plan approvals, the original approval time was kept if a NMS plan took less than 180 days to approve, which is the maximum timeframe the Commission currently has to approve a NMS plan or plan amendment after it is published in the **Federal Register**. See *supra* Section IV.B.2. If a NMS plan took 180 days or longer to approve, the Commission assumed that it would have a value of 300 days, which is the maximum timeframe the Commission has under the adopted amendments to act on a NMS plan or plan amendment from the time it is published in the **Federal Register**. See *supra* Section II.B.1.b. The average of these modified values is the Commission's estimate of the average time it will take the Commission, under modified Rule 608(b), to act on a proposed new NMS plan from the time it is published in the **Federal Register**, 248 days. The Commission chose this estimation method because it believes it is a conservative approach that represents an upper bound on the average time and accounts for the longer Commission timeframe to approve proposed new NMS plans under the modified procedures and timeframes for Rule 608(b).

<sup>204</sup> See *supra* Section IV.B.2 (for details on these estimates).

<sup>205</sup> Under the current process, the Commission has 120 days to approve a proposed new NMS plan or plan amendment from the date of publication in the **Federal Register**. However, the Commission has the option to extend its timeframe an additional 60 days, which gives the Commission a maximum timeframe of 180 days to approve a proposed new NMS plan or plan amendment from the date of publication in the **Federal Register**. See *supra* Section II.B.1 and IV.B.2.

needed, to review comments and better determine if a proposed new NMS plan or plan amendment is consistent with the Exchange Act.

The Commission believes that the new process for the Commission to institute proceedings, if needed, for proposed new NMS plans and plan amendments under adopted Rule 608(b)(2)(i) will improve the transparency and efficiency of the consideration process by enabling the Commission to inform the NMS plan and market participants about issues that provide potential grounds for disapproval of a proposed new NMS plan or plan amendment.<sup>206</sup> Publication of this information will improve transparency and efficiency by allowing the public a chance to address identified issues and provide the Commission with additional information.

The Commission believes that the requirement that proposed new NMS plans and plan amendments be filed with the Commission by email will benefit SROs by improving the efficiency of the filing process and reducing the costs they incur in connection with such filings. Currently, proposed new NMS plans and proposed amendments to NMS plans are filed with the Secretary of the Commission, typically using a paper-based filing process.<sup>207</sup> The new filing requirement should eliminate many of the costs associated with paper filing, including printing, copying, mailing, and delivery costs. It should also conserve Commission resources, as Commission staff will no longer manually process the receipt and distribution of proposed new NMS plans and plan amendments.

## 2. Costs

The Commission believes that rescinding the Fee Exception will impose costs on SROs if the process delays the implementation of a NMS plan fee increase, and will impose costs on SRO members and subscribers of SIP data if the process delays the implementation of a NMS plan fee decrease, because these parties would no longer receive the incremental revenue or costs savings they would have earned if NMS plan fee amendments were immediately effective. The Commission acknowledges that increasing the maximum timeframe for the Commission to act after publication in the **Federal Register** might have a negative impact on efficiency in some cases, but does not believe that this

effect will be significant.<sup>208</sup> The Commission does not believe the amendments will impose implementation costs on SROs or other market participants.

### a. Rescission of the Fee Exception

The Commission believes that rescinding the Fee Exception might impose costs on SROs because the new rule may delay implementation of NMS plan fee amendments.<sup>209</sup> For example, a delay in the approval of a NMS plan amendment increasing SIP fees may delay its implementation, which would eliminate incremental revenue that, under the baseline, would have been able to be generated earlier because fees were immediately effective upon the filing of the amendment. The loss of this incremental revenue, in turn, could reduce the revenues the SROs are able to collect from the SIP, as well as the SIP revenue that FINRA rebates back to its members.<sup>210</sup> However, the Commission believes the costs of rescinding the Fee Exception should not be significant because, on average, there are only 3.8 NMS plan fee changes in a year,<sup>211</sup> and because the Commission estimates that the average delay caused by the amendments to the implementation of NMS plan fee amendments will only be 127.1 days.<sup>212</sup>

<sup>208</sup> See *infra* Section IV.C.2.b (for a detailed discussion).

<sup>209</sup> Rescinding the Fee Exception will delay the implementation of NMS plan fee amendments that currently would have been implemented without a phase-in period. It might also delay the implementation of NMS plan fee amendments that currently would have been implemented with a phase-in period that is shorter than the amendment's specified time-frames for the review of NMS plan amendments. It would not delay the implementation of NMS plan fee amendments that currently would have been implemented with a phase-in period that is longer than the amendment's specified time-frames for the review of NMS plan amendments.

<sup>210</sup> See *supra* note 152; see also *supra* Section IV.B.4. In the case of the CAT plan, rescinding the Fee Exception could also delay the SROs from recovering money for costs they might have already incurred. See *supra* note 108 and accompanying text.

<sup>211</sup> See *supra* Section IV.B.1 (for details on the average number of NMS plan fee amendments).

<sup>212</sup> The Commission reached this estimate by adding the expected average time (16.5 days), under modified Rule 608(b), required to publish a NMS plan fee amendment in the **Federal Register** and the Commission's estimate of the average time (110.6 days) it will take the Commission, under modified Rule 608(b), to approve or disapprove a NMS plan fee amendment from the time it is published in the **Federal Register**, (16.5 days + 110.6 days = 127.1 days). See *supra* note 201 for a discussion of the Commission's estimate of the average time it will take to publish notice of a proposed NMS plan amendment in the **Federal Register**.

Because NMS plan fee amendments are immediately effective upon filing, there is no historical data on the time it takes the Commission to approve a NMS plan fee amendment. Given that

In addition, any lost revenue or delay in recovering costs by the SROs should represent a corresponding benefit to SRO members and subscribers of SIP data.<sup>213</sup> On the other hand, a delay in the effectiveness of a NMS plan fee amendment decreasing a NMS plan fee would reverse these costs and benefits.

### b. Modified Procedures for Proposed New NMS Plans and Plan Amendments

As noted above, the Commission believes that the adopted amendments will, on average, decrease the total time it takes for the Commission to act on a proposed new NMS plan or plan amendment from the time it is filed.<sup>214</sup>

The modified Rule 608(b) procedures for all Commission actions on proposed new NMS plans and plan amendments are largely patterned on Section 19(b), the Commission based its estimate of the average time it will take the Commission to approve or disapprove a NMS plan fee amendment on historical data on Commission actions during the Section 19(b) process for SRO proposed rule changes filed under Section 19(b)(2), modified to account for the modified timeframes under Rule 608(b) for proposed new NMS plans and plan amendments. The Commission estimated the percentage of time SRO proposed rule changes filed under Section 19(b)(2) were approved or disapproved: (1) Without instituting proceedings (88.4 percent), (2) when proceedings were instituted but not extended (3.1 percent), and (3) when proceedings were instituted and extended (8.5 percent). See *supra* note 148 and accompanying text. These percentages were multiplied, respectively, by the maximum amount of time the Commission could take to approve NMS plan amendments under the modified 608(b) procedures when it: (1) Does not institute proceedings (90 days), (2) institutes but does not extend proceedings (180 days), and (3) institutes and extends proceedings to the maximum allowable time (300 days). See *supra* Section II.B.1.b. The Commission chose these time estimates because they are a conservative estimate of how long it would take the Commission to approve a NMS plan fee amendment under each of these scenarios. The Commission's estimate for the average time it will take the Commission to approve or disapprove a NMS plan fee amendment is 110.6 days = 88.4 percent \* 90 days + 3.1 percent \* 180 days + 8.5 percent \* 300 days. If the Commission instituted proceedings and extended the review period to the 300 day time limit, the Commission estimates it would take an average of 316.5 days for the Commission to act upon a NMS plan fee amendment from the time it is initially filed with the Commission, which is 16.5 days to publish notice of the filing in the **Federal Register** plus the 300 days it would take the Commission to act on the NMS plan fee amendment from the date it is published in the **Federal Register**. See *supra* Section II.B.1.

These estimated time periods do not include the time period between when the Commission takes action and the NMS plan begins charging the fee. It is possible that the average time period between Commission approval and when the NMS plan begins charging fees (which time period may be specified by the NMS plan) could be similar to the Commission's estimate of the current average time period it takes a NMS plan to begin charging fees, *i.e.*, 66.3 days. The time period specified by the NMS plan could also be shorter, since market participants will have received earlier notice and more time to prepare for the potential fee change due to the Rule 608 process. See *supra* note 112.

<sup>213</sup> See *supra* note 195 and accompanying text.

<sup>214</sup> See *supra* Section IV.C.1.b.

<sup>206</sup> See *supra* Section II.B.2.

<sup>207</sup> See *supra* Section II.B.1.c and Section IV.B.2.



The Commission acknowledges, however, that for some proposed new NMS plans and plan amendments, the increase in the maximum timeframe for the Commission to act from the date of publication in the **Federal Register** from 180 days to 300 days could cause delays compared to the baseline for this part of the process, thereby decreasing efficiency.<sup>215</sup> To the extent that, as a result, there is an increase in the total time it takes to approve a proposed new NMS plan or plan amendment from the time it is initially filed, this may impose indirect costs on market participants.<sup>216</sup> The Commission, however, does not believe any such increase in total time will be significant. Specifically, with regard to proposed new NMS plans, the Commission believes the increase in total time will not be significant because, under the current process, the average total time it has taken the Commission to act on proposed new NMS plans from the time they are filed is close to the maximum total time the Commission can take to act under the modified procedures of Rule 608(b).<sup>217</sup>

<sup>215</sup> See *supra* Sections II.B.1 (for details on the modified timeframes) and Section IV.B.2 (for details on the current timeframes). The Commission estimates that the average time it takes for the Commission to act on proposed new NMS plans from the date of their publication in the **Federal Register** will increase from an average of 204.8 days under the current process to an average of 248 days under the modified procedures. See *supra* note 203 (for details on the Commission's estimate for proposed new NMS plans under the modified procedures) and *supra* note 135 and accompanying text (for the average time for proposed new NMS plans under the current procedures).

The Commission estimates that average time it takes for the Commission to act on proposed NMS plan amendments from the date of their publication in the **Federal Register** will remain the same, 62 days. See *supra* note 203 (for details on the Commission's estimate for proposed NMS plan amendments under the modified procedures) and *supra* note 134 and accompanying (for the average time for proposed NMS plan amendments under the current procedures).

<sup>216</sup> For example, if the amendments delayed the approval of a NMS plan that would improve liquidity, market participants may experience indirect costs in the form of higher transaction costs until the amendments are approved.

<sup>217</sup> The modified procedures of Rule 608(b) place limits on both the time the Commission can take to notice the filing and the time it can take to act on a proposed new NMS plan or plan amendment. Previously there was no limit on the total time for Commission consideration because there was no limit on the time for the Commission to notice a proposed new NMS plan or plan amendment.

The Commission estimates that under the current procedures it has taken an average total time of 368.5 days for the Commission to approve a proposed new NMS plan from the time it is initially filed. See *supra* Section IV.B.2 (for a discussion of this estimate). Under the modified procedures, the limit on the total time for the Commission to act from the time of filing will be 390 days (90 days to notice the proposed new NMS plan to the **Federal Register** + 300 for the Commission to act after it is published in the **Federal Register**) plus the time it takes the **Federal Register** to publish the

With regard to proposed new NMS plan amendments, the Commission believes any increase in the total time for the Commission to act from the time of filing will not be significant because the time it takes to publish notice of the proposed amendment in the **Federal Register** is expected to decrease and because currently 95 percent of proposed NMS plan amendments are approved within 120 days of publication of in the **Federal Register**.<sup>218</sup> To the extent that any indirect costs do occur as a result of an overall increase in time, the Commission is unable to estimate their effects because they would depend on the nature of future proposed new NMS plans and plan amendments.

The Commission acknowledges that the new timeframes for the Commission to send notice of proposed new NMS plans and plan amendments to the **Federal Register** may increase the time that it takes for the Commission to approve or disapprove certain proposed new NMS plans or plan amendments after they are published in the **Federal Register**. The new noticing deadlines under amended Rule 608(b)(1) may not allow sufficient time for the Commission and plan participants to resolve issues before notice publication.<sup>219</sup> Instead, the Commission and plan participants will need to resolve such issues during the Commission consideration process, which may increase the time it takes the Commission to approve or disapprove certain proposed new NMS plans or plan amendments from the time they are published in the **Federal Register**. However, because the new noticing deadlines would also result in proposed new NMS plans or plan amendments being published in the **Federal Register** more quickly, the Commission does not believe the total amount of time it takes the Commission to act on these

notice, which the Commission estimates will take an average of 5.9 days. See *supra* Section II.B.1 (discussing the new time limits for Rule 608(b)) and *supra* note 201 (discussing the estimate of the time for the **Federal Register** to publish notice).

<sup>218</sup> See *supra* Section IV.B.2 (for a discussion of current proposed NMS plan amendment approval times). The Commission estimates that the time it will take to publish notice of a proposed NMS plan amendment in the **Federal Register** will decrease from an average of 65.5 days under the current process to an average of 16.5 days under the modified procedures. See *supra* note 201 (for details on the Commission's estimate for proposed NMS plan amendments under the modified procedures) and *supra* note 131 and accompanying text (for the average time for proposed NMS plan amendments under the current procedures).

<sup>219</sup> See *supra* note 69 and accompanying text (discussing plan participants addressing issues in a proposed plan or plan amendment before notice publication reducing Commission approval time subsequent to notice publication).

proposed new NMS plans or plan amendments is likely to increase and impose indirect costs on market participants.<sup>220</sup>

The rescission of the Fee Exception is a procedural amendment and impacts the timing of effectiveness of NMS plan fee amendments; it does not affect substance of the supporting information that is required to be included in all proposed NMS plan fee amendments.<sup>221</sup> Additionally, the new procedures for Commission action on proposed NMS plans and plan amendments under Rule 608(b)(1) and (2) do not change the substance of the information that must be included in all proposed new NMS plans and plan amendments. Therefore, the Commission believes that the amendments will not impose additional implementation costs on the administration of NMS plans or on market participants.<sup>222</sup>

### 3. Impact on Efficiency, Competition, and Capital Formation

#### a. Efficiency

The Commission believes that rescinding the Fee Exception will result in a number of improvements in efficiency, including, among other things: Regulatory efficiency and the efficiency with which SRO members and subscribers to SIP data adjust to fee changes to NMS plans. However, the Commission also believes that rescinding the Fee Exception will decrease the efficiency of the implementation of NMS plan fee changes. Additionally, the Commission believes the modifications to the procedures and timeframes for notice and Commission actions for proposed new NMS plans and plan amendments, along with the requirement that they be filed with the Commission by email, will improve the efficiency of the notice and consideration process for proposed new NMS plans and plan amendments.

The Commission believes that rescinding the Fee Exception will enhance regulatory efficiency. The Commission believes that rescinding the Fee Exception will eliminate a potential disincentive for persons to provide comments on NMS plan fee

<sup>220</sup> The Commission estimates that the average total amount of time it takes the Commission to act on a proposed new NMS plan or plan amendment may decrease. See *supra* note 203 and accompanying text. See also *supra* note 216 and accompanying text (discussing these potential indirect costs).

<sup>221</sup> See Proposing Release, *supra* note 1, at 54796.

<sup>222</sup> One commenter agreed that rescinding the Fee Exception would not materially add to the administrative burden of filers. See RBC Capital Markets Letter at 4.



amendments.<sup>223</sup> This may enhance regulatory efficiency if it provides the Commission with more information at an earlier stage in its decision making process.

The Commission believes that rescinding the Fee Exception will improve the efficiency of handling NMS plan fee amendments that would otherwise have been abrogated.<sup>224</sup> Under the amendments, the Commission will not need to abrogate NMS plan fee amendments because, absent approval by the Commission, such fee changes will never take effect. Additionally, to the extent NMS plans currently issue refunds for NMS plan fee amendments that are abrogated by the Commission,<sup>225</sup> rescinding the Fee Exception may also improve efficiency if it helps market participants avoid complications associated with refunding NMS plan fees that are abrogated.<sup>226</sup>

The Commission believes that rescinding the Fee Exception might improve the efficiency with which SRO members and subscribers to SIP data adjust to fee changes to NMS plans. The notice of NMS plan fee amendments before they are approved by the Commission and become effective might give market participants more time to plan and prepare before they are subject to a new or altered NMS plan fee.<sup>227</sup>

On the other hand, the Commission believes the amendments might have a negative impact on the efficiency of the implementation of NMS plan fee changes, because they will delay when NMS plans could begin charging new fees. If plan participants seek to change existing NMS plan fees, possibly due to changes in technology or market conditions or other demonstrable increases in NMS plan costs, then the amendments might reduce efficiency because any NMS plan fee amendments will take longer to become effective under the amendments than when they

<sup>223</sup> See *supra* Section IV.C.1.a (discussing removal of a disincentive to comment).

<sup>224</sup> The amendments might also improve the efficiency of implementing some NMS plan fee amendments that would otherwise have been withdrawn and later refiled. Currently, these fee changes are refiled on an immediately effective basis. The Commission estimates that the average and median time it takes a NMS plan to refile these fee changes are 143.3 days and 175 days, respectively. See *supra* note 125 and accompanying text. If these fee changes are ultimately approved more quickly under the amendments, it might increase the efficiency of their implementation. See *supra* Section IV.B.1.

<sup>225</sup> The Commission is not aware of the occurrence of any refunds.

<sup>226</sup> See *supra* note 190 and accompanying text (discussing complications with refunds).

<sup>227</sup> See *supra* note 193 and accompanying text (discussing additional time to prepare).

were immediately effective-upon-filing.<sup>228</sup>

The Commission believes that the modified timeframes and procedures for the Commission to send notice of proposed new NMS plans and plan amendments to the **Federal Register** will, overall, improve the efficiency of the process for handling such plans and amendments by decreasing the time it takes for them to be published in the **Federal Register**,<sup>229</sup> as well as the average total time it takes for the Commission to act on them relative to the date they are initially filed.<sup>230</sup> The Commission further believes that the requirement that proposed new NMS plans and plan amendments be filed with the Commission by email will improve the efficiency of the filing process for both plan participants and the Commission.<sup>231</sup>

#### b. Competition

In the Proposing Release, the Commission stated that it believed the rescission of the Fee Exception would not have a significant impact on competition in either the market for core and aggregated market data products or in the market for trading services in NMS securities because the Commission believed the rescission of the Fee Exception would not have a significant effect on the fees charged for core data.<sup>232</sup> However, in response to commenters, the Commission has revised its analysis of the effect of rescinding the Fee Exception on the fees charged for core data.<sup>233</sup> As a result of the revisions, the Commission has also made revisions in its analysis on the effects rescinding the Fee Exception will have on competition in the market for core and aggregated market data products and the market for trading services in NMS securities. Overall, the Commission continues to believe the rescission of the Fee Exception will not have a significant impact on competition in either the market for core

<sup>228</sup> See *supra* Section IV.C.2.a (discussing costs of delaying NMS plan fee changes).

<sup>229</sup> See *supra* Section IV.C.1.b (for a detailed explanation of this improvement) and note 201 and accompanying text (for an estimate of time to publish in the **Federal Register**).

<sup>230</sup> See *supra* note 203 and accompanying text (for an estimate of total time for Commission action). As noted above, the Commission acknowledges that increasing the maximum timeframe for the Commission to act after publication in the **Federal Register** might have a negative impact on efficiency for some proposed new NMS plans or plan amendments, but does not believe that this effect will be significant. See *supra* Section IV.C.2.b (for a detailed explanation).

<sup>231</sup> See *supra* Section IV.C.1.b (discussing benefits of email filing).

<sup>232</sup> See Proposing Release, *supra* note 1, at 54804.

<sup>233</sup> See *supra* Section IV.C.1.a.

and aggregated market data products or in the market for trading services in NMS securities.

As discussed above,<sup>234</sup> the Commission believes that rescinding the Fee Exception will not have a significant immediate impact on the price of core data. However, the Commission acknowledges that over a longer time period it could have a limited effect on the fees charged for core data if it leads to a more robust comment process for NMS plan fee amendments that provides additional information that helps the Commission evaluate whether NMS plan fee amendments comply with the Exchange Act. Any effect of this change on the fees charged for core data could affect competition in the market for core and aggregated market data products over the longer term. Similarly, any effect over the longer term on the fees charged for core data (and thus on SRO revenues or core data costs) could affect competition in the market for trading services in NMS securities. However, the Commission is unable to estimate these longer-term effects, because they would depend on the nature of future NMS plan fee amendments. In addition, because the SIPs have significant market power and are monopolistic providers of certain information, the Commission believes that any such effects on competition in the market for core and aggregated market data products would be limited.

The Commission believes that the rescinding the Fee Exception will not have a significant impact on competition in the market for core and aggregated market data products for the following reasons: (1) The Commission believes that the SIPs have significant market power in the market for core and aggregated market data products and are monopolistic providers of certain information;<sup>235</sup> (2) rescinding the Fee Exception will not affect the contents of SIP data or comparable products; (3) on average, there are very few (only 3.8) proposed NMS plan fee amendments in a year; and (4) the Commission currently has the ability to abrogate NMS plan fee amendments.<sup>236</sup> Although the Commission believes rescinding the Fee Exception will not have a significant effect on the market power of the SIPs, the Commission believes it might have minor effects on the SIPs'

<sup>234</sup> See *id.*

<sup>235</sup> See *supra* Section IV.B.3.

<sup>236</sup> The Commission's ability to abrogate NMS plan fee amendments within 60 days of their filing means that the SIPs are already limited in their ability to potentially charge fees that do not comply with the Exchange Act. See *supra* Section IV.B.1 and IV.C.1.a.

ability to compete. On the margin, the SIPs' competitive positions might be negatively affected by rescinding the Fee Exception because it will allow the SIPs' competitors, such as market data aggregators and SRO top of book feeds, to be able to adjust their fees and prices more quickly than the SIPs.<sup>237</sup> For example, vendors and SROs would be able to adjust the prices for their data products more quickly than the SIPs in response to any cost shock. However, because the SIPs have significant market power in the market for core and aggregated market data products and are monopolistic providers of certain information,<sup>238</sup> the Commission believes that these competitive effects will not be significant.

The Commission believes that, in the short-term, rescinding the Fee Exception will not have a significant impact on competition in the market for trading services in NMS securities for two reasons.<sup>239</sup> First, the Commission believes that it will not have a significant impact on the future fees the CAT plan will collect from Industry Members or the allocation of costs among Participants and Industry Members because the Commission already has the ability to abrogate NMS plan fee amendments.<sup>240</sup> Second, as discussed above, the Commission believes that, over the short-term, rescinding the Fee Exception will not have a significant impact on the cost of core data.<sup>241</sup> Therefore, the Commission believes that, in the short-term, rescinding the Fee Exception will not have a significant impact on revenues SROs receive or the costs broker-dealer internalizers and ATSS pay for core data.

The Commission does not believe the modifications to the timeframes and procedures for the Commission to notice and act on proposed new NMS plans and plan amendments that currently are not immediately effective upon filing will have a significant effect on competition.<sup>242</sup> The Commission acknowledges that these modifications may have limited effects on competition if they significantly reduce or extend the time it takes to act on certain proposed new NMS plans and plan amendments. However, the Commission is unable to estimate these effects because they would depend on the nature of future

proposed new NMS plans and plan amendments. Additionally, the Commission believes that, even if the modifications to the timeframes and procedures for the Commission to notice and act on proposed new NMS plans and plan amendments does produce effects on competition, the effects would be limited because the Commission estimates that the average reduction in the total time it will take to act on proposed new NMS plans and plan amendments, relative to the time they are filed, will be less than 50 days.<sup>243</sup>

#### c. Capital Formation

The Commission believes that rescinding the Fee Exception will not have a significant impact on capital formation. The Commission believes that, in the short-term, rescinding the Fee Exception will not have a significant impact on capital formation because, for the reasons discussed above, any effect in the short term on NMS plan fees or on the average SIP costs are likely to be insignificant.<sup>244</sup> Moreover, any longer-term effects would also likely not be significant as the Commission does not expect these changes to have a significant effect on the overall costs that investors pay or investor participation in the market. Additionally, the Commission believes that the changes to the timeframes and procedures for the Commission to notice and act on proposed new NMS plans and plan amendments that are not immediately effective upon filing will not have a significant effect on capital formation because the Commission estimates that the average reduction in the total time it will take to act on proposed new NMS plans and plan amendments, relative to the time they are filed, will be less than 50 days.<sup>245</sup>

#### D. Reasonable Alternative

The Commission considered a reasonable alternative where the Commission would amend Rule 608(b)(3)(i) of Regulation NMS to provide that NMS plan fee amendments would not become effective immediately upon filing, but would instead become effective automatically without the Commission having to approve the NMS plan fee amendment at the end of the 60 day period, during which the Commission could potentially abrogate the NMS plan fee amendment. If the Commission did abrogate the NMS plan fee amendment,

then the NMS plan fee amendment would still need to be re-filed pursuant to the standard procedure of paragraphs (b)(1) and (2).

This alternative would provide a comment period for NMS plan fee amendments before they go into effect. Therefore, similar to the adopted amendments, market participants would benefit from being able to comment on NMS plan fee amendments *before* they could become effective. However, because this alternative does not require Commission approval before a NMS plan fee amendment could become effective, one commenter stated that, compared to the Proposal, this alternative would discourage market participants from submitting comments because the fee change would be viewed as a *fait accompli*.<sup>246</sup> The Commission acknowledges that market participants may be less likely to comment on NMS plan fee amendments under this alternative compared to the adopted amendments.<sup>247</sup> To the extent this occurs, the comment process for NMS plan fee amendments would not be as robust under this alternative compared to the adopted amendments and the Commission would be less likely to receive additional information from the comment process that would help it evaluate whether a NMS plan fee amendment complies with the Exchange Act compared to the adopted amendments.

Compared to the adopted amendments, the time until a NMS plan fee amendment becomes effective could be slightly shorter.<sup>248</sup> Therefore, NMS plans could implement fee changes more efficiently and the costs to the SROs from the delay in implementing NMS plan fee increases could be lower than under the adopted amendments.<sup>249</sup> However, SRO members and subscribers to SIP data would have less time to plan and prepare before they are subject to a new or altered NMS plan fee than under the adopted amendments.<sup>250</sup>

Under this alternative, the Commission could not extend the 60-

<sup>246</sup> See MFA Letter at 3.

<sup>247</sup> See *supra* Section IV.B.1 and Section IV.C.1.a.

<sup>248</sup> Under this alternative, NMS plan fee amendments would become effective 60 days after filing unless the Commission decided to abrogate the fee filing. Under the amendments, the Commission estimates that the average time it would take for NMS plan fee amendments to be approved by the Commission and become effective will be 127.1 days from the time of filing. See *supra* note 212 and accompanying text.

<sup>249</sup> Similarly, the costs to SRO members and subscribers from the delay in implementing NMS plan fee decreases could be lower under this alternative than under the adopted amendments. See *supra* Section IV.C.2.a and Section IV.C.3.a.

<sup>250</sup> See *supra* Section IV.C.1.a.

<sup>237</sup> See Proposing Release, *supra* note 1, at 54804 (for a details on why market data aggregators and SRO top of book feeds could adjust their prices quicker).

<sup>238</sup> See *supra* Section IV.B.3.

<sup>239</sup> See *supra* Section IV.B.4.

<sup>240</sup> See *supra* Section IV.B.1.

<sup>241</sup> See *supra* Section IV.C.1.a.

<sup>242</sup> See *supra* Section II.B.1.

<sup>243</sup> See *supra* note 203 and accompanying text. See also *supra* Section II.B.1.

<sup>244</sup> See *supra* Section IV.C.1.a and Section IV.C.3.b.

<sup>245</sup> See *supra* note 203 and accompanying text. See also *supra* Section II.B.1.

day abrogation period.<sup>251</sup> Without extensions, this alternative would provide market participants with more certainty about when the NMS plan fee amendments would become effective. If a NMS plan fee amendment is complicated, the Commission may be unable to complete its review during the 60-day abrogation period.<sup>252</sup> If the Commission is unable to determine if a NMS plan fee amendment is fair, reasonable, and complies with the Exchange Act by the end of the 60-day abrogation period, then the Commission may have to abrogate the NMS plan fee amendment, which would then require the NMS plan fee amendment to be refiled under the standard procedure. This could cause these fee filings to take longer to be approved from the date of initial filing than under the adopted amendments.<sup>253</sup>

Under this alternative, the timeframes and procedures for proposed new NMS plans and plan amendments that are not immediately effective upon filing would not change.<sup>254</sup> Therefore, the process for handling proposed new NMS plans and plan amendments would not experience the gains in efficiency and transparency under this alternative that it would when compared to the adopting amendments.<sup>255</sup>

## V. Regulatory Flexibility Certification

The Regulatory Flexibility Act (“RFA”)<sup>256</sup> requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)<sup>257</sup> of the Administrative Procedure Act,<sup>258</sup> as amended by the RFA, generally requires the Commission

<sup>251</sup> The Commission could also consider an alternative where it had the option to extend the 60-day abrogation period to allow the Commission more time to consider the filing and comments. The filing would not become effective automatically until the expiration of this longer time period. However, this alternative would still not require the Commission to approve NMS plan fee amendments before they became effective, which could still discourage market participants from submitting comments. This means the comment process would still not be as robust compared to the adopted amendments and the improvements to the Commission’s evaluation of NMS plan fee amendments would not be as great compared to the adopted amendments. See *supra* Section IV.C.1.a.

<sup>252</sup> Two commenters agreed that this alternative may not provide sufficient time for the Commission to ensure a NMS plan fee amendment is consistent with the Exchange Act before it is automatically approved. They stated that there could be situations where a NMS plan fee amendment is complicated and the Commission may be unable to complete its review during the 60-day abrogation period. See Clearpool Letter at 3; Healthy Markets Letter at 9.

<sup>253</sup> See Proposing Release, *supra* note 1, at 54796.

<sup>254</sup> See *supra* Section II.B.1.

<sup>255</sup> See *supra* Section IV.C.1.b and IV.C.3.a.

<sup>256</sup> 5 U.S.C. 601 *et seq.*

<sup>257</sup> 5 U.S.C. 603(a).

<sup>258</sup> 5 U.S.C. 551 *et seq.*

to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on “small entities.”<sup>259</sup> Section 605(b) of the RFA states that this requirement shall not apply to any proposed rule or proposed rule amendment which, if adopted, would not have a significant economic impact on a substantial number of small entities.<sup>260</sup>

The adopted amendments to Rule 608 would apply to national securities exchanges registered with the Commission under Section 6 of the Exchange Act and national securities associations registered with the Commission under Section 15A of the Exchange Act.<sup>261</sup> None of the exchanges registered under Section 6 that would be subject to the amendments are “small entities” for purposes of the Regulatory Flexibility Act.<sup>262</sup> There is only one national securities association, and the Commission has previously stated that it is not a small entity as defined by 13 CFR 121.201.<sup>263</sup>

The Commission received no comments regarding its initial Regulatory Flexibility Analysis.<sup>264</sup> For the foregoing reasons, the Commission certifies that the adopted amendments to Rule 608 would not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act.

<sup>259</sup> Although Section 601(b) of the RFA defines the term “small entity,” the statute permits agencies to formulate their own definitions. The Commission has adopted definitions for the term “small entity” for purposes of Commission rulemaking in accordance with the RFA. Those definitions, as relevant to this rulemaking, are set forth in Rule 0–10, 17 CFR 240.0–10.

<sup>260</sup> See 5 U.S.C. 605(b).

<sup>261</sup> See *supra* note 5 (stating that the participants in the NMS plans are all SROs).

<sup>262</sup> See 17 CFR 240.0–10(e). Paragraph (e) of Rule 0–10 states that the term “small business,” when referring to an exchange, means any exchange that has been exempted from the reporting requirements of Rule 601 of Regulation NMS, 17 CFR 242.601, and is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in Rule 0–10. Under this standard, none of the exchanges subject to the amendments to Rule 608 is a “small entity” for the purposes of the RFA. See also Securities Exchange Act Release Nos. 82873 (Mar. 14, 2018), 83 FR 13008, 13074 (Mar. 26, 2018) (File No. S7–05–18) (Transaction Fee Pilot for NMS Stocks); 55341 (May 8, 2001), 72 FR 9412, 9419 (May 16, 2007) (File No. S7–06–07) (Proposed Rule Changes of Self-Regulatory Organizations Proposing Release).

<sup>263</sup> See, e.g., Securities Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32556, 32605 n. 416 (June 8, 2010) (“FINRA is not a small entity as defined by 13 CFR 121.201.”).

<sup>264</sup> See Proposing Release, *supra* note 1, at 54805–06.

## VI. Other Matters

If any of the provisions of these rules, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

Pursuant to the Congressional Review Act, the Office of Information and Regulatory Affairs has designated these rules as not a major rule, as defined by 5 U.S.C. 804(2).

## VII. Statutory Authority

Pursuant to the Exchange Act, and particularly Section 2, 3, 6, 9, 10, 11A, 15, 15A, 17 and 23(a) thereof, 15 U.S.C. 78b, 78c, 78f, 78l, 78j, 78k–1, 78o, 78o–3 and 78w(a), the Commission is amending Sections 200.30–3, 201.700, 201.701, 240.19b–4 and 242.608 of chapter II of title 17 of the Code of Federal Regulations in the manner set forth below.

### List of Subjects

#### 17 CFR Part 200

Organization, Conduct and ethics, Information and requests.

#### 17 CFR Part 201

Rules of practice.

#### 17 CFR Part 240

Brokers, Confidential business information, Fraud, Reporting and recordkeeping requirements, Securities.

#### 17 CFR Part 242

Brokers, Reporting and recordkeeping requirements, Securities.

### Text of the Amendments

For the reasons stated in the preamble, the Commission is amending Title 17, Chapter II of the Code of Federal Regulations as follows:

## PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

- 1. The authority citation for part 200, subpart A continues to read, in part, as follows:

**Authority:** 15 U.S.C. 77c, 77o, 77s, 77z–3, 77sss, 78d, 78d–1, 78d–2, 78o–4, 78w, 78ll(d), 78mm, 80a–37, 80b–11, 7202, and 7211 *et seq.*, unless otherwise noted.

\* \* \* \* \*

Section 200.30–3 is also issued under 15 U.S.C. 78b, 78d, 78f, 78k–1, 78q, 78s, and 78eee.

\* \* \* \* \*

- 2. Amend § 200.30–3 by:

- a. Removing and reserving paragraphs (a)(27) and (29);
- b. Revising paragraph (a)(42); and
- c. Adding paragraph (a)(85).

The revision and addition read as follows:

**§ 200.30–3 Delegation of authority to Director of Division of Trading and Markets.**

\* \* \* \* \*

(a) \* \* \*

(42) Under 17 CFR 242.608(e), to grant or deny exemptions from 17 CFR 242.608.

\* \* \* \* \*

(85) Pursuant to Rule 608(b)(1)(ii) (17 CFR 242.608(b)(1)(ii)), to publish notice of the filing of a proposed amendment to an effective national market system plan; pursuant to Rule 608(b)(1)(iii) (17 CFR 242.608(b)(1)(iii)), to notify plan participants that the filing of a national market system plan or a proposed amendment to an effective national market system plan does not comply with paragraph (a) of Rule 608 (17 CFR 242.608) or plan filing requirements in other sections of Regulation NMS and 17 CFR 240, subpart A, and to determine that such plan or amendment is unusually lengthy and complex or raises novel regulatory issues and to inform the plan participants of such determination; pursuant to Rule 608(b)(2)(i) (17 CFR 242.608(b)(2)(i)), to institute proceedings to determine whether such plan or amendment should be disapproved, to provide the plan participants notice of the grounds for disapproval under consideration, and to extend for a period not exceeding 240 days from the date of publication of notice of the filing of such plan or amendment the period during which the Commission must issue an order approving or disapproving such plan or amendment and to determine whether such longer period is appropriate and publish the reasons for such determination; pursuant to Rule 608(b)(3)(iii) (17 CFR 242.608(b)(3)(iii)), to summarily abrogate a proposed amendment put into effect upon filing with the Commission and require that such amendment be refiled in accordance with paragraph (a)(1) of Rule 608 and reviewed in accordance with paragraph (b)(2) of Rule 608; and pursuant to Rule 608(b)(4) (17 CFR 242.608(b)(4)), to put a proposed amendment into effect summarily upon publication of notice and on a temporary basis not to exceed 120 days.

\* \* \* \* \*

**PART 201—RULES OF PRACTICE**

- 3. The authority citation for part 201, subpart D, continues to read as follows:

**Authority:** 15 U.S.C. 77f, 77g, 77h, 77h–1, 77j, 77s, 77u, 77sss, 77ttt, 78(c)(b), 78d–1, 78d–2, 78l, 78m, 78n, 78o(d), 78o–3, 78o–10(b)(6), 78s, 78u–2, 78u–3, 78v, 78w, 80a–8, 80a–9, 80a–37, 80a–38, 80a–39, 80a–40, 80a–41, 80a–44, 80b–3, 80b–9, 80b–11, 80b–12, 7202, 7215, and 7217.

- 4. Amend § 201.700 by revising the section heading and paragraphs (b), (c)(1), (3), and (4), and (d) to read as follows:

**§ 201.700 Initiation of proceedings for SRO proposed rule changes and for proposed NMS plans and plan amendments.**

\* \* \* \* \*

(b) *Institution of proceedings; notice and opportunity to submit written views*—(1) *Generally*. If the Commission determines to initiate proceedings to determine whether a self-regulatory organization’s proposed rule change or whether a proposed national market system (“NMS”) plan or a proposed amendment to an effective NMS plan (proposed NMS plan or NMS plan amendment hereinafter collectively referred to as “NMS plan filing”) should be disapproved, it shall provide notice thereof to the self-regulatory organization that filed the proposed rule change or to the NMS plan participants, as well as all interested parties and the public, by publication in the **Federal Register** of the grounds for disapproval under consideration.

(i) *Prior to notice*. If the Commission determines to institute proceedings prior to initial publication by the Commission of the notice of the self-regulatory organization’s proposed rule change or the notice of the NMS plan filing in the **Federal Register**, then the Commission shall publish notice of the proposed rule change or the NMS plan filing simultaneously with a brief summary of the grounds for disapproval under consideration.

(ii) *Subsequent to notice*. If the Commission determines to institute proceedings subsequent to initial publication by the Commission of the notice of the self-regulatory organization’s proposed rule change or the notice of the NMS plan filing in the **Federal Register**, then the Commission shall publish separately in the **Federal Register** a brief summary of the grounds for disapproval under consideration.

(iii) *Service of an order instituting proceedings*. In addition to publication in the **Federal Register** of the grounds for disapproval under consideration, the Secretary, or another duly authorized officer of the Commission, shall serve a copy of the grounds for disapproval under consideration to the self-regulatory organization that filed the proposed rule change by serving notice

to the person listed as the contact person on the cover page of the Form 19b–4 filing and shall serve a copy of the grounds for disapproval under consideration to the NMS plan participants by serving notice to the contact person for the NMS plan. Notice shall be made by delivering a copy of the order to such contact person either by any method specified in § 201.141(a) or by electronic means including email.

(2) *Notice of the grounds for disapproval under consideration*. The grounds for disapproval under consideration shall include a brief statement of the matters of fact and law on which the Commission instituted the proceedings, including the areas in which the Commission may have questions or may need to solicit additional information on the proposed rule change or NMS plan filing. The Commission may consider during the course of the proceedings additional matters of fact and law beyond what was set forth in its notice of the grounds for disapproval under consideration.

(3) *Demonstration of consistency with the Exchange Act*. (i) The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b–4, the Form is designed to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. A mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient. Instead, the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any

failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.

(ii) The burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans is on the plan participants that filed the NMS plan filing. In particular, these plan participants must explain why the NMS plan filing is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to NMS plans. A mere assertion that the NMS plan filing is consistent with those requirements is not sufficient. Instead, the description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the plan participants that filed the NMS plan filing to provide such detail and specificity may result in the Commission not having a sufficient basis to make an affirmative finding that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans.

(c) *Conduct of hearings*—(1) *Initial comment period in writing*. Unless otherwise specified by the Commission in its notice of grounds for disapproval under consideration, all interested persons will be given an opportunity to submit written data, views, and arguments concerning the proposed rule change or NMS plan filing under consideration and whether the Commission should approve or disapprove the proposed rule change or NMS plan filing.

(i) The self-regulatory organization that submitted the proposed rule change may file a written statement in support of its proposed rule change demonstrating, in specific detail, how such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization, including a response to each of the grounds for disapproval under consideration. Such statement may include specific representations or undertakings by the self-regulatory organization. The Commission will specify in the

summary of the grounds for disapproval under consideration the length of the initial comment period.

(ii) The NMS plan participants may file a written statement in support of a NMS plan filing demonstrating, in specific detail, how such NMS plan filing is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to NMS plans, including a response to each of the grounds for disapproval under consideration. Such statement may include specific representations or undertakings by the plan participants. The Commission will specify in the summary of the grounds for disapproval under consideration the length of the initial comment period.

\* \* \* \* \*

(3) *Rebuttal*. (i) At the end of the initial comment period, the self-regulatory organization that filed the proposed rule change will be given an opportunity to respond to any comments received. The self-regulatory organization may voluntarily file, or the Commission may request a self-regulatory organization to file, a response to a comment received regarding any aspect of the proposed rule change under consideration to assist the Commission in determining whether the proposed rule change should be disapproved. The Commission will specify in the summary of the grounds for disapproval under consideration the length of the rebuttal period.

(ii) At the end of the initial comment period, the NMS plan participants will be given an opportunity to respond to any comments received. The plan participants may voluntarily file, or the Commission may request the plan participants to file, a response to a comment received regarding any aspect of such NMS plan filing under consideration to assist the Commission in determining whether such NMS plan filing should be disapproved. The Commission will specify in the summary of the grounds for disapproval under consideration the length of the rebuttal period.

(4) *Non-response*. (i) Any failure by the self-regulatory organization to provide a complete response, within the applicable time period specified, to a comment letter received or to the Commission's grounds for disapproval under consideration may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are

applicable to the self-regulatory organization.

(ii) Any failure by the NMS plan participants to provide a complete response, within the applicable time period specified, to a comment letter received or to the Commission's grounds for disapproval under consideration may result in the Commission not having a sufficient basis to make an affirmative finding that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans.

(d) *Record before the Commission*—

(1) *Filing of papers with the Commission*. Filing of papers with the Commission shall be made by filing them with the Secretary, including through electronic means. In its notice setting forth the grounds for disapproval under consideration for a proposed rule change or a NMS plan filing, the Commission shall inform interested parties of the methods by which they may submit written comments and arguments for or against Commission approval.

(2) *Public availability of materials received*. During the conduct of the proceedings, the Commission generally will make available publicly all written comments it receives without change. In its notice setting forth the grounds for disapproval under consideration for a proposed rule change or a NMS plan filing, the Commission shall inform interested parties of the methods by which they may view all written communications relating to the proposed rule change or a NMS plan filing between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552.

(3) *Record before the Commission*. The Commission shall determine each matter on the basis of the record.

(i) The record shall consist of the proposed rule change filed on Form 19b-4 by the self-regulatory organization, including all attachments and exhibits thereto, and all written materials received from any interested parties on the proposed rule change, including the self-regulatory organization that filed the proposed rule change, through the means identified by the Commission as provided in paragraph (d)(1) of this section, as well as any written materials that reflect communications between the Commission and any interested parties.

(ii) The record shall consist of the NMS plan filing filed by the plan participants, including all attachments and exhibits thereto, and all written materials received from any interested

parties on such NMS plan filing, including the plan participants, through the means identified by the Commission as provided in paragraph (d)(1) of this section, as well as any written materials that reflect communications between the Commission and any interested parties.

\* \* \* \* \*

■ 5. Section 201.701 is revised to read as follows:

**§ 201.701 Issuance of order.**

(a) At any time following conclusion of the rebuttal period specified in 17 CFR 201.700(c)(3)(i), the Commission may issue an order approving or disapproving the self-regulatory organization's proposed rule change together with a written statement of the reasons therefor.

(b) At any time following conclusion of the rebuttal period specified in 17 CFR 201.700(c)(3)(ii), the Commission may issue an order approving or disapproving the proposed national market system plan or proposed amendment to an effective national market system plan together with a written statement of the reasons therefor.

**PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934**

■ 6. The authority citation for part 240 continues to read as follows:

**Authority:** 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77z-3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c-3, 78c-5, 78d, 78e, 78f, 78g, 78i, 78j, 78j-1, 78k, 78k-1, 78l, 78m, 78n, 78n-1, 78o, 78o-4, 78o-10, 78p, 78q, 78q-1, 78s, 78u-5, 78w, 78x, 78ll, 78mm, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4, 80b-11, and 7201 *et seq.*; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub. L. 111-203, 939A, 124 Stat. 1376 (2010); and Pub. L. 112-106, sec. 503 and 602, 126 Stat. 326 (2012), unless otherwise noted.

\* \* \* \* \*

Section 240.19b-4 is also issued under 12 U.S.C. 5465(e).

\* \* \* \* \*

■ 7. Amend § 240.19b-4 by revising paragraph (g) to read as follows:

**§ 240.19b-4 Filings with respect to proposed rule changes by self-regulatory organizations.**

\* \* \* \* \*

(g) Proceedings to determine whether a proposed rule change should be disapproved will be conducted pursuant to 17 CFR 201.700 and 201.701 (Initiation of Proceedings for SRO Proposed Rule Changes and for

Proposed NMS Plans and Plan Amendments).

\* \* \* \* \*

**PART 242—REGULATIONS M, SHO, ATS, AC, NMS AND SBSR AND CUSTOMER MARGIN REQUIREMENTS FOR SECURITY FUTURES**

■ 8. The authority citation for part 242 continues to read as follows:

**Authority:** 15 U.S.C. 77g, 77q(a), 77s(a), 78b, 78c, 78g(c)(2), 78i(a), 78j, 78k-1(c), 78l, 78m, 78n, 78o(b), 78o(c), 78o(g), 78q(a), 78q(b), 78q(h), 78w(a), 78dd-1, 78mm, 80a-23, 80a-29, and 80a-37.

- 5. Amend § 242.608 by:
  - a. Revising paragraphs (a)(1) and (8);
  - b. Adding paragraphs (b)(1)(i) through (iv);
  - c. Revising paragraph (b)(2); and
  - d. Removing and reserving paragraph (b)(3)(i).

The revisions and additions read as follows:

**§ 242.608 Filing and amendment of national market system plans.**

(a) \* \* \*

(1) Any two or more self-regulatory organizations, acting jointly, may file a national market system plan or may propose an amendment to an effective national market system plan (“proposed amendment”) by submitting the text of the plan or amendment to the Commission by email, together with a statement of the purpose of such plan or amendment and, to the extent applicable, the documents and information required by paragraphs (a)(4) and (5) of this section.

\* \* \* \* \*

(8)(i) A participant in an effective national market system plan shall ensure that a current and complete version of the plan is posted on a plan website or on a website designated by plan participants within two business days after notification by the Commission of effectiveness of the plan. Each participant in an effective national market system plan shall ensure that such website is updated to reflect amendments to such plan within two business days after the plan participants have been notified by the Commission of its approval of a proposed amendment pursuant to paragraph (b) of this section. If the amendment is not effective for a certain period, the plan participants shall clearly indicate the effective date in the relevant text of the plan. Each plan participant also shall provide a link on its own website to the website with the current version of the plan.

(ii) The plan participants shall ensure that any proposed amendments filed

pursuant to paragraph (a) of this section are posted on a plan website or a designated website no later than two business days after the filing of the proposed amendments with the Commission. If the plan participants do not post a proposed amendment on a plan website or a designated website on the same business day that they file such proposed amendment with the Commission, then the plan participants shall inform the Commission of the business day on which they posted such proposed amendment on a plan website or a designated website. The plan participants shall maintain any proposed amendment to the plan on a plan website or a designated website until the Commission approves the plan amendment and the plan participants update the website to reflect such amendment or the plan participants withdraw the proposed amendment or the plan participants are notified pursuant to paragraph (b)(1)(iii) of this section that the proposed amendment is not filed in compliance with requirements or the Commission disapproves the proposed amendment. If the plan participants withdraw a proposed amendment or are notified pursuant to paragraph (b)(1)(iii) of this section that a proposed amendment is not filed in compliance with requirements or the Commission disapproves a proposed amendment, the plan participants shall remove such amendment from the plan website or designated website within two business days of withdrawal, notification of non-compliant filing or disapproval. Each plan participant shall provide a link to the website with the current version of the plan.

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) *Publication of national market system plans.* The Commission shall send the notice of the filing of a national market system plan to the **Federal Register** for publication thereof under this paragraph (b)(1) within 90 days of the business day on which such plan was filed with the Commission pursuant to paragraph (a) of this section. If the Commission fails to send the notice to the **Federal Register** for publication thereof within such 90-day period, then the date of publication shall be deemed to be the last day of such 90-day period.

(ii) *Publication of proposed amendments.* The Commission shall send the notice of the filing of a proposed amendment to the **Federal Register** for publication thereof under this paragraph (b)(1) within 15 days of the business day on which such

proposed amendment was posted on a plan website or a website designated by plan participants pursuant to paragraph (a) of this section after being filed with the Commission pursuant to paragraph (a) of this section. If the Commission fails to send the notice to the **Federal Register** for publication thereof within such 15-day period, then the date of publication shall be deemed to be the business day on which such website posting was made.

(iii) A national market system plan or proposed amendment has not been filed with the Commission for purposes of this paragraph (b)(1) if, not later than 7 business days after the business day of receipt by the Commission, the Commission notifies the plan participants that the filing of the national market system plan or proposed amendment does not comply with paragraph (a) of this section or plan filing requirements in other sections of Regulation NMS and part 240, subpart A of this chapter, except that if the Commission determines that the plan or amendment is unusually lengthy and is complex or raises novel regulatory issues, the Commission shall inform the plan participants of such determination not later than 7 business days after the business day of receipt by the Commission and, for purposes of this paragraph (b)(1), the filing of such plan or amendment has not been made with the Commission if, not later than 21 days after the business day of receipt by the Commission, the Commission notifies the plan participants that the filing of such plan or amendment does not comply with paragraph (a) of this section or plan filing requirements in other sections of Regulation NMS and part 240, subpart A of this chapter.

(iv) For purposes of this section, a "business day" is any day other than a Saturday, Sunday, Federal holiday, a day that the Office of Personnel Management has announced that Federal agencies in the Washington, DC

area are closed to the public, a day on which the Commission is subject to a Federal government shutdown or a day on which the Commission's Washington, DC office is otherwise not open for regular business; provided further, a filing received by the Commission or a website posting made at 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 received or made on that business day, and a filing received by the Commission or a website posting made after 5:30 p.m. Eastern Standard Time or Eastern Daylight Saving Time, whichever is currently in effect, shall be deemed received or made on the next business day.

(2) The Commission shall approve a national market system plan or proposed amendment to an effective national market system plan, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act. The Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding. Approval or disapproval of a national market system plan, or an amendment to an effective national market system plan (other than an amendment initiated by the Commission), shall be by order. Promulgation of an amendment to an effective national market system plan initiated by the Commission shall be by rule.

(i) Within 90 days of the date of publication of notice of the filing of a national market system plan or

proposed amendment, or within such longer period as to which the plan participants consent, the Commission shall, by order, approve or disapprove the plan or amendment, or institute proceedings to determine whether the plan or amendment should be disapproved. Proceedings to determine whether the plan or amendment should be disapproved will be conducted pursuant to 17 CFR 201.700 and 201.701. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and shall be concluded within 180 days of the date of publication of notice of the plan or amendment. At the conclusion of such proceedings the Commission shall, by order, approve or disapprove the plan or amendment. The time for conclusion of such proceedings may be extended for up to 60 days (up to 240 days from the date of notice publication) if the Commission determines that a longer period is appropriate and publishes the reasons for such determination or the plan participants consent to the longer period.

(ii) The time for conclusion of proceedings to determine whether a national market system plan or proposed amendment should be disapproved may be extended for an additional period up to 60 days beyond the period set forth in paragraph (b)(2)(i) of this section (up to 300 days from the date of notice publication) if the Commission determines that a longer period is appropriate and publishes the reasons for such determination or the plan participants consent to the longer period.

\* \* \* \* \*

By the Commission.

Dated: August 19, 2020.

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

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