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**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 242**

**[Release No. 34-87193; File No. S7-15-19]**

**RIN 3235-AM56**

**Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Proposed rule.

**SUMMARY:** The Securities and Exchange Commission ("Commission" or "SEC") is proposing to amend 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 would be subject to the procedures set forth in Rule 608(b)(1) and (2) that require the Commission to publish the proposed amendment, provide an opportunity for public comment, and preclude a proposed amendment from becoming effective unless approved by the Commission (the "standard procedure").

**DATES:** Comments should be received on or before December 10, 2019.

**ADDRESSES:** Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/proposed.shtml); or

- Send an email to rule-comments@sec.gov. Please include File Number S7-15-19 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Vanessa A. Countryman, Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-15-19. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/proposed.shtml). Comments are also available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549-1090 on official business days between the hours of 10:00 a.m. and 3:00 p.m. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

Studies, memoranda, or other substantive items may be added by the Commission or staff to the comment file during this rulemaking. A notification of the inclusion in the comment file of any materials will be made available on the Commission's website. To ensure direct electronic receipt of such notifications, sign up through the "Stay Connected" option at www.sec.gov to receive notifications by email.

**FOR FURTHER INFORMATION CONTACT:** Michael Bradley, Special Counsel, at (202) 551-5594, Andrew Sherman, Special Counsel, at (202) 551-7255, Liliana Burnett, Attorney-Advisor, at (202) 551-2552, Division of Trading and Markets, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549.

**SUPPLEMENTARY INFORMATION:** The Commission is proposing to amend 17 CFR 242.608 (Rule 608 of Regulation NMS) under the Exchange Act to rescind paragraph (b)(3)(i) of Rule 608 and thereby eliminate 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) ("Proposed Fee Changes").

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## I. Introduction

Section 11A(a) of the Exchange Act directs the Commission to facilitate the creation of a national market system for qualified securities.[1] To help implement the national market system, the Commission has required the self-regulatory organizations ("SROs") to act jointly through NMS plans to, among other things, establish certain facilities. Some NMS plans govern the facilities through which registered securities information processors ("SIPs") collect, consolidate, and distribute real-time market information (also known as core data) that is essential to investors and others who wish to participate in the U.S. markets for exchange-listed equities and options. The SRO participants, through these NMS plans, charge fees for core data, and the total revenues generated by these fees totaled more than $500 million in 2017.[2] Core data fees are paid by a wide range of market participants, including investors, broker-dealers, data vendors, and others. The NMS plan governing the consolidated audit trail ("CAT") also contemplates fees would be paid by SRO participants and collected from SRO members.

Rule 608(b) of Regulation NMS sets forth the procedure and requirements for amending an NMS plan. Specifically, pursuant to Rule 608(b)(1), the Commission shall publish notice of any proposed NMS plan amendments, together with the terms of substance of the filing or a description of the subjects and issues involved, and provide interested persons an opportunity to submit written comments. These filings and related comments assist the Commission in determining whether to approve the proposed amendment. Pursuant to Rule 608(b)(2), the Commission shall approve a proposed NMS plan amendment, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan

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1 15 U.S.C. 78k-1(a).

2 See infra Section III.A.

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 Exchange Act.[3] Pursuant to Rule 608(b)(1) and (2), the Commission publishes public notice of a proposed NMS plan amendment and provides an opportunity for public comment before the amendment can go into effect. In addition, the rule provides that a proposed amendment cannot become effective until it is approved by the Commission.[4]

Paragraph (b)(3)(i) of Rule 608, however, provides an exception to the standard procedure for Proposed Fee Changes ("Fee Exception"). Under the Fee Exception, a Proposed Fee Change may be put into effect upon filing with the Commission, and an NMS plan may begin charging the new fee prior to an opportunity for public comment and without Commission action.

Rule 608(b)(3)(iii) also provides that the Commission may summarily abrogate a Proposed Fee Change within 60 days after filing and require it to be refiled in accordance with the standard procedure 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. The substance of a Proposed Fee Change filed under the Fee Exception is required to be the same as the substance

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3 See Rule 608(b)(2).

4 See Rule 608(b)(1).

of a Proposed Fee Change (or any other proposed NMS plan amendment) filed under the standard procedure.[5]

Given the substantial amount and broad effect of NMS plan fees, as well as the need of many market participants to obtain core data and the potential conflicts of interest in setting fees discussed below,[6] the Commission preliminarily believes that a Proposed Fee Change should not become effective (and SROs 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 and the Commission has approved the Proposed Fee Change. Accordingly, the Commission is proposing to eliminate the Fee Exception by rescinding subparagraph (b)(3)(i) of Rule 608.

## II. Background

### A. NMS Plans That Charge Fees

The Fee Exception is available for NMS plans that currently charge or intend to charge fees and for which the SRO participants, through these NMS plans, must file Proposed Fee Changes with the Commission. Currently, these NMS plans are the core data plans and the CAT plan.[7] The participants in these plans are all SROs.

#### 1. Core Data Plans

For each NMS security,[8] the NMS plans generally define consolidated market information (or "core data") as consisting of: (1) the price, size, and exchange of the last sale; (2)

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5 See Rule 608(a).

6 See infra Sections V.B.1 and V.B.2.

7 NMS plan filings under Rule 608 are available at: https://www.sec.gov/rules/sro/nms.htm.

8 See Rule 600(b)(47) (defining "NMS security" as any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for

each exchange's current highest bid and lowest offer, and the shares available at those prices; and (3) the national best bid and offer (i.e., the highest bid and lowest offer currently available on any exchange).[9] Pursuant to NMS plans, this core data is collected, consolidated, processed, and disseminated by the SIPs.[10] In addition, the SIPs collect, calculate, and disseminate certain regulatory data, including information required by the National Market System Plan to Address Extraordinary Market Volatility ("LULD Plan"),[11] information relating to regulatory halts and market-wide circuit breakers ("MWCBs"),[12] and information regarding short sale circuit breakers pursuant to Rule 201,[13] as well as collect and disseminate other NMS stock data and disseminate certain administrative messages.

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reporting transactions in listed options); see also Rule 600(b)(48) (defining "NMS stock" as any NMS security other than an option).

9 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").

10 See Rule 603(b) (requiring that every national securities exchange on which an NMS stock is traded and national securities association act jointly pursuant to one or more effective NMS plans to disseminate consolidated information on quotations for and transactions in NMS stocks, and that such plan or plans provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor).

11 See Securities Exchange Act Release Nos. 85623 (Apr. 11, 2019), 84 FR 16086 (Apr. 17, 2019) (approving LULD Plan on a permanent basis); 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012) (approving LULD Plan, as modified by Amendment No. 1, on a pilot basis); see also http://www.luldplan.com/index.html.

12 See Securities Exchange Act Release No. 67090 (May 31, 2012), 77 FR 33531(June 6, 2012) (SR-BATS-2011-038; SR-BYX-2011-025; SR-BX-2011-068; SR-CBOE-2011-087; SR-C2-2011-024; SR-CHX-2011-30; SR-EDGA-2011-31; SR-EDGX-2011-30; SR-FINRA-2011-054; SR-ISE-2011-61; SR-NASDAQ-2011-131; SR-NSX-2011-11; SR-NYSE-2011-48; SR-NYSEAmex-2011-73; SR-NYSEArca-2011-68; SR-Phlx-2011-129).

13 See Rule 201(b)(3) of Regulation SHO; 17 CFR 242.201(b)(3).

Multiple NMS plans currently govern the collection, consolidation, processing, and dissemination of core data for NMS stocks. Specifically, these plans govern three networks ("Networks") that disseminate core data based on primary listing market: (1) Network A for NYSE-listed stocks; (2) Network B for stocks listed on exchanges other than the NYSE or Nasdaq; and (3) Network C for stocks listed on Nasdaq. Networks A and B are operated pursuant to the Consolidated Tape Association ("CTA") Plan, which governs the collection and distribution of transaction information, and the Consolidated Quotation ("CQ") Plan, which governs the collection and distribution of quotation information. Transaction and quotation information for Network C stocks is collected and distributed pursuant to the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis ("Nasdaq/UTP").

In addition, one NMS plan governs the collection, consolidation, processing, and dissemination of last sale and quotation information for listed options, namely, the plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA").

**2. The CAT Plan**

The NMS plan governing the CAT was approved by the Commission on November 15, 2016.[14] The purpose of the CAT plan is to provide for the creation, implementation, and

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[14] See Limited Liability Company Agreement of CAT NMS, LLC (effective Jan. 10, 2018), available at https://www.catnmsplan.com/wp-content/uploads/2018/01/CAT-NMS-Plan-Current-as-of-1.10.18.pdf ("2018 CAT Plan"); Securities Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("CAT Plan Approval Order"). In 2012, the Commission adopted Rule 613, which required national securities exchanges and national securities associations to submit a national market system plan to create, implement, and maintain a consolidated audit trail. See Securities Act Release No. 67457 (July 18, 2012), 77 FR 45721 (Aug. 1, 2012).

maintenance of a comprehensive audit trail for the U.S. securities markets.[15] This consolidated audit trail is designed to "capture customer and order event information for orders in NMS securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single, consolidated data source."[16]

The CAT plan approved by the Commission allows the operating committee of CAT NMS, LLC (the entity charged with the creation, implementation, and maintenance of CAT), to establish funding for CAT NMS, LLC, including establishing an allocation of its related costs among SRO participants and SRO members that is consistent with the Exchange Act.[17] The CAT plan thus contemplates that fees would be paid by the SRO plan participants, as well as collected from SRO members, which are the "Industry Members" under the plan.[18]

### 3. NMS Plans' Fee Setting Process

Each of the NMS plans is governed by an operating committee composed of one voting representative from each SRO participant.[19] Through their participation in the plan operating

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15 See CAT Plan Approval Order, supra note 14, at 84698.

16 See id.

17 2018 CAT Plan, supra note 14, at Sections 11.1-11.2. The operating committee's funding responsibility also includes, among other things, establishing a "tiered fee structure" in which the fees charged to "execution venues" (i.e., SRO participants and alternative trading systems) are based upon the level of market share, and the fees charged to SRO members' non-ATS activities are based upon message traffic, as well as avoiding "any disincentives such as placing an inappropriate burden on competition and reduction in market quality[.]" Id. at Section 11.2.

18 See CAT Plan Approval Order, supra note 14, at 84710; see also 2018 CAT Plan, supra note 14, at Section 1.1 (defining an "Industry Member" as a member of a national securities exchange or a member of a national securities association) and Section 11.1(b).

19 See Second Restatement of CTA Plan Articles (effective Aug. 27, 2018), available at https://www.nyse.com/publicdocs/ctaplan/notifications/trader-update/CTA%20Plan%20-%20Composite%20as%20of%20August%2027,%202018.pdf ("2018 CTA Plan"), at I.(b), IV.(a); Restatement of CQ Plan (effective July 9, 2018), available at https://www.nyse.com/publicdocs/ctaplan/notifications/trader-

committees and votes to approve plan amendments, the SRO plan participants approve new fee proposals for each plan and, in the case of the core data plans (CTA/CQ, Nasdaq/UTP and OPRA), new proposed allocations of fee revenues.[20] Under the CAT plan, the operating committee has discretion to establish fees, which the SRO participants will implement, for both SRO participants and Industry Members.[21] Once a fee or revenue allocation proposal has been approved by the SRO plan participants, the proposal must be filed with the Commission pursuant to Rule 608 of Regulation NMS in order to become effective.

### B. Rule 608 of Regulation NMS and the Fee Exception

Rule 608 of Regulation NMS sets forth requirements for filing and amendment of NMS plans. Rule 608(a) provides that any two or more SROs, acting jointly, may file a new proposed NMS plan or a proposed amendment to an existing NMS plan by submitting to the Commission the text of the plan or amendment along with extensive supporting information. Rule 608(b)

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update/CQ_Plan_Composite_as_of_July_9_2018.pdf ("2018 CQ Plan"), at IV.(a); Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privilege Basis (effective Jan. 9, 2018), available at https://www.utpplan.com/DOC/Nasdaq-UTPPlan_after_43rd_Amendment-Excluding_21st_36th_38th_42nd_Amendments.pdf ("2018 Nasdaq/UTP Plan"), at IV.A; Limited Liability Company Agreement of Options Price Reporting Authority, LLC (effective Nov. 3, 2017), available at https://uploads-ssl.webflow.com/5ba40927ac854d8c97bc92d7/5bf419a6b7c4f5085340f9af_opra_plan.pdf ("2017 OPRA Plan"), at Section 4.2 (the 2017 OPRA Plan refers to its operating committee as the "Management Committee" and its SRO participants as "Members"; the terms "operating committee" and "participants" are used throughout this release for ease of reference and are meant to be interchangeable with the terms "Management Committee" and "Members" in the context of the OPRA Plan); 2018 CAT Plan, supra note 14, at Section 4.2.

20 See 2018 CTA Plan, supra note 19, at XII.(a) and XII.(b)(iii); 2018 CQ Plan, supra note 19, at IX.(a) and IX.(b)(iii); 2018 Nasdaq/UTP Plan, supra note 19, at IV.B.(3), IV.B.(5) and IV.C; 2017 OPRA Plan, supra note 19, at Sections 4.1(d), 7.1, 10.3; 2018 CAT Plan, supra note 14, at Sections 11.1-11.2.

21 See 2018 CAT Plan, supra note 14, at Sections 11.1(b) and 11.2.

addresses the effectiveness of proposed NMS plans and plan amendments. It sets forth the standard procedure, along with exceptions for certain types of proposals. Specifically, paragraphs (b)(1) and (b)(2) of Rule 608 generally require that proposed plan changes must be filed with the Commission, published for comment, and approved by Commission order before they can become effective and implemented.[22] Paragraph (b)(3) of Rule 608, however, provides an exception to this procedure in three contexts: (i) to establish or change fees or charges (including the allocation of resulting revenues among the participating SROs) (i.e., the Fee Exception), (ii) solely plan administration matters, and (iii) solely technical or ministerial matters. Proposed NMS plan amendments fitting one of these contexts may (but are not required to) be filed pursuant paragraph (b)(3) of Rule 608 and thereby avoid the standard procedure of paragraphs (b)(1) and (2).

A proposed NMS plan amendment that is filed pursuant to paragraph (b)(3) of Rule 608 is deemed effective upon filing, prior to an opportunity for public comment and without Commission action. Paragraph (b)(3)(iii), however, provides that the Commission, at any time within 60 days of the filing of an immediately effective amendment, may summarily abrogate the amendment and require that the amendment be re-filed pursuant to the standard procedure of paragraphs (b)(1) and (2). Consequently, while Rule 608(b)(3) provides an opportunity for public comment and for the Commission to abrogate a Proposed Fee Change, the effective-upon-filing provision means that market participants can be charged a new or altered fee before

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22 The Commission is required to approve an NMS plan amendment within 120 days of the date of publication of notice of the filing, 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. See Rule 608(b)(2). The Commission may extend this review period up to 180 days 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. Id.

comments can be submitted and before the Commission can evaluate whether to abrogate a Proposed Fee Change.

The Commission originally adopted the Fee Exception in 1981 in Rule 11Aa3-2, the predecessor to Rule 608. Rule 11Aa3-2 was adopted pursuant to Section 11A(a)(3)(B) of the Exchange Act, which broadly authorizes the Commission to require SROs to act jointly with respect to matters relating to the national market system or facilities thereof, including NMS plans.[23] Separate from the context of NMS plans and the SROs' roles as participants in those plans, SROs also charge fees individually pursuant to a different section of the Exchange Act. In contrast to Section 11A(a)(3)(B), which governs Rule 608 and NMS plan fees, Section 19(b) of the Exchange Act governs the fees that a SRO charges individually.[24] Unlike Section 11A(a)(3)(B), which does not statutorily mandate an effective-upon-filing procedure for Proposed Fee Changes, Section 19(b)(3)(A) specifically mandates by statute an effective-upon-filing procedure for all fee changes that SROs individually propose, regardless of whether the fee is charged to persons other than members of the SRO.[25] Congress added this mandate to Section 19(b)(3)(A) of the Exchange Act in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank Act").[26] The legislative history of the Dodd-Frank Act indicates that Congress was responding to a concern expressed by several exchanges that the

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23 See 15 U.S.C. 78k-1(a)(3)(B); see also Securities Exchange Act Release No. 17580 (Feb. 26, 1981), 46 FR 15866 (Mar. 10, 1981) ("Rule 608 Adopting Release").

24 15 U.S.C. 78s(b).

25 See 15 U.S.C. 78s(b)(3)(A).

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

Section 19(b) SRO rule filing process creates a significant competitive advantage for less regulated competitors that do not have to seek regulatory approval before changing their rules.[27]

NMS plan fees, in contrast, are not subject to Section 19(b) of the Exchange Act and, as discussed above, Congress, in amending Section 19(b)(3)(A), was responding to concerns about competitive disparities in the context of individual SRO fees. Indeed, the Commission previously has noted that Congress did not intend to treat NMS plan amendments the same as individual SRO rule changes. For example, when the Commission adopted Rule 11Aa3-2 (the prior designation of Rule 608), the Commission stated that it did "not believe that it was the intent of Congress to treat NMS Plans as analogous to SRO rules" and 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.[28]

Although the Commission did not believe that Congress mandated Section 19 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.[29] At that time, the Commission stated that the Fee Exception was added in response to concerns expressed by exchanges that they should be able to change NMS plan fees without prior Commission approval to avoid administrative delay.[30]

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27 See S. REP. NO. 111-176, at 106 (2010).

28 See Rule 608 Adopting Release, supra note 23, 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.").

29 See Rule 608 Adopting Release, supra note 23.

30 Id. at 15869.

When Regulation NMS was adopted in 2005, Rule 11Aa3-2 was redesignated as Rule 608 (and will hereinafter be referred to as Rule 608).[31] Several commenters on the proposal of Regulation NMS in 2004 advocated eliminating the effective-upon-filing procedure; they argued that it gave excessive power to self-interested parties and did not facilitate informed and meaningful public and industry participation and comment.[32] When adopted however, Regulation NMS did not change the effective-upon-filing procedure. Rather, the Commission stated that issues relating to the level of core data fees would be most appropriately addressed in the broader context of its separate review of SRO structure, governance, and transparency, which included a 2004 proposal on SRO transparency and a 2004 concept release on SRO structure.[33] The Commission ultimately did not take further action on the proposal or concept release.

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31 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37570 (June 29, 2005).

32 See Letter from Carrie E. Dwyer, General Counsel and Executive Vice President, Charles Schwab & Co., Inc. (June 30, 2004) at 9, available at https://www.sec.gov/rules/proposed/s71004/dwyer63004.pdf; Letter from Marc E. Lackritz, President, Securities Industry Association (June 30, 2004) at 26, available at https://www.sec.gov/rules/proposed/s71004/s71004-362.pdf; Letter from Marc E. Lackritz, President, Securities Industry Association (Feb. 1, 2005) at 26, available at https://www.sec.gov/rules/proposed/s71004/sia020105.pdf; Letter from Lisa M. Utasi, President, et. al., The Security Traders Association of New York, Inc. (June 30, 2004) at 15, available at https://www.sec.gov/rules/proposed/s71004/stany063004.pdf.

33 See Securities Exchange Act Release Nos. 51808 (June 9, 2005), 70 FR 37495, 37560-61 (June 29, 2005) (Regulation NMS adopting release); 50699 (Nov. 18, 2004), 69 FR 71125 (Dec. 8, 2004) (SRO governance and transparency proposing release); 50700 (Nov. 18, 2004), 69 FR 71255 (Dec. 8, 2004) (Concept Release Concerning Self-Regulation). One commenter on the SRO structure concept release echoed the sentiment expressed by commenters on the Regulation NMS proposal that the effective-upon-filing procedure gives excessive power to self-interested parties and does not facilitate informed and meaningful public and industry participation and comment. See Letter from Phylis M. Esposito, Executive Vice President and Chief Strategy Officer, Ameritrade, Inc. (Mar. 8, 2005) at 3, available at https://www.sec.gov/rules/concept/s74004/pmesposito030805.pdf.

### C. Recent Roundtable Comments and Petitions Regarding the Fee Exception

Some market participants questioned the Fee Exception more recently. Two petitions for rulemaking were submitted to the Commission in 2017 and 2018 requesting, among other things, that the Fee Exception be rescinded.[34] One of the petitions was submitted by 24 firms representing a broad cross section of market participants, including institutional investors, broker-dealers, and data vendors.[35] In connection with and during the Roundtable on Market Data and Market Access ("Roundtable") that was hosted by SEC staff in October 2018, commenters and panelists urged the Commission to rescind the Fee Exception to allow for more public and Commission scrutiny of Proposed Fee Changes for core data before they are effective.[36] These commenters and petitioners believe that market participants do not have an

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34 See Petition for Rulemaking Regarding Market Data Fees and Request for Guidance on Market Data Licensing Practice; Investor Access to Market Data (Aug. 22, 2018) (SEC 4-728) at 2, 11, available at https://www.sec.gov/rules/petitions/2018/petn4-728.pdf (noting that Section 11A does not mandate that SIP fee increases be effective upon filing and expressing the public's need for time to comment); Petition for Rulemaking Concerning Market Data Fees (Dec. 6, 2017) (SEC 5-716) at 8, available at https://www.sec.gov/rules/petitions/2017/petn4-716.pdf ("December 6, 2017 Petition") (similarly noting that Section 11A of the Exchange Act does not speak to the immediate effectiveness of SIP fee filings, and proposing that the Commission remove paragraph (b)(3)(i) from Rule 608); see also Letter from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA (May 21, 2018) at 1, available at https://www.sec.gov/comments/4-716/4716-3678964-162455.pdf (endorsing the December 6, 2017 Petition's proposal, among other things, that the Commission repeal immediate effectiveness for SIP fee filings).

35 See December 6, 2017 Petition, supra note 34, at 9.

36 See, e.g., Letter from Marcy Pike, SVP, Enterprise Infrastructure, Krista Ryan, VP, Associate General Counsel, Fidelity Investments (Oct. 26, 2018) at 6-7, available at https://www.sec.gov/comments/4-729/4729-4566044-176136.pdf ("Fidelity Letter") (recommending "that the SEC amend Rule 608(b) under Regulation NMS to prevent SIP fees from becoming effective immediately upon filing with the SEC, and to require a public notice and comment period for all SIP fee filings"); Letter from Mehmet Kinak, Vice President – Global Head of Systematic Trading & Market Structure, and Jonathan D. Siegel, Vice President – Senior Legal Counsel (Legislative & Regulatory Affairs), T. Rowe Price Associates, Inc. (Jan. 10, 2019) at 2 available at

opportunity to meaningfully comment on Proposed Fee Changes for core data before the market participants are subject to the new fees.[37]

## III. Proposed Rescission of the Fee Exception

The Commission is proposing to rescind Rule 608(b)(3)(i) and thereby eliminate the effective-upon-filing procedure for Proposed Fee Changes. As a result, the standard procedure, which requires public notice, an opportunity for public comment, and Commission approval by order before a proposed plan amendment can become effective, would apply to any Proposed Fee Change.

The proposed rescission of the Fee Exception would not change any requirements regarding the substantive information that must be set forth in Proposed Fee Changes. The information required by paragraph (a) of Rule 608 and the relevant provisions of the Exchange Act apply whether a proposed fee change filing is submitted under the Fee Exception or the standard procedure.

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https://www.sec.gov/comments/4-729/4729-4844471-177204.pdf (recommending that fee changes by the SIPs be "subject to notice and public comment before approval or disapproval by the SEC"); Equity Market Structure Roundtables: Roundtable on Market Data and Market Access October 26, 2018 Transcript, available at https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf ("Oct. 26 Tr."), at 239:13-20 (statement of Mr. Rich Steiner, RBC Capital Markets, noting that rescinding the Fee Exception "would require a public notice and comment period prior to the SEC's approval or disapproval of any fee changes, thereby allowing transparency and stakeholder input").

37 See, e.g., Fidelity Letter, supra note 36, at 6-7 (noting that "[f]rom a practical standpoint, [the Fee Exception] means that market participants do not know until after a fee filing is effective that fees have increased, or have an opportunity to meaningfully comment on fee increases before being subject to them."); December 6, 2017 Petition, supra note 34, at 6-7 ("In the public interest and for the protection of investors, there should be more transparency and stakeholder input into fee filings through the public notice and comment process, as well as more transparency into fee increases that come in the form of policy changes or changes to the terms and conditions stipulating allowable uses of market data.").

The Commission preliminarily believes that eliminating the Fee Exception and instead requiring the standard procedure for Proposed Fee Changes would help ensure that fees are fair and reasonable before they go into effect. NMS plan fee changes can significantly affect the interests of investors and market participants. By changing the timing of effectiveness, the proposed rescission of the Fee Exception would give commenters an opportunity to provide their views about a Proposed Fee Change prior to the time they are charged a new or altered fee. Moreover, while the Commission can abrogate an immediately effective NMS plan amendment, the input of commenters is an important part of the Commission's review of Proposed Fee Changes, and the Commission generally has not abrogated a Proposed Fee Change prior to reviewing the comments. Rather than allow an NMS plan to charge new or altered fees during this review process, with the potential that investors and market participants may not have adequate notice or time to plan for a fee change before it goes into effect, the Commission preliminarily believes, for the reasons discussed throughout, that the effectiveness and implementation of new or altered fees should occur only after the comment and review process is complete.

### A. NMS Plan Fees Must Be Paid By Non-Plan Participants and Are Substantial

Non-SRO market participants, including investors, broker-dealers, data vendors, and others, are required to pay the fees charged by the NMS plans to obtain access to core data.[38] Retail investors that access core data through their broker-dealers (and not directly) can still be affected by core data fees in that such fees paid by their broker-dealers can affect their ready

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38 SROs also pay the relevant fees for use of core data. The CAT plan is currently being funded by the plan participants, but the CAT plan contemplates a funding model in which both plan participants and market participants would contribute to the funding of the CAT. See 2018 CAT Plan, supra note 14, at Article XI.

access through their broker-dealer to full NBBO market information.[39] The Commission has previously stated that investors must have core data to participate in the U.S. equity markets.[40] And many market participants, including all broker-dealers, must have access to core data to meet their regulatory obligations. Broker-dealer panelists at the Roundtable noted that they are compelled to purchase core data for various reasons, including to receive Limit Up/Limit Down ("LULD") plan price bands, to perform checks required by Rule 15c3-5 under the Exchange Act (the "market access" rule),[41] and for redundancy purposes.[42] Moreover, some broker-dealers use core data to comply with the requirements of Rule 611 of Regulation NMS to prevent trade-throughs and to meet their duty of best execution for customer orders. Also, pursuant to Rule 603(c) of Regulation NMS,[43] known as the "Vendor Display Rule," if a broker-dealer displays any information with respect to quotations for or transactions in an NMS stock in certain

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39 As discussed in Section V.B.2 below, some broker-dealers provide customers with market information from SRO proprietary top-of-book data feeds as substitutes for core data in certain applications. This proprietary top-of-book data may be less expensive than SIP data, but may only contain information from one exchange or one exchange family.

40 See Bloomberg Order, supra note 9, at 4.

41 17 CFR 240.15c3-5.

42 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 138:23-139:3, 169:12-24 (statements of Adam Inzirillo, Bank of America Merrill); Oct. 25 Tr., at 184:14-185:2 (statement of Michael Friedman, Trillium).

43 17 CFR 242.603(c).

contexts, it must also provide a consolidated display for such stock.[44] Broker-dealers typically meet this regulatory requirement by using core data, for which fees must be paid.[45]

Similarly, pursuant to the CAT plan, the SRO participants may set fees that Industry Members must pay for the costs of the CAT system.[46] As discussed above, the CAT plan allows the SRO plan participants, through the operating committee of CAT, to establish an allocation of costs among SRO participants and Industry Members, and collect fees from Industry Members.[47] SRO participants, in setting the allocation of costs among themselves and Industry Members, are beset by similar conflicts that exist when setting fees for core data.[48]

Moreover, the total revenues derived from NMS plan fees are substantial. For example, the total revenues generated by fees for core data totaled more than $500 million in 2017.[49] Similarly, with respect to the CAT plan, the fees related to the costs of creation and maintenance of the CAT systems are and will continue to be substantial.[50] The substantial fees charged by

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44 See Rule 603(c).

45 See December 6, 2017 Petition, supra note 34, at 1 ("As required by the SEC's Display Rule, vendors and broker-dealers are required to display consolidated data from all the market centers that trade a stock. In order to comply with the Display Rule, such vendors and broker-dealers must purchase and display consolidated data feeds distributed by securities information processors ('SIPs'), which are owned by the exchanges and operated pursuant to NMS plans. The fees charged by SIPs are distributed as income to each of the participating exchanges.").

46 See supra note 17.

47 See supra Section II.A.2.

48 See infra Section V.B.1.

49 This figure is derived from 2017 audited financial statements for the CTA/CQ and Nasdaq/UTP plans, and from 2017 summary financial information for the OPRA plan.

50 See, e.g., CAT Plan Approval Order, supra note 14, at 84801-02; Securities Exchange Act Release No. 81189 (July 21, 2017), 82 FR 35005, 35008 (July 27, 2017) (stating that the Operating Committee estimated overall CAT costs to be $50,700,000 in total for the year beginning November 21, 2016).

NMS plans to a wide range of market participants heightens the need for full review of Proposed Fee Changes prior to the time that a new or altered fee is charged to market participants.

### B. Proposed Fee Changes To Be Subject To Standard Procedure

As noted above,[51] the Commission added the Fee Exception to Rule 608 in 1981 in response to concerns expressed by exchanges about the administrative burdens and delays that could occur if fees could not be changed without prior Commission approval.[52] A potential concern about administrative delay could arise in circumstances where an SRO's competitive position might be harmed by the inability to change its fee quickly. However, the Commission previously has noted that where plans responsible for providing core data are monopolistic providers of such data, there is no market competition that can be relied upon to set competitive prices.[53] For example, the core data plans provide critical market information that is not available from other sources, such as LULD plan price bands and administrative messages.[54]

Moreover, SRO structures and the nature of SRO relations with their members have changed substantially since the Fee Exception was adopted in 1981. Then, exchange SROs were structured as mutual organizations that were owned, for the most part, by SRO members that

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51 See supra Section II.B.

52 See Rule 608 Adopting Release, supra note 23, at 15869.

53 See, e.g., Bloomberg Order, supra note 9, at 4. Because the CTA, CQ, and Nasdaq/UTP plans establish the only processors to whom exchanges and associations are required to report their NMS stock data under Rule 603(b) of Regulation NMS, they effectively have a monopoly over core data. Cf. Securities Exchange Act Release No. 42208 (Dec. 9, 1999), 64 FR 70613, 70627 (Dec. 17, 1999) (Concept Release on Regulation of Market Information Fees and Revenues) (characterizing "exclusive processors of [core data] market information" as "monopolistic provider[s] of a service").

54 Examples of administrative messages include free form text messages that, among other things, announce systems problems at an exchange.

were registered broker-dealers.[55] Today, in contrast, nearly all exchange SROs are part of publicly-traded exchange groups that are not owned by the SRO members, and there is less opportunity for members to influence a Proposed Fee Change before it is filed with the Commission. As a result, the Commission preliminarily believes that it is more important today than it was prior to the demutualization of the exchange SROs for members and other interested parties to have an opportunity, via the standard procedure, to express their views on a Proposed Fee Change after it is filed with the Commission but before it is effective and can be charged to market participants. This opportunity is not available under the Fee Exception because, even if a Proposed Fee Change is subsequently abrogated, the fee is effective immediately upon filing, remains effective for the period between filing and abrogation, and market participants can be charged the fee during the entire period between filing and abrogation.

The Commission recognizes that eliminating the Fee Exception and subjecting Proposed Fee Changes to the standard procedure may extend the timeframe in which NMS plan participants can put into effect new or amended fees. But the Commission preliminarily believes that changes in the costs of operating NMS plans generally can be reasonably forecasted and that NMS plan participants should be able to account for the longer time periods of the standard procedure in planning new or amended fees. Moreover, as discussed below, few Proposed Fee Changes are filed each year under Rule 608, and we estimate based on past practice that the median time it would take the Commission to make a decision to approve or disapprove

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55 See Securities Exchange Act Release No. 50699 (Nov. 18, 2004), 69 FR 71125, 71132 (Dec. 8, 2004) (noting that SROs had been challenged by the trend to demutualize and that the "impact of demutualization is the creation of another SRO constituency—a dispersed group of public shareholders—with a natural tendency to promote business interests").

proposed NMS plan amendments would be 70.5 days from the time of filing.[56] In the Commission's preliminary view, this delay should not disrupt the ability of NMS plan participants to implement new or amended fees as necessary to perform their plan responsibilities. On balance, therefore, the Commission preliminarily believes that subjecting Proposed Fee Changes to the standard procedure should not impose significant costs, and that any such costs are justified by the benefit of requiring public notice, an opportunity for public comment, and Commission approval by order before a Proposed Fee Change can become effective and market participants are charged a new or altered fee.

The Commission therefore is proposing that all Proposed Fee Changes be subject to the standard procedure set forth in Rule 608(b)(1) and (2).

**Requests for Comment:**

The Commission requests comment on all aspects of this proposal as well as, in particular, on the following:

1. Do commenters agree that the Commission should rescind the Fee Exception? Why or why not?
2. Are there positive or negative implications, in addition to those discussed above, of the Commission's proposal to rescind the Fee Exception?
3. Is the procedure for notice, comment, and Commission approval or disapproval under existing Rule 608(b)(1) and (2) appropriate for Proposed Fee Changes? Should there

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56 See infra Section V.B.1. The Commission recognizes that this estimate is based on historical data on proposed NMS plan amendments. This historical data necessarily reflects the substance of the particular amendments, the comments received on those amendments, and other factors that can affect the timing of Commission action. As a result, the estimate based on historical data may not reflect the time periods for Commission action going forward.

be an opportunity for public comment before Proposed Fee Changes can become effective? Should Commission approval be required before Proposed Fee Changes can become effective? Should the time periods set forth in Rule 608(b)(2) be longer or shorter if applied to Proposed Fee Changes? Should any other aspects of paragraphs (b)(1) or (b)(2) of Rule 608 be altered in their application to Proposed Fee Changes?

4. Does the current effective-upon-filing procedure detract from the willingness of commenters to submit their views on Proposed Fee Changes, given that the proposed fee is already in effect when commenters may submit their views? Would market participants be more likely to comment on Proposed Fee Changes if they knew that the fees at issue were not yet effective and could not become effective without Commission action after consideration of comments? If so, do commenters believe that the proposed approach would lead to a more diverse and rich comment process and thereby promote a more informed evaluation of Proposed Fee Changes than is currently provided by the Fee Exception? If commenters do not believe the change would promote a more informed evaluation, why not?
5. Instead of rescinding the Fee Exception altogether, should the Commission modify the abrogation procedure in Rule 608(b)(3)(iii) such that Proposed Fee Changes are not effective immediately upon filing, but become automatically effective some time period (e.g., 60 or 90 days) after filing if the Commission does not abrogate the filing? This alternative would assure that commenters had an opportunity to comment prior to being charged a new or altered fee, as well as provide the Commission an opportunity to review the comments in deciding whether to abrogate

the filing. If this new period between the date of filing and automatic effectiveness expired without Commission abrogation, the Proposed Fee Change would become effective without Commission action. Do commenters believe this alternative is preferable to the proposed rescission of the Fee Exception? What, if any, additional aspects of this potential alternative should be considered?

6. Are there other alternative approaches that the Commission could adopt for achieving the goal of providing an opportunity for public comment on and Commission review of Proposed Fee Changes prior to the time they become effective and new or altered fees are charged to market participants?
7. Do commenters believe that the fact that nearly all exchange SROs are public companies that have demutualized raises concerns about immediate effectiveness of Proposed Fee Changes? Do commenters believe that, currently, investors and other market participants that are not plan participants do not have a meaningful opportunity to influence Proposed Fee Changes before they become effective under the Fee Exception? Do commenters believe that such an opportunity is provided under the Rule 608(b)(1) and (2) procedures?
8. What issues or improvements relating to Rule 608 procedures would you recommend the Commission address or undertake to ensure Proposed Fee Changes are not unduly delayed if the immediate effectiveness procedure were eliminated?
9. Do commenters believe that additional guidance on the content of Proposed Fee Changes would help improve the process for handling such filings?
10. Does the availability of proprietary data products sold by some SROs mitigate the Commission's preliminary concerns about subjecting market participants to new fees

prior to any review by the Commission or opportunity for comment? Do those proprietary data products represent viable, competitively-priced alternatives to the core data distributed by the NMS plan processors?

## IV. Paperwork Reduction Act

The Commission believes that the proposed rescission of the Fee Exception would not impose any new, or revise any existing, collection of information requirement as defined by the Paperwork Reduction Act of 1995, as amended ("PRA").[57] Accordingly, the Commission is not submitting this proposal to the Office of Management and Budget for review under the PRA.[58] The Commission requests comment on whether the proposed rescission of the Fee Exception would create any new, or revise any existing, collection of information pursuant to the PRA.

## V. 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.[59] 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.[60] 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.

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57 44 U.S.C. 3501 et seq.

58 44 U.S.C. 3507(d) and 5 CFR 1320.11.

59 15 U.S.C. 78c(f).

60 15 U.S.C. 78w(a)(2).

Wherever possible, the Commission has quantified the likely economic effects of the proposed amendments. However, most of the costs, benefits, and other economic effects discussed are inherently difficult to quantify. Therefore, much of our discussion is qualitative in nature. Our inability to quantify certain costs, benefits, and effects does not imply that such costs, benefits, or effects are less significant. We request that commenters provide relevant data and information to assist us in analyzing the economic consequences of the proposed amendments.

### B. Baseline

The Commission has assessed the likely economic effects of the proposed 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 filings in practice, 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 Filings

There are currently a total of five NMS plans that either charge fees or could charge fees and have filed Proposed Fee Changes 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.[61]

The SROs approve all Proposed Fee Changes.[62] 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

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61 See supra Section II.A.

62 See id.

incur as part of their businesses.[63] For example, some of the SROs sell proprietary data products that can, in some situations, be used as substitutes for core data.[64] This can create a conflict of interest with respect to the four NMS plans that set fees for core data because the SROs vote to set SIPs' fees and also own and control the dissemination of all equity and option market data and set the prices of some of the proprietary data products SIPs may compete against.[65] Another conflict potentially exists because both SRO participants and Industry Members are responsible for paying fees related to the CAT plan; however, the CAT operating committee decides how these fees should be split.[66] The Commission comment process is one of the only ways market participants have to express their views on these Proposed Fee Changes.[67] However, under the current process, market participants do not have the opportunity to comment before the Proposed Fee Changes become effective.[68]

Because Proposed Fee Changes are effective upon filing, fees in connection with an NMS plan can be charged immediately upon filing with the Commission.[69] In some cases, SRO members or subscribers to core data plans may not be given adequate time to plan for a new or

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63 See supra Section III.B and infra Section V.B.2.

64 However, these proprietary data products do not contain some critical market information, such as LULD plan price bands and administrative messages, which are only available through the SIPs. See supra note 54 and accompanying text; see also infra Section V.B.2.

65 See infra Section V.B.2.

66 See supra note 17 and accompanying text.

67 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 Proposed Fee Changes. See supra note 19.

68 See supra Section III.B.

69 SRO participants must post a proposed amendment to an 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).

altered fee before it is implemented.[70] For example, if subscribers to SIP core data are not given enough warning before a SIP changes fees, some subscribers, such as market data vendors, might not have enough time to adjust to the fee changes.

Table 1 shows information on the number of Proposed Fee Changes filed under Rule 608(b)(3)(i) since 2010 for each of the NMS plans that either charge fees or could charge fees. Since 2010, an average of 4.2 Proposed Fee Changes have been filed each year. The median time it takes the Commission to notice a Proposed Fee Change on its website is 25.5 days from the time it is filed.[71] The median time it takes an NMS plan to begin charging new fees pursuant

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70 The median time it takes NMS plans to begin charging new fees pursuant to Proposed Fee Changes is 62.5 days after filing with the Commission. See infra note 72 and accompanying text. However, a few Proposed Fee Changes 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). In some instances, commenters have indicated that they did not receive enough notice regarding the 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 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 need of "professionals and their firms, as well as market data vendors, to alter their systems and business plans"); and Fidelity Letter, supra note 36, at 6.

71 Statistics on the number of days it takes the Commission to notice a Proposed Fee Change and the number of days it takes the Commission to notice a withdrawn Proposed Fee Change 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 Proposed Fee Changes and withdrawn Proposed Fee Changes. The Commission preliminarily believes that the median value is the most appropriate measure to estimate these times. The Commission preliminarily believes that the average is not an informative estimate for these measures

to Proposed Fee Changes is 62.5 days after filing with the Commission.[72] Table 1 also contains information on how many of the fee filings 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 filing, the median time the fee filing is effective before the Commission abrogates the filing is 57 days.[73] No Proposed Fee Changes that have been abrogated by the Commission have been refiled under the standard procedure.[74] For cases in which an NMS plan withdraws a fee filing, the median time that the fee filing is effective before the NMS plan withdraws the filing is 46.5 days.[75] The median time it takes the Commission to

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because the sample size is small and contains extreme outliers. NMS plan amendments are available at: https://www.sec.gov/rules/sro/nms.htm.

72 Statistics on the number of days it takes an 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 filings 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 filing amendments to the CAT Plan. NMS plan amendments are available at: https://www.sec.gov/rules/sro/nms.htm.

73 The input of commenters are an important part of the Commission's review of Proposed Fee Changes, and the Commission generally has not abrogated a Proposed Fee Change prior to reviewing the comments. See supra Section III and Section II.B. Statistics on the number of days it takes the Commission to abrogate an 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.

74 See supra Section II.B.

75 Statistics on the number of days it takes an NMS plan to withdraw a 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. 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

notice fee filings that have been withdrawn is 34 days.[76] When an NMS plan refiles a withdrawn Proposed Fee Change, it is refiled on an immediately effective basis. The median time it takes an NMS plan to refile a withdrawn Proposed Fee Change is 174 days from the time the initial Proposed Fee Change was withdrawn.[77] The median time it takes the Commission to determine whether to approve an NMS plan amendment filed under the standard procedure is 45 days from the time it was noticed.[78]

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stayed by the Commission on July 31, 2018. See Bloomberg Order, supra note 9. NMS plan amendments are available at: https://www.sec.gov/rules/sro/nms.htm.

76 See supra note 71.

77 Some refiled Proposed Fee Changes 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 Proposed Fee Changes were modified in response to comments. See, e.g., Securities Exchange Act Release No. 70953 (Nov. 27, 2013), 78 FR 72932 (Dec. 4, 2013).

78 The time it takes for the Commission to determine whether to approve an NMS plan amendment filed under the standard procedure ranges from a minimum of 28 days to a maximum of 111 days. It takes the Commission an average of 60.8 days to determine whether to approve an NMS plan amendment filed under the standard procedure from the time it was noticed. Statistics on the number of days it takes the Commission to approve an NMS plan amendment filed under the standard procedure are based on NMS plan amendments to the CAT Plan, the CTA Plan, the CQ Plan, the Nasdaq/UTP Plan, and the OPRA Plan filed under the standard procedure between 2010 and 2019. NMS plan amendments are available at: https://www.sec.gov/rules/sro/nms.htm.

Table 1: Information on NMS plan fee filings under Rule 608(b)(3)(i)

| | Number Filed | | | | Number Abrogated | | | | Number Withdrawn | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Year | 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 |
| Total | 10 | 9 | 17 | 2 | 1 | 1 | 0 | 1 | 4 | 2 | 0 | 1 |

This table shows the number of Proposed Fee Changes filed under Rule 608(b)(3)(i) of Regulation NMS, the number of Proposed Fee Changes that were abrogated by the Commission, and the number of Proposed Fee Changes that were withdrawn by the NMS plan each year from 2010-2018 for the following NMS plans: the CTA and CQ Plans, the NASDAQ/UTP Plan, the OPRA Plan, and the CAT Plan. Proposed Fee Changes 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 Proposed Fee Change amendments under Rule 608(b)(3)(i). Two of these filings have been abrogated by the Commission and six have been withdrawn by the SRO participants.

Since 2017, the CAT Plan has filed two Proposed Fee Change 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. Market for Core and Aggregated Market Data Products

Under the NMS plans described above,[79] core data is collected, consolidated, processed, and disseminated by the SIPs.[80] NMS plan operating committees, which are composed of the

79 See supra Section II.A.1.

80 See supra note 10 and accompanying text.

SROs, set the fees the SIPs charge for core data.[81] Any revenue earned by the SIPs, after deducting costs, is split among the SROs.[82]

The Commission preliminarily 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,[83] which means that for all such products they would have the market power to charge supracompetitive prices.[84] Fees for core data are paid by a wide range of market participants, including investors, broker-dealers, data vendors, and others.

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. For example, in the equity markets, some third party data aggregators buy direct depth-of-book feeds from the exchanges and aggregate them to produce products similar to the equity market SIPs.[85] However, these products do not provide market

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81 See supra Section II.A.3.

82 FINRA rebates a portion of the SIP revenue it receives back to its members. See FINRA Rule 7610B, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7355.

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.

83 See supra note 54 accompanying text.

84 See NCAA v. Board of Regents, 468 U.S. 85, 109 n.38 (1984).

85 The feeds produced by third party data aggregators offer additional features, such as lower latency, but usually cost more than SIP data. See Oct. 25 Tr., supra note 42, at 126:20-129:8 (statement of Mr. Skalabrin).

The equity market SIPs are the core data governed by the CTA Plan, the CQ Plan, and the Nasdaq/UTP Plan. See supra Section II.A.1.

information that is critical to some subscribers and only available through the SIPs, such as LULD plan price bands and administrative messages.[86] Additionally, some SROs offer top-of-book data feeds, which may be considered by some to be viable substitutes for SIP data for certain applications.[87] 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 situations in which a trading or order routing decision can be implemented.[88]

The purchase of market data from all SROs, either directly or indirectly, is necessary for all broker-dealers executing orders in NMS securities. For example, Rule 611(a) of Regulation NMS requires trading centers to establish policies and procedures reasonably designed to prevent trade-throughs. In order to prevent trade-throughs, executing broker-dealers need to be able view the protected quotes on all exchanges. They can fulfill this requirement by using SIP data, proprietary data feeds offered by the SROs, or by using a combination of both. Additionally, some broker-dealers use core data to meet their duty of best execution for customer orders.

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86 See supra note 54 and accompanying text.

87 In the equity markets, the top-of-book feeds offered by the SROs are usually less expensive than SIP data. However, they may only contain information from one exchange, or one exchange family. See, e.g., Nasdaq Basic available at: https://business.nasdaq.com/intel/GIS/nasdaq-basic.html; CBOE One available at: https://markets.cboe.com/us/equities/market_data_services/cboe_one/; and NYSE BQT available at: https://www.nyse.com/market-data/real-time/nyse-bqt.

In the options markets, some SROs also offer top-of-book data feeds that aggregate options data from exchanges in their exchange family. However, they do not offer consolidated information from all of the options exchanges. These data feeds usually offer lower latency than OPRA. See, e.g., CBOE BBO available at: https://markets.cboe.com/us/options/market_data_services/; and Best of NASDAQ Options (BONO) available at: http://www.nasdaqtrader.com/Micro.aspx?id=BONO.

88 See supra note 45 and accompanying text.

SROs have significant influence over the prices of most market data products. For example, SROs set the pricing of the top-of-book data feeds that compete with SIP data, and they also collectively, as participants in the NMS plans, decide what fees to set for SIP data.[89] Although third party data aggregators might compete with the SIPs by offering products that provide core data for the equity markets, they ultimately derive their data from exchange proprietary direct feeds, whose prices are set by the SROs.[90]

### 3. 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 NMS Plan Approval Order.[91] While the Commission's analysis of state of competition in the Notice is fundamentally unchanged, the market for trading services in options and equities currently consists of 23 national securities exchanges, all but one of which are participants to NMS plans,[92] as well as off-exchange trading venues including broker-dealer internalizers and 31 NMS Stock ATSs,[93] which are not participants in NMS

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89 Fees are subject to Commission approval. See supra Section II.A.3 and Section II.B.

90 Pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder, SROs submit proposed rule changes to the Commission in which they set prices for their direct feed data, and those prices can vary depending on the type of end user.

91 See CAT NMS Plan Approval Order, supra note 14, Section V.G.1.

92 LTSE is not yet a participant to NMS plans.

93 As of September 18, 2019, 31 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.

plans.[94] The 23 exchanges are currently controlled by seven separate entities; three of which operate a single exchange.[95]

As discussed above, broker-dealer internalizers and ATSs subscribe to SIP data as well as other proprietary data products offered by the exchanges and data aggregators.[96] Additionally, FINRA rebates a portion of the SIP revenue it receives back to broker-dealer internalizers and ATSs based on the trade volume they report.[97] 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.[98]

### C. Benefits

Overall, the Commission preliminarily believes that the proposed rescission of the Fee Exception will not have significant economic effects for a number of reasons. First, on average, there are very few (only 4.2) proposed NMS plan fee changes in a year.[99] Second, because the existing filing procedure allows for Commission abrogation of proposed fee changes, the impact of the proposed amendments on the fees paid by market participants would largely be restricted

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94 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 67.

95 Cboe Global Markets, Inc. controls BYX, BZX, C2, EDGA, EDGX and CBOE; Miami International Holdings, Inc. controls Miami International, MIAX Emerald and MIAX PEARL; NASDAQ, Inc. controls BX, GEMX, ISE, MRX, PHLX and Nasdaq; Intercontinental Exchange, Inc. controls NYSE, Arca, American, Chicago and National. The three entities that control a single-exchange are IEX Group which controls IEX, a consortium of broker-dealers which controls BOX, and Long Term Stock Exchange, Inc. which controls LTSE.

96 See supra Section V.B.2.

97 See supra note 82.

98 See CAT Plan Approval Order, supra note 14, at 84882-84.

99 See supra Section V.B.1.

to the two to six month Commission review period, during which a fee change is effective under the current procedure, but would not be effective under the proposed amendments.[100] Third, as discussed above, the Commission preliminarily 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.[101] Therefore, the Commission preliminarily believes the proposed amendments would have a minimal effect on the SIPs' pricing models. Additionally, because the proposed amendments are a procedural change, they would not affect the contents of the SIP data or comparable products.[102]

Nonetheless, the Commission preliminarily believes that the proposed amendments offer three potential benefits. First, the Commission preliminarily believes that the proposed amendments would provide a benefit to market participants because Proposed Fee Changes to NMS plans would be subject to public notice, an opportunity for public comment, and Commission approval by order before they could become effective. Therefore, under the proposed amendments, 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 meet the standard for approval.

Second, the Commission preliminarily believes that the proposed amendments offer a benefit to SRO members and subscribers of SIP data. Because Proposed Fee Changes to NMS plans would not become effective until after they are subject to public comment and approved by the Commission, in cases where SRO members and subscribers to SIP data may not have

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100 The Commission preliminarily believes that the median delay from the proposed amendments would be 70.5 days. See infra note 106.

101 See supra Section V.B.2.

102 See id.

received adequate notice, they should have more time to plan and prepare before they are subject to a new or altered NMS plan fee.[103] For example, under the proposed amendments, third party vendors of SIP data would learn about potential fee changes to a type of SIP fee (i.e., non-displayed fees) earlier, which could give them more time to make adjustments and notify their clients before they are subject to the fee changes.

Third, the Commission preliminarily believes that the proposed amendments could benefit SRO members and subscribers of SIP data if a Proposed Fee Change increased an NMS plan fee. Under the proposed amendments, SRO members and subscribers of SIP data could benefit from the delay caused by the comment and Commission approval process because they would not have to pay the increased fee until the Commission approved the fee change and it became effective. However, the Commission preliminarily believes this benefit to SRO members and subscribers of SIP data would also represent a corresponding cost to the SROs.[104]

### D. Costs

The Commission preliminarily believes that the proposed amendments could impose costs on SROs because they could be delayed from implementing Proposed Fee Changes while

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103 See supra note 70 and accompanying text.

104 Correspondingly, if a Proposed Fee Change decreased an NMS plan fee, the delay caused by the comment and Commission approval process could impose a cost on SRO members and subscribers of SIP data and provide a benefit to the SROs. One comment letter submitted in response to the Roundtable contained analysis examining the change in fees that some broker-dealers paid for CTA data between 2010 and 2018. The analysis showed that CTA fees for most categories of data increased by an average of 5% between 2010 and 2018. However, the change in the total amount each 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 4% between 2010 and 2017, but the average amount spent by institutional broker-dealers increased by 7%. 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.

they wait for the Commission to determine whether to approve a fee change. In the case of the SIPs, if the Proposed Fee Change would increase the revenue earned by the SIP, then this delay could cause the SIP to lose out on the incremental revenue it could have collected compared to the baseline, where the Proposed Fee Change would have been effective immediately upon filing. This, 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.[105] In the case of the CAT plan, the proposed amendments could also delay the SROs from recovering money for costs they might have already incurred. However, the Commission preliminarily believes that the costs of the proposed amendments would not be significant because the Commission preliminarily estimates that the median delay caused by the proposed amendments to the implementation of Proposed Fee Changes would be 70.5 days.[106] Additionally, on average, there are not many NMS plan fee changes in a year.[107] The Commission preliminarily believes that any lost revenue or delay in

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105 See supra note 82; see also supra Section V.B.2.

106 The Commission preliminarily believes that the median delay caused by the proposed amendments to the implementation of Proposed Fee Changes would be 70.5 days. This estimate is based on the median time it takes the Commission to notice a Proposed Fee Change from the time it is filed, 25.5 days, and the median time it takes the Commission to determine whether to approve an NMS plan amendment filed under the standard procedure from the time it was noticed, 45 days. However, the Commission could extend the review period for a Proposed Fee Filing up to a total 180 days from the time it is noticed. See supra note 56; see also supra Section V.B.1 and Section II.B.

This delay does not include the time between when an NMS plan fee change is filed and the NMS plan begins charging the fee. Under the proposed amendments, an NMS plan fee filing could specify a date when fees will begin being charged based on a certain number of days after the fee filing is approved by the Commission. It is possible that the median delay specified by the NMS plan between approval and when the NMS plan begins charging fees could be similar to the current median delay, i.e., 62.5 days. The delay could also be shorter, since market participants would have received earlier notice about the potential fee change due to the delay caused by the Commission approval process. See supra note 70.

107 See supra Section V.B.1.

recovering money by the SROs could represent a corresponding benefit to SRO members and subscribers of SIP data. Similarly, if a Proposed Fee Change decreased an NMS plan fee, the delay caused by the comment and Commission approval process from the proposed amendments could impose a cost on SRO members and subscribers of SIP data and provide a benefit to SROs.[108]

The proposed rescission of the Fee Exception is a procedural amendment and impacts the timing of effectiveness of Proposed Fee Changes; it does not affect the supporting information that must be included in all proposed NMS plan amendments.[109] Therefore, the Commission preliminarily believes that the proposed amendments will not impose implementation costs on the administration of NMS plans or on market participants.

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

#### 1. Efficiency

For the reasons discussed above,[110] the Commission preliminarily believes that the proposed amendments will not have significant effects. Nonetheless, the Commission preliminarily believes that the proposed amendments could affect efficiency in a number of ways.

First, the Commission preliminarily believes that the proposed amendments could improve the efficiency with which SRO members and subscribers to SIP data adjust to fee changes to NMS plans. Specifically, the notice of Proposed Fee Changes to NMS plans before they are approved by the Commission and become effective might give market participants more

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108 See supra note 104.

109 See supra Section I.

110 See supra Section V.C.

time to plan and prepare before they are subject to a new or altered NMS plan fee. For example, under the proposed amendments, in circumstances where market participants previously would not have received adequate notice,[111] market participants such as market data vendors would now have more time to make adjustments and notify their clients before they are subject to a change in fees.

Second, the Commission preliminarily believes that the proposed amendments could improve efficiency for Proposed Fee Changes to NMS plans that would otherwise have been abrogated.[112] As discussed above, the median time it takes the Commission to abrogate a fee filing is 57 days, during which time the filings are effective. Under the proposed amendments, the Commission would not need to abrogate the fee filings; absent approval by the Commission, such fee changes would never take effect. To the extent that a fee filing would later be disapproved by the Commission, the proposed change would make the filing process more efficient than the current process.

On the other hand, the proposed amendments could also have a negative impact on efficiency because they could delay when NMS plans could begin charging new fees. As discussed above,[113] 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 proposed amendments could reduce efficiency because any Proposed Fee Changes

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111 See supra note 70 and accompanying text.

112 The proposed amendments may also improve the efficiency of implementing some Proposed Fee Changes that would otherwise have been withdrawn and later refiled. These fee changes are refiled on an immediately effective basis. The median time it takes an NMS plan to refile these fee changes is 174 days. If these amendments are ultimately approved more quickly under the proposed amendments, it could increase the efficiency of their implementation. See supra Section V.B.1.

113 See supra Section V.D.

would take longer to become effective under the standard procedure than under the effective-upon-filing procedure.

### 2. Competition

The Commission preliminarily believes that the proposed amendments will 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.

The Commission preliminarily believes that the proposed amendments will not have a significant impact on competition in the market for core and aggregated market data products because, for the reasons discussed above, the Commission preliminarily believes the proposed amendments will not have a significant effect on the fees charged for core data.[114] Although the proposed amendments are not likely to have a significant effect on the market power of the SIPs, the Commission preliminarily believes the proposed amendments could have minor effects on the SIPs' ability to compete. On the margin, the SIPs' competitive positions could be negatively affected by the proposed amendments because the amendments would allow the SIPs' competitors, such as third party data aggregators and SRO top-of-book feeds, to be able to adjust their fees and prices more quickly than the SIPs. Under the proposed amendments, the SIPs would face a delay in adjusting their prices, because they could not make any fee changes until they had been noticed for public comment and approved by the Commission. Other market data products would not face this delay because fee changes to products offered directly by the SROs would still be effective upon filing with the Commission and vendors that aggregate market data are not required to file with the Commission to change their prices. This means that if these data products were subject to a cost shock, vendors and data products offered by the SROs would be

114 See supra Section V.C.

able to adjust their prices more quickly in response to the cost shock, while the SIPs would face a delay. However, for the reasons discussed above, the Commission preliminarily believes that these competitive effects will not be significant.

The Commission preliminarily believes that the proposed amendments will not have a significant impact on competition in the market for trading services in NMS securities. First, for the reasons discussed above, the Commission preliminarily believes the proposed amendments will not have a significant impact on revenues SROs receive or the costs broker-dealer internalizers and ATSs pay for core data.[115] Second, the Commission preliminarily believes that the proposed amendments 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 filings.[116]

### 3. Capital Formation

The Commission preliminarily believes that the proposed amendments will not have a significant impact on capital formation because, for the reasons discussed above, the proposed amendments will not have a significant impact on NMS plan fees or on the average costs to the subscribers of SIP market data.[117] Since the proposed amendments are unlikely to have a significant effect on the cost of core data, they are also unlikely to significantly affect the fees that investors pay or investor participation in the market. Therefore, the Commission preliminarily believes the proposed amendments are unlikely to have a significant impact on capital formation.

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115 See supra Section V.C and Section V.D.

116 See supra Section II.A.2.

117 See supra Section V.C.

### F. Alternative

The Commission considered an alternative where the Commission would amend Rule 608(b)(3)(i) of Regulation NMS to provide that NMS plan fee filings would not become effective immediately upon filing, but would instead become effective automatically without the Commission having to approve the fee filing at the end of the 60 day period, during which the Commission could potentially abrogate the fee filing. If the Commission did abrogate the fee filing, then the 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 Proposed Fee Changes to NMS plans before they go into effect. Therefore, similar to the proposed amendments, market participants would benefit from being able to comment on Proposed Fee Changes before they could become effective. SRO members and subscribers to SIP data should have more time to plan and prepare before they are subject to a new or altered NMS plan fees.

Compared to the proposed amendments, the time until a Proposed Fee Filing becomes effective could be shorter.[118] Therefore, the costs to the SROs from the delay in implementing NMS plan fee changes could be lower than under the proposed amendments.[119]

However, under this alternative, the Commission could not extend the 60 day abrogation period.[120] This would provide market participants with more certainty about when the Proposed

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118 Under this alternative, Proposed Fee Filings would become effective 60 days after filing unless the Commission decided to abrogate the fee filing. Under the proposed amendments, the Commission preliminarily estimates that the median time it would take for Proposed Fee Filings to be approved by the Commission and become effective would be 70.5 days from the time of filing. See supra note 106.

119 See supra Section V.D.

120 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

Fee Changes would become effective because the Commission could not extend its review period. However, if a Proposed Fee Filing is complicated, the Commission may be unable to complete its review during the 60 day abrogation period. If the filing were abrogated by the Commission, it could be subject to the delays of refiling under the standard procedure, which could cause these fee filings to take longer to be approved from the date of initial filing than under the proposed amendments.[121]

### G. Request for Comment on the Economic Analysis

The Commission is sensitive to the potential economic effects, including the costs and benefits, of the proposed amendments to Rule 608 of Regulation NMS. The Commission has identified above certain costs and benefits associated with the proposal and requests comment on all aspects of its preliminary economic analysis. The Commission encourages commenters to identify, discuss, analyze, and supply relevant data, information, or statistics regarding any such costs or benefits. In particular, the Commission seeks comment on the following:

11. Do you believe the Commission's analysis of the potential effects of the proposed amendments to Rule 608 of Regulation NMS is reasonable? Why or why not? Please explain in detail.
12. What is the state of competition in the market for core and aggregated market data products? Is the state of competition similar in the equities and options markets? Why or why not? Please explain in detail.

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comments. The filing would not become effectively automatically until the expiration of this longer time period. This alternative would have similar benefits and costs to the proposed amendments.

121 See supra Section II.B.

13. The Commission requests that commenters provide relevant data and analysis to assist us in determining the economic consequences of the proposed amendments. In particular, the Commission requests data and analysis regarding the costs SROs and SRO members and subscribers of SIP data may incur from the proposed amendments delaying the implementation of Proposed NMS Fee Changes.
14. Do you agree with the Commission's assessment that the proposed amendments will not have significant effects on efficiency, benefits, or competition? Why or why not? Please explain in detail.
15. Do you agree with the Commission's analysis of the benefits of the proposed amendments? Why or why not? Please explain in detail.
16. Do you agree with the Commission's analysis of the costs of the proposed amendments? Why or why not? Please explain in detail.
17. Do you agree with the Commission's assessment that the proposed amendments will have a minimal effect on the SIPs' pricing models? Why or why not? Please explain in detail.
18. Do you agree with the Commission's analysis of the effects the proposed amendments will have on efficiency, competition, and capital formation? Why or why not? Please explain in detail.
19. Do you believe the proposed amendments will have effects on efficiency, competition, and/or capital formation that the Commission has not recognized? Please explain in detail.
20. Should the Commission adopt an alternative approach in which the Commission does not need to approve NMS plan fee filings but instead delays them from becoming

effective until after the 60 day period in which the Commission can abrogate the fee filing? Why or why not? What are the benefits and costs of such an approach? Please explain in detail.

21. Are there other reasonable alternatives for the proposed amendments to Rule 608 of Regulation NMS? If so, please provide additional alternatives and how their costs and benefits, as well as their potential impacts on the promotion of efficiency, competition, and capital formation, would compare to the proposed amendments.

22. Commenters should provide analysis and empirical data to support their views on the benefits and costs of the proposed amendments to Rule 608 of Regulation NMS.

## VI. Consideration of Impact on the Economy

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),[122] the Commission requests comment on the potential effect of this proposal on the United States economy on an annual basis. The Commission also requests comment on any potential increases in costs or prices for consumers or individual industries, and any potential effect on competition, investment, or innovation. Commenters are requested to provide empirical data and other factual support for their views to the extent possible.

## VII. Regulatory Flexibility Certification

The Regulatory Flexibility Act ("RFA")[123] requires Federal agencies, in promulgating rules, to consider the impact of those rules on small entities. Section 603(a)[124] of the

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122 Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C. and as a note to 5 U.S.C. 601).

123 5 U.S.C. 601 et seq.

124 5 U.S.C. 603(a).

Administrative Procedure Act,[125] as amended by the RFA, generally requires the Commission to undertake a regulatory flexibility analysis of all proposed rules, or proposed rule amendments, to determine the impact of such rulemaking on "small entities."[126] 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.[127]

The proposed rule 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.[128] None of the exchanges registered under Section 6 that would be subject to the proposed amendments are "small entities" for purposes of the Regulatory Flexibility Act.[129] There is only one national securities

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125 5 U.S.C. 551 et seq.

126 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 proposed rulemaking, are set forth in Rule 0-10, 17 CFR 240.0-10.

127 See 5 U.S.C. 605(b).

128 See supra Section II.A.3.

129 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 proposed amendment 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).

association, and the Commission has previously stated that it is not a small entity as defined by 13 CFR 121.201.[130]

For the above reasons, the Commission certifies that the proposed amendment to Rule 608, if adopted, would not have a significant economic impact on a substantial number of small entities for purposes of the Regulatory Flexibility Act.

The Commission invites commenters to address whether the proposed rules would have a significant economic impact on a substantial number of small entities, and, if so, what would be the nature of any impact on small entities. The Commission requests that commenters provide empirical data to support the extent of such impact.

## VIII. Statutory Authority and Text of the Proposed Rule Amendments

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, 78*l*, 78j, 78k-1, 78*o*, 78*o*-3 and 78w(a), the Commission proposes to amend Section 242.608 of chapter II of title 17 of the Code of Federal Regulations in the manner set forth below.

**List of Subjects in 17 CFR Part 242**

Brokers, Reporting and recordkeeping requirements, Securities.

For the reasons stated in the preamble, the Commission is proposing to amend title 17, chapter II of the Code of Federal Regulations as follows:

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

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

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130 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.").

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

**§ 242.608 [Amended]**

2. Amend § 242.608 by removing and reserving paragraph (b)(3)(i).

By the Commission.

Dated: October 1, 2019

Vanessa A. Countryman,

Secretary