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December 10, 2019

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0609

Re: Proposed Rescission of Effective-Upon-Filing Procedure for NMS Plan Fee Amendments, Securities Exchange Act Release No. 87193 (October 1, 2019), File Number S7-15-19¹

Dear Ms. Countryman:

The Nasdaq Stock Market LLC (“Nasdaq” or the “Exchange”) appreciates the opportunity to comment on the above-captioned rule change, a proposal by the Commission to amend Rule 608 of Regulation NMS² by rescinding paragraph (b)(3)(i), which allows proposed amendments to national market system plans (“NMS Plans”) that establish or change a fee or other charge to become effective upon filing (the “Proposal”).

Nasdaq respectfully suggests that the Commission’s process for reviewing NMS Plan amendments has a number of deficiencies not addressed in the Proposal. Specifically, Rule 608 has no definitive timetable for the review and approval of amendments, which has resulted in unwarranted delays in the consideration of a number of amendments. As such, Nasdaq concurs with the recommendation of the Operating Committees of the CTA Plan, CQ Plan, and UTP Plan (collectively, the “UTP/CTA Plans”) that the Commission adopt the same deadlines for the review of NMS Plan amendments as currently specified in Section 19(b) of the Exchange Act for proposed rule changes of self-regulatory organizations (“SROs”).³

¹ Securities Exchange Act Release No. 87193 (October 1, 2019), 84 FR 54794 (October 11, 2019).

² 17 C.F.R. § 242.608

³ See Comment Letter from Howard Kramer to Vanessa Countryman (Rescission of Effective-Upon-Filing procedure for NMS Plan Amendments) (December 9, 2019) (“UTP/CTA Comment Letter”). All of the arguments set forth in the UTP/CTA Comment Letter are incorporated herein by reference.

The Exchange further recommends that the Commission correct paragraph 608(b)(2)⁴ to clearly state that any substantive modification of a proposed NMS Plan amendment by the Commission may only be accomplished through “notice and comment” rulemaking in accordance with the Administrative Procedures Act.

The Exchange does not object to the Proposal as such, provided that the other changes recommended above are implemented, but notes that the alternative set forth by the Commission is equally acceptable.

Proposed Review Process for NMS Plans

The UTP/CTA Plans have recommended that the Commission incorporate the deadlines governing Commission action for proposed SRO rule changes under Exchange Act Section 19(b)⁵ and Rule 19b-4(1)⁶ into Rule 608(b)(1) and (2), and also add standards governing the rejection of an NMS Plan amendment similar to the standards imposed by Section 19(b)(10).⁷ Such changes are necessary because slow action—in one instance, a complete failure to act—has led to uncertainty and inefficiency in NMS Plan operations, and hampered the ability of participants to manage the plans.

As described in the UTP/CTA Comment Letter, two recent UTP Plan amendments have been subject to groundless delay. On July 5, 2019, the UTP Plan filed Amendment 44, an uncontroversial amendment to increase transparency by identifying possible conflicts of interest that was unanimously approved by the Participants and supported by the Advisory Committee. The Commission has failed to publish it for notice and comment for 158 days. On September 10, 2019, the UTP Plan filed Amendment 45, an uncontroversial amendment designed to resolve an inconsistency in Plan language regarding the UTP Plan processor’s ability to disseminate last sale reports during a regulatory halt. This amendment has not been published for notice and comment after 91 days.

These two recent incidents are not isolated. On April 27, 2010, the UTP Plan filed Amendment 21, which consisted of a number of changes and updates to the UTP Plan. This amendment was never been acted upon by the Commission, and is still accessible on the UTP Plan website, but classified as “not approved.”

The inherent uncertainty generated by long delays in approval for plan amendments inhibits the efficient operations of the NMS Plans by delaying both the implementation of necessary amendments, as well as the reformulation of amendments, where adjustments to plan amendments are needed. Long-term delays in approval such as that associated with Amendment 21 are particularly problematic in that they have the potential of generating ambiguity in the text

⁴ 17 C.F.R. § 242.608(b)(2)

⁵ 15 U.S.C. § 78s(b)(2).

⁶ 17 C.F.R. § 240.19b-4.

⁷ 15 U.S.C. § 78s(b)(10).

of the plan, uncertainty in plan administration, and possible confusion among purchasers of plan information.

The Commission tangentially addressed delays in its consideration of plan amendments when it analyzed the amount of time the Commission would likely take to approve or disapprove a proposed NMS Plan amendment, concluding that the median approval time of 70.5 days experienced over the past few years would likely continue.⁸

The Exchange believes that the use of “median” approval time in the Commission’s analysis is misleading because the median, defined as the middle value of a distribution with an odd number of observations, is less affected by large outliers than the average of these approval times, and it is precisely these outliers that the Commission needs to address. Indeed, the Commission itself recognized that the sample includes “extreme outliers,”⁹ yet did not acknowledge that the existence of such “extreme outliers” is itself a problem.

As noted in the UTP/CTA Plan comment letter, the current deadlines for the consideration of SRO changes were imposed on the Commission by Congress to “encourage the SEC to employ a more transparent and rapid process for consideration of rule changes,”¹⁰ at least in part because the prior lack of deadlines “delay[ed] transparency and public input.”¹¹ The Exchange believes that the same reasoning applies to NMS Plan Amendments, and the same deadlines should therefore apply.

For all of these reasons, and the reasons set forth in the UTP/CTA Comment Letter, the Exchange recommends that the Commission adopt the timetable currently used for the review of SRO filings for all NMS Plan Amendments to lay the groundwork for more effective and efficient plan operations.

Modification of Plan Amendments by the Commission

The Exchange recommends that the Commission remove language from Rule 608 implying that a proposed amendment to an NMS Plan may be modified without notice and comment rulemaking. Rule 608(b)(2) currently states that the Commission may approve a proposed amendment “with such changes or subject to such conditions as the Commission may

⁸ See 84 FR 54794, 54799.

⁹ *Id.* at 54801 at n.71.

¹⁰ See S. Rep. No. 111-176, at 106 (2010); see also Pub. L. No. 111-203, 124 Stat. 1833 (July 21, 2010) (“Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010”).

¹¹ See S. Rep. No. 111-176, at 106 (2010).

deem necessary or appropriate. . . .”¹² For amendments initiated by the Commission, Rule 608(b)(2) states that promulgation “shall be by rule.”¹³

The implication that the Commission may approve a proposed amendment with “changes” or subject to certain “conditions” without notice and comment rulemaking is misleading because such an action would contravene the Administrative Procedures Act (“APA”). The APA establishes procedures to be used by federal administrative agencies for “rule making,” defined as the “agency process for formulating, amending, or repealing a rule.”¹⁴ A “rule” is broadly defined as an “agency statement of general or particular applicability and future effect” that is designed to “implement, interpret, or prescribe law or policy.”¹⁵

Any substantive change by the Commission to an NMS Plan amendment—with the exception of a purely ministerial modification—would fall under the broad definition of rule making under the statute. As such, the Commission would be required to engage in the three steps of “notice-and-comment rulemaking”:¹⁶ (i) issue a “[g]eneral notice of proposed rule making,” ordinarily by publication in the Federal Register;¹⁷ (ii) provide “interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments”;¹⁸ and (iii) include “a concise statement” of the rule’s “basis and purpose” in the final rule.¹⁹ The statement in Rule 608(b)(2) that the Commission may approve an NMS Plan amendment “with such changes or subject to such conditions as the Commission may deem necessary or appropriate” conflicts with the plain language of the APA, and must therefore be removed.

Proposed Alternative

The Exchange does not object to the specific Proposal as such, provided that the other changes recommended above are implemented, but notes that the alternative proposal described by the Commission is equally acceptable. The alternative would allow fee filings to become effective automatically “at the end of the 60 day period, during which the Commission could

¹² 17 C.F.R. § 242.608(b)(2).

¹³ 17 C.F.R. § 242.608(b)(2).

¹⁴ 5 U.S.C. § 551(5).

¹⁵ 5 U.S.C. § 551(4).

¹⁶ 5 U.S.C. § 553(b).

¹⁷ 5 U.S.C. § 553(b).

¹⁸ 5 U.S.C. § 553(c).

¹⁹ 5 U.S.C. § 553(c).

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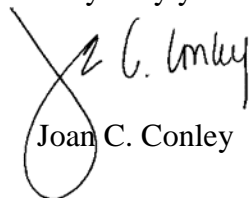
potentially abrogate the fee filing.”²⁰ This would provide time for public comment before the fee becomes effective, and would also provide for quick implementation in the absence of negative public comments. As such, the alternative achieves substantially the same goals as the proposal, and the Exchange views this alternative as a viable option.

* * *

The Exchange appreciates this opportunity to comment. For the reasons set forth above, the Commission’s review process for NMS Plan amendments is in need of reform, and implementation of the suggestions contained herein will improve the efficiency and effectiveness of the review process.

Please do not hesitate to contact me with any questions.

Very truly yours,



Joan C. Conley

cc: Honorable Jay Clayton, Chairman
Honorable Robert J. Jackson, Jr.
Honorable Hester M. Peirce
Honorable Elad L. Roisman
Honorable Allison Herren Lee
Brett Redfearn, Director, SEC Division of Trading and Markets

²⁰ See 84 FR 54794, 54804.