

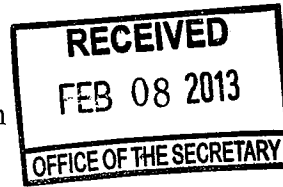


Financial Industry Regulatory Authority

February 7, 2013

**Robert L.D. Colby**  
Executive Vice President  
and Chief Legal Officer

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



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

Dear Ms. Murphy:

FINRA and the seventeen registered national securities exchanges (collectively, the “SROs”) respectfully request that the Securities and Exchange Commission (“Commission” or “SEC”) grant a temporary exemption, pursuant to its authority under Section 36 of the Securities Exchange Act of 1934 (“Act”), from the application of Rule 613(a)(1) of Regulation NMS with respect to the joint filing by the SROs of a national market system plan (“Plan”) to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository.<sup>1</sup> The SROs request that the Commission provide a temporary exemption from the deadline specified in Rule 613(a)(1) of the Exchange Act for submitting the NMS Plan to the Commission until December 6, 2013.

Background and Discussion

Rule 613(a)(1) of Regulation NMS requires that the SROs “jointly file on or before 270 days from the date of publication of the Adopting Release in the *Federal Register* a national market system plan to govern the creation, implementation, and maintenance of a consolidated audit trail and central repository as required by [the rule].”<sup>2</sup> The Adopting Release for Rule 613 was published in the *Federal Register* on August 1, 2012,<sup>3</sup> thus requiring the Plan to be filed on or before April 28, 2013.<sup>4</sup>

As adopted, Rule 613 “expand[ed] the set of solutions that could be considered by the SROs for creating, implementing, and maintaining a consolidated audit trail and

<sup>1</sup> 17 CFR 242.613(a).

<sup>2</sup> *Id.*

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

<sup>4</sup> Because April 28, 2013, is a Sunday, the Plan must be filed on or before April 26, 2013.

[provided] the SROs with increased flexibility in how they choose to meet the requirements of the adopted Rule.”<sup>5</sup> As the Commission noted in the Adopting Release, because of this expanded solution set, “the adopted Rule now requires the SROs to provide much more information and analysis to the Commission as part of their NMS plan submission.”<sup>6</sup> Specifically, these requirements were incorporated into Rule 613 as a series of twelve “considerations” that the SROs must address in the Plan, including:

- the specific details and features of the Plan;
- the SROs’ analysis of the Plan’s costs and impact on competition, efficiency, and capital formation;
- the SROs’ process in developing the Plan;
- information about the implementation of the Plan; and
- milestones for the creation of the consolidated audit trail.

As part of the discussion of these “considerations,” the SROs must include “cost estimates for the proposed solution, and a discussion of the costs and benefits of alternative solutions considered but not proposed.”<sup>7</sup> In addition, the Commission noted that

the adopted Rule requires that the SROs: (1) Provide an estimate of the costs associated with creating, implementing, and maintaining the consolidated audit trail under the terms of the NMS plan submitted to the Commission for its consideration; (2) discuss the costs, benefits, and rationale for the choices made in developing the NMS plan submitted; and (3) provide their own analysis of the submitted NMS plan’s potential impact on competition, efficiency, and capital formation.<sup>8</sup>

The Commission stated that these detailed requirements are “intended to ensure that the Commission and the public have sufficiently detailed information to carefully

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<sup>5</sup> Adopting Release at 45725.

<sup>6</sup> *Id.* See also Adopting Release at 45789.

<sup>7</sup> Adopting Release at 45789.

<sup>8</sup> Adopting Release at 45726.

consider all aspects of the NMS plan ultimately submitted by the SROs.”<sup>9</sup> Indeed, the Commission expressed its expectation that “the SROs will seriously consider various options as they develop the NMS plan to be submitted to the Commission for its consideration.”<sup>10</sup> As part of the SROs’ consideration, Rule 613 also requires that the Plan include a discussion of “[t]he process by which the [SROs] solicited views of their members and other appropriate parties regarding the creation, implementation, and maintenance of the consolidated audit trail, a summary of the views of such members and other parties, and how the [SROs] took such views into account in preparing the [Plan].”<sup>11</sup>

As the Commission made clear throughout the Adopting Release, and in Rule 613 itself, the Plan must include multiple, detailed analyses by the SROs—informed by the views of their members—to allow the Commission and the public to assess the proposed Plan. As described below, there are two primary reasons why the SROs do not believe the 270-day time period in Rule 613(a)(1) provides sufficient time for the SROs to develop and submit a Plan with the amount of detail and consultation that the Commission desires. First, the SROs do not believe there is sufficient time for an effective request for proposal (“RFP”) process that would provide adequate opportunity for detailed responses and careful evaluation. Second, the SROs do not believe 270 days provides sufficient time for effective consultation with and input from the industry and the public on the results of the RFP and the plan itself. This consultation process is essential if the SROs are to perform a meaningful cost/benefit analysis prior to submission of the Plan.

#### RFP Process

The SROs believe an RFP is necessary to consider and ultimately select the consolidated audit trail Plan Processor, prior to the SROs filing the Plan. An RFP will ensure that potential alternative solutions to creating the consolidated audit trail can be presented and considered by the SROs and a detailed and meaningful cost/benefit analysis can be performed, both of which are required considerations to be addressed in the Plan.<sup>12</sup> Further, to ensure the RFP process is effective, the SROs believe that the concepts the SROs are considering for the RFP should be subject to public comment before being finalized and published formally. To that end, the SROs

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<sup>9</sup> Adopting Release at 45725.

<sup>10</sup> Adopting Release at 45789.

<sup>11</sup> 17 CFR 242.613(a)(1)(xi).

<sup>12</sup> The SROs have engaged Deloitte & Touche LLP (“Deloitte”) to provide independent, outside consultation on the process of developing the Plan. The following discussion and timeline reflect the input of Deloitte and its expertise and experience with the RFP process.

published an RFP concept document on December 5, 2012, to provide the industry and any interested parties (including potential bidders) with an opportunity to comment on the various issues being considered by the SROs for inclusion in the RFP. The SROs requested any feedback be provided by January 18, 2013. Allowing time for public input before publication of the final RFP should ensure that the RFP adequately addresses areas of concern of both the SROs and the industry. In addition, providing the public with a draft of the RFP concepts in advance of formally soliciting bids will provide potential bidders with information on the RFP and an opportunity to provide input prior to its publication. The SROs do not believe the proposed timeframe in Rule 613(a)(1) provides sufficient time to develop the RFP, formulate and submit bids, and for the SROs to review and evaluate the bids.

#### Consultation with the Public

In addition to consultation on the RFP itself, the SROs believe that public comment on the proposed solution and portions of the Plan is necessary once an approach to the consolidated audit trail has been selected to elicit public insights and to ensure that an effective cost/benefit analysis can be performed. Although the SROs may be in a position to provide informed estimates on the costs associated with building the proposed solution as a result of the RFP process, the SROs would not be in a position to effectively assess the potential costs to broker-dealers and other market participants of the proposed solution without subsequent public comment. Significant aspects of this consultation can only take place following the RFP process, which will enable the SROs to present their proposed solution to the industry and solicit focused and targeted comment and input. Because of the anticipated complexity of the Plan and the level of analysis the SROs must perform before submission to the SEC, the SROs believe a 60-day public comment period would be necessary. The SROs would then need adequate time following the comment period to meaningfully assess and respond to the comments and draft the final Plan and rule filing for submission to the SEC.

#### Proposed Timeline

Based on the conclusions described above, the SROs believe the following estimated timeline, which is based on the SROs' current expectations regarding the RFP process and issues, provides an appropriate balance between ensuring that potential alternatives, costs and benefits are carefully considered and implementing the consolidated audit trail in a timely manner:

- December 5, 2012: The SROs published an RFP concept document for comment
- January 18, 2013: Deadline to submit comments on the RFP concept document (i.e., a 45-day comment period)
- February 2013: The SROs publish the final RFP

- March 2013: The SROs solicit public comments on certain portions of the proposed Plan that are not dependent on the RFP process and can benefit from public comment
- April 2013: Deadline for submitting bids in response to the RFP
- July 2013: The SROs select a proposed solution after reviewing and evaluating the RFP bids
- August 2013: The SROs solicit public comment on other specific portions of the proposed Plan that the SROs believe can benefit from public comment and that incorporate the RFP process and the proposed solution, including soliciting estimates on industry costs
- October 2013: Comments must be submitted on the proposed solution (i.e., a 60-day comment period)
- December 6, 2013: The SROs file the proposed Plan with the Commission

#### Request for Temporary Exemption

Section 36 of the Act grants the Commission the authority, with certain limitations, to “conditionally or unconditionally exempt any person, security, or transaction . . . from any provision or provisions of [the Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”<sup>13</sup>

Currently, the SROs believe that a temporary exemption from the deadline for filing the NMS Plan contained in Rule 613(a)(1) until December 6, 2013, is necessary and appropriate in the public interest and is consistent with the protection of investors. As described above, the temporary exemption is necessary to allow the SROs to conduct the thoughtful and comprehensive analysis this important regulatory initiative deserves. The consolidated audit trail will fundamentally alter the way market surveillance is conducted and, as the Commission observed, “should substantially enhance the ability of the SROs and the Commission to oversee today’s securities markets and fulfill their responsibilities under the federal securities laws.”<sup>14</sup> The SROs believe that the timeline outlined above will lead to a significantly better and more informed process and, as a result, the proposed solution will be the result of a more meaningful and careful analysis.

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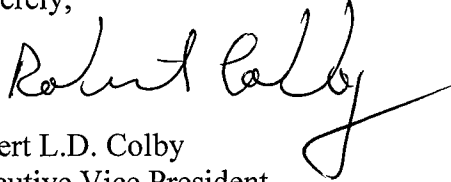
<sup>13</sup> 15 U.S.C. § 78mm(a)(1).

<sup>14</sup> Adopting Release at 45726.

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The SROs therefore respectfully request that, pursuant to Section 36 of the Act, the Commission grant the SROs a temporary exemption from the deadline contained in Rule 613(a)(1) for filing the Plan until December 6, 2013. The SROs will continue to provide the Commission with regular updates, including any potential changes in the above timeline as the RFP process unfolds or other issues arise. If there are any questions concerning this request, please contact me at (202) 728-8484 or any other SRO representative.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert Colby". The signature is fluid and cursive, with a long, sweeping underline that extends to the right.

Robert L.D. Colby  
Executive Vice President  
and Chief Legal Officer