

MEMO# 32697

August 21, 2020

SEC Rescinds Effective-Upon-Filing Procedure for NMS Plan Fee Amendments and Modifies NMS Plan Procedures

[32697]

August 21, 2020 TO: ICI Members SUBJECTS: Trading and Markets RE: SEC Rescinds Effective-Upon-Filing Procedure for NMS Plan Fee Amendments and Modifies NMS Plan Procedures

We are pleased to report that the SEC has adopted a final rule to rescind the “Effective-Upon-Filing” provision under Rule 608(b)(3)(i) of Regulation NMS for NMS plan fee amendments. NMS plan fee amendment filings, including those relating to SIP data, will instead be subject to public comment and SEC approval prior to becoming effective.[\[1\]](#) The SEC determined that allowing fees to become effective without prior public comment is no longer appropriate, given how the NMS has evolved and the broad impact of NMS plan fees on market participants. Last December, ICI filed a comment letter expressing strong support for the rescission, among other NMS reforms.[\[2\]](#)

The final rule includes modified procedures for proposed NMS plans and NMS plan amendments, described further below, and will be effective 30 days from publication in the *Federal Register*.

Modified Procedures for Proposed NMS Plans and NMS Plan Amendments

In addition to rescinding the Effective-Upon-Filing provision, the SEC adopted new processes and timeframes for handling proposed NMS plans and NMS plan amendments.[\[3\]](#) This new framework is intended to promote transparency, efficiency, and certainty in the SEC’s review process. The SEC based this new framework on the SRO rule filing process under Section 19(b) of the Exchange Act, with some key timing differences. A summary and comparison between relevant aspects of the frameworks are provided below.

Proposed NMS Plans/NMS Plan Amendments:

Prior Rule 608(b)

Proposed NMS Plans/NMS Plan Amendments: Amended Rule 608(b)[\[4\]](#)

Exchange Act Section 19(b) SRO Rule Filings

Trigger for Review Period

Date of publication of notice in Federal Register (“notice publication date”)

Date of publication of notice in *Federal Register* (“notice publication date”)

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Start Date of Review Period

No specified start time

Proposed NMS Plan: Last day of a 90-day period (starting from the business day on which the plan was filed with the SEC), unless the SEC sends notice to the Federal Register prior to that date[\[5\]](#)

Proposed NMS Plan Amendments: Business day on which the plan participants published notice on a plan website,[\[6\]](#) unless the SEC sends notice to the Federal Register within 15 days of plan participants’ publication[\[7\]](#)

Date on which the SRO published notice on a publicly accessible website,[\[8\]](#) unless the SEC sends notice to the Federal Register within 15 days of SRO’s publication[\[9\]](#)

SEC Issuance of Approval or Disapproval

SEC has 120 days from notice publication date to approve a proposed NMS plan or NMS plan amendment, with possible 60-day extension[\[10\]](#)

SEC must approve or disapprove the proposed NMS plan or NMS plan amendment, or institute proceedings to determine whether to disapprove, within 90 days of notice publication date or longer (if plan participants consent)[\[11\]](#)

SEC must approve or disapprove the proposed SRO rule filing, or institute proceedings to determine whether to disapprove, within 45 days of notice publication date, with possible 45-day extension[\[12\]](#)

Proceedings[\[13\]](#)

Not enabled

Proceedings must be concluded within 180 days of notice publication date but may be extended for up to 60 additional days.[\[14\]](#) Proceedings may then be extended another 60 days (to 300 total days)[\[15\]](#)

Proceedings must be concluded within 180 days of notice publication date but may be extended for up to 60 additional days (to 240 total days)[\[16\]](#)

Additional Public Comment

Not enabled

Permitted during proceedings

Permitted during proceedings

Absence of SEC Action

Not addressed

Proposed NMS plan or NMS plan amendment is not “deemed approved.” SEC states that it expects to act within prescribed timeframes above^[17]

SRO rule filing is “deemed approved”^[18]

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endnotes

^[1] This process is set forth under amended Rule 608(b)(1) and (2), as described below. Proposed NMS plan amendments that are solely administrative, technical or ministerial remain effective upon filing pursuant to Rule 608(b)(3)(ii) and (iii).

^[2] See ICI Memorandum No. 32091 (Dec. 10, 2019), *available at* https://www.ici.org/my_ici/memorandum/memo32091.

^[3] The SEC also amended Rule 608(a)(1) to require that proposed NMS plans or NMS plan amendments be filed with the SEC via email instead of paper filing with the Office of the Secretary.

^[4] In conjunction with these amendments to Rule 608, the SEC also amended the delegations of authority to the Director of the Division of Trading and Markets under Rule 30-3. The additional delegations allow the Director to perform certain procedural steps leading up to, but not including (i) extending a proceeding for a second additional 60-day period (up to 300 total days), as described further below; and (ii) approving or disapproving a proposed NMS plan or NMS plan amendment.

^[5] Amended Rule 608(b)(1)(i).

^[6] Amended Rule 608(a)(ii) continues to require NMS plan participants to post proposed NMS plan amendments on their website within two business days of filing to the SEC.

^[7] Amended Rule 608(b)(1)(ii). If the SEC fails to send the notice for publication within the 15-day period, then the date of publication is deemed as the date on which the NMS plan amendment was published on the plan website.

^[8] Rule 19b-4(l) currently requires an SRO to post a proposed rule filing on its website

within two business days of filing to the SEC.

[9] If the SEC fails to send the notice for publication within the 15-day period, then the date of publication is deemed as the date on which the SRO's filing was published on its website. Exchange Act Section 19(b)(2)(E).

[10] Rule 608(b)(2) previously did not require the SEC to issue an order of disapproval.

[11] Amended Rule 608(b)(2).

[12] Exchange Act Section 19(b)(2)(A).

[13] The SEC also adopted amendments to the Commission Rules of Practice 700 and 701, which set forth procedures for conducting proceedings related to SRO rule filings. The amendments apply the procedures to proceedings for proposed NMS plans and NMS plan amendments.

[14] Amended Rule 608(b)(2)(i).

[15] Amended Rule 608(b)(2)(ii).

[16] Exchange Act Section 19(b)(2)(B).

[17] The SEC determined that adopting a "deemed approved" provision is not appropriate for a proposed NMS plan or NMS plan amendment, given that the difference in impact and scope to SRO rule filings.

[18] The SRO rule filing is "deemed approved" if the SEC does not act by (i) approving, disapproving, or initiating proceedings on the filing; or (ii) approving or disapproving the filing after a proceeding. Exchange Act Section 19(b)(2)(D).