



Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove an Amendment to the National Market System Plan Governing the Consolidated Audit Trail

Dated: December 22, 2022.

I. Introduction

On September 8, 2022, the Operating Committee for Consolidated Audit Trail, LLC (“CAT LLC”), on behalf of the following parties to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan”):¹ BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the “Participants” or “SROs”) filed with the Securities and Exchange Commission (“Commission”) pursuant to

¹ The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Securities Exchange Act of 1934 (“Exchange Act”) and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016). The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company (“CAT LLC”) formed under Delaware state law through which the Participants conduct the activities of the consolidated audit trail. On August 29, 2019, the Participants replaced the CAT NMS Plan in its entirety with the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC. The latest version of the CAT NMS Plan is available at <https://catnmsplan.com/about-cat/cat-nms-plan>.

Section 11A(a)(3) of the Exchange Act,² and Rule 608 thereunder,³ a proposed amendment (“Proposed Amendment”) to the CAT NMS Plan that would authorize CAT LLC to revise the Consolidated Audit Trail Reporter Agreement (“Reporter Agreement”) and the Consolidated Audit Trail Reporter Agent Agreement (collectively with the Reporter Agreement, the “Reporter Agreements”) by: (1) removing the arbitration provision from each agreement and replacing it with a forum selection provision (the “Forum Selection Provision”) which would require that any dispute regarding CAT reporting be filed in a United States District Court for the Southern District of New York (the “SDNY”), or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court within the First Judicial Department; and (2) revising the existing choice of law clause to provide that any dispute will be governed by federal law (in addition to New York law).⁴ The proposed plan amendment was published for comment in the Federal Register on September 28, 2022.⁵

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,⁶ to determine whether to disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate.

II. Background

On July 11, 2012, the Commission adopted Rule 613 of Regulation NMS, which required the SROs to submit a national market system (“NMS”) plan to create, implement and maintain a consolidated audit trail (the “CAT” or “CAT System”) that would capture customer and order

² 15 U.S.C 78k-1(a)(3).

³ 17 CFR 242.608.

⁴ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, Commission (Sept. 8, 2022).

⁵ See Securities Exchange Act Release No. 95874 (Sept. 22, 2022), 87 FR 58876 (Sept. 28, 2022) (“Notice”). The Commission received no comments on the Proposed Amendment.

⁶ 17 CFR 242.608(b)(2)(i).

event information for orders in NMS securities.⁷ On November 15, 2016, the Commission approved the CAT NMS Plan.⁸ On August 29, 2019, the Operating Committee for CAT LLC approved Reporter Agreements that would limit the total liability of CAT LLC, the Participants and the Plan Processor⁹ to a CAT Reporter¹⁰ for any calendar year to the lesser of the total of fees paid by the CAT Reporter to CAT LLC for the calendar year in which the claim arose or five hundred dollars. The Reporter Agreements also included a mandatory arbitration provision. The Participants required each Industry Member¹¹ to execute a CAT Reporter Agreement prior to reporting data to the CAT.

On April 22, 2020, prior to the commencement of initial equities reporting for Industry Members, the Securities Industry and Financial Markets Association (“SIFMA”) filed, pursuant to Sections 19(d) and 19(f) of the Exchange Act, an application for review of actions taken by CAT LLC and the Participants (the “Administrative Proceedings”). SIFMA alleged that by requiring Industry Members to execute the Reporter Agreement as a prerequisite to submitting data to the CAT, the Participants improperly prohibited or limited SIFMA members with respect to access to the CAT System in violation of the Exchange Act. On May 13, 2020, the Participants and SIFMA reached a settlement and terminated the Administrative Proceedings, allowing Industry Members to report data to the CAT pursuant to Reporter Agreements that do

⁷ 17 CFR 242.613.

⁸ See supra note 1.

⁹ Plan Processor means the Initial Plan Processor or any other Person selected by the Operating Committee pursuant to SEC Rule 613 and CAT NMS Plan, Article IV, Section 4.3(b)(i) and Article VI, Section 6.1, and with regard to the Initial Plan Processor, the Selection Plan, to perform the CAT processing functions required by SEC Rule 613 and set forth in this Agreement. See CAT NMS Plan, supra note 1, at Section 1.1.

¹⁰ CAT Reporter means each national securities exchange, national securities association and Industry Member that is required to record and report information to the Central Repository pursuant to SEC Rule 613(c). See id., at Section 1.1.

¹¹ Industry Member means a member of a national securities exchange or a member of a national securities association. See id., at Section 1.1.

not contain a limitation of liability provision. Since that time, Industry Members have been transmitting data to the CAT.¹²

On December 18, 2020, the Participants proposed to amend the CAT NMS Plan to authorize CAT LLC to revise the Reporter Agreements to insert limitation of liability provisions that would: (1) provide that CAT Reporters and CAT reporting agents accept sole responsibility for their access to and use of the CAT System, and that CAT LLC makes no representations or warranties regarding the CAT System or any other matter; (2) limit the liability of CAT LLC, the Participants, and their respective representatives to any individual CAT Reporter or CAT reporting agent to the lesser of the fees actually paid to CAT for the calendar year or five hundred dollars; (3) exclude all direct and indirect damages; and (4) provide that CAT LLC, the Participants, and their respective representatives shall not be liable for the loss or corruption of any data submitted by a CAT Reporter or CAT reporting agent to the CAT System.¹³ On October 29, 2021, the Commission disapproved the Limitation of Liability Amendment.¹⁴

On May 20, 2022, the Participants proposed to amend the CAT NMS Plan to authorize CAT LLC to revise the Reporter Agreements to: (1) replace the arbitration provisions in the agreement with a forum selection provision, which would require the parties to the Reporter Agreements to bring any action in the SDNY, or, if there is no basis for federal subject matter jurisdiction, in the New York State Supreme Court within the First Judicial Department and, if it is permitted, seek assignment to the Commercial Division; (2) revise the governing law provision to set the governing law for all disputes as United States federal law or the laws of the state of New York; (3) include a provision requiring the parties to the Reporter Agreements to waive

¹² For a more detailed description of the background for the Proposed Amendment, see Notice, supra note 5, at 58876-78.

¹³ See Securities Exchange Act Release No. 90826 (Dec. 30, 2020), 86 FR 591, 593 (Jan. 6, 2021) (“Limitation of Liability Amendment”).

¹⁴ See Securities Exchange Act Release No. 93484 (Oct. 29, 2021), 86 FR 60933 (Nov. 4, 2021).

their right to a jury trial, with no exception; and (4) include a provision stating that CAT LLC and the Plan Processor disclaim any, and make no, representations or warranties, regarding the CAT System or any other matter pertaining to the Reporter Agreements, including any representation or warranty relating to merchantability, quality, fitness for a particular purpose, compliance with applicable laws, non-infringement, title, sequencing, timeliness, accuracy or completeness of information.¹⁵ On September 6, 2022, the Participants withdrew that proposed amendment.¹⁶

III. Summary of Proposal

The Participants now propose to amend the CAT NMS Plan to authorize CAT LLC to revise the Reporter Agreements to: (1) remove the arbitration provision from each agreement and replace it with the Forum Selection Provision, which would require that any dispute regarding CAT reporting be filed in the SDNY, or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court within the First Judicial Department; and (2) revise the existing choice of law clause to provide that any dispute will be governed by federal law (in addition to New York law).

In support of the Forum Selection Provision, the Participants believe that a court is the proper forum to resolve claims concerning CAT reporting, including claims relating to potential technical issues, system failures, and data breaches.¹⁷ The Participants state that litigating in court is appropriate to address claims, which likely will involve regulatory issues, including the

¹⁵ See Securities Exchange Act Release No. 95031 (June 3, 2022), 87 FR 35273 (June 9, 2022).

¹⁶ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, Commission (Sept. 6, 2022); see also Securities Exchange Act Release No. 96102 (Oct. 19, 2022), 87 FR 64294 (Oct. 24, 2022) (providing notice of withdrawal of the proposed amendment).

¹⁷ See Notice at 58878. The Participants explain that in the aftermath of high-profile data breaches, plaintiffs have brought common law claims of breach of contract and negligence as well as claims based on various federal statutes including the Stored Communications Act, the Federal Wiretap Act, and the Computer Fraud and Abuse Act. Id.

doctrine of regulatory immunity,¹⁸ and complex legal and factual issues involved in cyber litigation.¹⁹ The Participants state that litigating in court would allow parties to rely on precedent that has been developed to address those issues when resolving disputes that could potentially involve parties seeking substantial damages.²⁰

The Participants state that courts offer important procedural mechanisms that would help resolve claims related to CAT reporting fairly and efficiently.²¹ According to the Participants, adjudicating disputes in the courts would permit consolidation and joinder of claims, as federal and New York State rules of civil procedure provide mechanisms for consolidation and joinder, as well as permit the use of class actions for certain disputes.²² The Participants state that in arbitration, in contrast, the ultimate decision on consolidation is made by the arbitrator.²³ Further, the Participants state that the AAA Commercial Arbitration rules are silent on joinder, and parties have faced complications in joining parties to an arbitration claim when they are non-signatories, which could be significant since claims arising out of CAT reporting might be related incidents that impact Industry Members and other market participants (e.g., retail investors).²⁴ The Participants state that for those reasons, if the arbitration provisions remain in the Reporter Agreements, cases arising out of the same facts or involving the same legal issues might result in different outcomes and damage awards, and potentially create inconsistent rules.²⁵

¹⁸ Id. at 58879. The Participants state that comments letters in connection with the Limitation of Liability Amendment “demonstrated an assumption and understanding that” assessments of immunity would be decided by the courts. Id.

¹⁹ See id. at 58879. The Participants state that assessing potential defenses will likely require a tribunal to resolve complex issues that implicate the Participants’ status as self-regulatory organizations and the Commission’s oversight of the CAT. Id. at 58878.

²⁰ Id. at 58879. The Participants also state that litigating disputes in court would promote the development of precedent to guide Industry Members’ and Participants’ conduct. Id.

²¹ See id. at 58876.

²² Id. at 58878-79.

²³ Id. at 58879.

²⁴ Id.

²⁵ Id.

The Participants further state that adjudicating claims related to CAT in court provides parties with appellate rights and rules governing the discovery process and admissibility of evidence.²⁶ They state that direct appellate review is largely absent in arbitration and that the rules relating to discovery and evidence are more limited.²⁷

As for the forum itself, the Participants state that the SDNY and the New York State Supreme Court are venues with extensive experience adjudicating matters involving federal securities laws, market structure, and cybersecurity.²⁸ The Participants state that the Second Circuit, and the SDNY, have experience with securities and financial regulation matters, data breaches and cybersecurity incidents, and have authored opinions regarding the scope of regulatory immunity.²⁹ The Participants also state that New York State courts also focus on complex cases and have addressed the scope of regulatory immunity.³⁰ They state that New York is a convenient venue for the parties since the two largest securities exchanges, several Participants, and the most prominent Industry Members by trading volume are located in New York.³¹

The Participants state that they are proposing to modify the governing law provision, which currently provides that New York State law will govern disputes arising out of the Reporter Agreements, to provide that both federal law and New York State law will govern such disputes.³² The Participants state that the reason for this change is that such claims could involve

²⁶ Id. at 58879-80.

²⁷ Id.

²⁸ Id. at 58880-81.

²⁹ Id.

³⁰ Id.

³¹ Id.

³² Id. at 58881.

issues of federal law because CAT LLC was created pursuant to federal law and is subject to a federal regulatory regime.³³

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Amendment

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,³⁴ and Rules 700 and 701 of the Commission's Rules of Practice,³⁵ to determine whether to disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the Proposed Amendment to inform the Commission's analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission "shall approve a national market system plan or proposed amendment to an effective national market system plan, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Act."³⁶ Rule 608(b)(2) further provides that the Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.³⁷ In the Notice, the Commission sought comment on the Proposed Amendment, including whether the amendment is consistent with the Exchange Act.³⁸ In this

³³ Id.

³⁴ 17 CFR 242.608.

³⁵ 17 CFR 201.700; 17 CFR 201.701.

³⁶ 17 CFR 242.608(b)(2).

³⁷ See id.

³⁸ See Notice, supra note 5, 87 FR at 35279.

order, pursuant to Rule 608(b)(2)(i) of Regulation NMS,³⁹ the Commission is providing notice of the grounds for disapproval under consideration:

- whether, consistent with Rule 608 of Regulation NMS, the Proposed 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; and
- whether, and if so how, the Proposed Amendment would affect efficiency, competition or capital formation.

V. Commission's Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Amendment. In particular, the Commission invites the written views of interested persons concerning whether the Proposed 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. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,⁴⁰ any request for an opportunity to make an oral presentation.⁴¹ The Commission asks that commenters address the sufficiency and merit of

³⁹ 17 CFR 242.608(b)(2)(i). See also 17 CFR 201.700(b)(2).

⁴⁰ 17 CFR 242.608(b)(2)(i).

⁴¹ Rule 700(c)(ii) of the Commission's Rules of Practice provides that "[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views." 17 CFR 201.700(c)(ii).

the Participants' statements in support of the Proposed Amendment, in addition to any other comments they may wish to submit about the proposed rule changes.

Interested persons are invited to submit written data, views, and arguments regarding whether the Proposed Amendment should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number 4-698 on the subject line.

Paper comments:

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

All submissions should refer to File Number 4-698. This file number should be included on the subject line if e-mail is used. To help the Commission 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/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the Participants' principal offices. 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. All submissions should refer to File Number 4-698 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴²

Sherry R. Haywood,
Assistant Secretary.

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⁴² 17 CFR 200.30-3(a)(85).