

July 1, 2020

VIA EMAIL AND HAND DELIVERY

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for Exemption from Provisions of the National Market System Plan Governing the Consolidated Audit Trail related to Reporting of Certain Verbal Activity on and off Exchange Trading Floors

Dear Ms. Countryman:

The Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”)² respectfully request that the Securities and Exchange Commission (“Commission” or “SEC”) provide exemptive relief pursuant to the Commission’s authority under Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”)³ and Rule 608(e) of Regulation NMS under the Exchange Act⁴ from enforcing certain reporting requirements of the CAT NMS Plan for Industry Members conducting certain activities on the floor of national securities exchanges as well as certain activities by Industry Members off exchange floors (“upstairs activity”). Specifically, and as discussed in more detail below, the Participants request that the SEC exempt each Participant from the requirement in Section 6.4(d) of the CAT NMS Plan for each Participant, through its Compliance Rule,⁵ to require its Industry Members to record and electronically report to the Central Repository the following, to the

¹ The twenty-four Participants of the CAT NMS Plan are: BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc.; Financial Industry Regulatory Authority, Inc. (“FINRA”); Investors Exchange LLC; Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MIAIX Emerald, LLC, MIAIX PEARL, LLC; NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, NASDAQ PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc.

² The Limited Liability Company Agreement of Consolidated Audit Trail, LLC is the CAT NMS Plan. Unless otherwise noted, capitalized terms are used as defined in Rule 613, in the CAT NMS Plan, or in this letter.

³ See 15 U.S.C. § 78mm(a)(1), which provides, in relevant part, that the “Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title 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.”

⁴ 17 C.F.R. § 242.608(e), which provides that “[t]he Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.”

⁵ Section 1.1 of the CAT NMS Plan defines “Compliance Rule” to mean, with respect to a Participant, the rule(s) promulgated by such Participant as contemplated by Section 3.11.”

extent such are considered reportable under Rule 613 of Regulation NMS, the CAT NMS Plan and the Compliance Rules, until July 31, 2023:

- floor broker verbal announcements of firm orders on an exchange that are otherwise reported as systematized orders and market maker verbal announcements of firm quotes on an exchange trading floor; and
- the following upstairs activity: (1) telephone discussions between an Industry Member and a client that may involve firm bid and offer communications; and (2) unstructured electronic and verbal communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages).

The Participants believe that the requested exemptions are “necessary or appropriate in the public interest, and consistent with the protection of investors,”⁶ and are “consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.”⁷ If the requested exemptions are granted, the Participants would revise their Compliance Rules required by the CAT NMS Plan to reflect the exemptive relief requested in this letter as necessary.

This letter describes: (i) CAT NMS Plan reporting requirements; (ii) exchange floor activity, including orders that are systematized and verbalized, and upstairs activity; and (iii) the exemptions requested herein. Exhibit A to this letter includes a more detailed description of workflow on various exchange floors.

A. CAT Reporting Requirements

Under Rule 613(c)(7) of Regulation NMS and Sections 6.3(d) and 6.4(d) of the CAT NMS Plan, reportable events are based on, among other things, the receipt, routing and execution of orders.⁸ “Orders” are defined in Rule 613(j)(8) and the CAT NMS Plan to include: “(i) Any order received by a member of a national securities exchange or national securities association from any person; (ii) Any order originated by a member of a national securities exchange or national securities association; or (iii) Any bid or offer.” An order is also defined in SEC Rule 300 as “any *firm* indication of a willingness to buy or sell a security, as either principal or agent, including any bid or offer quotation, market order, limit order, or other priced order.”⁹ In addition, a “bid” or “offer” is defined in Regulation NMS as the bid price or offer price communicated by a member of an exchange or association to any broker-dealer or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as principal or agent, *but excluding indications of interest*.¹⁰ Because indications of interest and

⁶ 15 U.S.C. § 78mm(a)(1).

⁷ 17 C.F.R. § 242.608(e).

⁸ Rule 613(j)(9) provides that “the term *reportable event* shall include, but not be limited to, the original receipt or origination, modification, cancellation, routing, and execution (in whole or in part) of an order, or receipt of a routed order.”

⁹ See 17 CFR § 242.300(e) (emphasis added).

¹⁰ See 17 CFR 242.600(b)(8) (emphasis added).

non-firm indications of a willingness to buy or sell a security, are not “orders” or “bids” or “offers” under SEC rules, they can have no reportable events under the CAT NMS Plan.¹¹ Firm indications of a willingness to buy or sell a security are orders, bids or offers and have reportable events associated with them pursuant to the CAT NMS Plan.

B. Exemptive Request for Certain Verbal Floor Activity

1. Floor Activity

On all exchanges with floor trading, each order must be systematized upon receipt by the floor broker on the floor of the exchange. An order is considered systematized: (1) when it is sent electronically to the floor broker’s system at the exchange; or (2) when the order is manually systematized by the floor broker upon receipt outside of the floor broker’s system and prior to representation in the floor trading crowd.¹² To the extent a floor broker is not holding a systematized order, the floor broker is not eligible to represent any firm bid or offer, or to request firm quotes from in-crowd market participants on the floor of an exchange.¹³ Accordingly, all firm bids or offers represented by a floor broker must be associated with orders that have already been systematized. Conversely, any activity by the floor broker prior to systematization cannot be related to an order, bid or offer pursuant to the CAT NMS Plan. Because only firm orders are reportable events under the CAT NMS Plan, and all firm verbal interest expressed or requested on the floor of an exchange by a floor broker must first be systematized under exchange rules, all verbal interest by a floor broker that may be a CAT reportable event must be associated with an order that has previously been systemized, including execution of the order. Further, any cancellation or change to an order transmitted to an exchange floor broker must occur within the systematized order record.

As described in more detail below, a floor broker that has received and systematized orders may take one or more actions in handling that order, including routing electronically to an exchange for potential execution, routing to another broker-dealer, routing to an exchange trading official, and executing the order.¹⁴

a. Verbal Floor Activity Subject to CAT Reporting

As a result of the systematization requirements, all orders represented verbally by a floor broker on an exchange floor are required to be captured in exchange systems and, under CAT requirements, the floor broker’s receipt of the order, and any modification, electronic route, cancellation, or execution of the order is subject to CAT reporting.

¹¹ See FAQ B3 and B38 regarding indications of interest (“IOI”) and requests for quotes (“RFQ”), available at www.catnmsplan.com/faq/index.html.

¹² See, e.g., Consolidated Options Audit Trail System (“COATS”) requirements, such as Cboe Rule 5.7(f). NYSE options exchanges require that particular elements of an order be systematized so that the exchange may fulfill requirements for COATS reporting. See NYSE Arca Rule 6.67-O and NYSE American Rule 955NY.

¹³ See NYSE Rule 7.35B, NYSE Arca Rule 6.67-O, NYSE American Rule 955NY and Cboe Rule 5.91(a)(4).

¹⁴ A more detailed description of workflow processes on each exchange floor is included as Exhibit A to this letter.

i. Market Maker Quotes in Response to RFQ or IOI

When a floor broker has a systematized order, the floor broker may request a verbal quote from other floor participants, including a market maker, on the floor. To the extent the floor broker may seek non-firm interest from other floor participants by requesting a market (a “Request for Quote” or “RFQ”) or by indicating possible interest in a particular symbol at a particular price and/or size (an “IOI”), there are no CAT-reportable events for the RFQ or IOI itself, whether provided by a floor broker or market maker.¹⁵

Pursuant to exchange rule, a floor participant, including a market maker, may respond to a floor broker’s request for a firm quote with a firm verbal quote. Although the floor broker may or may not elect to trade against such firm verbal quote, the quote provided has no standing outside of the floor, expires immediately if not traded, and is not protected pursuant to the Options Order Protection and Locked/Crossed Market Plan.¹⁶ If the floor broker immediately indicates a desire to trade against the verbal quote, that execution is electronically reported to the exchange and that electronic record is reported to CAT. According to Rule 613 and the CAT NMS Plan, those firm verbal quotes provided in response to a request for a market may also be CAT-reportable. The Commission provided options market makers exemptive relief from reporting their quotes by the March 1, 2016 order (the “Options Market Maker Quote Exemption”).¹⁷ The Options Market Maker Quote Exemption generally provides that options exchanges will report options market maker quotes to CAT.¹⁸

ii. Floor Broker Orders

If a floor broker has a systematized order, the floor broker may announce a firm order to the trading crowd, pursuant to the rules of the exchange.¹⁹ If the floor broker is intending to indicate a firm willingness to buy or sell a security, the verbalization of that willingness to buy or sell a security may be an event in the lifecycle of that order that is CAT-reportable. The order itself will have been captured and reported to CAT as a result of systematization of the order, and

¹⁵ Additional detail regarding IOIs and RFQs is provided below.

¹⁶ See Options Order Protection and Locked/Crossed Market Plan (Aug. 14, 2019), available at https://www.theocc.com/components/docs/clearing/services/options_order_protection_plan.pdf. Verbal quotes are not actionable off exchange. See NYSE Arca Options Rule 6.86-O(b)(3); NYSE American Options Rule 970NY(b)(3); and Cboe Rule 5.59(e). Any on-floor (or off-floor) participant, including a market maker, that would like its verbal quote or order to have standing off of the floor and be protected under the Order Protection and Locked/Crossed NMS Plan, will enter a quote or order electronically. See also Reg NMS Rule 602, at 17 CFR § 242.602(a)(1)(i)(A) (excluding from the Reg NMS quote dissemination requirement any bid or offer executed immediately after communication and any bid or offer communicated by a responsible broker or dealer other than an exchange market maker which is cancelled or withdrawn if not executed immediately after communication).

¹⁷ See Order Granting Exemptions from Certain Provisions of Rule 613 Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934, available at: https://www.catnmsplan.com/wp-content/uploads/2017/03/cat_nms_approved_exemptive_letter_030116.pdf.

¹⁸ See *id.*

¹⁹ On the equities exchange floor, this interest is most often verbalized at or near the close of trading in order for a floor broker to have orders included in the closing transaction. There is no ability for a floor broker to announce an order and receive a firm quote from a Designated Market Maker (“DMM”) during regular hours. A floor broker who asks a DMM for a quote during the course of a trading would only receive a quotation of the current electronic market, which is already subject to CAT reporting. See NYSE Rule 7.35B.

any execution that results from the verbal announcement of the order will be reported as a result of the paired order being sent to the exchange's matching engine for trade reporting.²⁰

The verbal announcement of already systematized and reported orders and of firm quotes were not contemplated as being CAT-reportable at the time the Commission adopted Rule 613 and the CAT NMS Plan. There was no cost benefit analysis by the Commission related to the capture and reporting of verbal floor activity. Moreover, as described further below, the Participants believe that this small portion of floor activity that may be considered CAT-reportable should be explicitly excluded from CAT reporting to avoid impact on U.S. securities market structure and business processes of floor brokers and floor-based market makers and to avoid impact to available liquidity pools.

b. Verbal Floor Activity Not Subject to CAT Reporting

If the floor broker locates liquidity from one or more floor participants, the parties come to an agreement to trade, ultimately releasing the orders systemically to the exchange's matching engine for trade reporting.²¹ All systematized CAT-reportable events, including receipt of the order and the report to the exchange matching engine, will be reported to CAT.

i. Floor Broker RFQs and IOIs

As discussed above, a floor broker with a systematized order may verbalize an RFQ or IOI. Such activities are not CAT-reportable because they are not firm offers to trade, but rather are invitations to negotiate around particular symbol, side, size, or price in order to potentially execute a trade.²²

ii. Floor Broker Negotiations with Other Floor Participants

Similarly, discussions regarding interest potentially available from other floor participants, including discussions regarding potential price improvement or size parameters for an execution do not indicate a firm willingness to trade and are not CAT-reportable for either the floor broker or the market maker. For example, a floor broker announcing interest in an attempt to negotiate an execution for a systematized order includes no reportable verbal activity until the parties agree to an execution, which execution is reported to the exchange and reported to CAT.²³

²⁰ There are some differences in workflow among the exchange floors, including the processes for executing and reporting open outcry transactions. To understand the differences, please see [Exhibit A](#), which summarizes the workflow for all exchange floors.

²¹ *See id.*

²² *See* Consolidated Audit Trail, Exchange Act Release No. 67457 (July 18, 2012), 77 Fed. Reg. 45722, 45747 (Aug. 1, 2012). RFQs and IOIs, whether initiated by a floor broker with or without a systematized order, or by any other market participant, are not CAT-reportable.

²³ On NYSE Arca and NYSE American, the Trading Official would release the order back to the floor broker for reporting to the matching engine. On Cboe, the floor broker would create a timestamp reflecting the trade and submit the trade for reporting to the matching engine. Those electronic timestamps will be included in data reported to CAT regarding the order.

2. Exemption Considerations

As discussed above, all orders that are received by floor brokers must be systematized before a floor broker can route, execute, or verbally represent the order.²⁴ Floor brokers who seek to route, cancel or amend the terms of the order do so within the floor broker system and all such activity is CAT-reportable. Similarly, once an execution on the floor is completed, the systematized order receives a timestamp indicating the time of execution, which is also reported to CAT. After time of execution is appended to the order and other details are filled in within the system, the floor broker submits the executed order to the exchange's matching engine to be reported to the consolidated tape. Each event that occurs within an electronic system – routing, changes to the order, the execution time, and the time the executed order was submitted to the exchange matching engine for reporting, for example – will be reported to CAT.

The two verbal events described above that may be CAT-reportable are floor broker announcements of firm orders and market maker announcements of firm quotes. The Participants do not believe that either event was contemplated as being CAT-reportable when the Commission and the Participants were considering the cost and impact of the CAT NMS Plan.²⁵ Requiring those elements to be reported to CAT would have a significant and costly impact to exchange floors, to floor broker and market maker business models, and to market structure; and the data being captured would provide minimal added regulatory benefit, likely not justified by the costs that would be required to create systems to capture the small amount of activity. Consequently, if such verbal activity must be reported to CAT, floor brokers and market makers will ultimately be required to expend significant effort and funds to provide the data necessary to make the report to CAT. Neither the exchanges nor the Industry Members currently have or have the means to collect the data for verbal activity on the floor for purposes of CAT reporting and the measures necessary to put such systems in place would significantly disrupt floor trading.

Every order that is verbalized on an exchange floor has already been systematized and the systematization (*i.e.*, the origination or receipt of an order) is reported to CAT. In addition, any execution is reported to CAT by the floor broker and/or the exchange.²⁶ Accordingly, the Participants believe that requiring a report of such verbalization of a systematized order will provide very little additional information that is valuable to regulatory users.

a. Neither the Commission nor Participants Considered Verbal Orders and Market Maker Quotes to be Part of CAT

In the adopting release to Rule 613, the Commission explained that it was deferring analysis of impact of the NMS plan on efficiency, competition, and capital formation until after submission of the self-regulatory organizations' ("SROs") NMS Plan for Commission

²⁴ See [Exhibit A](#) for more detailed description of the timestamps applied.

²⁵ See generally, [CAT NMS Plan](#); [Order instituting Rule 613](#); [Notice of Filing of CAT NMS Plan](#); [Order approving the CAT NMS Plan](#).

²⁶ Executions on the floor between two options market makers will be reported to the CAT by the exchange, not the market makers. Executions on the floor between a floor broker and an options market maker will be reported to the CAT by the floor broker and the exchange. In neither case will the options market maker report such executions to the CAT.

approval.²⁷ Rule 613(a)(1)(viii) requires the CAT NMS Plan to provide an analysis of the impact on competition, efficiency, and capital formation of creating, implementing, and maintaining the CAT NMS Plan.²⁸ Implementation of the CAT is not intended to impact business or current market structure, and the Commission has explained its belief that the CAT will generally promote competition and efficiency and will not harm capital formation in the U.S. securities markets.²⁹

The Commission has said that it is sensitive to economic effects of the CAT NMS Plan requirements and required the Participants to analyze costs and CAT's potential impact to competition, efficiency, and capital formation.³⁰ The SROs provided that assessment in the CAT NMS Plan at Appendix C, Section B(8).³¹ In the CAT NMS Plan, the Participants cautioned that there could be negative impacts on competition if the CAT NMS Plan were to burden a group or class of CAT Reporters in a way that would harm the public's ability to access their services, either through increasing costs or decreased provisions of those services.³² "Further, competition may be harmed if a particular class or group of broker-dealers bears the costs disproportionately, and as a result, investors have more limited choices or increased costs for certain types of broker-dealer services."³³ In drafting the CAT NMS Plan, Participants were "cognizant that the method by which costs are allocated to broker-dealers may have implications for their business models that might ultimately impact competition. For instance, if the method of cost allocation created disincentives to quoting activity, certain broker-dealer's business models would be affected more greatly than others."³⁴

Those concerns are directly relevant to whether the small portion of verbal floor activity that is arguably CAT-reportable, as described above, should be explicitly exempted from reporting requirements. When the Commission adopted Rule 613 and approved the CAT NMS Plan, there was no cost-benefit analysis related to the capture and reporting of such verbal floor activity. Because of the impact that requiring firm verbal activity would have on a single class of market participants and those business structures, it is clear that neither Participants nor the

²⁷ See [Exchange Act Release No. 34-67457](#) (July 18, 2012), 17 CFR Parts 242 at p. 306-307 (Oct. 1, 2012).

²⁸ See [Rule 613\(a\)\(1\)\(viii\)](#), 17 CFR § 242.613(a)(1)(viii).

²⁹ See [Exchange Act Release No. 34-77724](#), Joint Industry Plan; Notice of Filing of the National Market System Plan Governing the Consolidated Audit Trail by BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange LLC, ISE Gemini, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc., at page 517, (Apr. 27, 2016).

³⁰ See [Exchange Act Release No. 34-79318](#), Joint Industry Plan; Order Approving the National Market System Plan Governing the Consolidated Audit Trail at page 421 (Nov. 15, 2016).

³¹ See CAT NMS Plan at Appendix C, Section B(8) at C-88.

³² *Id.*

³³ *Id.* at Appendix C, Section B(8)(a)(ii) at C-89. Participants relied upon the Costs to CAT Reporters Study to preliminarily conclude that the CAT NMS Plan would not likely have an adverse impact on competition. That study, however, did not examine costs imposed upon exchange floor participants if they were required to capture and report verbal activity.

³⁴ *Id.* at C-91.

Commission considered such activity to be included in CAT reporting and that an exemption is necessary and appropriate.³⁵

b. Requiring Firm Verbal Floor Activity in CAT Would Impact Business and Market Structures, Impacting Available Liquidity

If firm verbal floor activity were required to be reported to CAT, in order to capture the two types of firm verbal events, Industry Members operating on exchange floors would need to create a process or system to electronically record in real time the firm data being verbally communicated on exchange floors and to merge that data into the information tracked electronically. Floor-based market makers would likely be most significantly impacted by a requirement that two-sided, firm quotes verbally provided to floor participants be reported to CAT because those quotes are not otherwise electronically captured. In order to be reported by an exchange, the market maker would need to provide the exchange with the information to be reported. Irrespective of which entity would be charged with capturing firm verbal quote data, such a requirement would prompt a market maker to pause in order to record a firm verbalized quote and would significantly slow down the business processes involved in providing liquidity to floor participants, likely causing market makers to miss participation in fast-changing markets. No similar burden would be borne by electronic market makers, whose data collection for CAT reporting will not impact their real-time ability to provide liquidity to the market. A market maker that is required to record every ephemeral firm verbal quote provided to floor brokers would be prevented from reacting in real time to changing market conditions, which would likely reduce or eliminate the market maker's ability to participate alongside the electronic market.

Floor broker firms would need to create a process to capture the announcement of an order, whose terms could be part of, but slightly different from, the systematized order that they are seeking to execute. Changing the terms of a firm order on the floor of the exchange would require additional data capture and, similar to market makers, likely cause floor brokers to miss the opportunity to provide liquidity and execute interest on behalf of customers in a fast-moving market.

The measures described above that Industry Members on exchange floors would need to put in place would impact the liquidity available on exchange floors. The slower workflow and the additional compliance burden that floor-based member firms would bear would impact the firms' ability to provide liquidity and could eliminate the floors' ability to continue to provide liquidity to national market participants. These consequences are the same as those described above and are also among those expressed in the CAT NMS Plan, Rule 613, and in various Commission orders: that CAT should not burden a particular class or group and should not impact competition in the market.

³⁵ While Rule 613 and the CAT NMS Plan were being considered and approved, the SROs and the Commission were clearly seeking to consolidate the various audit trail systems into one, and to include activity sufficient to enable CAT to replace and retire these disparate systems. Specifically, one system CAT is intended to replace is COATS, the standardized audit trail for all options exchanges. *See Consolidated Audit Trail, Exchange Act Rel. No. 34-62174 (June 8, 2010)*. COATS does not require the capture and reporting of verbal activity and does not require that market makers on options exchanges systematize quotes, bids or offers that they represent verbally. *Id.*

3. Requested Exemption

For consistency of audit trail data, to ensure that no undue burden is placed upon a single group of market participants, and to ensure that market liquidity is unaffected by the implementation of CAT, the Participants request that the SEC exempt each Participant from the requirement in Section 6.4(d) of the CAT NMS Plan for each Participant, through its Compliance Rule, to require its Industry Members to record and electronically report to the Central Repository floor broker verbal announcements of firm bids and offers on an exchange trading floor that are otherwise reported as systematized orders and market maker verbal announcements of firm quotes on an exchange trading floor pursuant to Section 6.4(d) of the CAT NMS Plan, to the extent such are considered orders reportable under Rule 613, the CAT NMS Plan and the Compliance Rules, until July 31, 2023.³⁶ As discussed above, firm verbal interest was not contemplated for inclusion in the CAT and the exemption is requested to provide clarity to market participants. As a condition to the exemption, Participants would continue to require that firm verbal interest on an exchange floor be expressed pursuant to exchange rules approved by the Commission. In addition, any such firm verbal interest expressed by a floor broker must be related to a CAT-reportable systematized order, and any resulting trade must be reported to CAT.

C. Exemptive Request for Certain Upstairs Activity

1. Unstructured Verbal and Electronic Upstairs Activity

While much upstairs activity involves communications that do not involve firm orders subject to CAT reporting, two types of verbal and unstructured electronic upstairs activity may involve firm orders that would be subject to CAT reporting. First, verbal telephone discussions between an Industry Member and a client may involve firm bid and offer communications. Second, unstructured electronic communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages) may involve firm orders as well.

2. Exemption Considerations

The communications in these two upstairs scenarios may involve “orders” and therefore may be CAT-reportable. The Participants, believe, however, that these two categories of communications should be excluded from CAT reporting for several reasons.

a. Telephonic Discussions and Unstructured Electronic Upstairs Activities Were Not Contemplated as Being CAT-Reportable at the Time the Commission Adopted Rule 613 and the CAT NMS Plan

Like the floor activity discussed above, these two upstairs scenarios were not previously contemplated by the Commission in the context of CAT reporting, were not discussed in the CAT NMS Plan Adopting Release and were not included in the Commission’s cost-benefit analysis included in the Adopting Release. Based on discussion with CAT Advisory Committee

³⁶ The Participants request exemptive relief from the Industry Member reporting sections of the CAT NMS Plan, not the Participant reporting sections of the CAT NMS Plan, as floor activity by and between floor brokers and market makers is Industry Member activity, not Participant activity.

members, the Participants believe that the costs of including these scenarios in the CAT outweigh the benefits. The industry has provided the Participants with cost projections for capturing and reporting upstairs negotiations, which are estimated to be approximately \$485M to \$590M. These cost projections recognize that Industry Members do not currently collect data for these scenarios, and do not have the means today to collect such data. Indeed, there is uncertainty as to whether such information can be captured with today's technology (e.g., via natural language processing, voice recognition technology) or personnel (via the hiring additional clerks) in a reliable, accurate and consistent manner. Moreover, the Participants do not believe that this information will add very much value to the data that will be available in the CAT. Any minimal added regulatory benefit would be outweighed by costs imposed on, and adverse impact on, Industry Members.

b. Requiring Reporting of Certain Upstairs Activity Would Significantly and Adversely Impact Market Structure and Business Processes

As discussed above with regard to floor activity, the changes required to capture and report verbal and unstructured electronic upstairs activity would cause significant and adverse changes to existing industry practices and business models, which would conflict with one of the underlying principles of the CAT. In addition to the significant costs of capturing and reporting upstairs activity, the reporting of this upstairs activity also may slow trading processes at certain broker-dealers, and/or may increase the time to initiate a trade, causing clients potentially to receive less advantageous pricing for the investor. Furthermore, in light of these impacts on reporting orders, Industry Members may modify their workflows to rely more heavily on indications of interest or similar methods outside the definition of an order, thereby avoiding CAT reporting requirements for that activity. Such a shift could have negative impact on the price discovery process as well as existing workflows.

c. The Identification and CAT Reporting of Certain Upstairs Orders Will Be Difficult and Inconsistent

Similar to floor activity, the identification of firm orders versus non-firm verbal or unstructured electronic communications in the upstairs market is difficult. Given the subjective nature of this firmness determination, the CAT reporting of such communications will be variable and inconsistent. For example, the capture of verbal/manual quotes in the upstairs market could require a human being to listen to live or taped conversations or sift through electronic communications to determine if there was a firm order. Because determining firmness is often subjective, different broker-dealers and different individuals could reach different conclusions regarding whether activity involved a firm order in any given circumstances. Indeed, Industry Members on opposite sides of a bid/offer may capture the same activity differently, resulting in a misleading view of the transaction.

3. Requested Exemption

For the reasons discussed above, the Participants request that the SEC exempt each Participant from the requirement in Section 6.4(d) of the CAT NMS Plan for each Participant, through its Compliance Rule, to require its Industry Members to record and electronically report to the Central Repository the following communications that occur upstairs, to the extent such

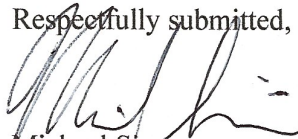
are considered reportable under Rule 613, the CAT NMS Plan and the Compliance Rules, until July 31, 2023:

- telephone discussions between an Industry Member and a client that may involve firm bid and offer communications; and
- unstructured electronic and verbal communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages).

* * *

Thank you for your attention to this matter. Please contact me at (212) 229-2455 if you have any questions or comments.

Respectfully submitted,



Michael Simon

CAT NMS Plan Operating Committee Chair

cc: The Hon. Jay Clayton, Chairman
The Hon. Allison Herren Lee, Commissioner
The Hon. Hester M. Peirce, Commissioner
The Hon. Elad L. Roisman, Commissioner
Mr. Brett Redfearn, Director, Division of Trading and Markets
Mr. David S. Shillman, Associate Director, Division of Trading and Markets
Mr. David Hsu, Assistant Director, Division of Trading and Markets
Mr. Mark Donohue, Senior Policy Advisor, Division of Trading and Markets
Ms. Manisha Kimmel, Senior Policy Advisor, Regulatory Reporting to Chairman Clayton
CAT NMS Plan Participants

Exhibit A: Floor Processes on the Exchanges

All exchanges with floor trading require floor brokers to systematize orders upon receipt and prior to representation in open outcry. All systematized orders are CAT-reportable. The following describes the process for each of the relevant exchanges.

1. NYSE Arca Options and NYSE American Options

On NYSE Arca and NYSE American options floors, systemized orders that a floor broker routes to an exchange Trading Official may be vocalized by a floor broker in open outcry. An initiating order that is properly vocalized may be executed by the floor broker in open outcry if, among other things, the terms of the initiating order fit within the market offered by market makers on the floor. If a properly vocalized order is executed, the Trading Official will confirm the trade and release the order back to the floor broker after appending a timestamp representing the execution time of the trade. Once the floor broker is in receipt of the released and timestamped order, the floor broker is obligated to submit the initiating order and all contra-side interest to the matching engine to report the trade price(s) and for submission to the exchange's clearing system. The contra-side interest, for example, may include on-floor market maker interest vocalized on the floor, interest from upstairs customers (whether professional or non-professional), off-floor market maker interest and broker-dealer orders. In all cases, the trade reported to CAT will reflect the price(s) and size(s) of all participants who are parties to the trade and the time of execution as indicated by the Trading Official timestamp.

2. Cboe

On the Cboe options floor, the process is similar, but no interaction with an exchange trading official is necessary. Systematized orders may be vocalized by a floor broker in open outcry (without need to first route the order to an exchange trading official). Initiating interest that is properly vocalized may be executed by the floor broker in open outcry if, among other things, the terms of the initiating order fit within the market offered by in-crowd market participants, which may include market makers, other floor brokers representing other systematized orders, and exchange trading officials (referred to as "PAR Officials") representing other systematized orders. If a properly vocalized order is executed, the floor broker will append a timestamp representing the execution time of the trade. The floor broker then submits the initiating order and all contra-side interest to the matching engine to report the trade price(s) for submission to the exchange's clearing system. The contra-side interest, for example, may include on-floor market maker interest vocalized on the floor; and interest vocalized by the initiating floor broker, other floor-brokers and PAR Officials holding orders (e.g., interest from upstairs customers (whether professional or non-professional), off-floor market maker interest, and broker-dealer orders). (The in-crowd contra side parties also have the ability to report their side of the transaction or utilize a market maker electronic trade notification system that allows the market maker to acknowledge/accept the trade reported by the floor broker.) Besides scenarios where floor brokers (or PAR Officials) trade with other floor brokers and/or on-floor market makers, there may also be scenarios where on-floor market makers trade directly with other on-floor market makers. To the extent that on-floor market makers trade directly with each other in open outcry, there are no systematized orders involved but trade reports are still submitted to the matching engine to report the trade price(s) and for submission to the

exchange's clearing system (sometimes referred to as "trades without orders" scenarios). In all cases, the trade reported to CAT will reflect the price(s) and size(s) of all participants who are parties to the trade.

c. Phlx

The Phlx process is similar to other exchanges, except that Phlx Rules do not require any interaction with an exchange trading official. Phlx's Floor Based Management System ("FBMS") automatically enforces trade-through and priority rules without manual intervention. A Phlx floor broker systematizes all orders received prior to announcing an order in the trading crowd. The floor broker, after properly vocalizing the order and once all terms of the trade are agreed upon in the trading crowd, submits the order for execution into the FBMS. Once the Floor Broker submits the order for execution, Phlx's System will verify that the trade complies with all trade-through and priority rules. If the execution is compliant, the trade will be reported to the consolidated tape. Once the floor broker receives an execution from the System, the floor broker may submit all contra-side interest to Phlx's clearing system.

d. NYSE

The floor on NYSE is similar to the NYSE's options floors in that a floor broker must have a systematized order prior to representing interest on the floor. Systematized orders may be verbally represented by the floor broker at the point of sale to the Designated Market Maker ("DMM"). Most often, verbal activity on the NYSE's equities floor occurs just prior to the close, with Floor Brokers seeking to have clients' interest included in the closing auction. Floor brokers proceed to the point of sale where the DMM is preparing stocks to close, and announces symbol, side, price, and size for the systematized orders they hold. The floor broker then transmits the order to the DMM, who validates the interest so that it may participate in the closing auction. CAT-reportable events in this chronology include the floor broker's systematized order, the transmittal to the DMM's book, the electronic entry of the order after 4:00 p.m., and the execution as part of the closing cross.

e. BOX

On BOX, a Floor Broker must have a systematized order prior to representing an order on the trading floor.³⁷ After the order has been systemized, the order is vocalized by a Floor Broker in open outcry. The initiating order that is properly vocalized may be executed by the Floor Broker in open outcry, if, among other things, the terms of the initiating order fit within the market offered by the market participants on the floor. After an order has been vocalized to the trading crowd, the Floor Broker must submit the agency order as part of a two-sided order (Qualified Open Outcry Order or "QOO Order") to the Trading Host for execution. When a Floor Broker submits a QOO Order for execution, the order will be executed based on the market conditions of when the order is received by the Trading Host and in accordance with Exchange rules. A QOO Order is not deemed executed until it is processed by the Trading Host, which, after enforcing all Trade Through and priority rules, appends a timestamp representing the execution time of the trade, reports the trade to the consolidated tape and submits the trade to the

³⁷ See BOX Rule 7580(e)(1).

exchange's clearing system. After the QOO Order is deemed executed by the Trading Host, it is released to the Trading Floor Official who certifies that the Floor Broker announced the order to the trading crowd. In all cases, the trade reported to CAT will reflect the price(s) and sizes(s) of all participants who are parties to the trade.