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July 21, 2016

**VIA E-MAIL**

Mr. Brent J. Fields  
Secretary  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

Re: Joint Industry Plan; Notice of Filing of the National Market System Plan Governing the Consolidated Audit Trail (Release No. 34-77724; File No. 4-698)

Dear Mr. Fields:

NYSE Group, Inc., on behalf of its wholly-owned subsidiaries, The New York Stock Exchange LLC, NYSE MKT LLC and NYSE Arca, Inc. (collectively, “NYSE Exchanges”), appreciates the opportunity to comment on the proposed National Market System Plan Governing the Consolidated Audit Trail, as amended (“CAT NMS Plan” or “Plan”).<sup>1</sup>

Rule 613 of Regulation NMS under the Securities Exchange Act of 1934 (“Exchange Act”)<sup>2</sup> requires the creation of a comprehensive consolidated audit trail that will allow regulators to efficiently and accurately track all activity throughout the U.S. markets in National Market System (“NMS”) securities. Rule 613 requires the national securities exchanges and Financial Industry Regulatory Authority, Inc. (“FINRA”) (collectively, “SROs”) to jointly submit the CAT NMS Plan. Rule 613 mandates that the CAT NMS Plan require, among other things, that the SROs, as well as their respective members, provide certain detailed information to a newly

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<sup>1</sup> The Securities and Exchange Commission (“Commission”) published on April 27, 2016, the proposed CAT NMS Plan jointly filed 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., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc. See Exchange Act Release No. 77724 (April 27, 2016), 81 FR 30614 (May 17, 2016).

<sup>2</sup> 17 CFR 242.613. See Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) (“Rule 613 Adopting Release”). See also Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32556 (June 8, 2010) (“Rule 613 Proposing Release”).

created central repository regarding each quote and order in an NMS security, and each reportable event with respect to each quote and order, such as origination, modification, cancellation, routing and execution.

The NYSE Exchanges strongly support the CAT NMS Plan and believe that the consolidation of this information and its availability to regulators in a Central Repository<sup>3</sup> in a uniform electronic format will facilitate regulators' ability to oversee the securities markets. However, the NYSE Exchanges believe that modifications should be made to the CAT NMS Plan to ensure that confidential data, including PII,<sup>4</sup> is appropriately safeguarded. Moreover, the NYSE Exchanges do not believe that the members of the Advisory Committee<sup>5</sup> should be granted voting rights with respect to matters being decided by the Operating Committee.

### Applicability of Security Requirements to Users with Access to CAT Systems

A security system is only as strong as its weakest link. The FAQs on the CAT NMS Plan website<sup>6</sup> estimate that there will be approximately 3,000 authorized users that will have access to CAT Data,<sup>7</sup> including regulatory staff of the SROs and Commission staff. Considering the large number of individuals with access to the Central Repository, the possibility of a security breach that may result in the disclosure of CAT Data, including PII, is a material threat with substantial consequences.<sup>8</sup> Accordingly, the NYSE Exchanges believe that the security of the confidential

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<sup>3</sup> "Central Repository" is defined in Section 1.1 of the Plan as "the repository responsible for the receipt, consolidation, and retention of all information reported to the [consolidated audit trail] pursuant to SEC Rule 613 and [the Plan]."

<sup>4</sup> "PII" is defined in Section 1.1 of the Plan as "personally identifiable information, including a social security number or tax identifier number or similar information."

<sup>5</sup> Exchange Act Rule 613(b)(7) requires that the CAT NMS Plan include an Advisory Committee to "advise the plan sponsors on the implementation, operation, and administration of the central repository." 17 CFR 242.613(b)(7).

<sup>6</sup> [http://www.catnmsplan.com/cat\\_faq/index.html#g\\_52](http://www.catnmsplan.com/cat_faq/index.html#g_52).

<sup>7</sup> "CAT Data" is defined in Section 1.1 of the Plan as "data derived from Participant Data, Industry Member Data, SIP Data, and such other data as the Operating Committee may designate as 'CAT Data' from time to time."

<sup>8</sup> There have been a number of recent high-profile cyber attacks resulting in the breach of sensitive information, including those involving federal agencies. For example, in June 2015, the Office of Personnel Management ("OPM") revealed that it was the target of two separate but related cybersecurity incidents impacting the data of Federal government employees, contractors and others. In the first incident in early 2015, OPM discovered that the personnel data of 4.2 million current and former Federal government employees had been stolen. This information included full name, birth date, home address and Social Security Numbers. In June 2015, OPM also discovered that the background investigation records of current, former and prospective Federal employees and contractors had been stolen, including the Social Security Numbers of 21.5 million individuals, from the background investigation databases. Some of those records also included findings from interviews conducted by background investigators and approximately 5.6 million included fingerprints. See <https://www.opm.gov/cybersecurity/cybersecurity-incidents/>.

data stored in the Central Repository and other CAT systems must be of the highest quality and that no authorized users with access to CAT Data should be exempt from any provisions regarding security requirements and standards set forth in the Plan.

Pursuant to Section 6.5(f)(i)(A) (Data Confidentiality) of the proposed Plan, the Plan Processor must require individuals who have access to the Central Repository, including employees and consultants of the Participants and Plan Processor, but not employees of the Commission, to agree (i) to use appropriate safeguards to ensure the confidentiality of CAT Data stored in the Central Repository and (ii) not to use CAT Data stored in the Central Repository for purposes other than surveillance and regulation in accordance with such individual's employment duties. The NYSE Exchanges believe that these two requirements should apply equally to all users with access to the Central Repository, including employees of the Commission. These security standards are essential safeguards and the NYSE Exchanges are concerned that unless all users with access to CAT Data, including PII, are required to abide by such baseline requirements, it represents an unnecessary and imprudent security risk.<sup>9</sup>

Additionally, Section 6.5(g) (Participants Confidentiality Policies and Procedures) of the proposed Plan, which requires Participants to, among other things, "establish, maintain and enforce written policies and procedures reasonably designed to (1) ensure the confidentiality of the CAT Data obtained from the Central Repository..." applies to Participants and the Plan

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Also, Reuters has reported, based on cybersecurity reports it obtained through a Freedom of Information Act request, that the U.S. Federal Reserve detected more than 50 cyber breaches between 2011 and 2015, including several incidents described internally as "espionage." Hackers or spies were suspected in many of these incidents. The report is limited to cases involving the Board of Governors and does not include reports relating to the 12 regional branches of the central bank. The Reuters article also cited former cybersecurity staff at the Federal Reserve that cyber attacks on the Federal Reserve are about as common as at other large financial institutions, indicating that government agencies are no less susceptible to cyber attacks than private entities. See <http://www.reuters.com/article/us-usa-fed-cyber-idUSKCN0YN4AM>.

<sup>9</sup> The NYSE Exchanges also support an amendment to the proposed Plan that would delete one requirement set forth in Section 6.5(f). Section 6.5(f)(i)(B) mandates that individuals, other than employees of the Commission, who have access to the Central Repository execute a personal "Safeguard of Information Affidavit" providing for "personal liability for misuse of data." The NYSE Exchanges do not believe that individuals performing their employment duties should be subject to personal liability and that such liability would not reduce security risks. Furthermore, the actions that trigger liability are ambiguously and broadly described as "misuse of data." The verb "misuse" is significantly more expansive than the language used in Section 6.5(f)(i)(A)(ii), which prohibits use of CAT Data for purposes "other than surveillance and regulation in accordance with such individual's employment duties." Also, employing the noun "data" rather than the defined term "CAT Data" may result in personal liability for "misuse" of any data associated with the CAT systems, even if such data is innocuous and/or publicly available.

Processor, but not to the Commission. The NYSE Exchanges believe that this requirement should be extended to include the Commission, whose employees will have the same access to CAT Data as SRO employees.<sup>10</sup> Given the highly sensitive nature of the data stored in the Central Repository and the risk of data breaches, regardless of source, the NYSE Exchanges believe that the Commission should be obligated to establish, maintain and enforce written policies and procedures reasonably designed to ensure the confidentiality of the CAT Data obtained from the Central Repository.

If employees of the Commission with access to the data stored in the Central Repository or other CAT systems are subject to security standards less stringent than those applicable to other authorized users, the data obtained and held by those individuals may be subject to heightened risk of a data breach. It would be unfortunate if the commendable objectives of the Plan were overshadowed, or public trust eroded, by a breach in the security of brokerage customers' PII maintained by the CAT Repository.

#### CAT NMS Plan Governance Structure

The NYSE Exchanges believe that the governance structure in the proposed CAT NMS Plan would establish an appropriate advisory role for the Advisory Committee that is consistent with the requirements specified by the Commission in Rule 613. Unlike the SROs, the members of the Advisory Committee are not legally obligated under Commission rules to create, implement or maintain a consolidated audit trail and central repository. For this reason, the NYSE Exchanges do not believe that the Advisory Committee members should be granted voting rights with respect to matters being decided by the Operating Committee.

Among the requirements specified in Rule 613 is that the CAT NMS Plan submitted by the SROs include "a governance structure to ensure the fair representation of the plan sponsors."<sup>11</sup> Rule 613, as proposed by the Commission, did not include an Advisory Committee, but the

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<sup>10</sup> The NYSE Exchanges note that the U.S. Government Accountability Office ("GAO") recently released a report assessing the Commission's information security controls over its own financial systems and data ("GAO Report"). The preparation of the GAO Report involved, among other things, the GAO's examination of the Commission's information security policies, plans and procedures. The GAO Report highlighted that, collectively, the weaknesses noted increased the risk that the Commission's systems "could be compromised, jeopardizing the confidentiality, integrity and availability of sensitive financial information." "Report to the Chair, U.S. Securities and Exchange Commission: Information Security: Opportunities Exist for SEC to Improve Its Controls over Financial Systems and Data," United States Government Accountability Office, April 2016.

<sup>11</sup> See Exchange Act Rule 613(b)(1), 17 CFR 242.613(b)(1). Exchange Act Rule 600(b)(70) defines a "sponsor," when used in connection with a national market system plan, as "any self-regulatory organization which is a signatory to such plan and has agreed to act in accordance with the terms of the plan." 17 CFR 242.600(b)(70).

Commission ultimately provided for one in response to comments received that the “broker-dealer industry receive a ‘seat at the table’ regarding governance of the NMS plan.”<sup>12</sup> Consequently, Rule 613, as adopted, specifically requires that the CAT NMS Plan include an Advisory Committee, the purposes of which are “to advise the plan sponsors on the implementation, operation, and administration of the central repository.”<sup>13</sup> Rule 613 further specifies that the members of the Advisory Committee shall “have the right to attend any meetings of the plan sponsors, to receive information concerning the operation of the central repository, and to provide their views to the plan sponsors.”<sup>14</sup> However, plan sponsors may meet without the Advisory Committee if, by affirmative vote of a majority of the plan sponsors, such an executive session is determined to be required.<sup>15</sup> Moreover, the Commission did not require in Rule 613 that the Advisory Committee members be permitted to vote.

The NYSE Exchanges believe that the different treatment of plan sponsors and Advisory Committee members under Rule 613 is appropriate and reflects that only the SROs have the legal obligation to create, implement and maintain the consolidated audit trail and central repository under Rule 613. In adopting Rule 613, the Commission underscored this point by stating that it “believes that an Advisory Committee structure that also permits the plan sponsors to meet in executive session without members of the Advisory Committee appropriately balances the need to provide a mechanism for industry input into the operation of the central repository, against the regulatory imperative that the operations and decisions regarding the consolidated audit trail be made by SROs who have a statutory obligation to regulate the securities markets, rather than by members of the SROs, who have no corresponding statutory obligation to oversee the securities markets.”<sup>16</sup>

The plan sponsors, as SROs, have an obligation to comply with and enforce compliance by its members with the Exchange Act, the rules promulgated under the Exchange Act by the Commission and the SROs’ own rules.<sup>17</sup> Also, Rule 613 requires the consolidated audit trail to be governed by a national market system plan,<sup>18</sup> and Rule 608(c) and Rule 613(h) of the Exchange Act only require a plan sponsor to comply with the terms of a national market system

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<sup>12</sup> See Rule 613 Proposing Release, *supra* note 2, at text accompanying footnote 733.

<sup>13</sup> See Exchange Act Rule 613(b)(7), 17 CFR 242.613(b)(7).

<sup>14</sup> See Exchange Act Rule 613(b)(7)(ii), 17 CFR 242.613(b)(7)(ii).

<sup>15</sup> *Id.*

<sup>16</sup> See Rule 613 Adopting Release, *supra* note 2, 77 FR at 45787.

<sup>17</sup> See Exchange Act Sections 6(b)(1) and 15A(b)(2).

<sup>18</sup> A “national market system plan” is defined in Rule 600(b)(43) as “any joint self-regulatory organization plan in connection with: (i) the planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof; or (ii) the development and implementation of procedures and/or facilities designed to achieve compliance by self-regulatory organizations and their members with any section” of Regulation NMS. 17 CFR 242.600(b)(43).

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plan, and enforce compliance by its members and persons associated with its members with such plan. Finally, only SROs are required under Rule 613(f) to “develop and implement a surveillance system, or enhance existing surveillance systems, reasonably designed to make use of the consolidated information contained in the consolidated audit trail.” Providing the non-SRO Advisory Committee members with a vote in connection with the CAT NMS Plan would be incompatible with the requirements of the Exchange Act and Commission rules that squarely place the obligations to implement and enforce an the CAT NMS Plan on the shoulders of the SROs.

For this reason, the NYSE Exchanges strongly oppose providing the Advisory Committee members with a vote, which in effect would elevate the Advisory Committee from a body that provides advice to the Operating Committee--the role identified for the Advisory Committee in Rule 613(b)(7)--to one equivalent to a plan sponsor, but one unburdened by the obligations imposed by the Commission on plan sponsors under Rules 608 and 613, and on exchanges and national securities associations by Section 6(b)(1) and Section 15A(b)(2) of the Exchange Act.

Respectfully submitted,



Elizabeth K. King

cc: Mary Jo White, Chair  
Michael Piwowar, Commissioner  
Kara Stein, Commissioner  
Stephen Luparello, Director, Division of Trading & Markets  
David Shillman, Associate Director, Division of Trading & Markets