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December 2, 2020

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

Re: Proposed Amendments to the National Market System Plan Governing the ConsolidatedAudit Trail to Enhance Data Security (Release No. 34-89632; File No. S7-10-20)

Dear Ms. Countryman:

Nasdaq, Inc. ("Nasdaq") appreciates the opportunity to comment on the Securities and Exchange Commission's ("SEC" or "Commission") Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail ("CAT") to Enhance Data Security (the "Proposal").[1] Nasdaq believes the Proposal will substantially impair effective regulation by preventing self regulatory organizations like Nasdaq from using CAT data effectively to regulate the markets. As such, the Proposal is contrary to the Commission's core missions of protecting investors and maintaining fair and orderly markets, and also diametrically opposed to the Commission's goals in adopting a CAT, namely to enhance cross-market surveillance

As described below, the Proposal suffers from multiple flaws:

- The SEC lacks the legal authority to place the Plan Processor[2] in a position of control over

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[1] Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail To Enhance Data Security, Securities Exchange Act Release No. 89632 (Aug. 21, 2020), 85 FR 65990 (Oct. 16, 2020), available at https://www.sec.gov/rules/proposed/2020/34-89632.pdf.

[2] "Plan Processor" is a defined term under the CAT NMS Plan and means "the Initial Plan Processor or any other Person selected by the Operating Committee pursuant to SEC Rule 613 and Sections 4.3(b)(i) and 6.1, and with regard to the Initial Plan Processor, the Selection Plan, to

the self-regulatory organizations ("SROs").

- Contrary to the stated goal of the Proposal and the stated goal of the CAT itself, the Proposal critically impairs Nasdaq's ability to use CAT Data[3] to enhance surveillance, analysis and investigation of market and member conduct.

- The Proposal underestimated the costs associated with the Proposal, and fails to establish that sufficient benefits exist to justify imposing such costa on the industry, the SROs, and, ultimately, investors.

With these flaws, the Proposal is unlikely to withstand judicial scrutiny under the Administrative Procedures Act or the Exchange Act of 1934 (the "Exchange Act").

Accordingly, Nasdaq urges the Commission to withdraw the Proposal and to work with the SROs to consider alternatives that would actually enhance rather than impair market regulation.

Proposal Unlawfully Authorizes the Plan Processor to Control SRO Access to CAT Data

The Commission lacks the legal authority to place the Plan Processor in a position of control over the SROs as proposed. The Exchange Act places governance of the National Market System ("NMS") Plans under the control of the SROs, with a limited role for non-SROs, largely to act as advisors.[4]

Section 11A of the Exchange Act allows the SEC to authorize or direct "*self-regulatory organizations* to act jointly with respect to matters as to which they share authority … in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof."[5] This empowers the Commission to direct joint action regarding matters governed by the Exchange Act to the shared, but otherwise exclusive,

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perform the CAT processing functions required by SEC Rule 613 and set forth in this Agreement." See id.

[3] "CAT Data" is a defined term under the CAT NMS Plan and means "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." See Securities Exchange Act Release No. 78318 (November 15, 2016), 81 FR 84696, (November 23, 2016) ("CAT NMS Plan Approval Order"). The CAT NMS Plan is Exhibit A to the CAT NMS Plan. See CAT NMS Plan at Section 1.1.

[4] See, e.g,. 15 U.S.C. § 78k-1(a)(3)(A) (authorizing the creation of advisory committees, which may include individuals representing non-SROs among their members, to provide input on national market system issues); Id. § 78k-1(d)(1) (requiring the creation of a National Market Advisory Board consisting of "persons associated with brokers and dealers . . . and persons not so associated who are representative of the public.").

[5] 15 U.S.C. § 78k-1(a)(3)(B) (emphasis added).

authority of the SROs. There is no parallel provision permitting the Commission to authorize *non*-SROs to participate in the governance of NMS plans.

Even if the Commission had the statutory authority to afford non-SROs a role in the implementation and governance of the NMS plans—which it does not—the Commission's existing regulations do not permit such a role for non-SROs.

Moreover, although the Commission contends that the Plan Processor should be granted authority over the SROs to provide consistency and efficiency,[6] there are any number of alternative structures that would be capable of providing consistency and efficiency within the current statutory and regulatory framework. Failure by the Commission to consider such alternative structures would be "arbitrary, capricious, an abuse of discretion," and should be set aside under the Administrative Procedure Act ("APA").[7]

Because the Plan Processor is not an SRO, the SEC does not have the authority under the Exchange Act or its own regulations to delegate to the Plan Processor the authority to control participant ("Participant")[8] access to CAT Data. In addition, a failure to consider alternative governance structures would be arbitrary and capricious under the APA.

The Proposal Vests the Plan Processor with the Authority to Deny a Participant Access to CAT Data

Under the Proposal, a Participant would obtain CAT Data through a Secure Analytics Workspace ("SAW").[9] The Plan Processor would be the gatekeeper tasked with approving or prohibiting a Participant from gaining access to CAT Data through the SAW. The Plan Processor would have the authority to determine whether a Participant adheres to the security controls set forth in the Comprehensive Information Security Program ("CISP"),[10] and would

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6 85 FR 65990, 66003.

7 Bus. Roundtable, 647 F.3d at 1148.

8 The Participants include BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors' Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange 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.

9 See 85 FR 65990; see also Proposed CAT Plan, Section 1.1 (Definitions) (defining SAWs as "an analytic environment account that is part of the CAT System, and subject to the Comprehensive Information Security Program, where CAT Data is accessed and analyzed by Participants pursuant to Section 6.13.").

10 Proposed CAT Plan, Section 1.1 (Definitions) ("Secure Analytic Workspace"); see also Proposed CAT Plan, Section 1.1 (Definitions) (defining the Comprehensive Information Security Program

monitor the Participants' usage of CAT Data for compliance with the CISP.[11] A Participant may request an exemption to some aspect of the CISP from the Plan Processor's Chief Information Security Officer ("CISO")[12] and the Chief Compliance Officer ("CCO"),[13] but a Participant may be denied access for failure to comply with the CISP.[14] There is no mechanism to appeal a decision of the Plan Processor, which appears to be the final arbiter on issues related to CISP compliance.

The Commission justifies this delegation of authority to the CISO and the CCO based on the contention that they are "fiduciaries to the Plan Processor and to the Company," and "have the most experience, knowledge, and expertise regarding the overall operation of the CAT, the state of the CAT's security, and compliance with the CAT NMS Plan."[15] The Commission further contends that "[r]equiring the Plan Processor to monitor each Participant's SAW in accordance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i) should enable the Plan Processor to conduct such monitoring consistently and efficiently across SAWs."[16]

The Act Authorizes the SROs—and Only SROs—to "Act Jointly" With Respect to NMS Plans

The Commission lacks authority to vest a non-SRO with the power to participate in the governance of an NMS plan.

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as including "the organization-wide and system-specific controls and related policies and procedures required by NIST SP 800-53 that address information security for the information and information systems that support the operations of the Plan Processor and the CAT System, including those provided or managed by an external organization, contractor, or source, inclusive of Secure Analytical Workspaces.").

11 See 85 FR 65990, 66003 ("[P]roposed Section 6.13(c)(i) would require the Plan Processor to monitor each Participant's SAW in accordance with the detailed design specifications developed pursuant to proposed Section 6.13(b)(i), for compliance with the CISP and the detailed designs specifications only, and to notify the Participant of any identified non-compliance with the CISP or the detailed design specifications.").

12 The CISO is the Chief Information Security Officer of the Plan Processor. See 85 FR 65990, 65993.

13 The "CCO" or "Chief Compliance Officer" is "the individual then serving (even on a temporary basis) as the Chief Compliance Officer pursuant to Section 4.6, Section 6.1(b), and Section 6.2(a)." See 85 FR 65990, 65999 n.71; 85 FR 65990, 66007 ("only the CISO and the CCO should be the decision-makers regarding any requested exceptions.").

14 85 FR 65990, 66009 ("Participants should not be indefinitely allowed to continue to access large amounts of CAT Data outside the security perimeter of the CAT without an affirmative determination that their systems are secure enough to adequately protect that information.").

15 85 FR 65990, 66007.

16 85 FR 65990, 66003.

Section 11A of the Exchange Act allows the SEC to authorize or direct "*self-regulatory organizations* to act jointly with respect to matters as to which they share authority … in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof."[17] This provision comprehensively describes how the Commission can delegate regulatory authority for NMS Plans, and excludes non-SROs. The Exchange Act tells the Commission *how* it can exercise its authority ("by rule or order"), *over whom* it can exercise its authority ("self-regulatory organizations"), and *what* it can direct those regulated SROs to do ("act jointly with respect to . . . planning, developing, operating, or regulating a national market system").[18] There is no parallel provision permitting the Commission to authorize *non*-SROs to participate in the governance of NMS plans.

The fact that the Exchange Act speaks expressly to the Commission's power over SROs, excluding non-SROs, unambiguously conveys the limited scope of the Commission's authority. It is well-settled that Congress's "mention of one thing implies exclusion of another thing."[19]

There is no other way to read the plain language of the provision. There would have been no need for Congress to expressly vest the Commission with authority to direct "self-regulatory organizations to act jointly" in "operating" NMS plans if Congress intended to authorize the Commission to empower *anyone* to participate in the operation of NMS plans.[20] Congress's deliberate and precise language makes clear that the Commission is only authorized to task SROs with operating NMS plans.

Where Congress addressed the role of non-SROs, it relegated non-SROs to advisory roles. Section 11A(a)(3)(A) of the Exchange Act authorizes the creation of advisory committees, which may include individuals representing non-SROs among their members, to provide input on national market system issues.[21] Section 11A(d) requires the creation of a National Market Advisory Board consisting of "persons associated with brokers and dealers . . . and persons not so associated who are representative of the public."[22] These provisions demonstrate that Congress envisioned a limited, advisory role for non-SROs in developing and implementing the

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17 15 U.S.C. § 78k-1(a)(3)(B) (emphasis added).

18 15 U.S.C. § 78k-1(a)(3)(B).

19 See Ethyl Corp., 51 F.3d at 1061 (internal quotation marks omitted); see also Jennings v. Rodriguez, 138 S. Ct. 830, 844 (2018) ("The expression of one thing implies the exclusion of others (*expressio unius est exclusio alterius*)." (internal quotation marks omitted)); see also, e.g., United States v. Johnson, 529 U.S. 53, 58 (2000); Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Indep. Ins. Agents of Am., Inc. v. Hawke, 211 F.3d 638, 644 (D.C. Cir. 2000); Schumann v. Comm'r, 857 F.2d 808, 811 (D.C. Cir. 1988).

20 15 U.S.C. § 78k-1(a)(3)(B).

21 See 15 U.S.C. § 78k-1(a)(3)(A).

22 See id. § 78k-1(d)(1).

national market system.[23]

Without express authorization to delegate authority to non-SROs such as the Plan Processor, the Commission cannot do so.[24] "Merely because an agency has rulemaking power does not mean that it has delegated authority to adopt a particular regulation."[25]

There are sound policy reasons supporting this interpretation of the Exchange Act. Unlike other private entities, SROs are obligated under the Exchange Act to discharge quasi-governmental functions and, in so doing, are required to act in the public interest and in furtherance of the Exchange Act's statutory objectives. SROs are statutorily required to "protect investors and the public interest;"[26] their rules are subject to Commission review and approval;[27] and they must comply with their own rules and enforce compliance with those rules, as well as with the securities laws, by their members and persons associated with their members.[28] It makes sense, then, that Congress would have entrusted responsibility for the development and implementation of the NMS plans to SROs, which must exercise that responsibility in a manner consistent with their statutory obligations and regulatory duties.

The Commission's Own Regulations Constrain Its Ability to Delegate Control to Non-SROs

Pursuant to its authority under Section 11A, the Commission promulgated Regulation NMS in 2005.[29] This regulation defines an NMS plan as a "joint self-regulatory organization plan" in connection with either "[t]he planning, development, operation or regulation of a national market system (or a subsystem thereof) or one or more facilities thereof"; or "[t]he 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."[30]

Regulation NMS explicitly delegates NMS Plan governance to SROs. Rule 608(a)(3) of

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23 See, e.g., id. § 78k-1(d)(3)(C) ("In carrying out its responsibilities under this paragraph, the Advisory Board shall consult with self-regulatory organizations").

24 New York Stock Exchange LLC v. SEC, 962 F.3d 541, 554 (D.C. Cir. 2020) ("[A]n agency cannot purport to act with the force of law without delegated authority from Congress.").

25 Id.; see also Ry. Labor Executives' Ass'n, 29 F.3d at 659 (rejecting the argument that the Court should "*presume* a delegation of power from Congress absent an express *withholding* of such power" because the agency's argument came "close to saying that the [agency] has the power to do whatever it pleases merely by virtue of its existence").

26 15 U.S.C. §§ 78f(b)(5), 78o-3(b)(6), 78q-1(b)(3)(F).

27 See id. § 78s(b).

28 See id. §§ 78f(b)(1), 78o-3(b)(2), 78q-1(b)(3)(A), 78s(g).

29 See Regulation NMS, Release No. 34-51808, 70 Fed. Reg. 37,496 (June 29, 2005).

30 17 C.F.R. § 242.600(44).

Regulation NMS states that "[s]elf-regulatory organizations are authorized to act jointly in . . . [p]reparing and filing a national market system plan" and in "[i]mplementing or administering an effective national market system plan."[31] Rule 608(c) directs that "[e]ach self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant," and "[e]ach self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members."[32]

Even if the Commission had the statutory authority to afford non-SROs a role in the implementation and governance of the NMS plans—which, as discussed above, it does not—the Commission's existing regulations do not permit such a role for non-SROs. "It is axiomatic that an administrative agency is bound by its own regulations."[33] The Commission cannot promulgate a binding regulation specifying the scope of its authority and then repudiate that regulation without amending or repealing it. If the Commission intends to deviate from an existing policy, it "must show that there are good reasons for the new policy."[34] "[H]owever the agency justifies its new position, what it may not do is gloss over or swerve from prior precedents without discussion."[35]

Thus, the Commission's own regulations—in addition to the statute—prevent it from delegating authority governance authority to the Plan Processor as a non-SRO.

The Failure to Set Forth a Reasoned Basis for the Proposed Delegation of Authority to the Plan Processor is Arbitrary and Capricious

Federal administrative agencies are required to engage in "reasoned decisionmaking" under the APA.[36] To do so, the agency must "examine[] the relevant data and articulate[] a satisfactory explanation for its action including a rational connection between the facts found and

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31 Id. § 242.608(a)(3)(ii)(iii).

32 Id. § 242.608(c).

33 Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1507 (D.C. Cir. 1984); see also Service v. Dulles, 354 U.S. 363, 372 (1957) ("regulations validly prescribed by a government administrator are binding upon him").

34 FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009); see also Sw. Airlines Co. v. FERC, 926 F.3d 851, 856 (D.C. Cir. 2019) ("A full and rational explanation becomes especially important when . . . an agency elects to shift its policy or depart from its typical manner of administering a program." (alterations and internal quotation marks omitted)).

35 Sw. Airlines Co., 926 F.3d at 856 (alterations and internal quotation marks omitted).

36 Michigan, 135 S. Ct. at 2706 ("Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational. It follows that agency action is lawful only if it rests 'on a consideration of the relevant factors.'") (internal citation omitted).

the choices made."[37] A failure to engage in reasoned decisionmaking is "arbitrary, capricious, an abuse of discretion," and will be set aside under the APA.[38]

The Commission justified delegating authority to the Plan Processor by asserting that it would be able to monitor Participant usage of CAT Data "consistently and efficiently across SAWs."[39] The Commission's proposal is not the only way to achieve consistent and efficient monitoring, however. There are any number of methods to do so that would be consistent with statute and regulation, such as, for example, vesting a subcommittee of the Operating Committee with the authority to review Participant compliance with the CISP. A failure to investigate other, legally sanctioned, methods of achieving the same result would be arbitrary and capricious.

Proposal Would Undermine Effective Regulation of Trading Without Justification

When the Commission ordered the SROs to create a CAT, its primary goal was to enhance market regulation in order to protect investors. The SEC in the CAT NMS Plan Approval Order provided as an example of this that, "improved data could lead to more effective and efficient surveillance that better protects investors and markets from violative behavior and facilitates more efficient and effective risk-based investigations and examinations that more effectively protect investors."[40] This Proposal risks doing the opposite, potentially hampering Nasdaq and other SROs from using CAT Data with their existing surveillance patterns, as well as introducing a much higher risk profile due to the introduction of SRO specific non-CAT Data, surveillance applications, pattern logic and alerts in a SAW environment. The aggregation of the CAT Data, SRO regulatory data, and regulatory intelligence greatly increases the value of information sitting within a SAW environment, which greatly increases the overall security risk.

The Proposal would effectively prevent the SROs from effectively using CAT Data for surveillance analysis and investigations. The SEC proposes limiting the SROs' ability to download CAT Data to enhance regulation. Section II of the Proposal would limit the number of records downloaded via the online-targeted query tool (OTQT) to 200,000 records. This limitation is far too restrictive to permit meaningful surveillance. CAT is estimated to receive over ***three hundred billion*** records per day. Therefore, 200,000 records reflects just a sub-second of activity in the CAT system. It is impossible to generate sufficient analysis and queries with such a small data set.

For example, Nasdaq employs over 100 surveillance patterns that generate alerts. Based

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37 Bus. Roundtable, 647 F.3d at 1148 (quoting Motor Vehicle Mfrs. Ass'n of U.S., 463 U.S. at 43); see also Bus. Roundtable. 647 F.3d at 1149 (explaining that decisions have been set aside where the Commission has "failed adequately to quantify the certain costs or to explain why these costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.").

38 Bus. Roundtable, 647 F.3d at 1148.

39 85 FR 65990, 66003.

40 See CAT NMS Plan Approval Order at 84817.

upon Nasdaq's own experience, most of these alerts require additional analysis and data where a 200,000 OTQT record limitation would make it impossible for Nasdaq to effectively resolve alerts and complete investigations. SROs have an extensive experience with surveillance patterns and result sets, and a 200,000 record limitation would severely impede an SRO's ability to efficiently and effectively surveil, analyze and monitor for market manipulation. Some lifecycles for a single order alone exceed 200,000 records, meaning it would not be possible to extract a complete lifecycle for such an order with this limitation in place.

The Proposal would require SROs to bring their own non-CAT Data into the SAW, including personally identifiable information (PII), which is required for their regulatory programs. This SRO specific data would not be reported through a CAT Reporter interface and would introduce significant risk for the Processor to manage and control such SRO sensitive data. This requirement would create substantial roadblocks to effective regulation.

The Proposal is Unjustified Because Nasdaq Systems are Secure

The Proposal fails to articulate, much less establish, a sound basis for limiting SROs' regulatory effectiveness in the manner proposed. Nasdaq systems are secure, as the Commission staff has validated through multiple on-site inspections. Nasdaq has implemented security controls, aligned to the NIST 800-53 industry standard. Based on our Data Classification Policy, Nasdaq will ensure the adequate levels of controls are implemented for the Highly Confidential CAT Data. Nasdaq's Information Security program is rigorously tested by its internal auditors and third party auditing firms. Nasdaq is uniquely positioned in that it has extensive experience globally in operating exchanges, clearinghouses, and selling exchange systems that have their own security requirements. In line with maturity industry standards, Nasdaq is constantly monitoring and updating its systems, including employing defensive layers throughout its technology stack.

The Commission's proposed limits on Nasdaq's use of CAT Data are unnecessary because Nasdaq is a Reg SCI entity with a proven track record of data security that is already subject to extensive SEC oversight and controls. The Commission deserves credit for the comprehensive system of SRO oversight it has created, culminating most recently with Regulation System Complaince and Integrity ("Reg SCI"). In response to Reg SCI, Nasdaq has adopted a multi-layered approach to security that includes strict policies and procedures; vigilant governance at the highest levels of Nasdaq management (e.g., its Chief Legal Officer and Chief Technology Officer); oversight by its Board of Directors and Regulatory Oversight Committee of the Board; independent review by its Chief Audit Officer; and direct involvement of its Chief Information Security Officer. Nasdaq constantly monitors and updates its systems and has considerable experience globally operating exchanges and clearinghouses. As a result of these and other measures, Nasdaq's record of data security is already top-tier and provides no basis for the Commission's proposed limitations.

Proposal Grossly Underestimates Costs

The cost-benefit analysis is a required part of the SEC's rulemaking, but the Proposal's

cost-benefit analysis fails to accurately weigh the costs of the rulemaking against the benefits it would render. Under the APA, agency actions will be set aside that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[41] This requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made."[42] Commission action has been set aside when it "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; [and] neglected to support its predictive judgments;" among other things.[43] The Proposal would impose costs on FINRA CAT ("FCAT") by making it a regulator for the SROs, with control over whether to deny or to grant them access to a SAW. FCAT does not have this expertise, however, other than that for its own systems. Thus, FCAT would need to engage in an intrusive examination of each SROs surveillance system, such as Nasdaq's proprietary SMARTS application before it could 'certify' that they meet security standards.

The Proposal also would impose opportunity costs by creating a more stagnant approach to regulation. Regulation is not one size fits all – the more innovation and varying approaches employed, the better, broader reaching and more diverse regulation becomes for all markets, to the benefit of all market participants. The more eyes, the better. The standardization of policies and procedures across all SROs would derail regulation and organic improvements. The most important benefit of having varied approaches to regulation would be stripped away if all the SROs have to maintain the same policies and procedures. The SROs do not do the same things in the same manner so the Proposal would be the equivalent of putting many square pegs in a single round hole. The Proposal is effectively taking many steps backwards and stifling innovation in a market that evolves quickly – it simply makes no sense to impose restrictions where they are not needed. Nasdaq understands best how to implement security controls aligned to an industry standard within its own organization.

The Proposal also underestimates the significant costs that FCAT would incur to manage the SAW. The Commission relies on a number of assumptions about how the Proposal would work to reach its conclusion that benefits exceed costs. In fact, it seems clear that the opposite would occur with the costs of the Proposal greatly exceeding the benefits the Proposal seeks to achieve.

FCAT provided CAT LLC with an estimate of the labor-only portion of SAW costs, using the scope outlined in the Proposal as the basis for its estimate. These cost estimates have a high degree of uncertainty, and FCAT has stated that the cost estimates provided to SROs are very likely low due to the lack of limitations/boundaries included in the Proposal. FCAT's labor-only cost estimate is $85.5 million, which is many times greater than the SEC's $3 million

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41 5 U.S.C. § 706(2)(A).

42 Business Roundtable v. SEC, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

43 See id. at 1148-1149.

estimate. FCAT also indicated that there would be other significant non-labor costs that must be included in the cost analysis (e.g., insurance, equipment, AWS fees, FINRA parent and Kingland costs, etc). These non-labor items would be quite significant and cannot be estimated at this time, as they are dependent upon information from SROs and the SEC. The Commission's failure to explain the vast discrepancy between its own estimate and informed estimates provided by the very entity that it wishes to administer the proposed oversight function renders the Commission's analysis patently inadequate.

Conclusion

The Commission's determination to rush and push through the Proposal is detrimental, shortsighted, and, in general, undermines the very reason the CAT was created. It is critical that the SEC does not undermine Nasdaq's ability to enhance the regulation of the U.S. markets that it operates for the benefit of investors.

Therefore, we respectfully ask the Commission to withdraw the Proposal.

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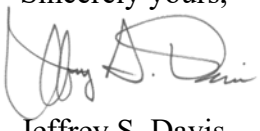
Thank you for your consideration of our comments. Please feel free to contact me with any questions.

Sincerely yours,



Jeffrey S. Davis

cc: The Hon. Jay Clayton, Chairman
The Hon. Caroline A. Crenshaw, Commissioner
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