



December 2, 2020

**VIA ELECTRONIC SUBMISSION**

Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington DC, 20549-1090  
Release No. 34-89632; File No. S7-10-20

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

Dear Ms. Countryman:

Cboe Global Markets, Inc. (“Cboe”) appreciates the opportunity to provide comments on the Securities and Exchange Commission (“SEC” or “Commission”) proposal to amend the national market system plan governing the consolidated audit trail (the “CAT Plan” or “Plan”),<sup>1</sup> which proposal is designed to enhance data security and confidentiality of the consolidated audit trail (“CAT”) (the “Proposal”).<sup>2</sup> Cboe is the parent company of six registered national securities exchanges, which are all Participants in the CAT Plan: Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe Exchange, Inc. (collectively, the “Cboe Exchanges”).<sup>3</sup>

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We understand the Commission’s primary objective of the Proposal is to further protect the security and confidentiality of CAT Data.<sup>4</sup> Cboe remains fully committed to protecting the security and confidentiality of CAT Data the Cboe Exchanges’ regulatory staff access from the Central Repository. The Participants have already taken numerous steps to enhance the security

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<sup>1</sup> Securities Exchange Act Release Nos. 78318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (“CAT Plan Approval Order”); and 87149 (September 27, 2019), 84 FR 52906 (October 3, 2019) (Notice of filing and immediate effectiveness of amended CAT Plan).

<sup>2</sup> Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security, Exchange Act Release No. 89632 (Aug. 21, 2020), 85 Fed. Reg. 65991 (Oct. 16, 2020) (the “Proposal”).

<sup>3</sup> Capitalized terms used but not defined in this letter have the meanings set forth in the Plan or Proposal, as applicable.

<sup>4</sup> See Proposal at 65991.

of CAT Data, including requesting an exemption from requiring Industry Members to submit personally identifiable information (“PII”) to the Central Repository, limiting the number of users that may access CAT Data, and restricting the usage of CAT Data to regulatory and surveillance purposes.<sup>5</sup> However, Cboe believes several parts of the Proposal are unnecessary to achieve the Commission’s security and confidentiality goals and that the Commission has not articulated a reasoned basis for believing that the Proposal is necessary or reasonably calculated to attain these goals. In addition, if approved, the Proposal will improperly restrict Participants’ usage of CAT Data in contravention of the purposes of the Plan. Specifically, Cboe believes approval of the Proposal will impose requirements and restrictions on the Participants’ use of CAT Data in a manner that would interfere with Participants’ ability to monitor and regulate their markets in accordance with their self-regulatory obligations. The Proposal also would prevent achievement of the Plan’s goals for more efficient regulation and the retirement of duplicative systems by decreasing Participants’ self-regulatory efficiency without a corresponding significant benefit. The Proposal’s requirements regarding confidentiality policies to be implemented under the Plan also would be unduly burdensome without providing a corresponding significant benefit.<sup>6</sup>

#### Required Usage of SAWs

The Plan currently provides for regulators, including the Participants, to have access to all CAT Data through an online targeted query tool and through user-defined direct queries and bulk extracts of data.<sup>7</sup> This provision is consistent with Rule 613, which expressly states, “Each national securities exchange, national securities association, and the Commission shall have access to the central repository . . . and access to and use of the data reported to and consolidated by the central repository . . . for the purpose of performing its respective regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations. The [Plan] shall provide that such access to and use of such data by each [such entity] for the purpose of performing its regulatory and oversight responsibilities pursuant to the federal securities laws, rules, and regulations *shall not be limited.*”<sup>8</sup>

Contrary to the Plan and Rule 613, the Proposal would limit Participants’ access to and use of CAT Data for the purpose of performing their regulatory and oversight responsibilities pursuant to the federal securities laws. Specifically, proposed Section 6.13(a)(i) of the Proposal would require Participants (1) to create and use secure analytical workspaces (“SAWs”) as the means of accessing and analyzing Customer and Account Attribute CAT Data; (2) use SAWs to access CAT Data through the user-defined direct query and bulk extract tools, unless an exception is granted

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<sup>5</sup> The Commission granted the Participants’ request for exemptive relief to not require Industry Members to report individual social security numbers or taxpayer identification numbers, or dates of births and account numbers associated with natural person retail customers. See Securities Exchange Act Release No. 34-88393 (March 17, 2020), 85 FR 16152 (March 20, 2020).

<sup>6</sup> Cboe also agrees with the comments submitted by the CAT Operating Committee, which is expected to be submitted the week of November 30, 2020.

<sup>7</sup> See Section 6.10(c)(i) of the Plan.

<sup>8</sup> 17 CFR § 242.613(e)(2) (emphasis added).

(which exception must be re-granted on an annual basis); (3) to only extract from SAWs the minimum amount of CAT Data necessary to achieve a specific surveillance or regulatory purpose; and (4) to use a secure file sharing capability as the only mechanism for extracting CAT Data from the SAWs.<sup>9</sup> The Proposal also amends Appendix D, Section 8.1.1 of the CAT Plan to impose a maximum number of 200,000 records that may be downloaded via the online query tool, regardless of the maximum number of records that the Plan Processor determines can be downloaded via that query tool.<sup>10</sup>

As self-regulatory organizations (“SROs”), the Cboe Exchanges (and we expect all Participants) have expended significant time and resources in developing comprehensive regulatory programs that monitor our markets to maintain fair and orderly activities and market integrity. As SROs, the Cboe Exchanges are responsible for monitoring and enforcing compliance with their rules and federal securities laws and regulations as well as for maintaining integrity in the markets. The Cboe Exchanges conduct both market-specific and cross-market surveillances (we do not rely solely on a regulatory services provider for cross-market surveillance reviews), which are not limited to the securities markets. We are closest to our markets, which best positions us to have the greatest understanding of and greatest ability to effectively regulate our markets. Cboe’s vast regulatory experience has given us the knowledge and ability to successfully address nefarious behavior in the equities, options, *and* futures markets. We have gained this experience through years of regulation and by designing and maintaining our own unique regulatory programs to effectively regulate our markets across all these asset classes.

In the years since the Commission’s adoption of Rule 613 under Regulation NMS<sup>11</sup> and approval of the Plan,<sup>12</sup> the Cboe Exchanges have made substantial investments in our regulatory programs with the understanding we would be able to complement them with CAT Data obtained through the online targeted query tool and through user-defined direct queries and bulk extracts of data as permitted by the Plan. Cboe believes the ability to access and use the CAT Data in the manner contemplated by Rule 613(e)(2) and Section 6.10(c)(i) of the Plan should not be negated as it will provide the Cboe Exchanges with a more diverse and deeper pool of data which will enhance our ability to effectively conduct near-time surveillances and reviews. While we currently do not do so, we expect to download large amounts of CAT Data into our existing surveillances and perform other large data queries.<sup>13</sup> Our ability to incorporate CAT Data into our mature regulatory programs without any limitations — such as the limitations which would be imposed by the Proposal — is no different from what we have historically done with other data (including the

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<sup>9</sup> See generally Proposal at 65995 - 66013.

<sup>10</sup> See *id.* at 66013 - 66015.

<sup>11</sup> Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) (“Rule 613 Adopting Release”).

<sup>12</sup> Securities Exchange Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (“CAT Plan Approval Order”).

<sup>13</sup> The Cboe Exchanges do not anticipate conducting bulk downloads (i.e., downloads of a full copy of CAT Data for a trading day). However, the Plan permits bulk downloads, and we may determine in the future that such downloads are necessary to conduct certain regulatory responsibilities.

data the Plan is intended to enhance and replace), and is imperative to further our regulatory efforts to provide effective and more timely regulatory reviews and actions, consistent with one of the primary purposes of the Plan.<sup>14</sup> For example, upon full implementation of enhancements to incorporate CAT Data into our regulatory programs, we expect to enhance our ability to conduct more comprehensive near-time surveillance of market activity rather than on a T + monthly or even quarterly basis. We also believe this will allow us to more effectively enforce our member suspension rule by addressing bad actors more swiftly. By allowing the incorporation of CAT Data into our existing surveillances and supplemental reviews outside of SAWs, the Cboe Exchanges support the retirement of other data inputs currently incorporated into our surveillance reviews, such as ECAT, OATS, and COATS, and the incorporation of CAT Data into those reviews outside of SAWs would also reduce the need for time-consuming, burdensome requests to firms for information through blue sheets and other means. The Cboe Exchanges believe these updates will improve our already robust audit trail, which is critical to fulfilling our statutory obligations, while at the same time providing efficiencies to the overall regulatory process.

In good faith, we have expended and continue to expend resources and time on implementing the CAT NMS Plan based on the understood ability to use CAT Data in our regulatory programs as provided in Rule 613 and as we deem appropriate pursuant to the Plan. The Plan today does not require use of SAWs to access CAT Data. For the Commission to now, after a substantial amount of time has passed since the Plan's approval, require such an abrupt change of course for no substantiated reason would conflict with the Commission's rule-making obligation to provide a reasoned basis for any change to its long-held regulatory positions, and simply goes against the original thinking and spirit of CAT. Moreover, this drastic change at such a late stage could potentially impair our ability to surveil our markets by requiring the recreation of our surveillance program in an unknown and potentially unusable environment. The Proposal's restrictions on access to CAT Data would interfere with the Cboe Exchanges' ability to implement these enhancements to our existing regulatory programs to achieve the Plan's goals, and puts Cboe in a position of trying to rebuild and duplicate – if even possible – a proven and effective surveillance program that has evolved through years of growth and enhancements in the completely different environment as set forth in the Proposal. We would also not be able to retire the existing and otherwise duplicative regulatory data streams, because we would be unable to incorporate a CAT Data stream with the same information as current data streams into our surveillance programs as we anticipated. This would create a significant risk of a gap in our regulatory programs. The Proposal does not acknowledge the substantial costs and impairment of regulatory functions or balance them against the speculative conclusion that the Proposal is needed to protect security or confidentiality of CAT data.

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<sup>14</sup> See Rule 613 Adopting Release at 45730. Some of the main benefits of a consolidated audit trail were described as providing regulators with readily available expanded data “to perform surveillance and investigations for illegal activities . . . allowing more accurate and faster surveillance” as well as “helping regulators focus their resources and better identify areas in which potentially manipulative trading may be occurring.” *Id.* at 45730 – 45731. In other words, CAT was intended to help regulators enhance their own regulatory programs by providing them with access to a more comprehensive audit trail, not limit how regulators may implement their regulatory programs.

Further, the proposed limit to the maximum number of records per online query tool request does not appear to consider SRO experience and the constantly changing landscape of markets and regulation. This limit is arbitrary, and the Proposal does not articulate a reasoned evaluation of evidence to justify it. Moreover, it may prevent a Participant from fully satisfying its SRO obligations. Further, the Commission has identified no reason why the Plan must impose a specific maximum number when the Plan Processor is positioned to permit Participants to access as many records as technologically possible. Avoiding unnecessary restrictions on Participants' ability to download records will permit a Participant to receive the number of records it needs when performing a regulatory review, which could conceivably be more than an arbitrary limit of 200,000 records.

The proposed restrictions on Participants' access to CAT Data are not necessary to ensure that CAT Data is protected by appropriate security controls, policies, and procedures, and the Commission has identified no reason to believe otherwise. Cboe strives to adopt the best security practices to protect our data, including data the Cboe Exchanges use for regulatory and surveillance purposes. Cboe has implemented and maintains robust policies and procedures that are reasonably designed to secure data related to our markets, which includes CAT Data and non-CAT Data that includes Customer and Account Attributes as well as PII. In 2015, the Commission adopted Regulation SCI, the purpose of which was to ensure adequate capacity, integrity, resiliency, availability, and security of systems designated as SCI systems.<sup>15</sup> Regulation SCI, among other things, requires each Participant (each of which is an SCI entity under Regulation SCI) to establish, maintain, and enforce written policies and procedures reasonably designed to ensure that its SCI systems have levels of capacity, integrity, resiliency, availability, and security adequate to maintain operational capability and promote the maintenance of fair and orderly markets.<sup>16</sup> The Commission's Regulation SCI adopting release acknowledged that a one-size-fits-all approach for these policies was not intended or required by the rule, noting that each SCI entity (including each exchange) needed "flexibility to determine how to tailor its policies and procedures to the nature of its business [and] technology . . . ."<sup>17</sup>

All SROs are not alike. The organization, technology, and structure of each Participant differ from those of other Participants. Pursuant to Regulation SCI, Cboe has established regulatory programs and policies and procedures to ensure the security of our regulatory and other sensitive data that reflects our internal framework and operations. The security protocol Cboe has adopted to protect our regulatory data is different than the security measures called for by the Proposal, such as use of a SAW. However, as the Commission has acknowledged, it is critical for exchanges to tailor their own policies and procedures to their own operations.<sup>18</sup> Cboe is confident

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<sup>15</sup> See Securities Exchange Act Release No. 73639 (February 3, 2015), 79 FR 72251 (December 5, 2014) ("Regulation SCI Adopting Release").

<sup>16</sup> 17 CFR § 242.1001(a).

<sup>17</sup> Regulation SCI Adopting Release at 72291.

<sup>18</sup> See *id.*

that its security controls, policies, and procedures, enhanced by the standards imposed by Appendix D of the CAT Plan, will provide strong protections for any CAT Data the Cboe Exchanges regulatory staff access. The existence of these security protocols, combined with the additional standards in Appendix D of the CAT Plan, the effectiveness of which the Commission already is empowered to police, makes it unnecessary for the Commission to impose the additional restrictions in the Proposal, particularly when to do so would impair Participants' regulatory effectiveness. The Commission certainly has not explained in a reasoned manner how the existing security protocols it has imposed and administered are insufficient.

Further, Cboe believes the Proposal's requirement that the CISO and CCO of the Plan Processor oversee CAT Data usage is inappropriate and that the Commission has not explained why this new requirement is necessary. Pursuant to the Exchange Act, the Commission is the regulator of the Participants, including the Cboe Exchanges. Therefore, the Commission has the authority to conduct examinations of Participants' CAT Data usage and to determine whether such usage complies with the Plan. As the Commission itself states, "[b]y statute, the Commission is the regulator of the Participants, and the Commission oversees and enforces their compliance with the CAT NMS Plan."<sup>19</sup> Yet, the Commission in the Proposal would cede this statutory authority and would shift the burden and expense of this authority to oversee whether usage of CAT Data complies with the CAT Plan to the Plan Processor, which is a technology vendor. The Commission does not explain why it is authorized to delegate some of its duties and authority under the Exchange Act to a non-regulatory entity, much less offer a reasoned basis for believing that such delegation is a good idea. Not only should the Plan Processor not have an oversight role over the Participants that engaged it as a vendor, giving the Plan Processor such a role could negatively impact the ability of the Participants to perform their regulatory duties. Although we oppose the required use of SAWs as noted above, if the Proposal is approved Cboe expects the Plan Processor, in order to exercise this oversight role, may seek to control Participants' usage of the SAWs, including what types of tools and data Participants may bring into the SAWs. As a result, the Plan Processor could restrict how Participants may conduct their regulatory programs within the SAWs and inhibit Participants' ability to enhance their regulatory programs as a result of technology advancements. Cboe prides itself on its ability to innovate on all fronts, including with respect to its regulatory programs, and Cboe opposes giving the Plan Processor the authority to impose restrictions that may infringe on our ability to innovate to the betterment of our regulatory programs.

### Confidentiality Policies

Cboe is committed to maintaining the confidentiality of any CAT Data the Cboe Exchanges access from the Central Repository and has established policies reasonably designed to ensure the confidentiality of this data and limit usage of CAT Data to regulatory and surveillance purposes in accordance with the Plan.<sup>20</sup> Cboe opposes the portion of the Proposal that would require all

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<sup>19</sup> Proposal at 66053.

<sup>20</sup> See Section 6.5(g) of the Plan.

Participants to have identical confidentiality policies. As noted above, the organization, technology, and structure of the Cboe Exchanges and, thus, the regulatory programs of the Cboe Exchanges differ from those of other Participants. While SROs may have persons that perform the same or similar regulatory roles within their organizations, that does not negate the need for an SRO to implement its regulatory program (including policies for that regulatory program, such as the CAT confidentiality policies) to reflect the individualized structure, technology, and organization of that SRO. The Commission has offered no reason why it is rational to require that entities with differences in structure and procedures nonetheless should have identical confidentiality policies, particularly when the Commission already has the authority to oversee whether a particular Participant's policies are sufficient.

Cboe believes it is critical to retain the ability for Participants to establish and maintain their own policies regarding the usage and confidentiality of CAT Data in a manner we deem to be appropriate and necessary to comply with our SRO obligations. The Cboe Exchanges have established and continue to maintain policies in accordance with their regulatory obligations, which policies are not required to be identical to those of other securities exchanges despite having identical SRO obligations and staff members with the same or similar roles (both regulatory and non-regulatory). As discussed above, Cboe has implemented policies and procedures in accordance with Regulation SCI, which protect the confidentiality of our regulatory data. Cboe believes a principles-based approach for Participant CAT Confidentiality policies is appropriate, as is the case for Regulation SCI, to permit each Participant to design its CAT confidentiality policies to reflect its own organization and technology and to respond to constantly and rapidly evolving technology and security concerns. The Commission has identified no reason why confidentiality restrictions, in contrast to Regulation SCI and other policies and procedures, can be effective only if they are identical. Additionally, the Commission has not weighed the substantial disadvantages associated with requiring a uniform approach to situations that differ among the Participants.

In addition, current Cboe policies and procedures are already designed to ensure that regulatory data the Cboe Exchanges handle are used solely for regulatory and surveillance purposes.<sup>21</sup> These policies and procedures apply to CAT Data, which will be handled by Cboe Exchange regulatory staff with the same responsibility and care as regulatory data is handled today.

Cboe further believes proposed Section 6.6(g)(v) in the Proposal, requiring each Participant to engage an independent accountant to conduct annual examinations of compliance with these confidentiality policies, is unnecessary and would impose additional unnecessary and burdensome costs on the Participants. As discussed above, the Commission is the statutory regulator of the Participants, giving the Commission the authority to conduct examinations of these policies to determine whether they comply with the Plan and whether the Participants

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<sup>21</sup> See e.g., Regulatory Independence Policy For Regulatory Group Personnel and Regulatory Independence Policy For Non-Regulatory Group Personnel, *available at* [markets.cboe.com/us/options/regulation](https://markets.cboe.com/us/options/regulation).

have complied with these policies.<sup>22</sup> In addition, Cboe's internal audit group conducts regular audits of our regulatory policies, which ongoing audits will include the CAT confidentiality policies. Cboe is aware of no other SRO regulatory policy subject to a requirement that it must be reviewed by an independent auditor. In fact, when considering a suggestion that Regulation SCI reviews be conducted by an independent third party, the Commission indicated it "continue[d] to believe that [was] appropriate to permit SCI reviews to be performed by personnel of the SCI entity or an external firm, provided that such personnel are . . . objective and . . . have the appropriate experience . . ." <sup>23</sup> The Commission did not offer any reason why it is appropriate or necessary to impose such an independent auditor requirement with respect to CAT confidentiality policies.

#### Inapplicability of Proposal to the Commission

As discussed above, Cboe does not believe the Proposal is necessary to secure CAT Data and may interfere with the Participants' ability to conduct their regulatory program in accordance with their SRO obligations. Further support that there is no rational basis to believe that the proposed changes are necessary to achieve security and confidentiality is that the security and confidentiality requirements in the Proposal would not apply to all parties that have access to CAT Data. There is no rational value in imposing far-reaching requirements on a portion of CAT Data users. Additionally, any efficiencies that might otherwise be gained by requiring Participants to access data in the same manner and to adopt the same policies would be lost, again, if not all the parties are required to adopt the same policies and procedures. The Commission has offered no reasoned basis to believe the Proposal can possibly enhance the security of the CAT and the protections afforded to CAT Data if a certain segment of CAT Data users are not subject to the Proposal's data usage requirements and policies. If the Commission believes the security and confidentiality requirements in the Proposal are necessary to further protect the security and confidentiality of CAT Data, it would apply it uniformly across all users.

The Proposal notes that the Commission and its staff are subject to federal and Commission rules and policies that address security and confidentiality obligations and are subject to audits by the SEC Office of Inspector General and the Government Accountability Office.<sup>24</sup> The Participants are also already subject to federal rules and regulations under the Exchange Act regarding security and confidentiality and subject to inspections and examinations by the Commission. The Commission offers no reason to believe that the existing rules and regulations, along with continued Commission oversight, are not sufficient to ensure the Participants have established policies and procedures that will safeguard CAT Data when those same policies and procedures have been deemed to be sufficient to ensure the Participants safeguard all of their other data.

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<sup>22</sup> The Commission, as noted above, examines the Cboe Exchanges' Regulation SCI policies and procedures on an annual basis for compliance with Regulation SCI.

<sup>23</sup> Regulation SCI Adopting Release at 72343.

<sup>24</sup> Id.



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Cboe reiterates its ongoing commitment to ensuring the security and confidentiality of CAT Data. However, it believes the portions of the Proposal described above are not necessary to maintain the security and confidentiality of CAT Data and could interfere with the Cboe Exchanges' ability to effectively and efficiently monitor our markets in accordance with our SRO obligations. It is critically important to preserve the ability of the Cboe Exchanges to access and utilize CAT Data as currently permitted and expected by the Plan, as well as to ensure that we may continue to enhance our regulatory programs in response to changes in technological and market changes. This will permit the Cboe Exchanges to use CAT Data as we believe is appropriate and necessary to regulate our markets and satisfy our SRO responsibilities and achieve the purposes of the Plan. Cboe requests that the Commission not approve these portions of the Proposal.

Please contact either of us (Patrick Sexton: [REDACTED]; Greg Hoogasian: [REDACTED] if you have any questions regarding our comments.

Regards,

/s/ Patrick Sexton

Patrick Sexton  
Executive Vice President, General Counsel

/s/ Greg D. Hoogasian

Greg D. Hoogasian  
Senior Vice President, Chief Regulatory Officer

cc: The Hon. Jay Clayton, Chairman  
The Hon. Caroline A. Crenshaw, Commissioner  
The Hon. Allison Herren Lee, Commissioner  
The Hon. Hester M. Peirce, Commissioner  
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