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Via Email

Ms. Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Alternatives to the Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail to Enhance Data Security (File No. S7-10-20) ("Proposal")

Dear Ms. Countryman:

NYSE Group, Inc. ("NYSE") respectfully submits this comment letter on behalf of the New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. in response to the comment letter submitted by FINRA CAT, dated December 2, 2020 (the "Letter").¹ In the Letter FINRA CAT described alternatives to the amendments proposed to the National Market System Plan governing the Consolidated Audit Trail ("CAT NMS Plan")² by the Securities and Exchange Commission (the "Commission") in its August 21, 2020 release (the "Proposal").³

As we stated in our December 2, 2020 comment letter ("Comment Letter"),⁴ the NYSE supports strong security for the Consolidated Audit Trail (the "CAT") and agrees with the Commission that

¹ See Comment Letter from Shelly Bohlin, President & Chief Operating Officer, FINRA CAT LLC to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission ("Commission"), available at <https://www.sec.gov/comments/s7-10-20/s71020-8088162-226120.pdf> (December 2, 2020).

² See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696, (November 23, 2016) (Joint Industry Plan: Order Approving the National Market System Plan Governing the Consolidated Audit Trail) ("CAT NMS Plan Approval Order"). The CAT NMS Plan is Exhibit A to the CAT NMS Plan Approval Order. See *id.*, at 84943–85034. See also Limited Liability Company Agreement of Consolidated Audit Trail, LLC, a Delaware Limited Liability Company (August 29, 2019), at <https://www.catnmsplan.com/sites/default/files/2020-07/LLC-Agreement-of-Consolidated-Audit-Trail-LLC-as-of-7.24.20.pdf>.

³ See Securities Exchange Act Release No. 89632 (August 21, 2020), 85 FR 65990 (October 16, 2020) (File No. S7-10-20). All capitalized terms not otherwise defined are used as defined in the Proposal.

⁴ See, e.g., Comment Letter from Elizabeth K. King, Chief Regulatory Officer, ICE to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, available at <https://www.sec.gov/comments/s7-10-20/s71020-8083358-226075.pdf> (December 2, 2020).

the CAT NMS Plan must “protect the security and confidentiality of CAT Data.”⁵ The NYSE is supplementing the views set forth in the Comment Letter with its views on the alternative proposal in the Letter (the “Alternative Proposal”).⁶ Neither the Commission’s original Proposal nor FINRA CAT’s Alternative Proposal is legally permissible under the securities laws, and each would contravene the goals the Commission stated when it proposed and adopted Rule 613 and when it approved the CAT NMS Plan.

In sum and as described further below, FINRA CAT’s Alternative Proposal presents many of the same issues we addressed in our Comment Letter regarding the Proposal including that (1) assigning regulatory oversight of SROs to FINRA CAT exceeds the Commission’s authority, (2) it creates additional risk for CAT Data and to other SRO data and systems, (3) third party oversight of an SRO system would impose costs and risks on SROs seeking to move systems into a SAW, (4) application of the Plan Processor’s risk management policies imposes potentially conflicting and overlapping policies on SROs seeking to use CAT Data, and (5) the Alternative Proposal would impose limitations on CAT Data availability to regulators and create competitive advantages for FINRA, to the disadvantage to all other SROs and the detriment of U.S. securities market oversight.

1. Assigning Regulatory Oversight of SROs to FINRA CAT Exceeds the Commission’s Authority

As discussed in the Comment Letter and as described by other SROs in comment letters they submitted in response to the Proposal,⁷ Section 11A of the Securities Exchange Act of 1934 permits the Commission to create NMS Plans and to require SROs to comply with NMS Plans, but does not permit the Commission to authorize non-SROs to participate in the governance of those NMS plans.⁸ FINRA CAT’s Alternative Proposal is fatally flawed because it seeks to “impose four oversight responsibilities [of SRO systems] with the Plan Processor,” an entity with no legally authorized SRO regulatory oversight responsibilities and no responsibilities pursuant to Rule 608 of Reg NMS.⁹

⁵ Proposal, at 65991. “CAT Data” is defined to mean “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.” CAT NMS Plan, at Section 1.1. See also Proposal, at note 4.

⁶ See Letter at 10-11.

⁷ See e.g., Comment Letter from Jeffrey S. Davis, Senior Vice President, Nasdaq to Vanessa Countryman, Secretary U.S. Securities and Exchange Commission, available at <https://www.sec.gov/comments/s7-10-20/s71020-8084827-226094.pdf> (December 2, 2020).

⁸ See, e.g., 15 U.S.C. 78k-l(a)(3)(B).

⁹ See, e.g., Letter at 7-9, 56-61; 17 CFR 242.608.

2. The Alternative Proposal Creates Risk for CAT Data and to Other Data and Systems

Although it is not clear if FINRA assumes in their Alternative Proposal that the Commission would be mandating use of a SAW overseen by the Plan Processor, mandating the use of a SAW creates the same concentration risk identified in our Comment Letter.¹⁰

Further, merely changing ownership of the SAW transfers the risk of a FINRA CAT insider abusing SAW ownership privileges (as described in our Comment Letter) with the insider risk resulting from FINRA CAT having ongoing network-level access to an SRO's SAW to accomplish the proposed scanning and intrusion monitoring functions. Such access, even if only provided for purposes of vulnerability scanning and intrusion detection, provides a FINRA CAT insider with access to knowledge regarding vulnerabilities existing on an SRO's network and with direct access to network hosts that could be used to exploit those vulnerabilities. The insider could co-opt a scanner (or could provide information to others so that they could do so) to exploit vulnerabilities on an SRO's network systems.. All of these risks are further aggravated by FINRA CAT's Alternative Proposal's requirement that the results of such scanning be reported to the Plan Processor.

3. Third Party Oversight of an SRO System Would Impose Costs and Risks Upon SROs

In many of the same ways described in our Comment Letter, the Alternative Proposal would impose costs and risks upon SROs that were not contemplated by the Commission when it proposed and adopted Rule 613 and approved the CAT NMS Plan. First, for example, mandating that SROs move data and systems into a SAW environment hosted outside of an SRO's security perimeter exposes such data and systems to risks.¹¹ Second, requiring that SROs engage third parties to conduct penetration testing and code reviews creates risk by allowing third parties to gain knowledge about potential penetration vulnerabilities before they may be addressed and by allowing third parties to have access to code that secures such systems. Further, requiring that third parties conducting such testing report findings to the Plan Processor not only violates section 11A as described above, but also increases the risk associated with such testing by allowing still more outside parties to have an understanding of an SRO's systems and code and associated vulnerabilities being reported. Finally, prescribing that such testing and reviews be conducted by outside parties imposes costs not contemplated by the Commission when it adopted Rule 613 and approved the CAT NMS Plan and is not justified by the analysis articulated in the Commission's Proposal or in FINRA CAT's Alternative Proposal.

4. The Alternative Proposal Would Impose Duplicative and Potentially Conflicting and Policies Upon SROs Using CAT Data

Similar to issues described in our Comment Letter, requiring that risks be addressed "in accordance with the Plan Processor's risk management policy" imposes a requirement that

¹⁰ See, e.g., Comment Letter at 13.

¹¹ See, e.g., Comment Letter at 15.

SROs track and reconcile two sets of risk management policies, creating confusion and costs not considered by the Commission.¹²

5. The Alternative Proposal Would Impose Limitations on CAT Data Availability and Create Competitive Advantage for FINRA, to the Disadvantage to all other SROs and to the Detriment of U.S. Securities Market Oversight

Each of the issues described above combine to limit the availability of CAT Data to SRO regulatory personnel and programs. The costs and risks that an SRO would be required to consider and weigh in order to use CAT Data directly lead to the likely outcome that an SRO would elect to not directly use CAT Data in its regulatory program, but would instead contract a third party to conduct surveillance on its behalf. Adopting the Commission's Proposal or FINRA CAT's Alternative Proposal would both limit SRO access to CAT Data, which, as the Commission previously stated in Rule 613 and in the release accompanying the final Rule, "shall not be limited."¹³

FINRA CAT's Alternative Proposal, similar to the Commission's Proposal, substantially increases the likelihood of FINRA's role as a monopoly provider of most or all cross-market regulatory services, decreasing the amount of innovation in, and the diversity of, regulatory approaches, contrary to one of the principal goals of the CAT and one of the primary intentions of the Commission when it adopted Rule 613.¹⁴ The Proposal and FINRA CAT's Alternative Proposal would result in the Commission choosing winners and losers for provision of regulatory services among the SROs and limiting regulator access to CAT Data, without justification or sufficient explanation why the current security requirements are inadequate.

Finally, the Proposal and the Alternative Proposal would radically alter the cost benefit analyses the Commission conducted when it proposed and adopted Rule 613 and approved the CAT NMS Plan. Adopting either of these proposals would require a full analysis under the Administrative Procedures Act of the benefits the Commission seeks to derive from and the costs to be imposed.

¹² See, e.g., Comment Letter at 15.

¹³ See 17 CFR 242.613(e)(2); Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45811 (August 1, 2012).

¹⁴ See, e.g., Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012) (order adopting Rule 613), at 45731 (explaining that the timely availability of data to regulators also impacts the efficacy of detecting (and possibly mitigating the effects of) some types of market manipulation.), 45736 (quoting the industry organization Financial Information Forum, who commented that "an enhanced audit trail system could increase the effectiveness of cross-market surveillance through better data availability and integration."), 45732 (explaining that "the consolidation of order data with direct access for *all* relevant regulators may create opportunities for regulators to develop entirely new methods of surveillance, and to keep existing forms of surveillance up to date as new market practices and new market technologies continue to rapidly evolve. In fact . . . *SROs are required* by the Rule to incorporate the expanded audit trail data into their surveillance systems." Emphasis added), and 45811 (explaining that regulator access to CAT Data "shall not be limited").

* * * * *

We reiterate our concern regarding potential conflicts of interest arising from the relationship between the Plan Processor and its parent, FINRA and that the net result of FINRA CAT's proposals would be to limit and inhibit access to CAT Data for regulatory use. Either proposal would create incentives for regulatory consolidation, reducing oversight of the U.S. securities markets and obviating a primary goal of CAT as articulated by the Commission: to improve data available to regulators, as "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."¹⁵

For the reasons set forth above, the NYSE respectfully requests that the Commission decline to adopt any portion of FINRA CAT's Alternative Proposal and that the Proposal itself be withdrawn.

Respectfully submitted,



Elizabeth K. King

Cc: Honorable Jay Clayton, Chairman
Honorable Caroline A. Crenshaw, Commissioner
Honorable Hester M. Peirce, Commissioner
Honorable Elad L. Roisman, Commissioner
Honorable Allison Herren Lee, Commissioner
Brett Redfearn, Director, Division of Trading and Markets

¹⁵ See CAT NMS Plan Approval Order at 84817.