

**BEFORE THE UNITED STATES
SECURITIES AND EXCHANGE COMMISSION**

In the Matter of the:

Order Granting Temporary Conditional Exemptive Relief Pursuant to Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 608(e) of Regulation NMS Under the Exchange Act, Relating to Certain Requirements of the National Market System Plan Governing the Consolidated Audit Trail

Release No. 34-90688 (Dec. 16, 2020)
85 Fed. Reg. 83634 (Dec. 22, 2020)

MOTION FOR PARTIAL STAY OF ORDER 34-90688

Consolidated Audit Trail LLC, on behalf of Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”),² respectfully requests that the Commission stay in part its Order Granting Temporary Conditional Exemptive Relief Pursuant to Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 608(e) of Regulation NMS Under the Exchange Act, Relating to Certain Requirements of the National Market System Plan Governing the Consolidated Audit Trail, Release No. 34-90688 (Dec. 16, 2020) (“688 Order” or “Order”).

The Participants support the Commission’s efforts to ensure that the Consolidated

¹ Consolidated Audit Trail LLC makes this motion on behalf of itself and the following Participants in the CAT NMS Plan: 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.; Investors Exchange LLC; 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; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

² See Public Appendix (“PA”) 2-275. Unless otherwise noted, capitalized terms are used as defined in Rule 613, the Plan, or this motion.

Audit Trail (“CAT”) provides the regulatory benefits envisioned by Rule 613³ and are working diligently to continue implementing the Plan with that goal in mind. At the same time, the Participants are concerned that portions of the Order interpret and apply the Plan in ways that will produce unintended adverse consequences, present implementation challenges, or both.

The Commission issued the 688 Order without providing notice or an opportunity to comment. Accordingly, for the reasons described below, the Participants request that the Commission stay the below identified provisions of the Order until the Commission has had an opportunity to consider the Participants’ arguments and supporting evidence and to reevaluate whether the Order is appropriate in light of that information. Alternatively, the Participants request that the Commission stay these provisions pending resolution of a petition for judicial review of the 688 Order, which the Participants intend to file on February 14, 2021.⁴

The Participants are committed to effectuating the Plan’s objectives for strengthening regulatory oversight of the Nation’s securities and options market, and we look forward to working with the Commission to address the issues raised in this motion.

³ See PA291-383, 385-1363.

⁴ Consolidated Audit Trail LLC makes this alternative request on behalf of itself and the following Participants: 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.; 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. The following Participants join in this stay motion but have not approved the filing of a petition for judicial review: Investors Exchange LLC, MEMX LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, and MIAX PEARL, LLC. FINRA and Long-Term Stock Exchange, Inc. did not approve this stay motion or the filing of a petition for judicial review.

Respectfully submitted,

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February 14, 2021

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**BRIEF IN SUPPORT OF MOTION FOR PARTIAL STAY OF
ORDER 34-90688**

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INTRODUCTION

The Participants respectfully request a stay of five provisions in the 688 Order so that the Commission may consider the Participants' concerns and reevaluate whether the challenged provisions are an appropriate means of implementing the Plan. Such a stay would present no risk of harm to others and would promote the public interest.

Parts of the Order require the CAT to be administered in ways inconsistent with the CAT NMS Plan. For example, the Plan grants the Operating Committee discretion to decide how to re-process CAT data when CAT Reporters submit error corrections more than five days after an event. But the Order removes that discretion, requiring the Plan Processor to assign a new CAT Order ID in every instance. A stay will allow the Participants and the Commission to fashion a framework in accordance with the Plan's text and purpose.

The Order's provisions also impose costs that outweigh their regulatory benefits or impede existing benefits. For example, the section addressed above requires the Plan Processor to assign new CAT Order IDs every time CAT Reporters submit error corrections more than five days after an event, even when the corrections have no effect on the original CAT Order ID, and without regard for the disruptive effects assigning a new CAT Order ID would have on surveillances and other regulatory oversight activities. The Participants would need to make an estimated [REDACTED] [REDACTED] new investment to implement this requirement, yet the changes would not meaningfully improve, and indeed would potentially degrade, regulators' ability to monitor the markets. Again, a stay will provide an opportunity to clarify the Commission's goals on this issue and, if necessary, to find a more cost-effective and less disruptive way to achieve those objectives.

By contrast, in the absence of a stay, the Participants will suffer irreparable harm. Increased compliance and technology development costs could impair the Participants' ability to administer

the CAT's other functions while also depriving the Participants of resources to regulate their own members. Much of these costs—likely in the [REDACTED] would be borne by the Participants and could not be fully recovered even if the Order is later modified or set aside.

Accordingly, for the reasons stated below, the Participants respectfully request that the Commission stay five portions of the 688 Order until the Commission has had an opportunity to consider all the Participants' arguments and supporting evidence and to reevaluate whether the Order is appropriate in light of that information. In the alternative, the Participants request a stay pending disposition of a petition for judicial review of the Order, which the Participants intend to file on February 14, 2021.⁵

BACKGROUND

The Participants wrote to the Commission on December 1, 2020 regarding implementation challenges posed by Plan requirements.⁶

On December 16, 2020, the Commission issued two Orders—one of which, Order 34-90689, responds to the Participants' letter. The Commission concurrently issued the 688 Order, which addresses CAT-implementation issues not raised in the Participants' letter, without first providing notice or an opportunity to comment.⁷

The 688 Order includes new interpretations of Plan provisions that are at odds with the approach taken by the Participants and the Plan Processor and that would impose burdens and requirements not contemplated by the Plan or Commission Rule 613. In particular, the 688 Order:

- Appears to interpret the Plan as requiring the Participants to provide interim CAT Order

⁵ See note 5, *supra*.

⁶ See PA1365-71.

⁷ The procedural history underlying this motion is the same as that underlying Consolidated Audit Trail LLC's Motion for Partial Stay of Order 34-90689. Their shared background is set forth in the brief in support of that Motion.

IDs by the day after a transaction (Part II.A);

- Requires the Plan Processor to assign a new CAT Order ID any time an error correction is received more than five days after an event, without considering the added costs or implementation problems that would result from that step and without analyzing whether this requirement would result in regulatory benefits (Part II.B);
- Directs the Participants to establish lifecycle linkages between CAT Transaction Data and Securities Information Processor (“SIP”) data without considering the substantial expense and negligible benefits associated with such an effort (Part II.C);
- Mandates reporting of port-level settings by multiple CAT Reporters without considering the resulting costs or technological challenges and without assessing whether such reporting would serve the CAT’s regulatory purposes (Part II.D); and
- Requires the Participants and CAT Reporters to link customer and representative orders in the same lifecycle even with respect to registered broker-dealers and other participants in the securities markets (“Industry Members”) that employ disconnected order-management and execution-management systems, irrespective of the CAT’s ability to link these orders through post-execution fill data (Part II.E).⁸

DISCUSSION

The Participants respectfully request that the Commission stay in part the 688 Order pursuant to its authority to issue a stay where, as here, “justice so requires.” 5 U.S.C. § 705; *see also* 15 U.S.C. § 78y(c)(2); 17 C.F.R. § 201.401; *In re Order Directing the Exchanges and the Financial Industry Regulatory Authority To Submit a New National Market System Plan Regarding Consolidated Equity Market Data*, 2020 WL 3266170, at *36921 (June 18, 2020) (Release No. 89066).

In evaluating stay motions, the Commission considers whether (1) the movant has demonstrated a “strong likelihood” of success on the merits, (2) absent a stay a party will suffer irreparable harm, (3) a stay would cause substantial harm to any person, and (4) a stay would serve

⁸ The 688 Order also requires the Participants to report to the CAT when “a Participant receives, but then rejects” an order. 688 Order at 11. The Participants are complying with this requirement by reporting to the CAT all messages rejected after receipt by an exchange.

the public interest. *In re Am. Petroleum Inst.*, Release No. 68197, 2012 WL 5462858, at *2 (Nov. 8, 2012). But as the Commission has explained, this framework is “not strictly required” for a stay to issue. *Id.* at *2 n.1.⁹ Further, when evaluating an order’s effect on the public interest, the Commission considers whether the order “will promote efficiency, competition, and capital formation.” 15 U.S.C. § 78c(f).

The Commission must comply with the Administrative Procedure Act (“APA”), including the APA’s requirement of reasoned decision-making, when interpreting and applying the Plan. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). In particular, the Commission may not “rel[y] on factors which Congress has not intended it to consider,” “fai[l] to consider an important aspect of the problem,” “offe[r] an explanation for its decision that runs counter to the evidence,” or reach a conclusion “so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Participants respectfully submit that the mandates issued by the Commission *sua sponte* in the 688 Order, without opportunity for the Participants to submit comments or evidence, are not in keeping with these bedrock APA principles. Accordingly, the Participants request a stay of the portions of the Order addressed below so that the Participants may continue to create and implement a CAT that consolidates securities market data and is useful to regulators as originally contemplated by Rule 613 and the Plan.

⁹ Irreparable harm sufficient to warrant a stay can include compliance costs that “would significantly harm or impair the regulated entities’ operations,” *In re Am. Petroleum Inst.*, 2012 WL 5462858, at *3, as well as costs that cannot be recovered even after successful resolution on the merits, *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (“unrecoverable economic loss ... qualif[ies] as irreparable harm”).

I. PART II.A OF THE ORDER RAISES QUESTIONS REGARDING THE PLAN'S REQUIREMENTS FOR PLAN PROCESSOR ACTION ON T+1.

Section 6.1 of Appendix D to the Plan prescribes deadlines for identifying and correcting errors upon the Plan Processor's receipt of an order event. Plan at Appendix D-18. These requirements include completing "[i]nitial data validation, lifecycle linkages and communication of errors to CAT Reporters" by noon ET the day following the transaction ("T+1"). *Id.* The 688 Order delays the effective date of this requirement to July 31, 2023 on the condition that the Participants "provide an interim CAT Order ID" and lifecycle linkages by 9 pm ET on T+1. 688 Order at 4–5.

It is unclear whether the 688 Order interprets the Plan to require the Participants to assign interim CAT Order IDs by noon on T+1. The Order does not expressly recite such a requirement, and the Plan identifies only three steps that must be taken by T+1 at noon: initial data validation, lifecycle linkages, and communication of errors to CAT Reporters. None of those steps involves assigning a CAT Order ID, which, as described below, is a separate process. Although the Order also conditions its exemptive relief on the Participants providing interim CAT Order IDs by 9 pm on T+1, that condition may be solely a function of the exemptive relief, as opposed to a conclusion that the Plan requires this step. The Participants request clarification regarding this issue and welcome an opportunity to discuss it with the Commission. However, to the extent that the Order determines that the Participants must assign interim CAT Order IDs by T+1 at noon, that interpretation contravenes the Plan's text, while also imposing significant new costs and causing implementation problems that would undermine the CAT's pro-regulatory purposes.

A. The Plan Does Not Require Assignment of Interim CAT Order IDs on T+1.

The Plan does not require the Participants to assign interim CAT Order IDs¹⁰ at any point, let alone by noon on T+1. Instead, it requires “initial data validation, lifecycle linkages, and communication of errors to CAT Reporters” by noon on T+1 and is silent regarding when CAT Order IDs must be assigned. Plan at Appendix D-18. Because the Plan “does not even mention” assignment of interim CAT Order IDs on T+1, the Plan “does not include” that requirement. *United States v. Nasir*, 982 F.3d 144, 159 (3d Cir. 2020). The Order implicitly acknowledges this distinction between CAT Order IDs and lifecycle linkages by directing the Participants to establish “interim CAT Order ID *and* lifecycle linkages by 9pm ET T+1.” 688 Order at 4 (emphasis added). Thus, the Plan’s deadline for validating lifecycle linkages cannot be read to include assignment of interim CAT Order IDs.

That understanding comports with the Plan’s broader structure and purposes for two reasons.

First, lifecycle linkages are data elements submitted by CAT Reporters, not connections created by the CAT system. As Appendix D explains, the Plan Processor must verify lifecycle linkages using the “daisy chain” approach whereby “unique order identifiers[] assigned to all order events handled by CAT Reporters are linked together by the Central Repository[.]” Plan at Appendix D-8. The identifiers that establish the linkages are in CAT Reporter submissions and thus, once validated by the Plan Processor, are available to regulatory users immediately on T+1 regardless of whether an interim CAT Order ID has been assigned. The CAT system [REDACTED]

¹⁰ Rule 613 defines a CAT Order ID as “a unique order identifier or series of unique order identifiers that allows the central repository to efficiently and accurately link all reportable events for an order, and all orders that result from the aggregation or disaggregation of such order.” 17 C.F.R. § 242.613(j)(1).

[REDACTED] Sealed Appendix (“SA”) 2-3.

Second, requiring assignment of an interim CAT Order ID by T+1 at noon is at odds with the Plan’s framework for identifying and correcting errors. CAT Reporters [REDACTED]

[REDACTED] SA2-3. CAT Reporters [REDACTED]

[REDACTED] *Id.* The upshot is that [REDACTED]

Even then, [REDACTED]

[REDACTED] SA3-4, 34-35.¹¹ Only *after* that point is each transaction “assigned a single CAT-generated CAT-Order-ID that is associated with each individual order event” and used to efficiently display the lifecycle of an order. Plan at Appendix D-8; *see* SA 39, 53, 55-58.

To the extent that the Order requires assignment of interim CAT Order IDs by noon on T+1, in addition to the CAT Order IDs released on T+5 when all data are “ready for regulators,” Plan at Appendix D-18, the Order conflicts with the Plan and Rule 613. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (agency’s interpretation of own rules “must ... be reasonable”) (internal quotations and citation omitted); *Ramaprakash v. FAA*, 346 F.3d 1121, 1124 (D.C. Cir. 2003) (“[A]gency action is arbitrary and capricious if it departs from agency precedent without

¹¹ Assigning a CAT Order ID [REDACTED]

[REDACTED] SA3-4. It would make little sense to require those tasks be completed within the four-hour period between T+1 at 8 am, when CAT Reporters must submit records to the Central Repository, and T+1 at noon, before CAT Transaction Data have been corrected and finalized. The Plan accounts for this concern by allowing the Plan Processor to assign CAT Order IDs at the end of—rather than during—linkage validation and error correction. *See* Appendix C-13.

explanation.”).

B. Assigning Interim CAT Order IDs at Noon on T+1 Would Impose Costs Outweighing Any Benefits.

Even if the Plan contemplated including interim CAT Order IDs as part of the process of ingesting CAT Reporter data submissions and validating lifecycle linkages by noon on T+1, such reporting would impose costs for no benefit. [REDACTED]

[REDACTED] SA4. In comparison, [REDACTED]

[REDACTED]

SA4-5.

Although the APA requires consideration of both costs and benefits, the Order is devoid of such consideration and does not analyze either with respect to the deadline for assigning interim CAT Order IDs. *See State Farm*, 463 U.S. at 43 (requiring consideration of all “important aspect[s] of [a] problem”). The Commission therefore should correct that oversight by studying the costs and implementation challenges associated with assigning interim CAT Order IDs by T+1 at noon and comparing those costs with any regulatory benefits that might flow from that new mandate.

Moreover, although the Order acknowledges that “the Plan Processor is currently unable to establish lifecycle linkages by the noon EST T+1 deadline,” 688 Order at 4, it incorrectly suggests that it will be feasible to assign interim CAT Order IDs by T+1 at noon after July 31, 2023, *id.* at 4–5. That is not the case, as discussed above. Accordingly, if this provision of the Order remains effective (and has the meaning discussed above), the Order directs the Participants

to expend resources for no reason.¹² The Order’s failure to consider this important aspect of the problem renders it arbitrary, capricious, and in need of further examination. *State Farm*, 463 U.S. at 43.

II. THE PLAN DOES NOT REQUIRE ASSIGNMENT OF A NEW CAT ORDER ID FOR ALL POST T+5 ERROR CORRECTIONS, AND DOING SO AS DIRECTED BY PART II.B OF THE ORDER WOULD COST [REDACTED] AND CREATE CHALLENGES FOR REGULATORY USERS.

Appendix D of the Plan requires CAT Reporters to submit data regarding each stage in the lifecycle of an order. After the CAT receives all relevant data, it assigns the full order lifecycle a CAT Order ID and then makes this ID available on T+5. *See* SA60. If the Plan Processor or a CAT Reporter corrects an error in the underlying data before then, the corrected data will be associated with the CAT Order ID on T+5. *See id.*; Sec. 6.1. But for errors corrected after T+5—and after the order has been assigned a CAT Order ID—the Plan instructs the Plan Processor to “notify[] and inform[]” Participants’ regulatory staff and the Commission “as to *how* re-processing will be completed.” Plan at Appendix D-19 (emphasis added).

[REDACTED]

[REDACTED] *See* SA 6. [REDACTED]

[REDACTED]

[REDACTED]

Further, [REDACTED]

[REDACTED]

¹² [REDACTED] SA5.

¹³ [REDACTED]

See SA6-7, 62-73.

[REDACTED]

[REDACTED] See SA6-7.

The 688 Order’s interpretation of Section 6.2 is at odds with the operative Plan provision and fails to account for problems that its rigid interpretation would create. Specifically, the Order would, in effect, require the Plan Processor [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See 688 Order at 5.

A. Requiring Reassignment of CAT Order IDs for All Corrected Data Received After T+5 Is Inconsistent with the Plan.

The 688 Order imposes obligations inconsistent with the Plan by depriving the Operating Committee of discretion over procedures applied to late corrections. By instructing the Plan Processor to inform the Commission “as to how re-processing will be completed” and indicating that “[t]he Operating Committee will be involved with decisions” on that issue, the Plan empowers the Operating Committee to determine how corrected data will be re-processed so long as the Operating Committee notifies the Participants’ regulatory staff and the Commission of the steps taken. Plan at Appendix D-19. Although Section 6.2 requires data to be “re-process[ed]” when error corrections “are received after T+5,” *id.*, reprocessing can take several forms, including [REDACTED]

[REDACTED]

[REDACTED] The Order improperly strips the Operating Committee of the ability to choose between these options and in doing so conflicts with the Plan’s text. See *Kisor*, 139 S. Ct. at 2416 (“The text ... establish[es] the outer bounds of permissible interpretation.”). Indeed, the fact that the cost-benefit analysis conducted when the Commission approved the Plan did not contemplate the [REDACTED] in costs resulting from the

688 Order’s interpretation of Section 6.2 indicates that no one—including the Commission—originally understood the Plan to require reassignment of CAT Order IDs for every late correction. *See* 81 Fed. Reg. 30614 (May 17, 2016) (Release No. 34-77724).

Granting the Operating Committee discretion makes sense given the Plan’s structure. Section 6.2 indicates that the purpose of correcting data after T+5 is to promptly make those data available to regulators. The Participants themselves use CAT data for regulatory purposes and, like the Commission, have a strong incentive for the data to be accurate and useful.

But requiring the Plan Processor to go beyond incorporating corrected data in the Central Repository—e.g., by mandating assignment of a new CAT Order ID—for every record corrected after T+5 would not further that shared goal. For example, [REDACTED]

[REDACTED]

[REDACTED] SA8. Similarly, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* Because assigning a new CAT Order ID can undermine the Plan’s core purposes, it is appropriate for the Operating Committee to exercise discretion over re-processing data affected by late corrections. *See Huashan Zhang v. U.S. Citizenship & Immigration Servs.*, 978 F.3d 1314, 1322 (D.C. Cir. 2020) (analyzing “structure, and regulatory context [to] show that [regulation’s] term” had “unambiguou[s]” meaning); *U.S. Dep’t of Labor v. Seward Ship’s Drydock, Inc.*, 937 F.3d 1301, 1309 (9th Cir. 2019) (relying on “purpose of the [regulation] and its regulatory history” to resolve ambiguity).

B. Requiring New CAT Order IDs for All Corrections Received After T+5 by July 2021 Would Cost [REDACTED] not Originally Contemplated, While Generating No Benefits and Potentially Reducing the CAT’s Usefulness.

Although the 688 Order exempts the Participants from its relabeling requirement until July

31, 2021, *see* 688 Order at 5, it does not address the costs or technical work necessary to achieve compliance by then.

Cost is not a trivial concern. The Plan Processor has preliminarily estimated that building the infrastructure to allow the CAT to reassign CAT Order IDs daily would require approximately

[REDACTED]¹⁴ *See* SA9. [REDACTED]

[REDACTED]

[REDACTED] *See* SA8-9. Even after investing [REDACTED]

[REDACTED] to accommodate this new requirement, the

[REDACTED]

[REDACTED] undermining the Participants' ability to meet other Plan obligations. *See* SA9.

[REDACTED] *Id.*

Moreover, reassigning CAT Order IDs would yield few benefits. In many cases, [REDACTED]

[REDACTED]

[REDACTED] *See* SA7. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED] SA8. Because errors are always corrected

in the Central Repository regardless of when the correction is submitted, the Commission is able

to see the whole picture for each order without assigning new CAT Order IDs. Further, requiring

¹⁴ This estimate does not include [REDACTED] *See* SA9.

reassignment of new CAT Order IDs can impede effective regulation. As explained above,

[REDACTED]

[REDACTED]

[REDACTED] See SA8.

The main effect of the 688 Order’s approach is to *force* the Operating Committee to undertake the costly and potentially disruptive process of assigning a new CAT Order ID even when facts indicate that a new CAT Order ID is unnecessary. To the extent that there are instances where the benefits of assigning a new CAT Order ID outweigh the costs, the Operating Committee can still take that step under the Participants’ interpretation of the Plan.

Part II.B of the 688 Order neither acknowledges the costs of its interpretation nor weighs them against any identified benefits, *see* 688 Order at 5–6, even though, as discussed above, the APA requires agencies to perform both steps, *cf. Michigan v. EPA*, 576 U.S. 743, 752-53 (2015) (“Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions.”). Given the unintended adverse consequences and the absence of benefits of this requirement, the Participants respectfully request that the Commission stay or rescind this component of the 688 Order, permitting the Participants to implement the Plan as originally intended.

III. PART II.C’S REQUIREMENT FOR LINKAGE OF CAT TRANSACTION DATA WITH SIP DATA OVERLOOKS IMPORTANT COSTS AND IMPLEMENTATION HURDLES.

The Plan provides that CAT Transaction Data and SIP Data collected by the Central Repository “shall be linked” when available to Commission staff. Plan at 50.

Although Part II.C of the 688 Order interprets this provision to require that SIP Data and other CAT Transaction Data be linked such that both types “are part of the lifecycle of an Order,” the Order correctly acknowledges that such linkage is unfeasible: “the CAT Plan Processor is only

able to provide a regulatory user a side-by-side view of – instead of a linkage between – both the transactional data in CAT and SIP Data through an online targeted query tool or a user-defined direct query.” 688 Order at 6–7. The Order then grants exemptive relief “to provide Participants more time to develop the changes necessary to meet the requirements[.]” *Id.* at 7.

Unfortunately, meeting this requirement would require more than just additional time. Although the Plan requires that SIP Data and other CAT Transaction Data “be linked,” it does not specify that the separate data streams be linked in the same lifecycle because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] SA13. [REDACTED]

[REDACTED]

[REDACTED] *Id.* The SIPs are not governed by the Plan, but rather by their own NMS plan. *See* 17 C.F.R. Parts 240, 242, 247 (Release No. 34-90610) (the “SIP Plan”). If changes are to be made to SIP Data, those changes must be made through the relevant NMS plan, not through an order interpreting the CAT NMS Plan. As a result, the requirement imposed by the 688 Order is not an appropriate or effective means of bringing about the necessary changes to SIP systems and data reporting.¹⁵

The 688 Order’s requirement is also problematic in light of the SIP Plan. The Commission has adopted a new, decentralized approach for the SIP Plan in which competing consolidators, rather than the existing SIPs, would “collect[], consolidat[e], and disseminat[e]” market data.

¹⁵ To the extent that the Order seeks to impose new reporting obligations on SIPs, the Order constitutes an unlawful amendment to the SIP Plan. *See Clean Air Council v. Pruitt*, 862 F.3d 1, 8–9 (D.C. Cir. 2017) (“an agency issuing” rule “is [] bound by the rule until that rule is amended or revoked” and “may not alter [it] without notice and comment” (citation and quotation marks omitted)).

Exchange Act Release No. 90610, December 9, 2020. Under this new framework, the number of entities disseminating SIP Data likely would increase, as would complexities arising from varying systems and workflows adopted by the new competing consolidators. SA14.

In light of the above, the Order's requirement would impose substantial costs while yielding no meaningful benefits. SA12-14. Indeed, the Order fails to address the costs that would result from its SIP-linkage requirement. 688 Order at 6–7. Rule 613 is likewise silent on the topic, *see* 17 C.F.R. Part 242 (Release No. 34-67457) at 79–80, because the CAT is a tool for “monitor[ing]” securities and options markets, not for changing their structure, *id.* at 44–45. By overlooking this “important aspect” of the issue, the Order fails to comply with the APA. *State Farm*, 463 U.S. at 43.

IV. PART II.D'S DIRECTIVE TO REPORT ALL PORT-LEVEL SETTINGS EXCEEDS THE PLAN'S REQUIREMENTS AND DOES NOT ADDRESS THE ADDED COST OR FEASIBILITY OF COMPLIANCE.

Sections 6.3(d)(ii)(G) and 6.3(d)(iii)(F) of the Plan require CAT Reporters to disclose the “Material Terms of the Order” for events in a transaction's lifecycle, including “any special handling instructions.” Plan at 7.

The Participants have structured their reporting systems to submit to the CAT all “material terms” applied to an order—including routing information and other instructions regarding how to handle a sale or purchase order, known as port-level settings. *See* PA1389-478. Each firm reports the port-level settings that they apply as a material term to an order. For example, if firm A routes an order to firm B for execution and firm B applies a material term to the order, firm A does not report the term that firm B applied to the CAT. *See id.* In that situation, only firm B and any subsequent CAT Reporter receiving the order with the instruction that firm B applied would report that material term to the CAT. *See id.*

In contrast, the 688 Order interprets Section 6.3 to require both the firm *sending* an order

and the firm *receiving* that order to submit the material terms that the receiving firm applied to the order to the CAT. *See* 688 Order at 7-8. The Order also construes the provision to include port-level settings transmitted but never applied to an order.

Both requirements go beyond what is required by the Plan and would generate costs not analyzed in the 688 Order or contemplated when the Commission approved the Plan.

A. Requiring All Port-Level Settings to be Reported Is Inconsistent with the Plan.

Requiring reporting of *all* port-level settings—including those never applied to an order or those merely passed along to another firm—expands the meaning of “material terms” beyond a reasonable interpretation of the Plan. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] SA15. Thus, [REDACTED]

[REDACTED]

[REDACTED]

The meaning of Section 6.3(d) is also clear in light of its context. As the Commission has explained, the Plan is intended to allow regulators to study the markets, not provide a mechanism to change market structures. *See* 17 C.F.R. Part 242 (Release No. 34-67457) at 44-45. However,

[REDACTED]

[REDACTED]

[REDACTED] *See* SA18-19,

75-79, 81. Because the regulatory background counsels against such consequential interpretations, the reporting obligations announced in the 688 Order could not reasonably fall within the Plan’s limits.

Regardless, the requirement is procedurally infirm because it creates new, substantive

obligations for the Participants and Industry Members without meeting the APA’s notice-and-comment requirement. *See Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 91 (1995) (notice-and-comment procedures are required when agency “effects a substantive change in the regulation”); *cf. Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2384 (2020) (putting “[f]ormal labels aside” and looking to contents of agency action to determine APA compliance).

B. Requiring All Port-Level Settings to Be Reported Would Generate Unwarranted Costs and In Some Situations May Be Impossible.

Although the 688 Order delays implementation of its port-level-settings requirement until July 31, 2023, *see* 688 Order at 8, it does not address the costs required to bring the CAT into compliance.

Requiring submission of all port-level settings sent and received, even if not ultimately applied to an order, would require Industry Members and Participants to [REDACTED]

[REDACTED] *See* SA18-19.¹⁶ [REDACTED]

[REDACTED] *See* SA18-19, 83. In some situations,

[REDACTED]

[REDACTED] *See* SA19, 85-

86.

The Order does not address either of these consequences or the absence of material benefits. Because the Participants already [REDACTED]

[REDACTED]

¹⁶ Similarly, even if the 688 Order is to be interpreted as requiring submission of port-level settings that are special handling instructions applied at a receiving firm by both the sending (to the extent that it pre-set those instructions with the receiving firm) and receiving firm, that would also require Industry Members and Participants to [REDACTED] *See* SA18-19.

SA17. The Order’s requirement thus generates no additional regulatory benefit that the Commission has articulated or considered in light of costs to be imposed.

Without having weighed these limited benefits against the significant costs of its port-level settings requirement, the 688 Order violates the APA. *See City & County of San Francisco v. U.S. Citizenship & Immigration Servs.*, 981 F.3d 742, 760 (9th Cir. 2020) (agency rule arbitrary and capricious because agency “did not adequately deal with the financial effects”).

V. PART ILE OVERLOOKS IMPLEMENTATION CHALLENGES REGARDING LINKAGE OF CUSTOMER AND REPRESENTATIVE ORDERS.

The Plan requires CAT Reporters to provide data such that customer orders may be linked “to ‘representative’ orders created in firm accounts for the purpose of facilitating a customer order[.]” Plan at Appendix D-8.¹⁷

Part II.E of the 688 Order interprets this requirement to include “linking a customer order handled on a riskless principal basis to the street-side proprietary order.” 688 Order at 9.

Although the CAT complies with that requirement in most cases, the Participants understand that some Industry Members have

[REDACTED]

[REDACTED] See SA88-117, 119, 121-31. To the extent that the 688 Order requires the Participants and Industry Members to go further—

[REDACTED]—the Order overlooks the added costs and limited benefits of its interpretation.

¹⁷ “A representative order is an order originated in a firm owned or controlled account, including principal, agency average price and omnibus accounts, by an Industry Member for the purpose of working one or more customer or client orders.” 688 Order at 9 n.14.

The implementation challenge on this issue arises [REDACTED]

[REDACTED]

[REDACTED] See

SA136, 144, 147, 154-56, 161-63. [REDACTED]

[REDACTED] See SA138, 147. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] SA137-38, 165-179, 181-188, 190-211.

According to the Financial Information Forum (“FIF”), requiring these firms to report linkage data on the front end, as contemplated by the Order, [REDACTED]

[REDACTED]¹⁸ See SA144, 216, 219, 224-44. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹ Moreover, little standardization exists between Industry Members’ systems, [REDACTED]

[REDACTED] SA 137, 219, 227. The available evidence—not addressed in the Order—indicates that [REDACTED]

[REDACTED] See SA139-40, 144, 234-37.

¹⁸ As the FIF observes, [REDACTED]

¹⁹ [REDACTED] SA234-36.

At a minimum, the cost of modifying data from firms with disconnected OMS/EMS frameworks would exceed any benefits. [REDACTED]

[REDACTED]

[REDACTED]

SA136-39, 144, 147, 200-03.

Because the Commission failed to address the time and expense necessary to comply with Part II.E for data from firms with disconnected OMS/EMS frameworks, as well as the minimal benefits associated with that directive, the Participants request that the requirement be stayed until the Commission may provide sufficient notice and opportunity for comment regarding these interpretations of the CAT reporting requirements. *See Shalala*, 514 U.S. at 100 (notice and comment procedures required when agency “effects a substantive change in the regulation”).

CONCLUSION

For the foregoing reasons, the Participants respectfully request that the Commission stay implementation of the Order provisions addressed above.

Respectfully submitted,

/s/ Michael Simon

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February 14, 2021

CERTIFICATE OF COMPLIANCE

Pursuant to 17 C.F.R. § 201.154(c), movants certify that the foregoing motion is 6,996 words in length, exclusive of the table of contents and table of authorities.

/s/ Kevin King
Kevin King

February 14, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2021, I caused copies of the foregoing motion for stay to be served as indicated below:

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February 14, 2021