

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

In the Matter of the:

Order Granting Temporary 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, From
Section 8.1.1 and Section 8.1.2 of Appendix D of
the National Market System Plan Governing the
Consolidated Audit Trail

Release No. 34-90689 (Dec. 16, 2020)
85 Fed. Reg. 83667 (Dec. 22, 2020)

MOTION FOR PARTIAL STAY OF ORDER 34-90689

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 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, From Section 8.1.1 and Section 8.1.2 of Appendix D of the National Market System Plan Governing the Consolidated Audit Trail, Release No. 34-90689 (Dec. 16, 2020) (“689 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 included interpretations of key Plan provisions in the 689 Order that were not addressed in the Participants’ December 1, 2020 letter to the Commission. 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 all 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 689 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 markets, 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,

s/ Michael Simon

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February 14, 2021

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Release No. 34-90689 (Dec. 16, 2020)
85 Fed. Reg. 83667 (Dec. 22, 2020)

**BRIEF IN SUPPORT OF MOTION FOR PARTIAL STAY OF
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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
STANDARD OF REVIEW	4
DISCUSSION.....	6
I. THE ORDER’S INTERPRETATION OF THE PLAN’S ONE-MINUTE QUERY REQUIREMENT IS UNREASONABLE.	6
II. REQUIRING MONTHLY OTQT TESTS WITH 300 SIMULTANEOUS QUERIES AS CONTEMPLATED BY THE ORDER WOULD CREATE SIGNIFICANT NEW COSTS FOR NO PRACTICAL BENEFIT.....	9
CONCLUSION.....	11
CERTIFICATE OF COMPLIANCE.....	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Aiken Cty.</i> , 725 F.3d 255 (D.C. Cir. 2013).....	8
<i>All. for Cannabis Therapeutics v. DEA</i> , 930 F.2d 936 (D.C. Cir. 1991).....	8, 9
<i>In re Am. Petroleum Inst.</i> , 2012 WL 5462858 (S.E.C. Nov. 8, 2012)	5
<i>Encino Motorcars, LLC v. Navarro</i> , 136 S. Ct. 2117 (2016).....	5
<i>Iowa Utilities Bd. v. FCC</i> , 109 F.3d 418 (8th Cir. 1996)	5
<i>Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.</i> , 463 U.S. 29 (1983).....	5, 9, 10
<i>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</i> , 2020 WL 3266170 (S.E.C. June 18, 2020).....	4
<i>United States ex rel. Sierra Land & Water Co. v. Ickes</i> , 84 F.2d 228 (D.C. Cir. 1936).....	9
Statutes	
5 U.S.C. § 705.....	4
15 U.S.C. § 78c(f).....	5
15 U.S.C. § 78y(c)(2).....	4
Other Authorities	
17 C.F.R. § 201.401	4
17 C.F.R. § 242.608.....	9
17 C.F.R. § 242.613.....	2
81 Fed. Reg. 30614 (May 17, 2016).....	3

**FOIA Confidential Treatment Requested by
Consolidated Audit Trail, LLC**

**Confidential Treatment Requested
Pursuant to SEC Rule of Practice 322**

81 Fed. Reg. 84696 (Nov. 23, 2016).....3

85 Fed. Reg. 83667 (Dec. 22, 2020)..... i

*National Market System Plan Governing the Consolidated Audit Trail Pursuant to
Rule 613 of Regulation NMS under the Securities Exchange Act of 1934 (Sept. 30,
2014).....3*

INTRODUCTION

The Participants respectfully request a stay of two provisions in the 689 Order concerning implementation of the Consolidated Audit Trail (“CAT”) 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.

Part of the Order requires the Participants to develop the CAT in ways that would be of little, if any, value to regulatory users. Among other things, the Order interprets the Plan as requiring searches using the Online Targeted Query Tool (“OTQT”)—including an intermediate data-organizing step—to be completed in one minute. [REDACTED]

[REDACTED] A stay will allow the Participants and the Commission to develop a solution that provides valuable query functionality to regulatory users.

Another part of the Order imposes costs on the Participants outweighing their regulatory benefits and that also impedes existing CAT benefits. In particular, the Order requires the Participants to conduct monthly tests of the OTQT’s search performance with up to 300 concurrent user queries. The technological upgrades necessary to run these tests would cost [REDACTED] with no corresponding regulatory benefits because the Participants already [REDACTED]

[REDACTED] 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 resulting from the 689 Order could impair the Participants' ability to administer the CAT's other functions while at the same time depriving the Participants of resources to regulate their own members. A significant proportion of these costs 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 the identified portions of the 689 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 CAT has its genesis in the "flash crash" of 2010. In less than half an hour on May 6, 2010, the Dow Jones Industrial Average dropped approximately ten percent, destroying nearly one trillion dollars in equity. Almost as quickly, leading U.S. stock indices rebounded, and within the hour the market regained 70% of the value it had lost. *See* PA1490.

At that time, data from each national securities and options exchange was unconsolidated, and the exchanges and Financial Industry Regulatory Authority, Inc. ("FINRA") as Self-Regulatory Organizations ("SROs"), and the Commission all had limited tools to reconstruct market events involving data that spanned separate database systems. *See* PA385–1363.

It was against this background that on June 11, 2012, the Commission adopted Rule 613 to establish a central data repository for the equities and options markets. *See* 17 C.F.R. § 242.613.

⁵ *See* note 4, *supra*.

Rule 613 instructed the SROs to submit a proposed plan for creating, implementing, and maintaining this repository, the CAT. *See* PA1486.

The Participants developed and submitted a plan to govern the CAT in September 2014,⁶ and the Commission published an amended version of the Plan for public comment in May 2016. *See* 81 Fed. Reg. 30614 (May 17, 2016) (Release No. 34-77724). Six months later, the Commission approved and adopted the CAT National Market System Plan. *See* PA385–1383.

The Plan requires the Participants, along with registered broker-dealers and other market participants (“Industry Members”), to submit information on transactions to the CAT. *See* PA1488, 1585–2017. Through these submissions, the CAT assembles the material terms of every order, quote, and execution with respect to NMS securities and OTC Equity Securities—from inception to routing, modification, and execution. *See* 81 Fed. Reg. 84696, 84698 (Nov. 23, 2016) (Release No. 34-79318). The Commission and the Participants’ own regulatory staff use the CAT to oversee the markets—meaning that the Commission and the Participants have a shared interest in ensuring that the CAT provides accurate, complete, and timely information.⁷

Since the CAT began accepting data on November 19, 2018, the Participants and the Plan Processor have worked diligently to integrate CAT Reporter data, implement new CAT capabilities pursuant to the Plan, and incorporate feedback from Commission staff and industry stakeholders.

On December 1, 2020, the Participants wrote to the Commission regarding implementation

⁶ *See National Market System Plan Governing the Consolidated Audit Trail Pursuant to Rule 613 of Regulation NMS under the Securities Exchange Act of 1934* (Sept. 30, 2014), <https://www.catnmsplan.com/sites/default/files/2020-02/p600989.pdf>.

⁷ Under the Plan, a Plan Processor is responsible for building and maintaining the CAT. *See id.* at 84699. An Operating Committee, consisting of one representative for each Participant, manages the Plan Processor. *See* 81 Fed. Reg. at 84700.

challenges posed by the Plan.⁸ Specifically, the Participants requested temporary exemptions from the Plan’s requirements that a search tool (known as the online targeted query tool or “OTQT”) be capable of (1) conducting targeted searches for data based on the error correction of a CAT Reporter over time, (2) returning search results within specified time limits, and (3) processing hundreds of simultaneous search requests with no degradation in performance. *See* Participants’ Letter at 1–2.

The Commission published the Order at issue here on December 16, 2020, responding to the Participants’ December 1 letter regarding OTQT capabilities. The Order includes new interpretations of Plan provisions that are at odds with the approach being taken by the Participants and the Plan Processor, and that would impose burdens and requirements not previously contemplated by the Plan or Rule 613. In particular, the Order interprets Plan provisions governing OTQT response times and performance degradation in a way that, in the overwhelming majority of cases, would make it impossible to yield search results with meaningful regulatory value.

STANDARD OF REVIEW

The Participants respectfully request that the Commission stay in part the 689 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

⁸ *See* PA1365–71.

irreparable harm, (3) a stay would cause substantial harm to any person, and (4) a stay would serve 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 parts of the Order are not in keeping with these bedrock APA principles. Accordingly, the Participants request a stay of the mandates described below so that the Participants may continue to develop and implement a CAT that consolidates market data and is useful to regulators in the way 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”).

DISCUSSION

Section 8.1.2 of Appendix D of the Plan sets forth timeframes for the OTQT to return results in response to queries, including “[r]eturning results within 1 minute for all trades and related lifecycle events for a specific Customer or CAT Reporter.” Plan at Appendix D-27-28. Section 8.1.2 also requires the OTQT to be able to “support parallel processing of queries,” meaning that it “must be able to process up to 300 simultaneous query requests with no performance degradation.” *Id.* at Appendix D-29.

The Participants requested exemptive relief from these requirements (and others) due to technical obstacles to achieving the required query performance. *See* Participants’ Letter at 4–6. Although the 689 Order grants some relief, it appears to interpret the Plan as requiring unreasonable and technologically unfeasible levels of search performance. 689 Order at 9–10.

I. THE ORDER’S INTERPRETATION OF THE PLAN’S ONE-MINUTE QUERY REQUIREMENT IS UNREASONABLE.

The problem here arises from the Order’s failure to account for the two distinct steps in providing search results. The OTQT functionality begins with a user asking the Central Repository to create a “data mart” so that a user may apply filters and query terms to the data and receive useful results. In this process, the Central Repository first curates a relevant subset of the trillions of data points included in the Central Repository, then applies the parameters of the search to identify responsive records and presents them to a user in a complete and user-friendly way. Participants’ Letter at 4. Then, at the second step, the user queries the resulting data mart to find specific information. The OTQT query function can perform the latter step, but not both steps, in one minute.¹⁰ *Id.* at 4–5; *see also* Sealed Appendix (“SA”) 23-24.

¹⁰ The one-minute deadline is by far the most demanding of the different query processing deadlines for different types of searches provided by the Plan. Plan at Appendix D-27, Appendix

Appendix D of the Plan provides timeframes for the OTQT to “return[] results,” but it does not define that term. Plan at Appendix D-27.

Although the 689 Order asserts (at 8) that the “plain meaning of the . . . Plan language” and the “purpose of the performance standard” compel the interpretation that the Plan requires both creation of the data mart *and* the subsequent query within the data mart in one minute, the Order points to nothing in the Plan regarding whether creation of the data mart counts toward the one-minute timeframe. So far as Participants are aware, the Plan is silent on that point.

Moreover, the Order’s conclusion is in tension with the Plan’s overall goal of providing regulatory users with access to accurate, complete, and useful market information. Given those core purposes, Appendix D should be construed in a way that allows the Plan Processor to curate and organize data before returning search results—

SA23-24.

First, meeting the 689 Order’s standard in a way that would allow the OTQT to be useful to regulatory users

SA23-24.

SA22.

Id. To the extent that the Commission wishes the OTQT to provide useful results in one minute, its Order directs Participants to do the impossible. As courts have recognized, such demands are by definition arbitrary and capricious. *See, e.g., All.*

D-28 (setting out required query processing timeframes, including a 30-minute deadline for “all trades and related lifecycle events for a specific Customer or CAT Reporter in a specified date range (maximum 1 month)” and a five-minute deadline for “all orders and quotes entered during a specific time period for a specified list of instruments must return results in a specified time window not to exceed 10 minutes for a single date”).

for Cannabis Therapeutics v. DEA, 930 F.2d 936, 940 (D.C. Cir. 1991) (“Impossible requirements imposed by an agency are perforce unreasonable.”); *In re Aiken Cty.*, 725 F.3d 255, 268–70 (D.C. Cir. 2013) (Garland, J., dissenting) (court should not require performance of “useless” or impossible action).

Second, as currently constructed, [REDACTED]

[REDACTED] SA24. [REDACTED]

[REDACTED] *Id.*; compare Participants’ Letter at 4 (data mart “allow[s] the user to analyze the dataset efficiently” with “further filtering and analytics”). That approach would have drawbacks, including that: [REDACTED]

[REDACTED] SA24. Indeed, [REDACTED]

[REDACTED] *Id.* The OTQT, therefore, would have little or no regulatory use if structured in a way that complies with the Order’s timing requirements.

Given these practical considerations and the regulatory challenges wrought by the Order’s approach, the one-minute query return deadline would undermine, not further, the shared objective of the Commission and Participants: “the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a

national market system.” 17 C.F.R. § 242.608(e).¹¹

The Commission should consider this evidence as well as alternative options for addressing its goals before construing the Plan in a way that would require the Participants to build such an unhelpful tool. *See United States ex rel. Sierra Land & Water Co. v. Ickes*, 84 F.2d 228, 232 (D.C. Cir. 1936) (refusing to compel party “to do a useless thing”). The Participants therefore respectfully request that the Commission stay this portion of the 689 Order. *See State Farm*, 463 U.S. at 43 (order unlawful where agency overlooks “an important aspect of the problem”); *All. for Cannabis Therapeutics*, 930 F.2d at 940 (agency orders that are “impossible to fulfill ... must be regarded as arbitrary and capricious”).

II. REQUIRING MONTHLY OTQT TESTS WITH 300 SIMULTANEOUS QUERIES AS CONTEMPLATED BY THE ORDER WOULD CREATE SIGNIFICANT NEW COSTS FOR NO PRACTICAL BENEFIT.

Although the 689 Order grants the Participants an exemption from meeting the one-minute timeframe until July 31, 2023, it imposes an unreasonable condition on that exemption. *See* 689 Order at 12–14.¹² In particular, the Order requires the Participants “to measure on a monthly basis, using benchmark queries, the time it takes to provide results to users from OTQT searches that are run concurrently with” up to 300 user queries. *Id.* at 14.

This condition bears no reasonable relation to the CAT’s regulatory purpose. [REDACTED]

[REDACTED]

[REDACTED]

¹¹ In any event, the Plan provides other search-time metrics, *see* Plan at Appendix D-27, Appendix D-28, [REDACTED] *see* SA25.

¹² Although the Participants request a stay of this condition, they do not request a stay of the underlying exemption.

[REDACTED]¹³ SA25. The Plan Processor must comply with all SLA and other PPA requirements related to OTQT functionality and meet the necessary level of testing. *Id.* Interpreting the Plan to require anything beyond the terms of the SLAs—as the 689 Order does—is inconsistent with the Plan.

The Order’s testing condition also imposes costs with no tangible benefit. [REDACTED]

[REDACTED] SA26. Specifically, the Participants estimate that adding the capacity required by the 689 Order would cost [REDACTED] solely to conduct testing with respect to [REDACTED]. *Id.* In other words, the added capacity would support the testing mandated by the 689 Order, but would not be required for any other aspect of the CAT system’s operation. The 689 Order does not provide a reasoned justification for mandating such an investment solely for testing purposes and therefore violates the APA. *See State Farm*, 463 U.S. at 43.

[REDACTED] SA25; *see also* SA246-49, 251-54, 256-63, 265-71, 273-360. Meeting the Order’s condition, therefore, would provide no regulatory benefit to counterbalance the incremental cost to the Participants, and a stay is warranted to enable the Participants and the Commission to develop a reasonable and useful testing regime.¹⁴

¹³ *See* Plan at Appendix D-32 (requiring establishment of SLAs for “query performance and response times”).

¹⁴ The 689 Order specifies that the OTQT must provide authorized users with the ability to retrieve the error correction rate of any CAT Reporter. 689 Order at 4–5. [REDACTED]

[REDACTED] SA26.

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 3,723 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