



December 23, 2013

By Electronic Mail (rule-comments@sec.gov)

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549

Re: File No. 4-668: Joint Industry Plan; Notice of Filing of Proposed National Market System Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to provide comments on the proposed National Market System Plan (the “Proposed Plan”) governing the process of selecting a plan processor and developing a plan for the Consolidated Audit Trail (“CAT”) pursuant to Rule 613 of Regulation NMS under the Securities and Exchange Act of 1934 (the “Exchange Act”). We continue to support the development of the CAT, and we believe that the CAT will provide an invaluable opportunity to enhance the information capture and reporting structure that exists today. Because the CAT will be a critical aspect of market infrastructure, it is imperative that the process through which the CAT is developed and implemented be open and transparent and include the integrated involvement and meaningful participation of representatives of the broker-dealer community.

SIFMA supports the basic mechanics of the selection process set forth in the Proposed Plan, in particular the steps the SROs have taken to address the conflicts of interest that will arise for SROs that also are bidders to be the plan processor. However, we believe the selection process must be transparent as it is carried out, and we believe that industry representatives should be directly involved in the selection process.

In addition, we are taking this opportunity to reiterate some of our previously expressed views on governance of the CAT. The Proposed Plan provides for an Operating Committee for

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

the CAT, but representation on the Operating Committee would be strictly limited to the SROs. As we have stated previously, the governance of the CAT should include public representation outside the SROs themselves, including industry participation. The current use of advisory committees to provide industry representation in NMS Plan governance, while offering a useful forum for discussion, does not offer the industry meaningful participation. With that being said, we further note that the Proposed Plan does not even provide for the advisory committee required under Rule 613. At a minimum, the Proposed Plan should be amended to specifically establish the advisory committee. In addition, while we continue to believe that direct industry involvement is needed instead of, or in addition to, an advisory committee, we reiterate some of our views on how an advisory committee ultimately should be structured and operated.

I. Comments on the SROs' Proposed Bid Review and Selection Process

Sections V and VI of the Proposed Plan set forth the process for the SROs evaluation of bids and the selection process for narrowing down the bids and choosing the Plan Processor.² SIFMA supports the selection mechanism itself and the way the SROs have proposed to address conflicts of interest in the selection process. However, SIFMA believes that the selection process should be carried out transparently and that industry representatives should have a role in the selection process.

SIFMA believes that it is critical for the selection process to be transparent. The CAT will be a significant industry utility and will result in extensive costs and compliance obligations for the entire industry. The CAT will impact the entire marketplace as a whole. SIFMA expects that the responses to the RFP will set forth each bidder's proposal for how the CAT processor will function and reflect significant differences in approach. Each of these proposed structures may impose different costs, provide different benefits, and allocate the costs and burdens differently. These different visions should be available to the public to inform the discussion regarding the costs and benefits of various CAT features and the technological feasibility of different solutions. The RFP responses that are not selected, along with the SROs' rationale for their elimination from consideration, will be important for the industry to consider in commenting on the ultimate NMS Plan filed with the Commission. For example, an RFP response may propose a lower cost alternative to the proposal selected by the SRO, but may be judged by the SROs to nonetheless be inferior to the higher cost proposal. The public has an interest in seeing the terms of the bids so it can better understand the SROs' ultimate choice.³

Accordingly, it is essential for the selection of the plan processor to be carried out in the open. However, Section V(B)(4) of the Proposed Plan provides that "[a]ll votes by the Selection

² See 78 FR at 69911.

³ The RFP responses could be redacted before public dissemination, to the extent that information contained in an RFP response is sensitive or proprietary, and the exclusion of information does not detract from the ability to evaluate the response.

Committee shall be confidential and non-public.” In addition, the SROs state that they do not anticipate that aggregate votes or anonymized voting distribution numbers will be provided to the SROs.⁴ The SROs have provided no explanation for conducting the selection process in secret, and we believe the Commission should not approve the Proposed Plan unless it is amended to provide for public disclosure of the process. At a minimum, the SROs should publish the bidders, the contents of the bids,⁵ and the selection criteria used to evaluate the bids. In addition, the SROs should publish information about the results of each round of voting, for example the total votes received by each bidder or a ranking of the bidders by voting result.

SIFMA also believes that industry members should be involved in the evaluation of bidders and the selection of the plan processor. It is critical for the CAT to be designed and implemented in the most efficient way possible. A comprehensive evaluation of the potential plan processor will require a wide array of skill sets, including not only legal and regulatory expertise, but also extending to expertise in systems and technology, operations, and finance. The unique expertise and insight of the broker-dealer community complements that of the SROs and would bring the perspective of the entities that will be providing the lion’s share of the reported data to the CAT. In particular, SIFMA’s participation on the Development Advisory Group (“DAG”) has shown that our member firms have specific expertise about the internal workings of broker-dealers that should be leveraged in the selection process. As such, the Selection Committee should include non-SRO industry representatives. This representation should not be merely advisory, but should be substantive and determinative as well.

II. Comments on Overall CAT Governance

SIFMA believes that the governance of CAT should include public representation, including industry representation, and we have stated repeatedly that the CAT governing body should include representation outside the SROs. Rule 613(b)(1) provides that the NMS plan for the CAT must include “a governance structure to ensure fair representation of the plan sponsors, and administration of the central repository, including the selection of the plan processor.” Notably, that provision of Rule 613 does not preclude non-SRO representation in the governance of CAT. While the basic development and day-to-day operation of the CAT generally should not involve confidential regulatory functions, SIFMA acknowledges that the surveillances the SROs develop leveraging CAT data will. In that regard, SIFMA understands that its members should not be nor need be involved in the development by the SROs of these components, and rather would expect that these decisions be made by the SROs outside of the governance and operation of the CAT itself. Accordingly, there is no policy, regulatory, or other reason that the governance of CAT should not include representation outside the SROs themselves.

⁴ *Id.* at 69912.

⁵ *See* SIFMA RFP Concepts Comment Letter at 8.

In the Proposed Plan, the SROs have taken the position that the CAT should be governed only by the SROs. Specifically, the SROs would establish an Operating Committee that is responsible for formulating, drafting, and filing with the Securities and Exchange Commission (the “Commission”) the CAT NMS Plan, as well as ensuring that the participant obligations under Rule 613 are met in a timely and efficient manner.⁶ The proposal provides that the Operating Committee is to be comprised only of the current participants to the NMS Plan (*i.e.*, the SROs), with the involvement of non-plan participants expressly prohibited.⁷

Before the Commission approves the Proposed Plan, the Operating Committee provisions should be amended to provide for public representation. The SROs have given no explanation for limiting the CAT Operating Committee to SRO representatives, and the current SRO-only governance structure has proven ineffective in existing NMS Plans. The DAG has given industry members an ability to provide feedback to the SROs, but mainly on very technical issues. The CAT will be a uniquely complex facility, unlike any of the others currently governed under NMS Plans, and industry participation in the governance of CAT will be critical. SIFMA has previously provided specific suggestions for the governance of CAT, and we urge the Commission and the SROs to incorporate those suggestions.⁸

III. Comments on the CAT Advisory Committee

Rule 613 expressly requires the formation of an Advisory Committee for the CAT. As noted above, SIFMA believes the structure and mandate of the advisory committee in existing NMS Plans has limited its effectiveness and that an advisory committee for the CAT should only be a supplement to substantive industry representation on the CAT’s Operating Committee. However, we note that the Proposed Plan does not provide at all for an advisory committee.

The Proposed Plan should be amended to establish the Advisory Committee required by Rule 613, and we take this opportunity to reiterate some of our previous comments on this topic. It is our belief that Advisory Committee must be constituted in a manner that is independent from the SROs so that it may act as a representative voice of the industry in the governance of the CAT.⁹ This is particularly important in light of the conflict of interest that the SROs face: the

⁶ See Securities Exchange Act Release No. 70892 (November 15, 2013), 78 FR 69910 (November 21, 2013).

⁷ Specifically, Section III(B)(4) of the proposed Plan states “Nothing in this section or elsewhere within the Plan shall authorize any person or organization other than Participants and their representatives to participate on the Operating Committee in any manner”. *Id.* at 69915.

⁸ See SIFMA Industry Recommendations for the Creation of a Consolidated Audit Trail (Mar. 28, 2013) at 5 available at <http://www.catnmsplan.com/industryFeedback/P242319> (the “SIFMA RFP Concepts Comment Letter”).

⁹ For instance, SIFMA believes that SRO member firms, rather than the SROs, elect members to the Advisory Committee, and that the Advisory Committee should be composed primarily of representatives of SRO

SROs are sponsors and overseers of the NMS Plan, while at the same time, the NMS Plan will impose obligations on those same SROs. The Advisory Committee must therefore become and remain an integrated part of the CAT governance, rather than a peripheral body external to the actual CAT decision-making.¹⁰ SIFMA notes that in other contexts, such as under the CTA Plan and the Nasdaq UTP Plan, advisory committees that were originally intended to have an integrated role have instead been relegated to passivity and effectively excluded from the deliberation process. This result was caused, in significant part, by the SROs' excessive use of executive sessions that precluded the participation of the advisory committee members.¹¹ This was the case recently when the operating committee of the UTP SIP Plan conducted a post-mortem of the August 22nd, 2013, events in executive session without the advisory committee members, who were simply briefed after the executive session.

Accordingly, SIFMA believes that safeguards and procedural protections must be implemented to create an Advisory Committee that will be able to become and continue to be an active participant and effective part of the CAT governance structure.¹² For instance, to prevent abuse of executive session, the SROs must be required to maintain specific written criteria that limit executive session only to situations where there will be a specific discussion of confidential regulatory information. SRO representatives voting to enter into executive session must be required to submit a written explanation for why an executive session is required. These written records should be maintained for inspection by the SEC and Advisory Committee members to ensure that the purpose of the executive session is not abused. Hence, we continue to believe

member firms, as it is SRO members and their representatives that will be directly impacted by the requirements and the cost of the CAT. *See* SIFMA Selected CAT NMS Plan Topics Comment Letter at 6 – 7.

¹⁰ For instance, SIFMA continues to believe that the Advisory Board should have a substantive voting role. Rule 613 does not preclude the SROs from granting the Advisory Committee voting rights on key issues, such as budgets, increases in fees and costs, new requirements that could place significant burdens on member firms, or determining when public comment should be solicited on critical issues before certain actions be taken. SIFMA believes that the CAT governance would benefit from more direct involvement of the Advisory Committee, and SROs should propose such a role as part of the NMS Plan. *See* SIFMA Selected CAT NMS Plan Topics Comment Letter at 8.

¹¹ *See, e.g.,* Letter from Ira D. Hammerman, General Counsel, SIFMA, to John Ramsay, Acting Director, Division of Trading and Markets, SEC (Mar. 28, 2013) (objecting to Nasdaq UTP Plan's purported adoption of a fee increase taken during executive session excluding the advisory committee) available at <http://www.sec.gov/comments/s7-24-89/s72489-31.pdf>; Exchange Act Release No. 69587 (May 15, 2013) (Nasdaq UTP Plan adopting an amendment to reverse the improper fee increase).

¹² SIFMA believes that additional safe guards are necessary to assure that the SROs fully consider the views of the Advisory Committee. For instance, the SROs should be required to document and provide the Advisory Committee with a written statement explaining the reasons for any SRO rejection of a written recommendation submitted by the Advisory Committee. Additionally, the Advisory Committee members must have sufficient time to analyze information and formulate views before meetings and the SROs should prepare agendas for meetings and provide document to be discussion at the meeting in advance. *See* SIFMA Selected CAT NMS Plan Topics Comment Letter at 9.

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that procedural safeguards such as these are necessary to be sure that the Advisory Committee remains an active part of the governance process, providing the benefits of industry insight that the SEC envisioned.

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We appreciate your consideration of our views in connection with the proposed NMS Plan governing the process of selecting a plan processor and developing a plan for the CAT. SIFMA would be pleased to discuss these comments in greater detail with the Commission and the Staff. If you have any questions, please contact me at (202) 962-7383 or tlazo@sifma.org.

Sincerely,



Theodore R. Lazo
Managing Director and
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