December 22, 2017

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

Mr. Brent J. Fields
Secretary
U.S. Securities & Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: File No. SR-BatsBYX-2017-11; File No. SR-BatsBZX-2017-38; File No. SR-BatsEDGA-2017-13; File No. SR-BatsEDGX-2017-22; File No. SR-BOX-2017-16; File No. SR-C2-2017-017; File No. SR-CBOE-2017-040; File No. SR-CHX-2017-08; File No. SR-IEX-2017-16; File No. SR-MIAX-2017-18; File No. SR-PEARL-2017-20; File No. SR-BX-2017-023; File No. SR-GEMX-2017-17; File No. SR-ISE-2017-45; File No. SR-MRX-2017-04; File No. SR-PHLX-2017-37; File No. SR-NASDAQ-2017-046; File No. SR- NYSE-2017-22; File No. SR-NYSEARCA-2017-52; File No. SR-NYSEMKT-2017-26; File No. SR-FINRA-2017-011; Self-Regulatory Organizations; Amendments to the Fee Schedule for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

Dear Mr. Fields:

The Securities Industry and Financial Markets Association ("SIFMA")[1] submits this letter to the Securities and Exchange Commission ("Commission") to provide further comments on the above-referenced proposed rule change filed by the Self-Regulatory Organizations ("SROs") that are the Plan Participants to the Consolidated Audit Trail ("CAT") National Market System ("NMS") Plan. We appreciate that the Plan Participants have made some changes to the funding of the CAT, particularly the additional CAT Fee tiers for equity execution venues, the discount for Alternative Trading Systems ("ATSs"), and adjustments for options and equity market makers. However, most of our concerns, as expressed in our previous comment letters on the proposal still exist.[2] At a fundamental level, the Plan Participants have yet to justify the need

[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.

[2] *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA to Brent J. Fields, Secretary, Securities and Exchange Commission dated July 18, 2016 ("July 2016 Letter"); *See* Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA to Brent J. Fields, Secretary, Securities and Exchange Commission dated June 6, 2017 ("June 2017 Letter"); *See* Letter from Theodore R. Lazo, Managing

to impose any additional fees on the industry participants, let alone an unequitable portion of the total cost, to fund the development and operation of the CAT. We request that the Commission disapprove the proposals because, as discussed in further detail below, we believe the proposals do not satisfy the requirements of the Securities Exchange Act of 1934 ("Exchange Act").

Policy Concerns with CAT NMS Plan Fees

As we have stated previously, the Plan Participants have offered no justification for requiring broker-dealers to bear any of the financial burden of funding a system that exists to receive and process information that the broker-dealers are legally obligated to report. The Exchange Act does not require broker-dealer funding of SROs and, under current rules and practices, the SROs do not have an unlimited right of recovery of regulatory costs. Historically, the Commission has allowed SROs to recover regulatory costs through the collection of fees from member firms.[3] However, nothing under Rule 613 of the CAT NMS plan directs or "requires" the Plan Participants to impose a broker-dealer fee to cover the costs.

We also have stated repeatedly that the Plan Participants have no justification for imposing a CAT fee until they can show a complete picture of how regulatory fees are currently allocated, how the CAT fee fits into the existing regulatory framework, and why assessing broker-dealers an additive regulatory fee is necessary to fund the creation and operation of the CAT. Broker-dealers already provide the Plan Participants a significant amount of regulatory funding through membership fees, registration and licensing fees, dedicated regulatory fees, options regulatory fees, and monetary fines. Funding for the CAT system should come from cost savings realized by the SROs before they start additionally charging broker-dealers. Thus, the Commission should not approve any fee for the CAT until the SROs demonstrate that new CAT fees are necessary in addition to existing fess that are already levied upon members.

Regulatory Concerns with the CAT Funding

Broker-dealers are responsible for their own costs associated with developing the necessary compliance systems for its own reporting, but the current funding proposal additionally imposes approximately 88% of the SROs cost of developing the CAT on the broker-dealers. The exchanges, as for-profit companies, have a conflict of interest between their fiduciary duty to maximize shareholder profit and their duty to provide equitable allocation of costs under the Exchange Act. In our view, this conflict is reflected in the fact that the Plan

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Director and Associate General Counsel, SIFMA to Brent J. Fields, Secretary, Securities and Exchange Commission dated July 28, 2017 ("July 2017 Letter").

[3] *See e.g.*, Securities Exchange Act Release no. 50700 (November 22, 2004), 69 FR 71256, 71257 (December 8, 2004) ("SEC Concept Release Concerning Self-Regulation").

Participants have developed a funding system for building the CAT that minimizes the costs for the exchanges and maximizes the costs to broker-dealers.

The current funding proposal still does not meet the applicable Exchange Act requirements because the Plan Participants discriminate between entities and allocate an unequitable portion of the cost to the broker-dealers. The Plan Participants goal of imposing 75% of the total CAT costs to broker-dealers does not satisfy Section 6(b)(4)[4] or Section 15A(b)(5)[5] of the Exchange Act because this is clearly not equitable allocation of reasonable fees. Additionally, the Plan Participants developed discriminatory methods of calculating the CAT NMS Fees by calculating the fees by different methods, depending on the entities.

The Plan Participants continue to maintain that the primary cost-driver of the CAT is message traffic,[6] so that broker-dealers should be charged on a tier schedule based on the amount of message traffic they generate relative to other broker-dealers.[7] This approach automatically allocates a larger portion of the funding of the CAT to broker-dealers. This is compounded by the fact that the draft reporting specifications for broker-dealers require broker-dealers to report a significant amount of information to CAT, which will only increase the amount of messages that broker-dealers will have to submit.

Conversely, with the execution venues, the Plan Participants unjustifiably separate the tiers based on market share. This approach allows the SROs to avoid charges based on message traffic, which would certainly increase fees to the SROs. And it remains incongruous that the SROs want to avoid as much financial obligation as possible for the CAT, even though the SROs will be the actual users of the system. Moreover, we continue to object to including ATSs in the same fee measurement as exchanges. ATSs compete for market share with exchanges, and the proposal continues to allow the SROs to leverage their regulatory status to impose unnecessary fees on their competitors. ATSs should not be measured for fees in the same manner as exchanges since ATSs will not have any usage of the CAT.

Due to the SROs' conflict of interest, and the discriminatory fees currently proposed by the Plan Participants, any CAT fees should be reviewed by an independent third-party before they are allowed to take effect. We urge the Commission, or an independent third-party, to

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[4] Section 6(b)(4) of the Act requires equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using its facilities.

[5] Section 6(b)(5) of the Act requires the Exchanges' rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest, and not designed to permit unfair discrimination between customers, issuers, and broker-dealers.

[6] Section B.7, Appendix C of the CAT NMS Plan

[7] Section 11.3(b) of the CAT NMS Plan.

conduct an objective and transparent review of the CAT funding issues to determine the appropriate level of fees.

Scope of Fees Is Too Broad

The additional CAT-specific fee is unreasonably broad and covers costs that should be borne solely by the Plan Participants. The CAT-specific fee currently includes costs that the SROs incurred in developing the CAT NMS Plan, such as legal, consulting, and audit fees and operational reserves and insurance costs. These costs are solely the responsibility of the SROs as the entities obligated to develop the plan. Broker-dealers should not cover any of these costs incurred by the Plan Participants as part of the regulatory cost of doing business as an SRO. Additionally, broker-dealers should not be responsible for any portion of the costs incurred to develop the CAT NMS Plan when the broker-dealers had no meaningful representation or participation in the development of the Plan.

Conclusion

As previously stated in our July 2016, June 2017 and July 2017 letters, a fee structure designed by for-profit market participants, without input from other industry participants, results in a funding plan that benefits their own commercial interests. The Plan Participants created a payment mechanism that benefits their own bottom line at the expense of their competitors and regulates. The broker-dealers had no opportunity to negotiate reasonable terms and must pay the fees as designed or be subject to regulatory action by the Plan Participants. Due to the Plan Participants' patent conflict of interest, with no means for checks and balances, we request the funding plan be thoroughly reviewed by the Commission or an independent third party.

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SIFMA greatly appreciates the Commission's consideration of the issues raised above and 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
Associate General Counsel

cc: The Honorable Jay Clayton, Chairman
The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner

Brett Redfearn, director, Division of Trading and Markets
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