PRINCIPAL TRADERS GROUP

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May 12, 2021

Vanessa Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0609

Re: Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail by 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., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, 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.
(Release No. 34–91555; File No. 4–698)

Dear Ms. Countryman:

The FIA Principal Traders Group ("FIA PTG")[1] appreciates the opportunity to comment on the above-captioned amendment (the "Amendment" or "Proposal")[2] to the National Market System Plan Governing the Consolidated Audit Trail ("CAT") filed by the Self-Regulatory Organizations ("SROs") that are the Plan Participants to the CAT. FIA PTG supports data-driven decision making and accordingly is supportive of providing regulators, including SROs like the Plan Participants with the data they need to ensure our markets operate efficiently and effectively for the market participants that use them. After many years of discussion and recent months of implementation, we are still not confident that the CAT, as currently designed and implemented, is the optimal data

[1] FIA PTG is an association of firms, many of whom are broker-dealers, who trade their own capital on exchanges in futures, options and equities markets worldwide. FIA PTG members engage in manual, automated and hybrid methods of trading, and they are active in a wide variety of asset classes, including equities, fixed income, foreign exchange and commodities. FIA PTG member firms serve as a critical source of liquidity, allowing those who use the markets, including individual investors, to manage their risks and invest effectively. The presence of competitive professional traders contributing to price discovery and the provision of liquidity is a hallmark of well-functioning markets. FIA PTG advocates for open access to markets, transparency and data-driven policy and has previously made recommendations about a variety of equity market structure issues, including Regulation NMS.

[2] https://www.govinfo.gov/content/pkg/FR-2021-04-21/pdf/2021-08049.pdf.

collection model, especially considering the actual costs that, to-date, have far exceeded the original estimates, as well as the cyber-risk concerns that have only grown since the rule was finalized in August 2012. FIA PTG filed three comment letters[3] in response to the previous funding proposal, and we were pleased to see that some of our concerns were addressed in the Amendment. Unfortunately, however, we continue to have concerns with many aspects of the Amendment including: the lack of transparency, the governance of CAT NMS, LLC ("the Company"), perceived conflicts of interest, the cost allocation methodology, the use of inconsistent metrics, the overall costs and cost-benefit, and the complete exclusion from consideration of the costs that Industry Members have incurred. Accordingly, we urge the Securities and Exchange Commission (the "Commission") not to approve the Amendment.

Our member firms are particularly well suited to understand and indent these concerns, as they have spent considerable time, effort, and capital in order to implement systems designed to comply with their CAT reporting obligations. As a result, the lack of transparency regarding the proposed fees, the magnitude of the fees incurred to date and the disproportionate allocation of those fees amongst exchanges and Industry Members is particularly troubling. The remainder of this letter expands on these concerns.

I. The Amendment lacks the level of transparency needed to thoroughly analyze and respond. The Amendment states in several places that different alternatives were considered before selecting one, but the Amendment then fails to disclose to the reader the data necessary to conduct a reasonable review to determine if they agree with the selection. To effectively respond to a funding filing like the Amendment, it is critical that granular data be provided to allow for thorough analysis. The Amendment lacks this necessary level of data.

Accordingly, FIA PTG requests that the Company provide either publicly, or at a minimum, to all Industry Members, a copy of the 2021 operating budget along with any quarterly updates and projected costs going forward. Additionally, the Company should provide a breakdown of fixed and variable expenses. For variable expenses, the Company should provide the drivers of those expenses and how those expenses scale, as well as if there are discounts associated with the volume of data or usage. Without such foundational information, we cannot opine as to whether any aspect of the funding model is sound. We further request that the Company agree to provide Industry Members with the data, including Plan Participant data, industrywide data, and their individual firm data, that was used to support the Company's selected funding model and the funding models that were rejected.

II. Industry Member input not considered in analysis. In one of our previous letters we said, "Since broker-dealers, like many FIA PTG members, already provide Plan Participants with a significant amount of regulatory funding through various membership and regulatory fees, having representation during the development of the funding model would have certainly been helpful in understanding the justification for charging market participants at all – not to mention

[3] *See* Letter from Joanna Mallers, Secretary, FIA PTG, to Brett J. Fields, Secretary, SEC, dated June 22, 2017 ("FIA PTG CAT Funding Letter #1"); Letter from Joanna Mallers, Secretary, FIA PTG, to Brett J. Fields, Secretary, SEC, dated Jul 28, 2017 ("FIA PTG CAT Funding Letter #2"); Letter from Joanna Mallers, Secretary, FIA PTG, to Brett J. Fields, Secretary, SEC, dated January 12, 2018 ("FIA PTG CAT Funding Letter #3").

the rationale for the ultimate structure proposed."[4] We are quite disappointed that Industry Members had little to no input in the development of the amended model. While we do not agree with the cost allocation – which is discussed later in this letter – we are incredulous of the process used to construct a proposed allocation model in which Industry Members are allocated 75% of the expenses yet had no meaningful input into the model's development. The phrase "taxation without representation" certainly appears apropos, and although incredulous about the process, it comes as no surprise to us that absent meaningful industry input, Industry Members are being saddled with three-fourths of both the historic and proposed ongoing costs.

Going forward, if the Amendment is approved, we are concerned that the current governance structure will not incentivize aggressive cost management because the Plan Participants will be responsible for only 25% of the expenses. Accordingly, FIA PTG believes that, at a minimum, the CAT NMS Plan Operating Committee should be reconfigured, with Industry Members comprising 75%, or whatever allocation percentage is eventually selected.

III. Plan Participants are conflicted. We remain concerned that the Plan Participants clearly have a conflict of interest when it comes to determining how much cost they should bear of this expensive and questionable endeavor. The Plan Participants have tried to satisfy this concern by explaining that the Company will not generate any profits; however, we remain unconvinced that the break-even basis of the venture addresses any potential conflicts. The Plan Participants have control over the source of the costs, while they propose that 75% of the burden of maintaining the "break-even" construct is passed on to Industry Members. At a minimum, increased transparency described in "I" above, should at least expose actual or potential conflicts so that they may be reasonably addressed.

IV. The use of inconsistent metrics is discriminatory. As we stated in one of our previous letters, "if message traffic is what generates the costs, then all participants – both Plan Participants and market participants – should be assessed based on the same metric. Unfortunately, what is good for the goose does not appear to be good for the gander and the inconsistent approach is inherently discriminatory."[5] We continue to believe this is the case. The Amendment continues to argue that while message traffic is the appropriate measure for Industry Members, it should not be used for Plan Participants and proposes using market share instead. FIA PTG believes market share is a flawed metric and essentially gives a free pass to Plan Participants who generate high levels of message traffic but have very little market share.

We reiterate our position that the same metric should be used across the board. If the biggest driver of the CAT's cost is indeed the processing and storing of messages, then Plan Participants should be subject to fees based on message traffic. However, the result of the proposed approach is a model that appears to be designed to maximize costs for Industry Members and minimize costs for Plan Participants. This inconsistent approach is inherently discriminatory and leads one to question whether this is the result of the inherent conflicts of interest and lack of industry input described above.

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[4] FIA PTG CAT Funding Letter #1 at 2.
[5] FIA PTG CAT Funding Letter #2 at 2.

V. Cost allocation methodology remains flawed. While we were pleased to see the elimination of the tier structure, which would have introduced a whole host of problems, we were disappointed that the 75%-25% allocation persists for Industry Members and Plan Participants, respectively. We are not convinced that backing into the allocation – based on ensuring the highest paying Industry Members pay basically the same amount as the highest playing Plan Participants – should be the goal. As discussed previously, the Amendment applies different metrics to the two groups; therefore, we are unsure how significant it is that the highest payers in each group pay the same amount.

As we stated in our second letter,[6] we strongly believe that trying to allocate a percentage, any percentage, of the overall costs to one group over the other is the wrong approach. No matter what percentage is applied to each group, it will be an arbitrary number that will be essentially meaningless. One way to address the inherent conflicts of interest in the Amendment's proposed allocation model would be to apply a Section 31 fee-like cost allocation framework to the CAT. The use of this type of framework would allow the Company the flexibility to allocate 100% of the costs across its ownership (the Plan Participants) in whatever manner it deems appropriate. In turn, each Plan Participant could determine how those costs would be passed on to market participants, including Industry Members, trading on their venue. Not only would this type of methodology obviate the need to resolve the current 75%-25% allocation debate, but it would incentivize the Plan Participants to aggressively manage the CAT's costs. It would also encourage each Plan Participant to look for efficient and creative ways to manage their individual cost allocation and might even result in Plan Participants competing over how these costs are passed on to market participants.

The Amendment mentions that this type of model was considered but then rejected for the following reasons: likely inconsistency of the ensuing charges; potential for lack of transparency; and impracticality of multiple SROs submitting invoices for CAT charges. FIA PTG disagrees that these issues are material enough to reject this concept out of hand, and in fact, SROs already have a well-established model for recouping their Section 31 fees by passing them through to their members.

VI. Market Maker Discount is a welcome addition to the funding metrics. FIA PTG welcomes the addition of the Market Maker Discount. As we previously cautioned, without some type of adjustment, because of their continuous quoting obligations, many Market Makers would find themselves incurring a disproportionate percentage of the CAT costs, which could impact the liquidity they are willing to provide, and thus negatively impact overall market quality. Any funding plan, once approved, must maintain this concept.

VII. Costs and Cost-Benefit Projections completely missed the mark. Since conception, the cost estimates for the CAT's build and its annual operation have varied widely. In 2014, the NMS Plan Governing the Consolidated Trail included average one-time build cost bids of $53 million and annual maintenance cost bids of $51.1 million.[7] In 2017, the CAT NMS Plan Operating

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[6] Ibid.
[7] NMS Plan Governing the Consolidated Audit Trail, September 30, 2014 at Appendix C – 54.

Committee estimated the annual operating cost to be $50.7 million.[8] The Amendment estimates historical costs, excluding certain Excluded Costs, of $193.3 million and projects annual costs of $132.5 million.

To reiterate our earlier concerns, we are at a loss as to how to respond to these dynamic estimates. There is no transparency into the actual numbers and no material governance participation by Industry Members, yet they shoulder the bulk of the costs. We are troubled by the historical build costs that are multiples of estimates (and still growing) and a project timeline with repeated stops, starts, rewinds, and restarts, as well as the apparent lack of accountability for the entire project, the costs incurred to date, and the projected costs going forward. All of this leaves us asking: what incentives do Plan Participants have to ensure these costs are aggressively managed going forward when historically there has been no accountability and most of the costs are being passed on to Industry Members?

Additionally, we continue to believe that if Industry Members must share in the CAT's cost, they should not be required to cover any costs or expenses other than the direct costs to build and operate the system itself. We understand that the Plan Participants are going to incur other costs (insurance, consulting, audit, etc.) in connection with the CAT, but we believe those are the costs of doing business as SROs and should not be allocated to Industry Members as suggested in the Amendment. Additionally, we understand that fine revenue will continue to be payable to the SROs. We believe that, at a minimum, this revenue, collected at least peripherally due to the availability of the CAT data, should go to the Company operating reserve, which would decrease overall CAT costs.

Finally, we urge the Commission to be mindful that additional costs assessed to Industry Members will ultimately be passed on to those who use the markets, including individual investors – so it is essential that these costs be managed carefully.

VIII. Industry Members have incurred substantial costs as well. FIA PTG is disappointed that the Amendment discusses the costs incurred to date by the Plan Participants and makes no mention of the substantial costs incurred by Industry Members, including FIA PTG members. For the past several years, Industry Members have allocated resources and absorbed costs associated with the CAT's development, testing, and implementation – and these costs persist as FAQs and revised specifications continue to be rolled out. The Amendment contends that "After analyzing the various alternatives, the Participants determined that the 75%–25% allocation continues to be an equitable allocation of reasonable CAT fees between Industry Members and Participants that balances the costs paid by each CAT Reporter and the regulatory benefits each receives."[9] FIA PTG has a long history of supporting well-regulated markets and providing regulators with the tools they need to be effective. However, ignoring the costs incurred by Industry Members only compounds the previously detailed inequities of the proposed allocation model.

IX. Conclusion. As we have outlined in this letter, FIA PTG finds the Amendment to be fraught with issues that remain unresolved. The overall lack of industry participation in the process

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[8] Amendment No. 2 to the National Market System Plan Governing the Consolidated Audit Trail, June 14, 2017 at 30.
[9] The Amendment at 21054.

continues to be very troubling. This lack of inclusion, coupled with the lack of sufficient transparency into the decision-making process, and the failure to provide the data necessary to allow us to perform our own analysis, leaves us at a loss as to how to respond. We continue to have serious concerns as to whether the CAT is a worthwhile endeavor overall, especially considering the cost overruns and ongoing cyber-risk concerns. For all these reasons, we respectfully urge the Commission not to approve the Amendment.

Finally, in light of the data released by the CAT NMS Plan Operating Committee on May 5,[10] FIA PTG reserves the right to comment further on the Amendment once we have had the opportunity to thoroughly analyze this new data, along with the additional data requested in the transparency section above. Accordingly, we request the Commission formally extend the comment period an additional 45 days to allow for this analysis.

If you have any questions about these comments, or if we can provide further information, please contact Joanna Mallers (jmallers@fia.org).

Respectfully,

FIA Principal Traders Group

Joanna Mallers
Secretary

cc: Gary Gensler, Chair
Hester M. Peirce, Commissioner
Elad L. Roisman, Commissioner
Allison H. Lee, Commissioner
Caroline A. Crenshaw, Commissioner

Christian Sabella, Acting Director, Division of Trading and Markets

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[10] *See* Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC, dated May 5, 2021.