

VIA EMAIL (rule-comments@sec.gov)

June 9, 2023

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: File Number S7-06-23

Dear Ms. Countryman:

Consolidated Audit Trail, LLC (“CAT LLC”), on behalf of the Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan”), appreciates the opportunity to comment on the Securities and Exchange Commission’s proposal to address cybersecurity risks in the securities markets (“Cybersecurity Proposal”).² CAT LLC urges the Commission to exclude SCI entities³ from the Cybersecurity Proposal. Applying both Regulation Systems Compliance and Integrity (“Reg SCI”) and the Cybersecurity Proposal to SCI entities subjects SCI entities to regulatory complexity and duplication and related unnecessary costs without increasing cybersecurity protections. Moreover, the proposal to broadly disclose cybersecurity incidents to the public should be eliminated as it would enhance – not reduce – cybersecurity risks by exposing potential vulnerabilities. Furthermore, CAT LLC urges the Commission to provide guidance regarding the role of third parties in complying with the Cybersecurity Proposal similar to the guidance regarding third parties in the context of Reg SCI.

¹ The twenty-five Participants of the CAT NMS Plan are: BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc. (“FINRA”), Investors Exchange LLC, Long-Term Stock Exchange, Inc., 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, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc. CAT LLC notes that the responses set forth in this letter represent the consensus of the Participants, but that all Participants may not fully agree with each response set forth in this letter.

² Securities Exchange Act Rel. No. 97142 (Mar. 15, 2023), 88 Fed. Reg. 20212 (Apr. 5, 2023) (“Cybersecurity Proposal”).

³ Rule 1000 of Reg SCI defines an “SCI entity” as “an SCI self-regulatory organization, SCI alternative trading system, plan processor, exempt clearing agency subject to ARP, or SCI competing consolidator,” and defines an “SCI self-regulatory organization” to include national securities exchanges and registered securities associations.

1. Exclude SCI Entities from Cybersecurity Proposal

SCI entities are required to comply with Reg SCI, and most SCI entities,⁴ including national securities exchanges and national securities associations, would be required to comply with the Cybersecurity Proposal.⁵ Therefore, such SCI entities would be subject to the requirements of both Reg SCI and the Cybersecurity Proposal. However, Reg SCI and the Cybersecurity Proposal would impose overlapping and duplicative regulatory requirements on SCI entities. For example, under the Cybersecurity Proposal, FINRA and the exchanges would be required to establish, maintain, and enforce written policies and procedures that are reasonably designed to address their cybersecurity risks. However, FINRA and the exchanges are already required to establish, maintain and enforce similar written policies and procedures under Reg SCI. In addition, FINRA and the exchanges also would be required to comply with the immediate notification and reporting requirements of the Cybersecurity Proposal even though they are subject to the immediate notification and subsequent reporting requirements under Reg SCI. SCI entities would also be required to comply with similar disclosure requirements under Reg SCI and the Cybersecurity Proposal. Indeed, the Commission itself highlights the overlapping and duplicative nature of Reg SCI and the Cybersecurity Proposal for SCI entities.⁶ The costs and burdens of the duplicative regulation for SCI entities under the Cybersecurity Proposal far outweigh the regulatory need for the additional regulation. Accordingly, CAT LLC urges the Commission to exclude SCI entities from the Cybersecurity Proposal.

2. Eliminate Requirement to Publicly Disclose Cybersecurity Incidents

The Cybersecurity Proposal would require a covered entity to provide public disclosures relating to cybersecurity incidents. One element of such disclosures would be a summary description of each significant cybersecurity incident that occurred during the current or previous calendar year. The summary description of each significant cybersecurity incident would need to include: (1) the person or persons affected; (2) the date the incident was discovered and whether it is ongoing; (3) whether any data was stolen, altered, or accessed or used for any other unauthorized purpose; (4) the effect of the incident on the covered entity's operations; and (5) whether the covered entity, or service provider, has remediated or is currently remediating the incident. There is a substantial security risk in broadly disclosing any information about security vulnerabilities and weaknesses, even disclosing that they once existed. Such public disclosures may assist threat actors in engaging in cybercrime. Accordingly, CAT LLC recommends that the public disclosure requirement in the Cybersecurity Proposal be eliminated.

⁴ The SEC stated that the definition of "covered entity" in the Cybersecurity Proposal covers national securities exchange and national securities associations, but that it is not intended to cover plan processors. Cybersecurity Proposal at 20269, n.473. If the SEC were to adopt the proposed definition of "covered entity," FINRA CAT, the plan processor for the CAT, may be included in the definition of covered entity. FINRA CAT is both the plan processor for the CAT as well as a part of the registered securities association FINRA. Securities Exchange Act Rel. No. 85764 (May 2, 2019), 84 Fed. Reg. 20173, 20174 (May 8, 2019). CAT LLC requests that the SEC clarify that the definition of "covered entity" is not intended to include FINRA CAT.

⁵ Cybersecurity Proposal at 20269.

⁶ Cybersecurity Proposal at 20268-78; and Securities Exchange Act Rel. No. 97143 (Mar. 15, 2023), 88 Fed. Reg. 23146, 23192-99 (Apr. 14, 2023).

The SEC asserts that its requirement to provide a summary description of each significant cybersecurity incident, rather than overly detailed disclosures, “is designed to produce meaningful disclosures but not disclosures that would reveal information (*e.g.*, proprietary or confidential methods of addressing cybersecurity risk or known cybersecurity vulnerabilities) that could be used by threat actors to cause harm to the Covered Entity or its customers, counterparties, members, users, or other persons.”⁷ However, even summary descriptions of significant cybersecurity incidents would increase the cybersecurity risk for the covered entity and other persons. Accordingly, such a requirement would be at odds with the intrinsic purpose of the Cybersecurity Proposal.

3. Provide Guidance regarding Third Party Assistance

In the context of Reg SCI, an SCI entity may determine to contract with third parties to operate SCI systems on its behalf. In such cases, the SEC Staff has stated that it

believes the expertise and access of the third party directly operating the applicable SCI system could be reasonably leveraged by the SCI entity on whose behalf that system is being operated in fulfilling regulatory obligations under Regulation SCI. For example, where an SCI entity (“Contracting SCI Entity”) has contracted with another entity (“Operating Entity”) to perform certain functions on its behalf that use SCI systems, the Contracting SCI Entity may look to the Operating Entity to take the initial steps to facilitate the meeting of certain obligations under Regulation SCI, subject to appropriate due diligence by the Contracting SCI Entity.

The SEC Staff has described how SCI entities may rely on such third parties with regard to the SCI entities’ compliance with Regulation SCI in its Frequently Asked Questions regarding Regulation SCI.⁸ CAT LLC recommends that the SEC provide similar guidance with regard to third parties in the context of the Cybersecurity Proposal.

Respectfully submitted,

/s/ Brandon Becker

Brandon Becker
CAT NMS Plan Operating Committee Chair

cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner

⁷ Cybersecurity Proposal at 20256.

⁸ Question 2.03, SEC Division of Trading and Markets, Responses to Frequently Asked Questions Concerning Regulation SCI. The SEC Staff guidance addresses, among other things, the ability of Contracting Entities to rely on Operating Entities to provide notifications of SCI events under Rule 1002.

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The Hon. Jaime Lizárraga, Commissioner

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CAT NMS Plan Participants