

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71596; File No. 4-668]

**Joint Industry Plan; BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, NYSE Arca, Inc. and Topaz Exchange, LLC; Order Approving Proposed National Market System Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail**

February 21, 2014.

### I. Introduction

On September 3, 2013, BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, NYSE Arca, Inc., and Topaz Exchange, LLC (collectively, “SROs” or “Participants”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) pursuant to Section 11A of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 608 thereunder,<sup>2</sup> a proposed National Market System (“NMS”) Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail (“Plan”).<sup>3</sup> The Participants requested that the Commission approve the Plan.<sup>4</sup> The Plan was published for comment in the *Federal Register* on November 21,

2013.<sup>5</sup> The Commission received six comment letters from five commenters in response to the proposal.<sup>6</sup> On January 31, 2014, the Participants to the Plan responded to the comment letters.<sup>7</sup> This order approves the Plan.

### II. Background

On July 11, 2012, the Commission adopted Rule 613 under the Act to require the SROs to jointly submit an NMS plan (“CAT NMS Plan”) to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail (“CAT”), with respect to the trading of NMS securities, that would capture customer and order event information for orders in NMS securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution.<sup>8</sup> Rule 613 outlines a broad framework for the creation, implementation, and maintenance of the consolidated audit trail, including the minimum elements the Commission believes are necessary for an effective consolidated audit trail. In instances where Rule 613 sets forth minimum

requirements for the consolidated audit trail, the Rule provides flexibility to the SROs to draft the requirements of the CAT NMS Plan in a way that best achieves the objectives of the Rule. Specifically, Rule 613 incorporates a series of twelve “considerations” that the Participants must address in the CAT NMS Plan, including:

- The specific details and features of the CAT NMS Plan;
- The Participants’ analysis of the CAT NMS Plan’s costs and impact on Competition, efficiency, and capital formation;
- The process in developing the CAT NMS Plan;
- Information about the implementation of the CAT NMS Plan; and
- Milestones for the creation of the consolidated audit trail.<sup>9</sup>

As part of the discussion of these “considerations,” the Participants must include cost estimates for the proposed solution, and a discussion of the costs and benefits of alternate solutions considered but not proposed.<sup>10</sup> In addition, Rule 613 requires that the Participants: (1) Provide an estimate of the costs associated with creating, implementing, and maintaining the consolidated audit trail under the terms of the CAT NMS Plan submitted to the Commission for its consideration; (2) discuss the costs, benefits, and rationale for the choices made in developing the CAT NMS Plan submitted; and (3) provide their own analysis of the submitted CAT NMS Plan’s potential impact on competition, efficiency, and capital formation.<sup>11</sup> These detailed requirements are intended to ensure that the Commission and the public have sufficiently detailed information to carefully consider all aspects of the CAT NMS Plan ultimately submitted by the Participants.<sup>12</sup>

In light of the numerous specific requirements of Rule 613, the Participants concluded that publication of a request for proposal (“RFP”) was necessary to ensure that potential alternative solutions to creating the consolidated audit trail can be presented and considered by the Participants and that a detailed and meaningful cost/benefit analysis can be performed, both of which are required considerations to be addressed in the CAT NMS Plan.<sup>13</sup> The Participants published the RFP on February 26, 2013, and requested that any potential

<sup>5</sup> See Securities Exchange Act Release No. 70892 (November 15, 2013), 78 FR 69910 (“Notice”).

<sup>6</sup> See letters to Elizabeth M. Murphy, Secretary, Commission, from Marcia E. Asquith, Senior Vice President and Corporate Secretary, Financial Industry Regulatory Authority, Inc. (“FINRA”), dated December 20, 2013 (“FINRA Letter”); from Anonymous (“Anonymous 1”), dated December 23, 2013 (“Anonymous 1 Letter”); from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (“SIFMA”), dated December 23, 2013 (“SIFMA Letter”); from Manisha Kimmel, Executive Director, Financial Information Forum (“FIF”), dated December 23, 2013 (“FIF Letter”); Anonymous (“Anonymous 2”), dated December 23, 2013 (“Anonymous 2 Letter”) from Manisha Kimmel, Executive Director, FIF, dated January 24, 2014 (“FIF Letter II”).

FINRA notes that it has two roles with respect to the development of the consolidated audit trail: (1) A role as a Participant in developing the CAT NMS Plan (as defined below) (“SRO Side”) and (2) a role as an entity that has submitted an intent to submit a Bid (as defined below) in response to the RFP (as defined below) (“Bid Side”). FINRA notes that it has implemented a communications firewall between the SRO Side and the Bid Side, including policies and procedures designed to prevent the members of the SRO Side and the Bid Side from communicating with one another about non-public matters involving the consolidated audit trail. The FINRA Letter was submitted by the Bid Side. See FINRA Letter at 1.

Copies of all comments received on the proposed Plan are available on the Commission’s Web site, located at <http://www.sec.gov/comments/4-668/4-668.shtml>. Comments are also available for Web site viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. ET.

<sup>7</sup> See letter to Elizabeth M. Murphy, Secretary, Commission, from the Participants, dated January 31, 2014 (“Response Letter”).

<sup>8</sup> See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2013) (“Adopting Release”).

<sup>9</sup> See Rule 613(a)(1)(i)-(xii).

<sup>10</sup> See Rule 613(a)(1)(vii); Rule 613(a)(1)(xii).

<sup>11</sup> See Rule 613(a)(1)(viii).

<sup>12</sup> See Adopting Release, *supra* note 8, at 45725.

<sup>13</sup> See Submission Letter, *supra* note 3, at 3.

<sup>1</sup> 15 U.S.C. 78k-1.

<sup>2</sup> 17 CFR 242.608.

<sup>3</sup> See letter to Elizabeth M. Murphy, Secretary, Commission, from the SROs dated August 23, 2013 (“Submission Letter”).

<sup>4</sup> *Id.* at 1.

bidders notify the Participants of their intent to bid by March 5, 2013. Thirty-one firms submitted an intent to bid in response to the publication of the RFP; four of the firms were Participants or Affiliates of Participants.<sup>14</sup>

### III. Description of the Proposal

The Participants filed the Plan to govern how the SROs will proceed with formulating and submitting the CAT NMS Plan—and, as part of that process, how to review, evaluate, and narrow down the bids submitted in response to the RFP (“Bids”)<sup>15</sup>—and ultimately choosing the plan processor that will build, operate, and maintain the consolidated audit trail (“Plan Processor”).<sup>16</sup>

#### A. Governance

Section III of the Plan establishes the overall governance structure the Participants have chosen.<sup>17</sup> Specifically, the Participants propose establishing an Operating Committee responsible for formulating, drafting, and filing with the Commission the CAT NMS Plan and for ensuring the Participants’ joint obligations under Rule 613 are met in a timely and efficient manner. As set forth in Section III(B) of the Plan, each Participant will select one individual and one substitute to serve on the Operating Committee; however, other representatives of each Participant are permitted to attend Operating Committee meetings. Section III of the Plan also establishes the procedures for the Operating Committee, including provisions regarding meetings,

<sup>14</sup> Since that time, 13 firms—including two Participants and one Affiliate of a Participant—have formally notified the Participants that they will not submit bids as primary bidders. A list of firms that submitted an intent to bid is located on the Participants’ Web site at [www.catnmsplan.com](http://www.catnmsplan.com) (“CAT NMS Plan Web site”). According to the Plan, “[a]n ‘Affiliate’ of an entity means any entity controlling, controlled by, or under common control with such entity.” See Section I(A) of the Plan.

<sup>15</sup> See Section I(C) of the Plan.

<sup>16</sup> See Submission Letter, *supra* note 3, at 4.

<sup>17</sup> Section I sets forth the definitions used throughout the Plan, and Section II lists the Participants and establishes the requirements for admission of new, or withdrawal of existing, Participants. Each currently approved national securities exchange and national securities association subject to Rule 613(a)(1) is a Participant in the Plan. Section II(B) of the Plan provides that any entity approved by the Commission as a national securities exchange or national securities association under the Act after the effectiveness of the Plan shall become a Participant by satisfying each of the following requirements: (1) effecting an amendment to the Plan by executing a copy of the Plan as then in effect (with the only change being the addition of the new Participant’s name in Section II of the Plan) and submitting such amendment to the Commission for approval; and (2) providing each then-current Participant with a copy of such executed Plan.

Participants’ voting rights, and voting requirements.

#### B. Conflicts of Interest

The Participants recognize their important regulatory obligations with respect to the development of the CAT NMS Plan, and ultimately the creation and operation of the consolidated audit trail.<sup>18</sup> However, they also recognize that Participants or Affiliates of Participants may also be Bidders seeking to serve as the Plan Processor or may be a subcontractor to Bidders seeking to serve as the Plan Processor.<sup>19</sup> Accordingly, the Participants have sought to mitigate these potential conflicts of interest by including in the Plan multiple provisions, which are described below, designed to balance these competing factors. The Participants believe that the Plan achieves this balance by allowing all Participants to participate meaningfully in the process of creating the CAT NMS Plan and choosing the Plan Processor while imposing strict requirements to ensure that the participation is independent and that the process is fair and transparent.<sup>20</sup>

#### C. Plan Processor Selection Process

##### 1. Bidder Shortlist Determination

Sections V and VI of the Plan<sup>21</sup> set forth the process for the Participants’ evaluation, and narrowing down, of the Bids, and choosing the Plan Processor.<sup>22</sup> Pursuant to these Sections, the evaluation of Bids and selection of the Plan Processor will be performed by a Selection Committee composed of one senior officer from each Participant (“Voting Senior Officer”).<sup>23</sup> The SROs

<sup>18</sup> See Notice, *supra* note 5, at 69911.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Section IV of the Plan governs amendments to the Plan. In general, except with respect to the addition of new Participants, any change to the Plan requires a written amendment that sets forth the change, is executed by over two-thirds of the Participants, and is approved by the Commission pursuant to Rule 608 of the Act or otherwise becomes effective under Rule 608.

<sup>22</sup> Initial steps in the evaluation and selection process will be performed pursuant to the Plan; the final two rounds of evaluation and voting, as well as the final selection of the Plan Processor, will be performed pursuant to the CAT NMS Plan. The sections of the CAT NMS Plan governing these final two voting rounds are set forth in Sections VI(D) and (E) of the Plan and will be incorporated into the CAT NMS Plan. The Participants believe it is essential that the entire process be laid out in the Plan so that the Commission can consider and approve the entire evaluation and selection process, even though the final two voting rounds, including the selection of the Plan Processor, will not be conducted until after the approval of the CAT NMS Plan. See Submission Letter, *supra* note 3, at 4.

<sup>23</sup> In the case of Affiliated Participants, one individual may be (but is not required to be) the

noted that, because of the potential conflicts of interest noted above, the Plan includes multiple requirements to increase the independence of the Voting Senior Officer who participates on the Selection Committee on behalf of a Bidding Participant.<sup>24</sup> The criteria set forth in Section V(D) of the Plan include requirements concerning the Voting Senior Officer’s job responsibilities, decision-making authority, and reporting, and require that the Bidding Participant establishes functional separation between its Plan responsibilities and its business/commercial (including market operations) functions. In addition, the criteria prohibit any disclosure of information regarding the Bid to the Voting Senior Officer and prohibit the Voting Senior Officer from disclosing any non-public information gained in his or her role as such. According to the SROs, these criteria are intended to insulate the Voting Senior Officer from any inside knowledge regarding the Bid (while also preventing any information about the evaluation process from being shared with staff preparing the Bidding Participant’s Bid) and to reduce any potential personal motivation that may exist that could improperly influence a Voting Senior Officer’s decisions.<sup>25</sup>

Any action requiring a vote by the Selection Committee under the Plan can only be taken in a meeting in which all Participants entitled to vote are present.<sup>26</sup> All votes taken by the Selection Committee are confidential and non-public, and a Participant’s individual votes will not be disclosed to other Participants or to the public.<sup>27</sup> For

Voting Senior Officer for more than one or all of the Affiliated Participants.

<sup>24</sup> The Plan defines a “Bidding Participant” broadly to include any Participant that: (1) submits a Bid; (2) is an Affiliate of an entity that submits a Bid; or (3) is included, or is an Affiliate of an entity that is included, as a Material Subcontractor as part of a Bid. See Section I(E) of the Plan. A “Material Subcontractor” is “any entity that is known to the Participant to be included as part of a Bid as a vendor, subcontractor, service provider, or in any other similar capacity and, excluding products or services offered by the Participant to one or more Bidders on terms subject to a fee filing approved by the SEC, (1) is anticipated to derive 5% or more of its annual revenue in any given year from services provided in such capacity; or (2) accounts for 5% or more of the total estimated annual cost of the Bid for any given year.” See Section I(J) of the Plan. The Plan provides that “[a]n entity will not be considered a ‘Material Subcontractor’ solely due to the entity providing services associated with any of the entity’s regulatory functions as a self-regulatory organization registered with the SEC.” See *id.*

<sup>25</sup> See Notice, *supra* note 5, at 69912. As described below, even with the independence criteria in place, the Plan also requires recusal by the Voting Senior Officer from certain votes.

<sup>26</sup> See Section V(C)(1) of the Plan.

<sup>27</sup> See Section V(B)(4) of the Plan.

this reason, the Plan provides that votes of the Selection Committee will be tabulated by an independent third party approved by the Operating Committee.<sup>28</sup> Moreover, the Participants do not anticipate that aggregate votes or anonymized voting distribution numbers will be provided to the Participants following votes by the Selection Committee.<sup>29</sup>

The Plan divides the processes for review and evaluation of Bids, and selection of the Plan Processor, into four separate stages. After Bids are submitted,<sup>30</sup> Section VI(A) of the Plan provides that the Selection Committee will review them to determine which are Qualified Bids (*i.e.*, Bids that contain sufficient information to allow the Voting Senior Officers to meaningfully assess and evaluate them).<sup>31</sup> At this initial stage, if two-thirds or more of the Participants determine that a Bid does not meet the threshold for a Qualified Bid, the Bid will be eliminated from further consideration. The Participants believe this initial step will ensure that only those Bids meeting a minimum level of detail and sufficiency will move forward in the process, and insufficient Bids can be eliminated.<sup>32</sup>

Following the elimination of Bids that are not Qualified Bids, each Qualified Bidder will be provided the opportunity to present its Bid to the Selection Committee.<sup>33</sup> After the Qualified Bidders have made their presentations, the Selection Committee will establish a subset of Bids that will move on in the process (“Shortlisted Bids”).<sup>34</sup> The Plan provides that, if there are six or fewer Qualified Bids submitted, all of those Bids will be selected as Shortlisted Bids.<sup>35</sup> If there are more than six but fewer than eleven Qualified Bids, the Selection Committee will choose five Shortlisted Bids, and, if there are eleven or more Qualified Bids, the Selection

Committee will choose 50% of the Qualified Bids as Shortlisted Bids.<sup>36</sup>

When voting to select the Shortlisted Bids from among the Qualified Bids, each Voting Senior Officer must rank his or her selections, and the points assigned to the rankings increase in single-point increments.<sup>37</sup> Thus, for example, if five Shortlisted Bids are to be chosen, each Participant will vote for its top five choices in rank order, with the first choice being given five points, the second choice four points, the third choice three points, the fourth choice two points, and the fifth choice one point. The Plan also provides that at least two Non-SRO Bids must be included as Shortlisted Bids, provided there are two Non-SRO Bids that are Qualified Bids.<sup>38</sup> According to the SROs, this provision further reduces the impact of potential conflicts of interest in choosing Shortlisted Bids.<sup>39</sup> If, following the vote, no Non-SRO Bids have been selected as Shortlisted Bids, the Plan requires that the two Non-SRO Bids receiving the highest cumulative votes be added as Shortlisted Bids.<sup>40</sup> If, in this scenario, a single Non-SRO Bid was a Qualified Bid, that Non-SRO Bid would be added as a Shortlisted Bid.<sup>41</sup> The Participants believe selecting Shortlisted Bids is appropriate both to ensure that Bidders submit a complete and thorough Bid initially and so that Qualified Bidders will know whether they have a realistic opportunity to be selected as the Plan Processor after the CAT NMS Plan is approved.<sup>42</sup>

## 2. Bid Revision and Selection of Plan Processor

Following the selection of Shortlisted Bids, the Participants will identify the optimal proposed solution(s) for the consolidated audit trail for inclusion in the CAT NMS Plan for submission to the Commission.<sup>43</sup> As a part of this process, and the overall review and evaluation of Shortlisted Bids, the Selection Committee may consult with

the advisory committee required and established by Rule 613 (“Advisory Committee”). If the Commission approves the CAT NMS Plan, the Selection Committee will determine, by majority vote, which Shortlisted Bidders will have the opportunity to revise their Bids in light of the provisions in the final, approved CAT NMS Plan.<sup>44</sup> In making a decision whether to permit a Shortlisted Bidder to revise its Bid, the Selection Committee will consider the provisions in the CAT NMS Plan as well as the content of the Shortlisted Bidder’s initial Bid. According to the SROs, to reduce potential conflicts of interest, the Plan also provides that, if a Bid submitted by or including a Bidding Participant or an Affiliate of a Bidding Participant is a Shortlisted Bidder, that Bidding Participant must recuse itself from all votes regarding whether a Shortlisted Bidder will be permitted to revise its Bid.<sup>45</sup>

Section VI(E) provides that, after the permitted Shortlisted Bidders submit any revisions, the Selection Committee will select the Plan Processor from the Shortlisted Bids in two rounds of voting where, subject to the recusal provision described below, each Participant has one vote. In the first round, each Participant will select a first and second choice, with the first choice receiving two points and the second choice receiving one point. The two Shortlisted Bids receiving the highest cumulative scores in the first round will advance to the second round.<sup>46</sup> In the event of a tie resulting in more than two Shortlisted Bids advancing to the second round, the tie will be broken by assigning one point per vote to the tied Shortlisted Bids, and the one with the most votes will advance. If this procedure fails to break the tie, a revote will be taken on the tied Shortlisted Bids with each vote receiving one point. If the tie persists, the Participants will identify areas for discussion, and revotes will be taken until the tie is broken.<sup>47</sup>

Once two Shortlisted Bids have been chosen, the Participants will vote for a single Shortlisted Bid from the final two to determine the Plan Processor.<sup>48</sup> If one or both of the final Bids is submitted by or includes a Bidding Participant or an Affiliate of a Bidding Participant, the Bidding Participant must recuse itself from the final vote.<sup>49</sup> In the event of a

<sup>28</sup> *Id.*

<sup>29</sup> See Notice, *supra* note 5, at 69912.

<sup>30</sup> The Participants anticipate that Bids must be submitted four weeks after the Commission approves the Plan. See *id.*

<sup>31</sup> The Plan defines a Qualified Bid as “a Bid that is deemed by the Selection Committee to include sufficient information regarding the Bidder’s ability to provide the necessary capabilities to create, implement, and maintain a consolidated audit trail so that such Bid can be effectively evaluated by the Selection Committee.” See Section I(Q) of the Plan. The Plan provides that, “[w]hen evaluating whether a Bid is a Qualified Bid, each member of the Selection Committee shall consider whether the Bid adequately addresses the evaluation factors set forth in the RFP, and apply such weighting and priority to the factors as such member of the Selection Committee deems appropriate in his or her professional judgment.” See *id.*

<sup>32</sup> See Notice, *supra* note 5, at 69912.

<sup>33</sup> See Section VI(B)(1) of the Plan.

<sup>34</sup> See Section VI(B)(2) of the Plan.

<sup>35</sup> See *id.*

<sup>36</sup> See Sections VI(B)(3)–(4) of the Plan. The Plan provides that, if there is an odd number of Qualified Bids, the number of Shortlisted Bids to be chosen will be rounded up to the next whole number (*e.g.*, if there are thirteen Qualified Bids, seven Shortlisted Bids will be selected). See Section VI(B)(4) of the Plan. In the event of a tie to select the Shortlisted Bids, all such tied Qualified Bids will be Shortlisted Bids. See Section VI(B)(3)(c) of the Plan.

<sup>37</sup> See Section VI(B)(3) of the Plan.

<sup>38</sup> *Id.* The Plan defines a “Non-SRO Bid” as “a Bid that does not include a Bidding Participant.” See Section I(L) of the Plan.

<sup>39</sup> See Notice, *supra* note 5, at 69912–13

<sup>40</sup> See Section VI(B)(3)(d) of the Plan.

<sup>41</sup> *Id.*

<sup>42</sup> See Notice, *supra* note 5, at 69912.

<sup>43</sup> See Submission Letter, *supra* note 3, at 7; Section VI(D) of the Plan.

<sup>44</sup> See Section IV(D)(1) of the Plan.

<sup>45</sup> See Notice, *supra* note 5, at 69913. See Section V(B)(2) of the Plan.

<sup>46</sup> See Section VI(E)(3) of the Plan. Each round of voting throughout the Plan is independent of other rounds.

<sup>47</sup> *Id.*

<sup>48</sup> See Section VI(E)(4)(b) of the Plan.

<sup>49</sup> See Section V(B)(2) of the Plan.

tie, a revote will be taken. If the tie persists, the Participants will identify areas for discussion and, following these discussions, revotes will be taken until the tie is broken.<sup>50</sup> As set forth in Section VII of the Plan, following the selection of the Plan Processor, the Participants will file with the Commission a statement identifying the Plan Processor and including the information required by Rule 608.

#### D. Implementation

The terms of the Plan will be operative immediately upon approval of the Plan by the Commission. The Participants have announced that Bids must be submitted four weeks after the Commission's approval of the Plan.<sup>51</sup> The Participants will begin reviewing and evaluating the Bids pursuant to Section VI of the Plan upon receipt of the Bids, and anticipate that it will take seven months to evaluate the Bids and submit the CAT NMS Plan to the Commission pursuant to Sections VI(A) and (B) of the Plan.<sup>52</sup> As noted above, upon approval of the CAT NMS Plan, the Plan will automatically terminate. The review of revised Shortlisted Bids and the selection of the Plan Processor will be undertaken as set forth in Sections VI(D) and (E) of the Plan as those sections are incorporated into the CAT NMS Plan.

#### IV. Comment Letters and Response Letter

The Commission received six comment letters from five commenters on the proposed Plan.<sup>53</sup> Three of the commenters generally supported the Plan.<sup>54</sup> All of the commenters had concerns with, and/or questions regarding, specific details on the terms of the Plan, collectively identifying three main issues—(1) industry participation in the evaluation of Bidders, the selection of the Plan Processor, and the drafting of the CAT NMS Plan; (2) transparency in SRO decision-making; and (3) conflicts of interest—and offering suggestions as to how those concerns and/or questions could be addressed.<sup>55</sup> The Participants responded to the comments regarding the proposal.<sup>56</sup>

<sup>50</sup> See Section VI(E)(4)(c) of the Plan.

<sup>51</sup> See Notice, *supra* note 5, at 69913.

<sup>52</sup> *Id.*

<sup>53</sup> See *supra* note 6.

<sup>54</sup> See FINRA Letter at 1; SIFMA Letter at 1; FIF Letter at 1.

<sup>55</sup> See FINRA Letter at 1–2; Anonymous 1 Letter at 1; SIFMA Letter at 1; FIF Letter at 1–2; Anonymous 2 Letter at 1; FIF Letter II at 2–3.

<sup>56</sup> See Response Letter, *supra*, note 7.

#### A. Industry Participation

As proposed in the Plan, only the SROs will participate in the selection process, and they may consult with the Advisory Committee when reviewing and evaluating the Shortlisted Bids.<sup>57</sup> Three commenters believe that industry participation in the selection process is important, and they suggest varying solutions to ensure that such participation is required by the Plan.<sup>58</sup>

One commenter states that the process should include the integrated involvement and meaningful participation of representatives of the broker-dealer community.<sup>59</sup> Specifically, the commenter states that there should be public representation on the Operating Committee, and that non-SRO, industry members should be involved in the evaluation of Bidders and the selection of the Plan Processor.<sup>60</sup> The commenter believes that “[t]he 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.”<sup>61</sup> This commenter additionally recommends that the Participants amend the Plan to establish the Advisory Committee as part of this Plan, as opposed to waiting for the submission of the CAT NMS Plan, with safeguards and procedural protections to assure that the SROs fully consider the views of the committee.<sup>62</sup> Another commenter states that it supports consultation with the Advisory Committee as part of the selection process so long as safeguards are put in place to ensure the confidentiality of the Bidders’ information is protected.<sup>63</sup> A third commenter believes that the Advisory Committee’s scope of participation is extremely limited and should be expanded and it recommends

<sup>57</sup> See Sections II and VI(D)(2) of the Plan.

<sup>58</sup> See SIFMA Letter; FINRA Letter; and FIF Letter.

<sup>59</sup> See SIFMA Letter at 1.

<sup>60</sup> *Id.* at 2–4.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 4–5. In particular, the commenter suggests that the Plan should require the SROs: (1) 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 committee; and (2) to prepare agendas for meetings and provide documents to be discussed at the meetings in advance to give committee members sufficient time to analyze information and formulate views. *Id.*

<sup>63</sup> See FINRA Letter at 4. The commenter requests clarification on whether members of the Advisory Committee would be required to sign a non-disclosure agreement (“NDA”) if they are given access to confidential information as part of any consultation with the Selection Committee. *Id.* at 3–4.

that the SROs should be required to consult the Advisory Committee when reviewing the Shortlisted Bids to select the Plan Processor.<sup>64</sup>

In response to these comments, the SROs indicate how the Operating Committee has provided, and will continue to provide, for industry participation in the development of the CAT NMS Plan.<sup>65</sup> In response to the comment that Advisory Committee consultation should be mandatory as part of the review of Shortlisted Bidders, the SROs noted that they will consult proactively with the industry for input on key aspects of the Bids, so long as the selection process is not impaired, especially with regard to maintaining Bidder confidential information.<sup>66</sup> The SROs also note that they created the CAT Development Advisory Group (“DAG”) and that the DAG has been, and will continue to be, a valuable source of input for the development of the CAT NMS Plan.<sup>67</sup> The SROs state that they will continue to engage the industry on key topics pertaining to aspects of the Bids that directly affect the industry.<sup>68</sup> The SROs further state that, after Bids are received in response to the RFP, they are committed to providing the DAG with anonymized information taken from Bids that will provide the DAG members with enough specificity to allow them to understand the comparative advantages and disadvantages of the options being considered by the SROs, so that they can contribute in a meaningful way to the SROs’ analysis of such information.<sup>69</sup> The SROs further note that they intend to work with the DAG to identify the particular sections of the RFP that will benefit from industry input during the evaluation of Bids.<sup>70</sup>

<sup>64</sup> See FIF Letter at 4.

<sup>65</sup> See Response Letter, *supra* note 7, at 2–4.

<sup>66</sup> *Id.* The SROs, however, note that the creation of the Advisory Committee that is required by Rule 613(b)(7) (“Rule 613 Advisory Committee”) is not germane to the Plan. The SROs state that the requirement in Rule 613(b)(7) is that the CAT NMS Plan establish an Advisory Committee to advise the SROs on the implementation, operation and administration of the consolidated audit trail. The SROs then state that the Rule 613 Advisory Committee will be established in the CAT NMS Plan, and that the CAT NMS Plan will provide specifics as to the role of the Rule 613 Advisory Committee in the process of reviewing and evaluating Bids. *Id.* at 2.

<sup>67</sup> *Id.* at 2–4. The SROs also note their previous engagement with industry through posting industry questions on the CAT NMS Plan Web site and conducting open meetings. *Id.* at n.5.

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.* at 3. The SROs note that this information sharing will occur only after executed NDAs are in place with the appropriate industry members. *Id.* at n. 7.

<sup>70</sup> *Id.* at 3.

The SROs also explain that they understand that broad industry input during the development of the CAT NMS Plan is critical to selecting optimal proposed solutions, and that they will continue to hold discussions with the DAG at the greatest level of detail possible without compromising a fair selection process and confidential Bid information.<sup>71</sup>

### B. Transparency

Several commenters stress the importance of transparency in the Bidder selection process and the standards the SROs will employ for review of Bids.<sup>72</sup> One commenter states that the Commission should not approve the Plan unless it is amended to provide public disclosure of the selection process.<sup>73</sup> The commenter recommends that the SROs publish the Bidders and the contents of the Bids, explaining that the Bids should be available to the public to inform the discussion regarding the costs and benefits, and technological feasibility of different solutions.<sup>74</sup> The commenter believes that these responses to the RFP and the SROs' rationale for eliminating them from consideration as the Plan Processor will be important for the industry to consider in commenting on the CAT NMS Plan.<sup>75</sup>

Another commenter recommends that the SROs share information contained in the Bids, specifically relating to the functions and interfaces of the entities (*i.e.*, broker-dealers and SROs) that are required to report to the CAT ("CAT Reporters"), so that the industry can provide feedback to the SROs for assessment of Bidder responses.<sup>76</sup> The commenter believes that broad input from the DAG during the CAT NMS Plan development process is critical to ensure that the SROs consider issues from the CAT Reporter perspective.<sup>77</sup> The commenter maintains that this information would represent an external description of the Plan Processor and should not require any disclosure of internal implementations or proprietary information from the Bidders.<sup>78</sup> Further, the commenter argues that this level of information will be public information once the CAT NMS Plan is published as Rule 613 requires that the CAT NMS Plan be sufficiently detailed to describe

the alternatives to the solution selected by the SROs.<sup>79</sup> The commenter also argues that because Bids cannot be revised prior to the submission of the CAT NMS Plan pursuant to the proposed Plan, information leakage should not be a concern.<sup>80</sup>

The commenter also opines that if the SROs deem it necessary to require DAG members to sign NDAs in order to share confidential portions of Bidders' responses, any such NDAs should be targeted and finite in nature, specifically noting that DAG discussions on CAT Reporter functionality should not be subject to an NDA.<sup>81</sup> The commenter states that only confidential portions of Bids should be covered by NDAs, and that to the greatest extent possible, information relating to Bidders' responses should be publicly available to facilitate critical outreach from the DAG.<sup>82</sup>

In response to these comments, the SROs state that they do not intend to publish the content of the Bids in order to manage a fair process and to address Bidders' concerns regarding the confidentiality of proprietary and other sensitive information during the selection process.<sup>83</sup> The SROs represent that this is standard industry practice.<sup>84</sup> The SROs further indicate that, as required by Rule 613, the CAT NMS Plan submitted will discuss appropriate and anonymized elements of the Bids that were not selected, including the relative advantages and disadvantages of each solution, an assessment of the costs and benefits, and the basis upon which the SROs selected the optimal proposed solutions in the CAT NMS Plan.<sup>85</sup> The SROs also note that the CAT NMS Plan will be subject to notice and comment.<sup>86</sup> However, the SROs state that they will seek industry feedback on proposed approaches and key themes of the RFP responses.<sup>87</sup>

The SROs also state that, prior to any consultation with the Advisory Committee or the DAG about information contained in a Bid, the SROs will require the execution of an NDA.<sup>88</sup> In response to the comment regarding the scope of NDAs, the SROs state that NDAs will be appropriately drafted to protect confidential information while allowing for meaningful discussion between the

SROs and members of the Advisory Committee or the DAG.<sup>89</sup>

Three commenters recommend that the selection criteria used to evaluate the Bids be publicly available.<sup>90</sup> Specifically, one commenter states that, if the evaluation criteria are thorough and known to all parties (*i.e.*, SROs, Bidders, the industry and the Commission), the process will be more transparent and fair.<sup>91</sup> This commenter suggests that the evaluation process and criteria used in the final two rounds of voting be published prior to each round of voting, or at a minimum reviewed with the industry via the DAG.<sup>92</sup> Another commenter requests clarification regarding the criteria that Voting Senior Officers will employ when reviewing and ranking Bids, both when selecting the Shortlisted Bids from the Qualified Bids and when selecting the Plan Processor from the Shortlisted Bids.<sup>93</sup> A third commenter suggests that the SROs should publish information about the results of each round of voting (*e.g.*, the total votes received by each Bidder or a ranking of the Bidders by voting result).<sup>94</sup>

In response to these comments, the SROs agree to publish more detailed descriptions of the evaluation criteria listed in the RFP, which will be used by each SRO as a guideline when evaluating Bids.<sup>95</sup> The SROs note that the evaluation criteria can be broadly grouped into the following five areas: (1) technical architecture, (2) operations—technical (processing capability), (3) operations—non-technical, (4) company information, and (5) contract and terms. The SROs further provide lists of criteria within each of the five areas in the Response Letter.<sup>96</sup> The SROs explain that each SRO's assessment will be informed by the defined criteria noted above but that an individual SRO may determine that other factors are important in making its independent evaluation of a Bid.<sup>97</sup> The SROs do not intend to publish voting results.<sup>98</sup> The SROs state that this approach is considered standard industry practice and there is no articulated benefit to making this information publicly available. The SROs state that they are concerned that the public disclosure of such information may incorrectly and

<sup>71</sup> *Id.*

<sup>72</sup> See FINRA Letter at 1–2; SIFMA Letter at 1–3; FIF Letter at 2–3; FIF Letter II at 2.

<sup>73</sup> See SIFMA Letter at 3.

<sup>74</sup> *Id.* at 2.

<sup>75</sup> *Id.*

<sup>76</sup> See FIF Letter at 2–3; and FIF Letter II at 2–3.

<sup>77</sup> See FIF Letter II at 3.

<sup>78</sup> See FIF Letter at 3.

<sup>79</sup> See FIF Letter II at 2–3.

<sup>80</sup> *Id.* at 2.

<sup>81</sup> See FIF Letter II at 3.

<sup>82</sup> *Id.*

<sup>83</sup> See Response Letter, *supra* note 7, at 9.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> See FINRA Letter at 2; SIFMA Letter at 3; FIF Letter at 2.

<sup>91</sup> See FIF Letter at 2.

<sup>92</sup> *Id.*

<sup>93</sup> See FINRA Letter at 2.

<sup>94</sup> See SIFMA Letter at 3.

<sup>95</sup> See Response Letter, *supra* note 7, at 4.

<sup>96</sup> *Id.* at 4–5.

<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 9.

inaccurately suggest the relative strength of a particular Bid without any meaningful context.<sup>99</sup>

One commenter recommends that the minutes of the SRO Operating Committee meetings be made public, in order to further increase transparency and serve as a communications vehicle for informing the industry of the CAT governance actions and decisions.<sup>100</sup> In response to this comment, the SROs indicate that the Operating Committee meeting minutes will not be made public either prior to or after approval of the CAT NMS Plan.<sup>101</sup> The SROs state that, in managing a fair process and maintaining Bidder confidentiality as provided for in the NDA executed with the Bidders, the SROs will not publish Operating Committee minutes during the Bid evaluation and selection process.<sup>102</sup> The SROs believe that this approach encourages effective and critical review of the Bids as well as open and frank discussions in light of all material considerations, including timing and complexity.<sup>103</sup> The SROs explain that the decisions made by the Operating Committee regarding aspects of the Bids will be reflected in the CAT NMS Plan, which will be open to public comment, and will include an analysis of both the optimal proposed solutions and those solutions not selected, thus providing the public with the opportunity to consider the SROs' decisions.<sup>104</sup> The SROs further state that, once the CAT NMS Plan has been approved and the Advisory Committee has been established, members of that committee will have the right to attend CAT management committee meetings, except for executive sessions, and, as such, will have access to the minutes from such meetings, as well as the right to receive information concerning the operation of the central repository and to provide their views to the SROs.<sup>105</sup>

Finally, one commenter requests clarification on whether the optimal proposed solutions for the CAT NMS Plan will be the product of an individual Bid or a composite of select portions of multiple Bids.<sup>106</sup> If it will be the latter, the commenter questions how the SROs will determine the costs and benefits of such solutions.<sup>107</sup> In response to this comment, the SROs

clarify that the optimal proposed solutions could include approaches from different Bids in order to identify a solution that best meets the requirements of Rule 613.<sup>108</sup> The SROs recognize that there may be inherent challenges in combining elements of separate solutions, but they want to ensure the flexibility in the evaluation process to identify a holistic solution that is better suited to meet the requirements of Rule 613, while not being limited to the components of any individual Bid.<sup>109</sup> The SROs intend to consult with the DAG and the industry as part of the review of anonymized solutions from the Bids, including, but not limited to, requesting input on the technical and operational specifications of the proposed solutions, and the associated cost-benefit analysis.<sup>110</sup>

### C. Conflicts of Interest

Two commenters express concerns that the provisions in the Plan that are intended to address conflicts of interest are insufficient.<sup>111</sup> One commenter questions the genuineness of the separation through firewalls within the SROs intended to segregate individuals participating in the selection process from those participating in the bidding process.<sup>112</sup> The commenter also expresses concern that it is challenging to enforce and monitor such restrictions.<sup>113</sup> The commenter further recommends that the Plan either limit the Bidders to non-SROs or only to SROs.<sup>114</sup> Another commenter recommends that the Plan require Bidding Participants to be recused from both rounds of voting on Shortlisted Bids, not just the second round of voting to select the Plan Processor.<sup>115</sup>

In response to these comments, the SROs note the important regulatory obligations that exist for each of them with respect to the creation and operation of the CAT, and that it is essential that each one contribute to the development of the CAT NMS Plan and the selection of the Plan Processor.<sup>116</sup> However, the SROs recognize that SROs or Affiliates of SROs may also be Bidders seeking to serve as the Plan Processor or may be included as part of a Bid.<sup>117</sup> The SROs represent that they

have sought to mitigate these potential conflicts of interest by including in the Plan multiple provisions designed to balance these competing factors, and have established information barriers, which they believe are sufficient to maintain functional separation between employees representing a specific SRO as part of the consortium planning the CAT and employees developing Bids.<sup>118</sup> The SROs state that the implementation of information barriers is considered a standard industry practice for mitigating the risks of conflicts of interests.<sup>119</sup> The SROs continue to believe that the Plan achieves this balance by allowing all SROs to participate meaningfully in the process of creating the CAT NMS Plan and choosing the Plan Processor, while imposing strict requirements to ensure that the participation is independent and that the process is fair and transparent.<sup>120</sup>

Distinct from the concern regarding potential conflicts of interest arising from an SRO that is also a Bidder, one commenter suggests that the Plan or NDA should be amended to require, even for SROs that are not Bidders or Affiliates of Bidders, the functional separation of employees representing an SRO for purposes of the selection process and its business or commercial functions to safeguard against misuse of Bidders' confidential information.<sup>121</sup>

The SROs state that, although the Bidding Participants are required to maintain the functional separation suggested by the commenter, it will not be practical for all other SROs to isolate their employees that participate in the Bid evaluation and selection process, as varying skillsets will be required to fully evaluate the Bids, and many SROs are faced with resource constraints that would make them unable to wall off certain personnel without either decreasing the expertise available to evaluate Bids or having inadequate resources to manage their business/commercial functions.<sup>122</sup> While the SROs state that it is not practical to isolate non-Bidding SRO employees participating in the Bid evaluation and selection process from other SRO employees, they represent that, to protect Bidders' confidential information, all SROs will adhere to the section of the NDA executed with Bidders that restricts the distribution and use of Bid information by SROs,

<sup>99</sup> *Id.*

<sup>100</sup> See FIF Letter at 2.

<sup>101</sup> See Response Letter, *supra* note 7, at 10.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* The SROs state, however, that consistent with standard industry practices, the SROs will not share the minutes with the industry as a whole. *Id.*

<sup>106</sup> See FIF Letter at 2.

<sup>107</sup> *Id.*

<sup>108</sup> See Response Letter, *supra* note 7, at 8.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 4.

<sup>111</sup> See Anonymous 1 Letter at 1; Anonymous 2 Letter at 1.

<sup>112</sup> See Anonymous 1 Letter at 1.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> See Anonymous 2 Letter at 1. The commenter has submitted an intent to bid on the RFP. *Id.*

<sup>116</sup> See Response Letter, *supra* note 7, at 7.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See FINRA Letter at 4.

<sup>122</sup> *Id.*

their affiliates, agents, advisors, and contractors by obligating such parties:

(i) to hold the Disclosing Party's Confidential Information in strict confidence and to protect such Confidential Information from disclosure to others (including, without limitation, all precautions the Receiving Party employs with respect to its own Confidential Information), (ii) no [sic] to divulge any such Confidential Information . . . other than to its Representatives for the purpose of assisting the Receiving Party with respect to the CAT NMS Selection Process, and (ii) [sic] not to make use whatsoever at any time of Confidential Information except to evaluate and discuss the CAT NMS Selection Process . . . the Receiving Party shall ensure that its Representatives comply with this Agreement as if they were parties to this Agreement.<sup>123</sup>

#### D. Other Issues

##### 1. Revision of Bids

The proposed Plan provides that, following approval of the CAT NMS Plan, upon a majority vote of the Selection Committee, Shortlisted Bidders will be permitted to revise their Bids provided that revisions are necessary or appropriate in light of the Shortlisted Bidder's initial Bid and the provisions in the approved CAT NMS Plan. One commenter recommends that the Selection Committee instead should only allow revised Bids: (1) After the first round of voting on the Shortlisted Bidders, at which time the list of Bidders would be narrowed to two; and (2) only for the purposes of confirming that the final two Bidders have proposals that meet the requirements of the approved CAT NMS Plan.<sup>124</sup> The commenter also believes that, if revisions would require material changes to the Bid of either of the two remaining Bidders, both Bidders should be permitted to revise their Bids.<sup>125</sup> This commenter is concerned that allowing Bidders to revise their Bids too early in the selection process could materially impact the depth and breadth of information that Bidders are willing to provide in their initial Bids.<sup>126</sup> Under the Plan as proposed, the commenter believes that Bidders will not have a strong incentive to put forth their best ideas, processes, systems, and methods in response to the initial RFP, and will include only enough information to meet the Qualified Bidder threshold.<sup>127</sup> Contrary to this position, another commenter believes that all Bidders should be permitted to revise their Bids, based on the provisions contained in the

approved CAT NMS Plan, and recommends removing the requirement that the Selection Committee grant permission to revise Bids.<sup>128</sup>

In response to these comments, the SROs state that they recognize the value of allowing the Shortlisted Bidders to revise their Bids and expect that including this component in the Plan will result in better quality and more comprehensive Bids from all Bidders.<sup>129</sup> Further, the SROs note that preserving their discretion to limit revision of Bids is important, particularly in the instance where there are six or fewer Bidders, all of whom would automatically become Shortlisted Bidders.<sup>130</sup> The SROs believe that without SRO discretion to determine which Bidders can revise their Bids, Bidders may not provide detailed information in their initial Bids, but will await the final structure of the CAT NMS Plan to provide full information in their revised Bids.<sup>131</sup> Therefore, the SROs believe they need discretion to not allow a Shortlisted Bidder to revise its Bid if the initial Bid did not clearly communicate a cogent, workable plan and evidence the ability to execute the plan.<sup>132</sup> Accordingly, the SROs will assess whether revisions are necessary or appropriate in light of the content of the Shortlisted Bidder's initial Bid and the provisions of the approved CAT NMS Plan.<sup>133</sup> More specifically, the SROs anticipate permitting revision of Bids where the initial Bid clearly communicated a feasible CAT approach and showed a substantial likelihood that the Bidder could implement the approach contained in the approved CAT NMS Plan.<sup>134</sup> The SROs believe this is consistent with standard industry practices when managing an RFP process.<sup>135</sup>

##### 2. Timing

Two commenters express concerns with timing related to the selection process.<sup>136</sup> One commenter takes issue with the due date for Bids in response to the RFP being four weeks after approval of this Plan.<sup>137</sup> Specifically, the commenter believes that Bidding Participants are likely to have information about the final selection process and associated timeline for approval before it is made publicly

available, and that Bidders must have adequate time to modify their Bids to reengage subcontractors and product/service providers, as well as to update prices for technology components.<sup>138</sup> Accordingly, the commenter recommends that the due date for Bids in response to the RFP be 12 weeks after approval of the Plan.<sup>139</sup> Another commenter does not believe that two months after effectiveness of the CAT NMS Plan is sufficient time for the SROs to select a Plan Processor from among the Shortlisted Bidders, particularly if there are significant changes from the proposed and approved CAT NMS Plan.<sup>140</sup> The commenter recommends a four- to six-month period to allow the Shortlisted Bidders time to revise their Bids to reflect the approved CAT NMS Plan, and to allow the SROs time to consider the Bids and seek industry and technical expertise to aid their evaluation process.<sup>141</sup>

In response to the comment regarding the due date for Bids, the SROs indicate that the anticipated deadline four weeks after the approval of the Plan is based on the current requirement to submit the CAT NMS Plan by September 30, 2014.<sup>142</sup> However, the SROs note that, if the approved Plan has a material impact on the Bidders' ability to respond to the RFP, then the due date may be extended.<sup>143</sup> In response to the comment regarding the timeframe to select the Plan Processor, the SROs note that that requirement is mandated by Rule 613(a)(3)(i) and that they hope to meet the deadline.<sup>144</sup> Going forward, the SROs indicate that they will continue to evaluate whether, and how much, additional time they may be required to seek from the Commission for the selection of the Plan Processor.<sup>145</sup>

##### 3. Quorum Standard

One commenter is concerned that the quorum standard for the Selection Committee is too difficult and could lead to delays.<sup>146</sup> Specifically, the commenter notes that each SRO's Voting Senior Officer is a very unique employee and is concerned that such individuals may not always be available for meetings of the Selection

<sup>123</sup> See Response Letter, *supra* note 7, at 10–11.

<sup>124</sup> See FINRA Letter at 2–3.

<sup>125</sup> *Id.* at 3.

<sup>126</sup> *Id.* at 3.

<sup>127</sup> *Id.*

<sup>128</sup> See FIF Letter at 4.

<sup>129</sup> See Response Letter, *supra* note 7, at 6.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> See Anonymous 2 Letter at 1; FIF Letter at 5.

<sup>137</sup> See Anonymous 2 Letter at 1.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> See FIF Letter at 5.

<sup>141</sup> *Id.*

<sup>142</sup> See Response Letter, *supra* note 7, at 11–12.

<sup>143</sup> *Id.* at 12. Any such changes to the due date will be communicated to Bidders as soon as such a decision is made. *Id.*

<sup>144</sup> *Id.* at 11.

<sup>145</sup> *Id.*

<sup>146</sup> See FIF Letter at 2.

Committee.<sup>147</sup> The commenter further believes that, because all Voting Senior Officers are required to be present in order to have a quorum of the Selection Committee, delays in the evaluation and voting procedures could occur.<sup>148</sup>

Consequently, the commenter recommends that an alternate member, with less stringent qualifications, be considered as a voting substitute for the Voting Senior Officer, but any actions taken by the voting substitute would continue to be the direct responsibility of the Voting Senior Officer.<sup>149</sup>

In response to this comment, the SROs state that they will ensure that all Voting Senior Officers will be in attendance for all voting processes as part of the Plan Processor selection, either in person or telephonically, as permitted under operation of the CAT beyond the selection of the Plan Processor.<sup>150</sup> The SROs further indicate that the Plan does not affect the operation of the CAT beyond the selection of the Plan Processor, and, as such, the SROs will include additional personnel with voting rights as part of the broader governance of the CAT.<sup>151</sup>

#### 4. Information Sharing

Another commenter expresses a concern related to information sharing with Bidders.<sup>152</sup> Specifically, the commenter believes that some Bidders may be affiliated or associated with members of the DAG and, therefore, may have access to information relating to DAG discussions that other Bidders do not.<sup>153</sup> The commenter further believes that all Bidders should have uniform information relating to DAG discussions and recommends that a formal process be developed under which the SROs disseminate information to all Bidders relating to DAG discussions that are relevant to the Bidding process.<sup>154</sup> Another commenter similarly stated that the Bidders and all other interested parties should have access to DAG discussions.<sup>155</sup> The commenter recommended that all DAG meeting materials and minutes could be posted on the CAT NMS Plan Web site to achieve this goal.<sup>156</sup>

In response to the concern that some Bidders will have access to the DAG discussions while others will not, the SROs state that, prior to consultation on

any aspect of information included in a Bid, the SROs intend to require the execution of NDAs by members of the Advisory Committee or the DAG, thus facilitating communication and mitigating the confidentiality risks of proprietary Bidder information.<sup>157</sup> Additionally, the SROs indicate that it will be a requirement that no member of the Advisory Committee or the DAG will have affiliations with Bidding entities, unless such members have functional separation between their representatives on the DAG and their representatives involved with entities preparing or participating in a Bid similar to those restrictions imposed on Bidding SROs under Section V(D) of the Plan.<sup>158</sup>

In response to comments recommending the dissemination of DAG materials, the SROs state that they are committed to holding an open dialogue with industry members during the development of the CAT NMS Plan and will host additional industry outreach events to communicate, among other updates, decisions and ongoing discussion topics from DAG meetings.<sup>159</sup> The SROs state that they will post to the CAT NMS Plan Web site those materials from DAG discussions that are deemed to be non-confidential information regarding the CAT NMS Plan development and Bidder evaluation process, such as gap analyses regarding the sunset of existing regulatory systems.<sup>160</sup> However, the SROs state that not all DAG materials will be posted to the Web site in order to safeguard confidential information and maintain a fair process.<sup>161</sup>

#### V. Discussion and Commission Findings

After carefully considering the proposed Plan, the issues raised by the comment letters, and the Response Letter, including the commitments contained therein, the Commission has determined to approve the Plan pursuant to Section 11A(a)(3)(B) of the Act<sup>162</sup> and Rule 608,<sup>163</sup> in that it is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national

market system.<sup>164</sup> Rule 613 mandates that the SROs develop the CAT NMS Plan, and the SROs have voluntarily filed this Plan for the purpose of facilitating that development. The Commission believes the Plan is reasonably designed to govern the process by which the SROs will formulate and submit the CAT NMS Plan, including the review, evaluation, and narrowing down of Bids in response to the RFP, and ultimately choosing the Plan Processor that will build, operate, and maintain the consolidated audit trail. The Commission believes that the Plan should thereby help promote the goals of investor protection, and fair and orderly markets, by describing the process of developing the CAT NMS Plan, selecting a Plan Processor, and ultimately creating the consolidated audit trail, which will substantially enhance the ability of the SROs and the Commission to oversee today's securities markets and fulfill their responsibilities under the federal securities laws.

The Commission notes that, in response to the comments regarding industry participation in the selection process,<sup>165</sup> the SROs state that the DAG is a valuable source of input for the development of the CAT NMS Plan, and commit to provide the DAG with anonymized information taken from Bids with enough specificity to allow the DAG to understand the comparative advantages and disadvantages of the options being considered so that the DAG can contribute in a meaningful way to the SROs' analysis of Bid information.<sup>166</sup> The SROs also commit to continue to work with the DAG to identify the particular sections of the RFP that will benefit from industry input, and to solicit the views of the DAG and the industry for the required cost-benefit analysis, while adhering to their responsibility to maintain the confidentiality of the Bid submissions.<sup>167</sup> The Commission believes that such an ongoing and open dialogue between the SROs and the DAG during the selection process is appropriate, and will facilitate the drafting of a detailed and thoughtful CAT NMS Plan, as contemplated by Rule 613. The Commission encourages the SROs to consult with and utilize the DAG to inform their decision making processes.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Response Letter, *supra* note 7, at 7.

<sup>151</sup> *Id.* at 7–8.

<sup>152</sup> See FINRA Letter at 4.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 4–5.

<sup>155</sup> See FIF Letter II at 2.

<sup>156</sup> *Id.*

<sup>157</sup> See Response Letter, *supra* note 7, at 8.

<sup>158</sup> *Id.* at 9.

<sup>159</sup> *Id.* at 9.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> 15 U.S.C. 78k–1(a)(3)(B).

<sup>163</sup> 17 CFR 242.608. In approving this Plan, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>164</sup> 17 CFR 242.608(b)(2). See also 15 U.S.C. 78k–1(a).

<sup>165</sup> See SIFMA Letter at 1–5; FINRA Letter at 4; and FIF Letter at 4.

<sup>166</sup> See Response Letter, *supra* note 7, at 2–4.

<sup>167</sup> *Id.*

With respect to the comments on the transparency of the selection process,<sup>168</sup> the SROs reiterate their commitment to provide transparency to the industry during the selection process and thereafter, and agree to provide more detailed descriptions of their evaluation criteria in the RFP.<sup>169</sup> The SROs, however, recognize the need to balance full transparency with Bidder concerns about the confidentiality of proprietary information, in addition to more general concerns about inhibiting an open dialogue during the decision-making process. In light of these concerns, the SROs decline to publish the contents of the Bids, the Operating Committee minutes, or the SRO voting results.<sup>170</sup> The Commission believes in the importance of a transparent process with respect to the development of the CAT NMS Plan and to the selection of a Plan Processor, but at the same time recognizes the legitimate concerns of Bidders regarding the confidentiality of proprietary and other sensitive information, and the desire by the SROs to encourage Bidders to provide sufficiently detailed Bids to facilitate the development of a robust CAT NMS Plan. The Commission believes that the SROs have appropriately balanced these competing goals as described above.

To address concerns regarding potential conflicts of interest in the selection process,<sup>171</sup> the SROs included in the Plan multiple provisions that are intended to balance the need for SROs to participate in the process given the important regulatory obligations that exist for each of them with respect to the creation and operation of the CAT, with the potential for conflicts of interest that can arise when an SRO is a Bidding Participant.<sup>172</sup> The Commission believes that the SROs have included reasonable steps to address the concerns about conflicts of interest.

With regard to the issue of when and under what circumstances Bidders should be permitted to revise their Bids, one commenter encourages the SROs to liberalize the proposed Plan's approach to allowing revisions while another commenter suggests that the SROs increase restrictions on the ability of

Bidders to revise their Bids.<sup>173</sup> In their Response Letter, the SROs state that they will not modify their proposal to permit each Shortlisted Bidder the opportunity to revise its Bid only if a majority of the Selection Committee believes that revisions by the particular Bidder are "necessary or appropriate." As noted above, the SROs believe that without SRO discretion to determine which Bidders can revise their Bids, Bidders may not provide detailed information in their initial Bids, but will await the final structure of the CAT NMS Plan to provide full information in their revised Bids.<sup>174</sup> The Commission believes that the SROs' approach is reasonably designed to help assure that the SROs receive sufficiently detailed information to develop the CAT NMS Plan.

With respect to the comments raised by a commenter relating to the due date for Bids<sup>175</sup> (four weeks after Commission approval of the Selection NMS Plan), the Commission notes that the SROs explain that the timeframe is based on the current requirement to submit the CAT NMS Plan by September 30, 2014, and note that, if the approved Plan has a material impact on the Bidders' ability to respond to the RFP, then the SROs may extend this date.<sup>176</sup> Regarding the comments made by another commenter relating to the two-month period for the selection of the Plan Processor,<sup>177</sup> the Commission notes that this is a deadline imposed by Rule 613(a)(3)(i)<sup>178</sup> and that the SROs state that they hope to meet this deadline but will continue to evaluate whether, and, if so, how much, additional time may be required, and will seek additional time from the Commission for the selection of the Plan Processor if needed.<sup>179</sup>

With respect to the comment regarding the quorum requirement for Selection Committee meetings,<sup>180</sup> the Commission notes that the SROs state that they will ensure that all Voting Senior Officers will be in attendance for all voting processes as part of the Plan Processor selection, either in person or telephonically.<sup>181</sup> With respect to the concerns regarding information sharing,<sup>182</sup> the Commission notes that, in addition to requiring NDAs, the SROs have indicated that no member of the

Advisory Committee or the DAG will be permitted to have affiliations with Bidding entities, unless such members have functional separation between their representatives on the DAG and their representatives involved with entities preparing or participating in a Bid.<sup>183</sup>

The Commission finds that the Plan is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanism of, a national market system and that it is reasonably designed to achieve its objective of facilitating the development of the CAT NMS Plan and the selection of the Plan Processor. Accordingly, the Commission expects that the Participants will implement the Plan as described, and complete the evaluation of the Bids and submission of the CAT NMS Plan as required by Rule 613.<sup>184</sup>

## VI. Conclusion

*It is therefore ordered*, pursuant to Sections 11A of the Act,<sup>185</sup> and the rules thereunder, that the Plan (File No. 4-668) is approved and declared effective, and the Participants are authorized to act jointly to implement the Plan as a means of facilitating a national market system.

By the Commission.

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>168</sup> See Response Letter, *supra* note 7, at 9.

<sup>184</sup> Rule 613(a)(1) required the SROs to file the CAT NMS Plan 270 days from the date of publication of the Adopting Release in the **Federal Register**. See 17 CFR 242.613(a)(1). The Adopting Release was published on August 1, 2012, thus establishing April 28, 2013 as the initial deadline for the submission of the CAT NMS Plan. See Adopting Release, *supra* note 8. Since April 28, 2013, was a Sunday, in accordance with Rule 160(a) of the Commission's Rules of Practice, the deadline for filing the CAT NMS plan was Monday, April 29, 2013. On March 7, 2013, the Commission granted a request from the SROs for a temporary exemption from this deadline until December 6, 2013. See Securities Exchange Act Release No. 69060, 78 FR 15771 (March 12, 2013); and letter to Elizabeth M. Murphy, Secretary, Commission, from Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA, dated February 7, 2013. On December 6, 2013, the Commission granted a second request from the SROs for a temporary exemption from the new deadline until September 30, 2014. See Securities Exchange Act Release No. 71018, 78 FR 75669 (December 12, 2013); and letter to Elizabeth M. Murphy, Secretary, Commission, from Robert L.D. Colby, Executive Vice President and Chief Legal Officer, FINRA, dated November 7, 2013.

<sup>185</sup> 15 U.S.C. 78k-1.

<sup>168</sup> See FINRA Letter at 1-2; SIFMA Letter at 1-3; FIF Letter at 2-3.

<sup>169</sup> See Response Letter, *supra* note 7, at 4-5.

<sup>170</sup> *Id.* at 9-10. The Commission further notes that keeping voting information non-public can help address conflicts of interest by limiting the ability of outsiders to observe and reward certain voting behavior.

<sup>171</sup> See Anonymous 1 Letter at 1; Anonymous 2 Letter at 1.

<sup>172</sup> See Response Letter, *supra* note 7, at 7.

<sup>173</sup> See FIF Letter at 4; FINRA Letter at 2-3.

<sup>174</sup> See Response Letter, *supra* note 7, at 6.

<sup>175</sup> See Anonymous 2 Letter at 1.

<sup>176</sup> See Response Letter, *supra* note 7, at 11-12.

<sup>177</sup> See FIF Letter at 5.

<sup>178</sup> See Response Letter, *supra* note 7, at 11.

<sup>179</sup> *Id.*

<sup>180</sup> See FIF Letter at 2.

<sup>181</sup> See Response Letter, *supra* note 7, at 7.

<sup>182</sup> See FINRA Letter at 4-5.