



August 9, 2010

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

RE: Consolidated Audit Trail; Exchange Act Release No. 62174; File No. S7-11-10

Ms. Murphy:

BATS Exchange, Inc. (“BATS”) appreciates the opportunity to comment on the above referenced proposal to create new Rule 613 under Section 11A(a)(3)(B) of the Exchange Act of 1934 (“the Act”) that would require the exchanges and FINRA to develop a national market system (“NMS”) plan to develop, implement, and maintain a consolidated audit trail with respect to the trading of NMS securities. BATS generally supports the Commission’s proposal. Over the last several years, liquidity has dispersed across multiple interconnected venues, such that no one market center can claim a majority share of equity securities transactions. However, regulatory tools have not evolved to keep pace with these changes, and the limited existing processes and data available to analyze inter-market trading are inadequate. As a consequence, regulators rely on inefficient processes to reconstruct inter-market trading activity, including ad hoc requests to members for trading data when a potential problem is identified. For this reason BATS applauds the Commission for taking the initiative to create a consolidated audit trail.

While BATS supports the Commission’s initiative, BATS believes the specific proposal put forward by the Commission may be overly ambitious, and we have serious concerns about the projected costs the industry would bear to implement the proposal. By its own estimations – and any estimation in this regard necessarily involves a certain amount of guesswork – initial implementation costs across the industry could be in excess of \$4 billion. BATS believes that the Commission should consider some potential modifications to its proposal to mitigate these potential costs.

A. Real Time Versus End of Day Reporting

Under proposed Rule 613, specific data elements would be required to be reported in real time, while other data elements, such as account allocations, would be required to be reported by midnight on the trade date. BATS understands that there is tremendous cost involved in real time reporting, some of which may not be fully captured in the Commission’s estimate of implementation costs, and BATS questions the need for real time reporting in the first instance. For example, real time reporting would prevent the industry from utilizing data compression/aggregation techniques that are common in the industry and instead require the

industry to maintain significantly greater bandwidth, storage, and reconciliation processes to an extent not required for delayed, batch processing. In addition, real time reporting would make it difficult to use existing communication infrastructures to satisfy the requirement, because these infrastructures are largely devoted intraday to trading. Accordingly, the industry would likely be required to make substantial capital expenditures to develop new, robust communication infrastructures to satisfy real time reporting. BATS believes that requiring overnight processing on order and trade date would dramatically reduce the bandwidth necessary to meet the Commission's goals, and would enable the industry to largely make use of existing communications infrastructure.

In contrast to the costs involved with real time reporting, BATS does not believe the benefits are commensurate. While some SROs including BATS operate certain surveillances in real time, particularly for certain technical violations of Regulation NMS as well as to monitor price movements and general market activity, most surveillances are not processed in any detail in real time. Potential inter-market frauds, such as manipulation, insider trading, and front-running cannot be conclusively identified in real time and will always require follow-up investigation. No matter how robust the consolidated audit trail, this follow up will take time and effort to complete and will likely require use of traditional investigative techniques, such as the taking of testimony, and additional document review including, for example, email and telephone records. As the Commission is aware, when such inter-market fraud is identified today, the prosecution of an enforcement action takes months and in some cases years. When viewed in this context, it is difficult to justify what BATS suspects are massive industry costs associated with real time reporting as opposed to end of day, overnight, batch processing using existing communications infrastructures and common data compression/aggregation techniques.

B. Existing Audit Trails and Consolidated Regulation

BATS understands that there is support from some in the industry for using existing audit trails, particularly OATS, as a starting point for the development of the consolidated audit trail. In their current forms, no existing audit trail, including OATS, would meet the specifications required by the Commission's proposal. Nonetheless, the industry expended a great amount of resources when it implemented OATS and there may be cost savings – possibly significant – associated with building a new consolidated audit trail that leverages elements of OATS. If so, BATS would be supportive of looking to OATS as a starting point; however, BATS wishes to make clear that whether elements of OATS form the starting point for the consolidated audit trail or not, that decision should be divorced from the decision the exchanges and FINRA will collectively make under the proposal as to who will build and maintain the envisioned data repository.

In a similar vein, BATS wishes to make clear that it does not support a Commission-mandated consolidated market regulator. As proposed, the consolidated audit trail will be accessible to each exchange, FINRA and the Commission for the fulfillment of their regulatory functions. This raises unique competitive concerns regarding the exchanges having access to non-public information about each other's members' activities on each exchange.

Some have suggested that these concerns could be addressed by mandating that a single regulator that does not operate a market – in this case FINRA – be tasked with conducting cross-market surveillance from the consolidated audit trail. BATS recognizes that in addition to competitive concerns there also are inefficiencies associated with each exchange potentially conducting cross market surveillance using the same data. However, as an SRO, each exchange shares the same obligation currently to conduct market surveillance, including cross market surveillance where some portion of potentially violative conduct occurs on its market. Currently, competitive forces come to bear on how each exchange discharges that responsibility.

In the case of BATS, we made a decision to enter into a regulatory services agreement with FINRA with respect to the fulfillment of much of our regulatory responsibility; however, we did not make that decision lightly, spending considerable time analyzing the costs and benefits associated with outsourcing versus insourcing, and the possibility of partnering with a regulator other than FINRA. We have since closely monitored FINRA's performance of certain regulatory functions on our behalf. Other exchanges have similarly analyzed the best means of discharging their obligations and have entered into regulatory services contracts with FINRA, such that FINRA now provides regulatory services for multiple exchanges, encompassing the vast amount of equity trading volume.

Today, however, FINRA is subject to competitive forces in providing these regulatory services. These forces ensure that FINRA provides services in an efficient manner and, importantly, foster innovation with respect to market surveillance. BATS is concerned that if the Commission were to mandate a consolidated market regulator, the end result would be increased costs on the industry and the potential for a lack of innovation associated with surveillance tools available to identify increasingly sophisticated frauds.

With respect to concerns about each exchange having access to non-public information about activity on competitor exchanges through the consolidated audit trail, BATS believes these concerns can be mitigated. BATS notes that the Commission's proposal references the need to ensure that the security of confidential information is maintained and that the information collected in the consolidated audit trail is used only for regulatory purposes. BATS suggests that the final rule adopted by the Commission more explicitly enunciate permissible and impermissible uses of the consolidated audit trail, include a requirement of an audit trail of an SROs' personnel access to and use of the data, and further contain a commitment by the Commission to review each SRO with respect to the adequacy of its information barriers.

C. Books and Records Requirements

In the proposal, the Commission notes some potential savings that could be realized by the industry with the implementation of a consolidated audit trail. In particular, the Commission notes that the proposed consolidated audit trail would replace the need to have existing disparate SRO audit trails. And, the Commission notes that the consolidated audit trail may render

Elizabeth M. Murphy
August 9, 2010
Page 4 of 4

duplicative and hence unnecessary certain data obtained from the equity blue sheet system, which would result in offsetting cost savings to the industry.

BATS agrees with the Commission that implementation of the proposed consolidated audit trail would likely render unnecessary existing audit trails and data obtained through the equity blue sheet system. However, BATS also encourages the Commission to consider the extent to which the consolidated audit trail might render other existing regulatory requirements duplicative and, hence, unnecessary. In particular, broker dealers are currently required to maintain specific books and records related to orders and trades for specified timeframes and in specified formats. Pursuant to the proposal, many such books and records would for the first time be required to be separately stored through the consolidated audit trail in the data repository. Given that the cost of storing this data for some firms can be significant, and given that the SROs and the Commission would have full access to the data repository, BATS questions whether the Commission should take this opportunity to alleviate broker dealers from maintaining books and records that are duplicative of those required to be maintained by the data repository. At a minimum, BATS suggests the Commission take this issue up for consideration as it evaluates the proposal.

BATS appreciates the opportunity to comment on the Commission's proposal. Please feel free to contact me if you have any questions in connection with matter.

Sincerely,



Eric J. Swanson
SVP & General Counsel