

SEC Proposes Consolidated Audit Trail

I. Overview

The Securities and Exchange Commission (“SEC” or “Commission”) recently proposed a new rule – Rule 613 under the Securities Exchange Act of 1934 (“Exchange Act”) – which, if implemented, would radically change how securities trading information is reported to US securities regulators. Proposed Rule 613 requires national securities exchanges and the Financial Regulatory Authority (“FINRA”) (self-regulatory organizations or “SROs”)¹ to act jointly in developing a national market system (“NMS”) plan to develop, implement, and maintain a consolidated order tracking system or “consolidated audit trail” (“CAT”) with respect to trading NMS securities.²

The proposal comes on the heels of the unusual market events of May 6, 2010, when at 2:30 p.m., the equity and futures markets experienced a severe drop in prices, falling more than five percent (5%) in a matter of minutes, and recovered only a short time later.³ However, as discussed in the Proposing Release and underscored in various public statements by SEC Commissioners and staff over the last nine months, prior to the May 6 market event, the SEC was concerned about its ability to effectively and efficiently supervise trading activity in increasingly automated and dispersed markets. Thus, the SEC and its staff have been considering a CAT for some time now and have been working over the past several months to publish the proposal for consideration.⁴ The proposed system would be designed to enable the SEC and SROs to better investigate unusual market activity, fraudulent and manipulative market practices, and other potential violations of securities rules and regulations.⁵

¹ For purposes of this discussion, SRO refers only to national securities exchanges or national securities associations. Proposed Rule 613 would apply to all national securities exchanges and national securities associations.

² Exchange Act Rel. No. 62174 (May 26, 2010), 75 Fed. Reg. 32556 (Jun. 8, 2010) (“Proposing Release”).

³ See Report of the Staffs of the CFTC and SEC to the Joint Advisory Committee on Emerging Regulatory Issues: Preliminary Findings Regarding the Market Events of May 6, 2010 (May 18, 2010), *available here*. According to the report, approximately 86% of securities reached lows for the day that were less than ten percent away from the 2:40 pm price, and the other 14 percent of securities suffered greater declines than the broader market, with some trading all the way down to one penny. *Id.* at 4.

⁴ See, e.g., Mary L. Schapiro, Chairman, SEC, Testimony Concerning the Severe Market Disruption on May 6, 2010 before the Subcommittee on Capital Markets, Insurance and Government Sponsored Enterprises of the United States House of Representatives Committee on Financial Services (May 11, 2010); Mary L. Schapiro, Chairman, SEC, Keynote Address at the Compliance and Legal Society of the Securities Industry and Financial Markets Association 2010 Annual Seminar (May 6, 2010); James A. Brigagliano, Deputy Director, Division of Trading and Markets, SEC, Keynote Speech of the SIFMA Dark Pool Symposium (Jan. 21, 2010). See also Exchange Act Rel. No. 61358 (Jan. 14, 2010), 75 Fed. Reg. 3594 (Jan. 21, 2010) (requesting comment on the SEC’s concept release on equity market structure).

⁵ Proposing Release at 32556, 32564.

Proposed Rule 613 would require the SROs to file jointly with the SEC, within 90 days of approval of the Rule, a single NMS plan to govern the creation, implementation, and maintenance of a CAT and central repository (responsible for the receipt, consolidation, and retention of all data submitted to it) for secondary market transactions in all NMS securities – effectively, exchange-listed securities and listed options.⁶ It also would require the plan to include provisions regarding:

- The operation and administration of the NMS plan;
- The creation and oversight of the central repository;
- Clock synchronization;
- Compliance by SROs and their broker-dealer members with Rule 613 and the NMS plan; and
- The expansion of the NMS plan to products other than NMS securities.⁷

In effect, the proposed Rule would create a time-stamped electronic audit trail report for the lifecycle of each order involving an NMS security by requiring each market participant that touches the order to report information regarding routing, modification, cancellation, and execution of that order.⁸

As discussed below, the proposed CAT presents many issues. Among the most significant of these are the costs associated with the proposal. The Proposing Release states that the initial costs associated with the CAT would be \$4 billion, and annual costs thereafter would be approximately \$2.1 billion.⁹

Comments on proposed Rule 613 are due by August 9, 2010.

II. Current Audit Trails and Commission Concerns

The Commission considered the possibility of integrating the various existing SRO audit trails into a consolidated audit trail. For example, FINRA, the New York Stock Exchange (“NYSE”), and various options exchanges have rules requiring the submission of information to the SROs about orders and

⁶ Rule 600(b)(46) of Regulation NMS defines “NMS security” to mean “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.” 17 CFR 242.600(b)(46).

⁷ As proposed, the CAT would initially cover NMS securities, but the Commission is interested in ensuring the scalability of the system. Under the proposal, SROs would have to jointly provide the SEC with a document outlining how the CAT could incorporate non-NMS equity securities and debt securities, as well as primary market transactions in NMS stocks, equity securities that are not NMS stocks, and debt securities. Proposing Release at 32569-70.

⁸ *Id.* The NMS plan would not become effective unless approved by the SEC after notice and comment or as otherwise permitted in accordance with Rule 608 of Regulation NMS (regarding the filing and amendment of NMS plans). *Id.* at 32568.

⁹ *Id.* at 32602.

executions.¹⁰ In addition, the Commission and SROs utilize the Electronic Bluesheet System (“EBS”),¹¹ and the Commission also relies on the National Securities Clearing Corporation’s (“NSCC”) equity cleared report and the Options Clearing Corporation’s (“OCC”) Options Cleared Report.¹²

However, the Commission has concerns about the extent to which these varying systems and rules might serve as a basis for a consolidated audit trail for a number of reasons, including the lack of uniformity and gaps in the information collected.¹³ In particular, the Commission is concerned that existing audit trails do not require broker-dealers to provide information identifying the “ultimate customer” for the order, whether it be the customer submitting the order, the person with investment discretion for the order, or the beneficial owner.¹⁴ Existing audit trails also may require data to be reported end-of-day or upon request, rather than in real time. The SEC believes that current practices for collecting ultimate customer and other audit trail information are overly burdensome and do not provide information in a timely manner. The Commission believes that such time delays hinder regulatory investigations and enforcement efforts, impede regulators’ ability to promptly analyze trading patterns and prepare market reconstructions, and limit regulators’ ability to conduct real-time cross-market surveillance, including the timely detection of market manipulation.¹⁵ As a result, the Commission believes that “retrofitting” existing rules and systems is not a viable alternative to CAT.¹⁶

III. Proposed Rule 613

A. Overview of Proposed Rule

As discussed further below, Proposed Rule 613 would require the NMS plan developed by the SROs to include various provisions regarding the CAT and central repository, including SRO and broker-dealer obligations. In addition, the Commission has proposed a phased-in approach to implementation of the Proposed Rule. SROs would be required to provide the data required under the Proposed Rule to the central repository within one year after effectiveness of the NMS plan. Broker-dealers then would be required to begin providing the data required under the Proposed Rule to the central repository within two years after the effectiveness of the NMS plan.¹⁷

¹⁰ See FINRA Rules 7400-7470 (Order Audit Trail System (“OATS”)); NYSE Rules 123 and 132B (Order Tracking System (“OTS”)); NYSE Amex Equities Rule 123 and 132B; NYSE Arca Equities Rule 9.17; Chicago Exchange (“CHX”) Article II, Rule 3; Nasdaq Rules 6950-6958; Boston Exchange (“BX”) Rules 6950-58; National Stock Exchange (“NSX”) Rules 4.1 and 4.2; BATS Rule 4.1. See also Exchange Act Rel. No. 43268 (Sept. 11, 2000) (requiring the American Stock Exchange (“Amex”), Chicago Board of Exchange (“CBOE”), Pacific Exchange (now “NYSE Arca”), and the Philadelphia Stock Exchange (now “Nasdaq OMX Phlx”) to establish the Consolidated Options Audit Trail System (“COATS”). The International Securities Exchange, LLC (“ISE”), Boston Options Exchange Group, LLC (“BOX”), Nasdaq Options Market (“NOM”), and BATS Options Exchange Market (“BATS Options”) also comply with COATS requirements. See Proposing Release at 32561, fn. 80.

¹¹ See Exchange Act Rel. No. 44494 (Jun. 29, 2001), 66 Fed. Reg. 35836 (Jul. 9, 2001) (adopting Rule 17a-25). Rule 17a-25 replaced the manual bluesheet system with the EBS, and requires broker-dealers to electronically submit information regarding customer and proprietary securities transactions in response to SEC and/or SRO execution information requests to assist in investigations of possible federal securities law violations and to create market reconstructions. See Proposing Release at 32557-8.

¹² The NSCC clearing reports are generated by the SROs and provided to the NSCC. The Options Cleared Report is generated by the OCC for analysis of trading in listed options. See Proposing Release at 32558.

¹³ *Id.* at 32564-5.

¹⁴ *Id.* at 32565.

¹⁵ *Id.* at 32567.

¹⁶ *Id.* at 32564.

¹⁷ Proposed Rule 613(a)(3).

B. Provision of Information to the Central Repository

1. Definition of “Order” and Who Must Submit Information

The Commission’s stated goal is to require any entity acting in a broker-dealer capacity that would receive an order from a customer or originate an order for its own account to provide information to the central repository. Thus, Proposed Rule 613 would require information to be provided to the central repository for every order in an NMS security originated or received by a member of an exchange or FINRA. Specifically, Proposed Rule 613(j)(4) would define an “order” to mean:

- Any order received by an SRO from any person;
- Any order originated by a member of an SRO; or
- Any bid or offer, as defined in Rule 600(a)(8) of Regulation NMS.¹⁸

As a result, the CAT would cover all orders, whether for a customer or a broker-dealer’s own account, as well as quotations in NMS securities. Proposed Rule 613 would require information to be provided to the central repository by SROs and broker-dealers, including alternative trading systems (“ATs”).¹⁹

2. Provision of Information

As a general matter, proposed Rule 613(c)(1) requires the NMS plan to provide for an accurate, time-sequenced record of orders beginning with the receipt or origination of an order by a broker-dealer and extending throughout the lifecycle of the order, including the process of routing, modifying, cancelling, and executing an order (whether in whole or in part). To accomplish this goal, the NMS plan would require each SRO and each broker-dealer to collect and provide to the central repository certain information for each NMS security registered or listed for trading on a national securities exchange or admitted to unlisted trading privileges on such exchange, or for which transaction reports are required to be submitted to FINRA. All data would be required to be transmitted electronically to the central repository in a format that is uniform across all markets.²⁰

a) Submission of Real-Time Information

Proposed Rule 613(c)(3) would require certain information to be captured and transmitted to the central repository on a real-time basis, by which the SEC means immediately and with no built-in delay from when the reportable event occurs.²¹ Real-time information would include:

¹⁸ Rule 600(b)(8) of Regulation NMS defines “bid or offer” to mean “the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as either principal or agent, but shall not include indications of interest.” 17 CFR 242.600(b)(8).

¹⁹ Because Regulation ATS requires ATs to register as broker-dealers with the SEC, they must become FINRA members and are subject to the broker-dealer regulatory regime. Proposing Release at 32571, fn. 181. See also Exchange Act Rel. No. 40760 (Dec. 8, 1998), 63 Fed. Reg. 70844 (Dec. 22, 1998) (adopting Regulation ATS).

²⁰ Proposed Rule 613(c)(2).

²¹ Proposing Release at 32572.

- Customer information of sufficient detail to identify the customer,²² including customer account information²³ and the customer's unique customer identifier²⁴;
- SRO or broker-dealer unique identifier for each report an SRO or broker-dealer sends to the central repository for a reportable event;
- Date, time (in milliseconds), and material terms of an order when a broker-dealer receives or originates an order,²⁵ as well as a unique order identifier²⁶;
- Information regarding the routing of an order, including information provided by the SRO or broker-dealer routing an order,²⁷ and the SRO or broker-dealer receiving a routed order²⁸; and
- Information regarding modification to the material terms of an order or partial or full cancellations of an order,²⁹ and full or partial execution of an order³⁰.

²² For purposes of Proposed Rule 613 only, Proposed Rule 613(j)(1) would define "customer" to mean the beneficial owner(s) of the account originating the order and the person exercising investment discretion for the account originating the order, if different from the beneficial owner(s). *Id.* at 32572-3.

²³ Under Proposed Rule 613(j)(2), customer account information would include, but would not be limited to, the account number, account type (e.g., options), customer type (e.g., retail, mutual fund, broker-dealer proprietary), date account was opened, and large trader identifier, if applicable.

²⁴ Proposed Rule 613(c)(7)(i)(B). The unique customer identifier would remain constant for each customer and have the same format across all broker-dealers. Proposing Release at 32573.

²⁵ Proposed Rule 613(c)(7)(i)(I). Material terms would include, but would not be limited to: NMS security symbol; type of security; price(s) (if applicable); size (displayed and non-displayed); side (buy/sell); order type; whether long, short, or short exempt if a sell order; locate identifier for short sale; open/close indicator; time in force (if applicable); whether solicited or unsolicited; whether the account has a prior position in the security; for listed options, option type (put/call), option or root symbol, underlying symbol, strike price, expiration date, and open/close; and any special handling instructions. Although order types are not listed in the Proposed Rule, the Commission notes that SROs may choose to include more detail regarding order types in the NMS plan. Proposing Release at 32575.

²⁶ Proposed Rule 613(c)(7)(i)(D). The unique order identifier would stay with the order throughout its life, including routing, modification, execution, and cancellation. Proposing Release at 32575.

²⁷ Proposed Rule 613(c)(7)(ii). This information would include the unique order identifier; the date and exact time (in milliseconds) when the order was routed; the unique identifier of the SRO or SRO member routing the order; the unique identifier of the SRO or SRO member that receives the routed order; the identity and nature of the department or desk to which an order is routed if a broker-dealer routes the order internally; and the material terms of the order.

²⁸ Proposed Rule 613(c)(7)(iii). This information would include the unique order identifier; the date and exact time (in milliseconds) when the order was received; the unique identifier of the SRO or SRO member that receives the routed order; the unique identifier of the SRO or SRO member routing the order; and the material terms of the order.

²⁹ Proposed Rule 613(c)(7)(iv). This information would include the unique order identifier; date and time (in milliseconds) that an order modification or cancellation was originated or received; the identity of the person responsible for the modification/cancellation instruction; the price and remaining size of the order, if modified; and other modifications to the material terms of the order.

³⁰ Proposed Rule 613(c)(7)(v). This information would include the unique order identifier; execution date and time (in milliseconds); capacity of the entity executing the order (principal, agency, riskless principal); execution price; size of execution; unique identifier of the SRO or SRO member executing the order; and whether the execution was reported pursuant to an effective transaction reporting plan or the OPRA plan, and the time of such report.

b) Submission of Other Information

Proposed Rule 613(c)(4) would permit other information to be captured and transmitted to the central repository promptly after the SRO or broker-dealer receives the information, but in no instance later than midnight of the day that the reportable event occurs or the SRO or broker-dealer receives such information. This information would include:

- The account number for any subaccounts to which an execution is allocated;
- The unique identifier of the clearing broker or prime broker for the transaction, if applicable, and the unique order identifier of any contra-side order;
- For cancelled executions, a cancelled trade indicator;
- Any special settlement terms for the execution, if applicable, such as short sale borrower information; and
- The amount of a commission, if any, paid by the customer, and the unique identifier of the broker-dealer(s) to whom the commission is paid.³¹

C. Central Repository

Proposed Rule 613(e)(1) would require the NMS plan to provide for the creation and maintenance of a central repository, which would be a facility of each exchange and FINRA, and as such would be jointly sponsored, owned, and operated by the exchanges and FINRA. A plan processor, selected pursuant to the NMS plan's administrative provisions, would develop and operate the central repository in accordance with the NMS plan.³²

The central repository would be responsible for the receipt, consolidation, and retention of all CAT data submitted by broker-dealers and SROs pursuant to the Proposed Rule and the NMS plan. The repository also would be required to collect from the central processors and retain (in a format compatible with CAT data) on a current and continuous basis the National Best Bid and Offer ("NBBO") for each NMS security, transaction reports reported pursuant to Rule 601 of Regulation NMS, and last sale reports generated pursuant to the Options Price Reporting Authority ("OPRA") Plan. The collection and retention of this additional data is intended to allow SROs and the SEC to search more easily across order, NBBO, and transaction databases.³³

The NMS plan also would include policies and procedures designed to help ensure the integrity of information submitted to the central repository. The SEC believes these policies and procedures should include validation parameters to screen data before it is entered into the central repository. Such policies and procedures also would need to address: (i) re-transmission of data in the event of rejection; (ii) ensuring the accuracy of consolidation of the data; and (iii) compliance mechanisms for SROs, as

³¹ Proposed Rule 613(c)(7)(vi).

³² Rule 600(b)(55) of Regulation NMS defines a "plan processor" to mean "any self-regulatory organization or securities information processor acting as an exclusive processor in connection with the development, implementation and/or operation of any facility contemplated by an effective national market system plan." 17 CFR 242.600(b)(55). The Commission expects that the plan sponsors would engage in a thorough analysis and formal competitive bidding process to choose the plan processor. Proposing Release at 32585.

³³ Proposing Release at 32580.

discussed further below, such as penalties for an SRO's failure to comply with any provision of the NMS plan.³⁴

The SEC believes information in the central repository generally should be made available immediately to SROs or the SEC, or, for archived data, accessible within one hour after a request for information is made.³⁵ SROs would be required to develop and implement (or enhance existing) surveillance systems reasonably designed to make use of the consolidated information contained in the CAT within 14 months after effectiveness of the NMS plan.³⁶ However, coordinated surveillance across SROs has not been proposed; instead each SRO would be responsible for surveillance of its own market and own members using CAT information.³⁷

D. Clock Synchronization

The proposed NMS plan would require that SROs and broker-dealers synchronize their business clocks used to record the date and time of any event that must be reported under the Proposed Rule to the time maintained by the National Institute of Standards and Technology.³⁸ Rather than setting a specific time increment within which the clocks must remain synchronized, the Commission instead is proposing that clocks be synchronized "consistent with industry standards," although the SROs would be able to set a limit in the NMS plan. The Proposed Rule also would require SROs and broker-dealers to evaluate annually the actual synchronization standard adopted to consider whether it should be shortened, consistent with changes in industry standards.

E. Compliance with Proposed Rule 613 and the NMS Plan

Any failure by an SRO to comply with the NMS plan could be considered a violation of Rule 613 (e.g., a failure to provide required information to the central repository). Under the Proposed Rule, the NMS plan would include penalties for an SRO that fails to comply.³⁹ Similarly, Proposed Rule 613(g) would require SROs to promulgate rules requiring their members to comply with the requirements of the Proposed Rule and NMS plan and to agree to enforce compliance by their members with the NMS plan provisions.⁴⁰

F. Operation and Administration of the NMS Plan

Proposed Rule 613(b) would require the NMS plan to include a governance structure that ensures fair representation of the NMS plan sponsors. SROs would retain authority to devise the governance structure, so long as the plan also includes a provision addressing the percentage of votes required by the plan sponsors to amend the plan. The Proposed Rule also would require provisions regarding admission to and withdrawal from the plan, as well as the allocation of costs associated with implementing and operating the central repository.

³⁴ *Id.* at 32582.

³⁵ *Id.* at 32580.

³⁶ SROs would be required to begin reporting information to the central repository within 12 months after effectiveness of the NMS plan, and would have two additional months to update surveillance systems. *Id.* at 32583, fn. 247.

³⁷ *Id.* at 32583.

³⁸ Proposed Rule 613(d)(1).

³⁹ Proposing Release at 32583.

⁴⁰ *Id.* at 32584.

The NMS plan also would require the selection of a plan processor; however, the Proposed Rule does not dictate the selection process for the plan processor. In addition, the NMS plan must contain a requirement that a Chief Compliance Officer (“CCO”) be appointed to regularly review the operation of the central repository and establish reasonable procedures designed to ensure the central repository’s operations keep pace with technological developments.⁴¹

G. Request for Comments

The SEC requests comment on a variety of issues regarding Proposed Rule 613, including, but not limited to, the following:

- Whether the proposed definition of “order” is appropriate, including whether the definition should include quotations;
- Whether the scope of the proposed CAT is appropriate and/or necessary;
- Whether requiring all national securities exchange/association members to provide required information to the central repository encompasses all broker-dealers or other persons that would receive or originate orders;
- Whether it is feasible and/or necessary to transmit certain information on a real-time basis as proposed and a discussion of the issues that such a requirement raises, including the costs and benefits of real-time information;
- Whether the items of information identified for transmission to the central repository, including the unique order identifier, are feasible and/or necessary, whether such information is sufficient to create a complete and accurate audit trail, and whether additional information should be required;
- Whether there are trading practices that raise particular issues under the proposal, such as how the unique order identifier would operate for riskless principal or parent/child orders;
- Whether access to the central repository data should be limited to SROs and the SEC or whether it should be made available to third parties and, if so, how confidentiality of the data should be protected;
- Whether other systems or technologies could be replaced by the proposed CAT and central repository;
- What governance structure would be appropriate for the NMS plan, including how the plan processor should be selected, whether a CCO is necessary, and how the CCO should be selected; and
- Whether the phased-in implementation approach is appropriate and, in particular, whether ATSS should be required to implement the proposed requirements before broker-dealers that are not ATSS.

IV. Costs and Benefits of the Proposed Rule

The Administrative Procedure Act (“APA”) requires an assessment of benefits and costs of a proposed significant legislative rule.⁴² This cost-benefit analysis must focus on all of the potentially impacted

⁴¹ Proposed Rule 613(b)(5).

⁴² 5 U.S.C. §§ 551–559, 701–706 (2000 & Supp. IV 2004).

industries, consider both the quantitative and qualitative aspects of a proposed rule, and show that the probable benefits of the rule exceed the probable costs of the rule. The Proposing Release outlines the various costs involved in the Proposed Rule in a fair amount of detail, and commenters undoubtedly will focus on this aspect of the proposal. In her statements during the SEC open meeting announcing Proposed Rule 613, SEC Commissioner Kathleen Casey stated that she was “impressed that the release does not attempt to sugarcoat the real cost of this proposal,” and called on the SEC to be “realistic as to the benefits” and “sober as to the analysis of the cost.”⁴³

The Commission recognizes that the CAT and central repository proposals will require significant implementation costs, particularly for SROs. For instance, providing information not captured by current audit and other regulatory requirements⁴⁴ and, more generally, all information in a uniform manner to the central repository will require significant initial expense to enhance or modify existing order handling, trading, and other systems.⁴⁵ However, the Commission notes that the Proposed Rule ultimately could provide cost reductions by leading to the elimination of redundant SRO rules and requirements.⁴⁶ Moreover, despite the associated costs, the Commission believes that a CAT and central repository is necessary to permit better regulatory oversight across markets and to enable SROs and the Commission to take necessary action more quickly to address adverse market events or illegal activity.⁴⁷ As a result, the Commission believes the benefits associated with establishing a CAT and central repository outweigh the implementation and ongoing operational costs associated with them.

V. Continuation of Market Structure Reform

Proposed Rule 613 is probably the most ambitious step in a long line of proposed NMS reforms that have stemmed from the Commission’s broad review of equity market structure.⁴⁸ The idea of a CAT has been discussed for years as a potential means of providing uniform cross-market surveillance, and the Proposed Rule aims to address many of the concerns about the disparate and disconnected audit trail systems currently in place in the equity markets. Given the trading events of May 6, 2010, and the resulting Congressional inquiry regarding the same, this Proposed Rule likely will receive a fair amount of attention from SROs, broker-dealers and other market participants, and legislators alike. One question is

⁴³ See Fawn Johnson, SEC Proposed Stock-Exchange Data Repository, *Wall Street Journal Online*, May 27, 2010.

⁴⁴ The Commission believes that much of the information required to be collected and reported in real time by SRO members is already being collected and reported currently in accordance with existing regulations, although it recognizes that systems modifications and ongoing new reporting requirements would generate additional costs. Proposing Release at 32591-2.

⁴⁵ *Id.* at 32603. See also Proposing Release discussion starting at 32589.

⁴⁶ *Id.* at 32564, 32595.

⁴⁷ *Id.* at 32594-5.

⁴⁸ See, e.g., Exchange Act Rel. No. 61379 (Jan. 13, 2010), 75 Fed. Reg. 4007 (Jan. 26, 2010) (proposing rules regarding market access); Exchange Act Rel. No. 61358 (Jan. 14, 2010), 75 Fed. Reg. 3594 (Jan. 21, 2010) (requesting comment on equity market structure); Exchange Act Rel. No. 60684 (Sept. 18, 2009), 74 Fed. Reg. 48632 (Sept. 23, 2009) (proposing a ban on flash orders); Exchange Act Rel. No. 60997 (Nov. 13, 2009), 74 Fed. Reg. 61208 (Nov. 23, 2009) (proposing new rules regarding non-displayed liquidity). See also SEC Proposes Broad Changes for Broker-Dealers with Direct Access to ATSS and Exchanges, WilmerHale Client Alert (Feb. 3, 2010), [available here](#); SEC’s Equity Market Structure Concept Release Highlights Potential New Regulatory Initiatives, WilmerHale Client Alert (Jan. 20, 2010), [available here](#); Proposed Ban of Flash Orders: A New Chapter in the Market Structure Debate, WilmerHale Client Alert (Sept. 22, 2009), [available here](#); Proposed National Market System Changes Aim to Lighten Dark Pools, WilmerHale Client Alert (Nov. 19, 2009), [available here](#).

whether the proposed implementation timeline will be regarded as overly cautious (or, if more extensive systems changes will be required than currently anticipated by the Commission, overly ambitious). Another is whether the costs of the proposal, and in particular any costs associated with real-time reporting of information to the CAT, are justified in relation to, for example, an alternative that might permit prompt, rather than real-time, reporting of data. This may be of particular interest given that, although the CAT will provide information to facilitate cross-market surveillance of NMS securities activity, the proposal indicates that SROs will continue to be responsible for policing their own markets and does not make clear whether the Commission will use the CAT to engage in cross-market surveillance on a real-time basis.

FOR MORE INFORMATION ON THIS OR OTHER SECURITIES MATTERS, CONTACT:

Andre E. Owens +1 202 663 6350 andre.owens@wilmerhale.com
Daniel M. Gallagher, Jr. +1 202 663 6864 daniel.gallagher@wilmerhale.com
Cristie L. March, Ph.D. +1 202 663 6267 cristie.march@wilmerhale.com

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