FINANCIAL INFORMATION FORUM

June 1, 2023

By electronic mail

Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090
Attn: David S. Shillman, Associate Director

Re: Reporting of non-executable RFQ responses to CAT

Dear Mr. Shillman,

Financial Information Forum ("FIF") and our members are writing in response to (i) the May 23, 2023 request for exemption submitted by the Participants in the National Market System Plan Governing the Consolidated Audit Trail (the "Plan Participants") to the Securities and Exchange Commission (the "Commission") relating to the reporting of certain RFQ responses to the consolidated audit trail (the "Plan Participant RFQ Exemption Request"),[1] and (ii) a March 22, 2023 presentation from the Plan Participants and FINRA CAT, LLC ("FINRA CAT") on Electronic RFQ Responses (the "RFQ Response Presentation"), which provides that "all RFQ responses ... will be required to be reported to CAT." Since executable RFQ responses (i.e., RFQ responses that a solicitor can execute without a further action by the responder) are already reportable to CAT as orders and order routes, the RFQ Response Presentation must be proposing that non-executable RFQ responses (i.e., RFQ responses that a solicitor cannot execute without a further action by the responder) be reported to CAT.[2]

Non-executable RFQ responses are neither orders nor bids or offers under Commission Rule 613 ("Consolidated audit trail").[3] Accordingly, non-executable RFQ responses should not be reportable to CAT. As discussed in detail below, "RFQ responses" are never mentioned in Rule 613, the proposing and

[1] Letter dated May 23, 2023 from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Securities and Exchange Commission, available at https://catnmsplan.com/sites/default/files/2023-05/05.23.23-Exemption-Request-Regarding-Responses-to-Electronic-RFQs.pdf ("Plan Participant RFQ Exemption Request").

[2] A solicitor and responder will have an understanding as to whether an RFQ response is or is not executable. For example, one common approach is for a responder to communicate this instruction to a solicitor using FIX Tag 537 (QuoteType). With FIX Tag 537, a value of '1" represents that an RFQ response is tradeable (i.e., executable) and a value of '0' represents that an RFQ response is indicative (i.e., not executable). See https://btobits.com/fixopaedia/fixdic50-sp1/index.html?tag_537_QuoteType.html.

[3] 17 CFR §242.613.

adopting releases for CAT, the CAT NMS Plan, or the Commission's Order approving the CAT NMS Plan. To the contrary, non-executable RFQ responses are akin to "invitations to negotiate," which the CAT adopting release expressly excludes from CAT reporting.[4]

To date, the Plan Participants and FINRA CAT have not required the reporting of non-executable RFQ responses to CAT.[5] In the RFQ Response Presentation, the Plan Participants and FINRA CAT propose to change the current requirements. In an Order dated April 20, 2020 (the "April 2020 Order"), the Commission approved a plan for CAT to be implemented in five phases (Phases 2a through 2e).[6] The Order provides for certain quotes to be reportable for Phases 2c (for equities) and 2d (for options) of CAT and expressly limits the RFQ responses that are reportable to CAT to executable RFQ responses.[7] If the Commission were to require the reporting of non-executable RFQ responses to CAT, this would require amendments to Rule 613, the CAT NMS Plan and the April 2020 Order.

Simultaneously with this letter, FIF also is submitting a letter to the Plan Participants and FINRA CAT on the same subject. That letter provides comments and questions on the RFQ Response Presentation and gaps in the proposed reporting specifications, in the event that the Commission incorrectly determines that non-executable RFQ responses must be reported to CAT. FIF has copied Commission representatives on the letter to the Plan Participants and FINRA CAT, and FIF has copied the Plan Participants and FINRA CAT on this letter.

We use the term "executable" to classify RFQ responses instead of the term "actionable". The term "actionable" creates unnecessary confusion because the Commission uses this term with a different meaning as compared to how this term is used by the Plan Participants and FINRA CAT in the CAT documentation. If a non-executable RFQ response includes a symbol, side, price and quantity, it could be actionable under the Commission's definition of "actionable indication of interest" in Rule 600(b)(1) of Regulation NMS[8] but not actionable as the term is used by the Plan Participants and FINRA CAT (because it cannot be executed by the solicitor). It is important that the Commission and the Plan Participants use consistent terminology to avoid any unnecessary confusion.

FIF members request to have a call with Commission representatives to discuss the points set forth in this letter.

A. Non-executable RFQ responses are neither orders nor bids or offers under Rule 613; accordingly, they should not be reportable to CAT

Commission Rule 613(j)(8) (applicable to CAT) defines an order as follows:

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[4] Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45721 (Aug. 1, 2012) (Consolidated Audit Trail), available at https://www.sec.gov/rules/final/2012/34-67457.pdf ("CAT Adopting Release"), at 45747.
[5] See, for example, CAT FAQ B45, available at https://catnmsplan.com/faq.
[6] Exchange Act Release No. 88702 (Apr. 20, 2020) (Order Granting Conditional Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 ("Exchange Act") and Rule 608(e) of Regulation NMS Under the Exchange Act, from Sections 6.4, 6.7(a)(v) and 6.7(a)(vi) of the National Market System Plan Governing the Consolidated Audit Trail) ("April 2020 Order").
[7] Id. at 16-18 and 19-20.
[8] 17 CFR §242.600(b)(1).

(8) The term order shall include:
(i) Any order received by a member of a national securities exchange or national securities association from any person;
(ii) Any order originated by a member of a national securities exchange or national securities association; or
(iii) Any bid or offer.[9]

The term "order" is used in clauses (i) and (ii) but not further defined. If we consider the scenario where a broker-dealer sends a non-executable RFQ response to an RFQ solicitor that is an institutional customer, it is clear that the non-executable RFQ response is not an "order". This is because an institution cannot receive an order. Only a broker-dealer can receive an order. If a broker-dealer sends a non-executable RFQ response to an RFQ solicitor that is a broker-dealer, this does not change the characteristic of the non-executable RFQ response. The non-executable RFQ response is still not an order because it cannot be executed by the soliciting broker-dealer without the soliciting broker-dealer routing an order to the responding broker-dealer. In these scenarios, the solicitor is routing an order to the responder; the responder is not routing an order to the solicitor.

This means that a non-executable RFQ response can only be an "order" under Rule 613 if it is a "bid or offer". For the reasons discussed in the following sections, a non-executable RFQ response is not a "bid or offer" under Commission Rule 613. Accordingly, non-executable RFQ responses should not be reportable to CAT.

B. A non-executable RFQ response is not a bid or offer under Rule 613 because the Regulation NMS definition of "bid or offer" expressly excludes indications of interest (including actionable indications of interest)

Non-executable RFQ responses are indications of interest (as defined in Regulation NMS) and thereby exempt from the Regulation NMS definition of bid and offer. Commission Rule 613 is part of Regulation NMS. Rule 600(b)(11), which is part of Regulation NMS, defines a bid or offer as:

> 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*** [emphasis added].[10]

In its 2009 proposing release on Regulation of Non-Public Trading Interest, the Commission wrote:

[9] 17 CFR §242.613(j)(8).
[10] 17 CFR §242.600(b)(11). FIF members assume it is an oversight that the definitions in Rule 600(b) technically apply only to Rules 600 through 612. In any event, Rule 613 is part of Regulation NMS, and Rule 600(b)(11) is the only definition of "bid or offer" set forth in Regulation NMS.

This exclusion of IOIs was part of the definition of bid or offer when it was originally drafted in 1978 for inclusion in the predecessor of Rule 602. In the adopting release, the term 'indication of interest' was not defined, discussed, or expressly limited to a non-actionable communication of trading interest."[11]

The Commission makes clear with this statement in the 2009 proposing release that indications of interest, including actionable and non-actionable indications of interest, are not bids or offers for purposes of Regulation NMS.

C. The reference to "round lots" in Rule 600(b)(11) provides further evidence that Rule 600(b)(11) is intended to apply to displayed bids and offers

The fact that Rule 600(b)(11) expressly refers to "… one or more round lots …" further supports the understanding that the Regulation NMS definition of "bid or offer" is intended to apply to bids and offers that are displayed on an exchange or other order display facility. This further supports the position that Rule 613 does not apply to non-executable RFQ responses.

D. Non-executable RFQ responses are indications of interest as defined in Regulation NMS

In connection with its 2018 amendments to Rule 606, the Commission added a definition of "actionable indications of interest" to Rule 600(b)(1). The Commission did not amend the definition of bid or offer at this time, and the exclusion of indications of interest from the Regulation NMS definition of bid and offer remained in effect. It is clear from the definition of "actionable indications of interest" (and the 2018 Commission adopting release for the Rule 606(a) amendments) that non-executable RFQ responses are either actionable indications of interest (if they communicate all four elements set forth in the Rule 600(b)(1) definition) or non-actionable indications of interest (if they do not communicate all four elements set forth in the Rule 600(b)(1) definition). In either case, non-executable RFQ responses are not bids or offers under Regulation NMS.

E. The proposing and adopting releases for CAT make clear that the Commission never intended to include non-executable RFQ responses in CAT reporting

Apart from the guidance under Rule 600(b)(11), the proposing and adopting releases for CAT make clear that the only types of bids and offers that the Commission intended for CAT reporting are bids and offers that are orders (i.e., bids and offers that are "executable" and therefore already subject to CAT reporting).[12] In the proposing and adopting releases, the Commission is expressly focused on executable market maker quotes that are communicated to an exchange or other display market. The Commission discusses in these sections of the CAT proposing and adopting releases why these market maker quotes, which were not subject to OATS reporting, should be subject to CAT reporting.

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[11] Securities Exchange Act Release No. 60997 (Nov. 13, 2009), 74 FR 61208 (Nov. 23, 2019) (Regulation of Non-Public Trading Interest) ("Regulation of Non-Public Trading Interest"), available at https://www.sec.gov/rules/proposed/2009/34-60997.pdf, at 61212.

[12] CAT Adopting Release, at 45745-45747. Securities Exchange Act Release No. 62174 (May 26, 2010), 75 FR 32555 (Jun. 8, 2010) (Consolidated Audit Trail), available at https://www.sec.gov/rules/proposed/2010/34-62174.pdf, at 32570-32571.

For example, the Commission writes as follows in the CAT adopting release:

> The Commission also considered the comment that recommended including indications of interest in the definition of "order." The Commission, however, is not including indications of interest in the definition of "order" for purposes of the consolidated audit trail because the Commission believes that the utility of the information such data would provide to regulators would not justify the costs of reporting the information. Indications of interest are different than orders because they are not firm offers to trade, but are essentially invitations to negotiate. As such, ***the Commission believes that indications of interest are less likely to be used as a vehicle for illegal activity, such as manipulation or layering, because they would be less likely to induce a response from other market participants*** [emphasis added].[13]

This reasoning by the Commission applies for non-executable RFQ responses. Specifically, non-executable RFQ responses are not posted on a display market and, accordingly, "… are less likely to be used as a vehicle for illegal activity, such as manipulation or layering, because they would be less likely to induce a response from other market participants…."[14] In other words, the specific reason that the Commission cited for excluding indications of interest from CAT reporting applies to non-executable RFQ responses.

F. In the CAT adopting release, the Commission expressly rejected a recommendation from a commenting party to include indications of interest in CAT reporting

In the adopting release for CAT, the Commission expressly rejected a recommendation from a commenting party to include indications of interest in CAT reporting.[15] In rejecting this recommendation, the Commission did not distinguish between actionable and non-actionable indications. In other words, the Commission's express rejection of a recommendation to include indications in CAT reporting applies to actionable and non-actionable indications.

G. Rule 613, the proposing and adopting releases for CAT, the CAT NMS Plan and the Commission's order approving the CAT NMS Plan make no reference to non-executable RFQ responses

FIF members also are not aware of any reference to reporting of non-executable RFQ responses (or any similar activity) in Rule 613, the proposing and adopting releases for CAT, the CAT NMS Plan or the Commission's order approving the CAT NMS Plan. Given the fact that non-executable RFQ responses fall squarely within the Commission's definition of indications of interest and that indications of interest are expressly excluded from the Regulation NMS definitions of bid and offer, the Commission's failure to discuss non-executable RFQ responses in any of the above CAT documentation (and, more generally, the Commission's failure to discuss reporting of any indications of interest, other than to expressly reject a

[13] CAT Adopting Release, at 45747.
[14] Ibid.
[15] Ibid.

recommendation from a commenting party for the reporting of indications of interest) further supports the conclusion that non-executable RFQ responses are not subject to CAT reporting.

H. Rule 300 (of Regulation ATS) and Rule 3b-16 do not apply to CAT

In the Plan Participant RFQ Exemption Request and in an exemption request submitted by the Plan Participants to the Commission on March 31, 2023 relating to CAT reporting for certain verbal activity,[16] the Plan Participants reference the definition of "order" from Commission Rule 300 (which is part of Regulation ATS).[17] The Commission provides a similar definition of "order" in Rule 3b-16.[18] It is important to highlight that Commission Rule 300 is part of Regulation ATS (Rules 300 through 304) and does not apply to Regulation NMS or to CAT. Rule 3b-16 was adopted at the same time as Regulation ATS and is limited specifically to defining the term "exchange" under the Securities Exchange Act. Rule 3b-16 also does not apply to CAT.

In fact, in the adopting release for Regulation ATS, the Commission wrote:

> "The Commission's definition of 'order' in paragraph (c) of Rule 3b-16 is intended to be broader than the terms bid and offer in the Firm Quote Rule. Therefore, it is possible for an indication of interest to be an 'order' under Rule 3b-16, without being a bid or offer under the Firm Quote Rule."[19]

The Firm Quote rule -- referenced by the Commission as having a narrower definition of order as compared to Rule 3b-16 -- is now part of Regulation NMS (Rule 602). In other words, the Commission is effectively stating in the adopting release for Regulation ATS that the definition of "order" under Rule 3b-16 is broader than the definition of "order" under Regulation NMS; as noted above, CAT Rule 613 is part of Regulation NMS.

FIF members also are not aware of any provisions or statements in Rule 613, Regulation NMS, the CAT NMS Plan or the proposing and adopting releases for CAT that extend the definitions in Rule 300 or Rule 3b-16 to CAT.

Even if Rule 3b-16 were applicable to CAT reporting (which it is not), there is ambiguity as to the definitions of order, bid and offer under Rule 3b-16. For example, Rule 3b-16(d) provides that "[F]or the purposes of this section, the terms bid and offer shall have the same meaning as under §242.600 of this chapter."[20] As discussed above, the terms bid and offer in Rule 600 expressly exclude actionable and non-actionable indications of interest. Further, the Commission wrote in a January 2022 release

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[16] Plan Participant RFQ Exemption Request, at 3. Letter dated March 31, 2023 from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Securities and Exchange Commission, available at https://catnmsplan.com/sites/default/files/2023-03/03.31.23-CAT-Exemption-Request-Verbal-Floor-and-Upstairs-Activity.pdf.
[17] Id. at 2-3.
[18] 17 CFR §240.3b-16.
[19] Securities Exchange Act Release No. 40760 (Dec. 8, 1998), 63 FR 70844 (Dec. 22, 2008) (Regulation of Exchanges and Alternative Trading Systems) ("Regulation ATS Adopting Release"), at 70850.
[20] 17 CFR §240.3b-16(d).

proposing amendments to Rule 3b-16 that conditional orders[21] are not firm. The Commission wrote: "[F]or example, a Covered ATS would be required to explain how the sender of a message would 'firm-up' a conditional or other non-firm message to execute a trade."[22] When discussing conditional orders in this release, the Commission further wrote that "[W]hen resting non-firm trading interest on a trading venue, market participants can use non-firm trading interest as a tool to avoid the risk of double-execution."[23] The same reasoning would apply to a non-executable RFQ response, which must be 'firmed-up' by the responder before an execution can occur. Considering that non-executable RFQ responses, like conditional orders, require a subsequent firming-up as a condition for execution, the Commission is effectively stating in this 2022 proposing release that non-executable RFQ responses are not firm.

CAT FAQ B40 similarly explains how conditional orders are not reportable to CAT because they must be "firmed-up":

> For example, certain trading interest, sometimes referred to as "conditional orders," available on some alternative trading systems (ATSs) must have their terms and conditions "firmed up" or otherwise confirmed by the sender before they can be executed against a potential contra-side. Such trading interest would not be reportable to CAT by either the sender or the receiving ATS until it was firmed up/confirmed by the sender.[24]

FIF members understand that the CAT Operating Committee approves all material FAQs (and all material FAQ amendments) that are published. Given the fact that the Commission is entitled, under the CAT NMS Plan, to designate representatives to attend all meetings of the CAT Operating Committee,[25] and given the following provision of the CAT NMS Plan, FIF members assume that Commission representatives would have reviewed and assented to the above FAQ:

> Interpretive questions arising during the operation or maintenance of the Central Repository with respect to applicable laws, rules or regulations shall be presented to the Operating Committee, which shall determine whether to seek interpretive guidance from the SEC or other appropriate regulatory body and, if so, in what form.[26]

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[21] In this paragraph, we use the term "conditional order" to refer to an order that requires a firm-up before an execution can occur. This should be distinguished from a "conditional order" described in the CAT Technical Specification, which refers to a scenario where an order is contingent on the execution of another order.
[22] Securities Exchange Act Release No. 94062 (Jan. 26, 2022), 87 FR 15496 (Mar. 8, 2022) (Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities) ("Rule 3b-16 Proposing Release"), at 15557.
[23] Id. at 15595.
[24] Available at https://catnmsplan.com/faq.
[25] CAT NMS Plan, at 23-24.
[26] Id. at 25.

I. Interpretation by a CAT Plan Participant

The interpretation of Regulation NMS by FIF members above is consistent with the interpretation of Regulation NMS by Nasdaq, one of the CAT Plan Participants. Nasdaq has written that "[A]ctionable IOIs are firm quotes in all but name. Yet they are not treated as such in the Commission's rules, which require market centers to display bids and offers. As a result, actionable quotes and orders do not contribute to the NBBO."[27]

J. Requiring non-executable RFQ responses to be reported to CAT is inconsistent with the Commission's April 2020 Order

In the April 2020 Order the Commission approved a plan for CAT to be implemented in five phases (Phases 2a through 2e).[28] The Order provides that certain quotes would be reportable Phases 2c (for equities) and 2d (for options) and expressly limits the RFQ responses that are reportable to CAT to executable RFQ responses.[29] If the Commission were to require the reporting of non-executable RFQ responses to CAT, this would be contrary to the April 2020 Order.

In the Order, the Commission limits CAT reporting for quotes for equities to: (i) a bid or offer displayed on the Alternative Display Facility; (ii) a bid or offer displayed on an inter-dealer quotation system (as defined in FINRA Rule 6420(c)) (applicable for unlisted equities only); and (iii) a bid or offer "… which is accessible electronically by customers or other market participants and is immediately actionable for execution or routing; i.e., no further manual or electronic action is required by the responder providing the quote in order to execute or cause a trade to be executed)."[30] The Commission then provides specific guidance with respect to RFQ responses:

> The Participants explain that accordingly, any response to a request for quote or other form of solicitation response provided in a standard electronic format (e.g., FIX) that meets this quote definition (i.e., an equity bid or offer which is accessible electronically by customers or other market participants and is immediately actionable for execution or routing) would be reportable in Phase 2c."[31]

In the April 2020 Order the Commission adopts the same approach for options. Specifically, reporting is limited to "… a listed option bid or offer which is accessible electronically by customers or other market participants and is immediately actionable (i.e., no further action is required by the responder providing the quote in order to execute or cause a trade to be executed)."[32] The Commission further provides with respect to RFQ responses: "[T]he Participants state that accordingly, any response to a request for quote or other form of solicitation response provided in standard electronic format (e.g., FIX)

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[27] Nasdaq, "Optimizing Markets for Today and Tomorrow: A Framework for U.S. Equities Market Reform" (2022), available at https://www.nasdaq.com/docs/optimizing-markets-for-today-and-tomorrow, at 9.
[28] April 2020 Order.
[29] Id. at 16-18 and 19-20.
[30] Id. at 17.
[31] Id. at 18.
[32] Id. at 19-20.

that meets this definition would be reportable in Phase 2d for options."[33]

The Commission is clear in the April 2020 Order that executable RFQ responses are reportable to CAT and non-executable RFQ responses are not reportable to CAT. Commission representatives cannot direct the Plan Participants to mandate the reporting of non-executable RFQ responses to CAT unless the Commission first amends Rule 613, the CAT NMS Plan and the April 2020 Order.

K. The Commission has never granted exemptive relief for non-executable RFQ responses

The Plan Participants correctly note in the Plan Participant RFQ Exemption Request that the Commission has never granted exemptive relief with respect to non-executable RFQ responses.[34] This is further evidence that the Commission has never intended for non-executable RFQ responses to be reportable to CAT.

L. CAT FAQ B45 further supports the point that the Commission never intended for non-executable RFQ responses to be reportable to CAT

CAT FAQ B45 further supports the point that the Commission has always intended for executable RFQ responses (but not non-executable RFQ responses) to be reportable to CAT. FAQ B45 first provides that executable RFQ responses are reportable to CAT:

> As stated in FAQ B44, any equity bid or offer that is accessible electronically by customers or other market participants and is immediately actionable (i.e., no further manual or electronic action is required by the responder providing the quote in order to execute or cause a trade to be executed) is reportable starting in Phase 2c; and any listed option bid or offer which is accessible electronically by customers or other market participants and is immediately actionable (i.e., no further action is required by the responder providing the quote in order to execute or cause a trade to be executed) is reportable starting in Phase 2d. Accordingly, any response to an RFQ or other form of solicitation response provided in a standard electronic format (i.e. FIX) that meets this definition would be reportable starting in Phase 2c for equities and Phase 2d for options.[35]

FAQ B45 then provides that non-executable RFQ responses are not reportable to CAT:

> Example 3
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> A CAT Reporter issues an RFQ through a 3rd party vendor RFQ platform not operated by a broker-dealer. In response to the RFQ, multiple CAT Reporters respond by sending FIX messages directly to the requesting CAT Reporter's OMS. Upon selection of a response, the solicitor CAT Reporter either:

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[33] Id. at 20.
[34] Plan Participant RFQ Exemption Request, at 5.
[35] Available at https://catnmsplan.com/faq.

- initiates and routes an order electronically to the winning bidder,
- the RFQ platform automatically sends a routed order to the winning bidder, or
- the winning bidder has standing instructions to create a new order acceptance once it receives a message from the RFQ platform that it has won.

> Although the RFQ responses were sent via standard electronic format directly to the solicitor/CAT Reporter's OMS/EMS, ***the responses are not reportable in Phase 2c because the CAT Reporters sending the responses would be required to take additional action by accepting a separate order from the requestor before any execution can occur, and would therefore not be considered immediately actionable*** [emphasis added]."

For the same reasons as discussed above for FAQ B40, FIF members assume that Commission representatives would have reviewed and assented to FAQ B45.

M. The Commission should not approve the Plan Participant RFQ Exemption Request

Because non-executable RFQ responses are not "orders" for purposes of Rule 613 and therefore not reportable to CAT, there is no need for the Commission to grant the exemption requested by the Plan Participants in the Plan Participant RFQ Exemption Request.

N. Potential impact on other rules

FIF members are concerned that the Commission's interpretation of the definition of "order", "bid" and "offer" under Rule 613 to include non-executable RFQ responses could unintentionally impact the interpretation of those terms under other Commission regulations and FINRA regulations (for example, Regulation SHO, other provisions of Regulation NMS, the books and records rules, and FINRA trading regulations).

The Commission should make clear that any interpretation of the definition of "order", "bid" and "offer" that the Commission adopts under Rule 613 would not impact the understanding of those terms under other Commission regulations. This clarification would be appropriate because the appropriate scope for any interpretation of Rule 613 would be Rule 613 and not any other rule. Given the lack of clarity on these definitions over a period of many years, any attempt to redefine the scope of rules outside of CAT should be implemented through a rule change proposal and not through a CAT reporting interpretation.

As examples, the Commission should clarify that any guidance it provides is specific to CAT to ensure that interpretations under the following rules would not be impacted:[36]

[36] FIF and our members have not conducted a comprehensive analysis of rules that could be impacted. The list provided is intended to demonstrate potential unintended impacts.

- Under Rule 200(g) of Regulation SHO, "[A] broker or dealer must mark all sell orders of any equity security as 'long,' 'short,' or 'short exempt.'"[37] A responder does not mark an offer-side non-executable RFQ response that it sends as long, short or short exempt (because non-executable RFQ responses are not orders).
- Under Rule 203(b) of Regulation SHO, a broker-dealer is not permitted to effect a short sale unless the broker-dealer has borrowed the security or entered into a bona-fide arrangement to borrow the security or has "… [R]easonable grounds to believe that the security can be borrowed so that it can be delivered on the date delivery is due…"[38] This is sometimes referred to as the "locate" requirement. Based on FAQs from the Commission's Division of Trading and Markets staff, a broker-dealer is required to decrease its long position for an outstanding but unexecuted short sale order,[39] which could trigger a locate requirement. Today a responder would not decrease its long position when it sends an offer-side non-executable RFQ response; this is because non-executable RFQ responses are not orders. In many cases a responder could respond to multiple RFQs for the same shares that it owns (and could enforce compliance with the locate requirement at the point of execution), so it would not make sense for a responder to decrease its long position when it sends a non-executable RFQ response.[40]
- Under Rule 602(b)(1) of Regulation NMS, a broker-dealer under certain conditions is required to "… promptly communicate to its national securities exchange or national securities association, pursuant to the procedures established by that exchange or association, its best bids, best offers, and quotation sizes for any subject security."[41] This requirement does not apply to a non-executable RFQ response because non-executable RFQ responses are not orders.
- Rule 17a-3(a)(6) requires a broker-dealer to maintain "[A] memorandum of each brokerage order."[42] This does not apply to non-executable RFQ responses because RFQ responses are not orders.
- FINRA Rule 6240 (Prohibition from Locking or Crossing Quotations in NMS Stocks) prohibits the display of certain bids and offers that cross or lock the displayed market. This requirement does not apply to a non-executable RFQ response because non-executable RFQ responses are not orders.

Whether or not the Commission agrees with the analysis above, it is important to understand that the Commission and FINRA have not provided guidance as to how the provisions above (as well as other provisions that we have not cited) apply to non-executable RFQ responses. Any such guidance would

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[37] 17 CFR §242.200(g).
[38] 17 CFR §242.203(b)(1).
[39] Securities and Exchange Commission, Division of Trading and Markets staff, "Responses to Frequently Asked Questions Concerning Regulation SHO," Question 2.5(B), available at https://www.sec.gov/divisions/marketreg/mrfaqregsho1204.htm.
[40] The discussion of Rule 203(b) highlights a fundamental difference between orders and non-executable RFQ responses. If a firm simultaneously routes multiple sell orders for the same stock, it is understandable that a firm would decrease its long position for all of these orders because all of these orders could get executed at the same time. This is not the case with non-executable RFQ responses, where a responder can simultaneously send multiple offer-side non-executable RFQ responses in the same stock to multiple solicitors and only execute against one order sent from one solicitor (i.e., the responder can reject subsequent orders from other solicitors after the execution against the first solicitor).
[41] 17 CFR §242.602(b)(1).
[42] 17 CFR §240.17(a)(3)(A)(6).

need to be specific to each provision and with consideration of the wording, intent and history of the specific provision. In many, if not all, cases a rule filing would be appropriate. FIF members understand that the Commission would not intend for CAT interpretations to impact the interpretation of other rules. This would be the proverbial "tail wagging the dog" (or, more precisely in this instance, the "CAT wagging the dog"). Accordingly, the Commission should make clear in any interpretation it issues relating to what is reportable under CAT that the scope of the interpretation is limited to CAT.

O. Need for guidance as to the scope of non-executable RFQ responses that would be reportable to CAT

If the Commission determines, notwithstanding the points above, that non-executable RFQ responses must be reported to CAT, industry members will require additional guidance from the Commission, the Plan Participants and FINRA CAT with respect to when a non-executable RFQ response would be reportable and when a non-executable RFQ response would not be reportable. This guidance is necessary because of the current lack of guidance on this point and also to ensure that firms (and the CAT Transaction Reporting system) do not end-up with linkage errors resulting from soliciting and responding firms adopting different interpretations as to when a non-executable RFQ response is reportable to CAT.

The RFQ Response Presentation provides:

> "All RFQ responses, even those not selected, communicated in standard electronic format (e.g., FIX) that are not immediately actionable ("NIA") (i.e., further manual or electronic action is required by the responder providing the quote to execute or cause a trade to be executed) will be required to be reported to CAT."

This proposed standard for reporting RFQ response, which would encompass every electronic RFQ response as reportable to CAT, is an inaccurate interpretation of Rule 613 and directly contrary to the Commission's express rejection, in the CAT adopting release, of a recommendation from a commenting party to include indications of interest in CAT reporting.[43] Accordingly, further guidance is required.

P. Commission's proposed amendments to Rule 3b-16

In January 2022, the Commission proposed amendments to Rule 3b-16.[44] In May 2022 the Commission provided further opportunity for the public to comment on these proposed amendments.[45] In April 2023

[43] CAT Adopting Release, at 45747.

[44] Securities Exchange Act Release No. 94062 (Jan. 26, 2022), 87 FR 15496 (Mar. 8, 2022) (Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange"; Regulation ATS for ATSs That Trade U.S. Government Securities, NMS Stocks, and Other Securities; Regulation SCI for ATSs That Trade U.S. Treasury Securities and Agency Securities) ("Rule 3b-16 Rule Proposal").

[45] Securities Exchange Act Release No. 94868 (May 9, 2022), 87 FR 29059 (May 12, 2022) (Reopening of Comment Periods for "Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews" and "Amendments Regarding the Definition of `Exchange' and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities).

the Commission provided further guidance on the Rule 3b-16 rule proposal and requested additional comment on specific issues relating to the rule proposal.[46]

It is unclear at this time whether the version of Rule 3b-16 that is adopted by the Commission would impact the operations and registration status of existing RFQ systems for equities and options. With respect to equities, the Commission writes as follows in the January 2022 release: "The Commission estimates that there are currently 4 Communication Protocol Systems operating in the market for NMS stocks that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b-16."[47] With respect to options, the Commission writes as following in the January 2022 release: "As the Commission understands, there is currently 1 Communication Protocol System trading in listed options that may meet the definition of exchange under the proposed changes to Exchange Act Rule 3b-16."[48]

As noted above, FIF members are not able to predict at this time whether the version of Rule 3b-16 that is adopted by the Commission would impact the operations and registration status of existing RFQ systems for equities and options. If such operational and registration changes were required, FIF members are concerned that they could be required to incur significant resources to analyze, develop, test and implement the CAT reporting requirements for non-executable RFQ responses, and then there would be a need to go through that same costly process within a short time period after this initial implementation of CAT reporting for non-executable RFQ responses to address RFQ systems changing their workflows and/or registration status in response to changes to Rule 3b-16. This occurred previously, for example, with respect to CAT reporting for trading activity on OTC Link. Given the complexities that will be associated with CAT reporting of non-executable RFQ responses, it would be more efficient for the Commission to reach and publish a final determination with respect to its planned amendments to Rule 3b-16 prior to requiring CAT reporting for non-executable RFQ responses.

FIF members also are not aware of any pressing regulatory need for regulators to implement CAT reporting for non-executable RFQ responses prior to the adoption of amendments to Rule 3b-16.

Q. Cost-benefit analysis

Given the fact that CAT operating costs are significantly higher than projected in the CAT NMS Plan, and given that Rule 613, Regulation NMS, the CAT NMS Plan and the proposing and adopting releases for CAT never discussed the reporting of non-executable RFQ responses, the Commission should conduct a formal cost-benefit analysis of requiring the reporting of non-executable RFQ responses to the CAT system. This cost-benefit analysis should incorporate the fact that reporting firms would become subject to expanded books and records requirements.

[46] Securities Exchange Act Release No. 97309 (Apr. 14, 2023), 88 FR 29448 (May 5, 2023) (Supplemental Information and Reopening of Comment Period for Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange").
[47] Rule 3b-16 Proposing Release, at 15613.
[48] Id. at 15609.

R. Implementation time period for CAT reporting of RFQ responses

As discussed above, FIF members do not consider non-executable RFQ responses to be reportable to CAT because they are neither orders nor bids or offers. In a communication to FINRA CAT dated August 3, 2022, FIF members proposed an implementation time period of one year from the publication of reporting scenarios if the Commission were to require reporting of non-executable RFQ responses. If the Commission were to require this reporting, the one-year period should not commence until the Commission, the Plan Participants and FINRA CAT have provided clear written guidance (through updates to the Technical Specifications and Reporting Scenarios documents) on all workflows identified by FIF members, including the applicable CAT events to be reported by each reporting firm for each step in the applicable workflow, the data elements to be reported for each CAT event for the applicable workflow, and applicable linkage requirements. FIF members also recommend that any requirement for reporting of non-executable RFQ responses be implemented in the following three phases:

- Phase 1: equities
- Phase 2: options (excluding multi-leg options)
- Phase 3: multi-leg options.

FIF members note that the tentative December 11, 2023 date proposed in the current CAT Scope and Schedule document[49] is not a realistic date for implementing reporting of non-executable RFQ responses. FIF members appreciate that the Plan Participant RFQ Exemption Request proposes a period of twelve months from publication of final technical specifications for implementation of CAT reporting of non-executable RFQ responses.[50] FIF members note that guidance from the Commission as discussed in this letter and guidance with respect to the scenarios set forth in the FIF letter to the Plan Participants and FINRA CAT are necessary conditions for the commencement of the twelve-month implementation period.

* * * * *

FIF members appreciate the opportunity to provide input on CAT reporting for non-executable RFQ responses. If you would like clarification on any of the items discussed in this letter, please contact me at howard.meyerson@fif.com.

Very truly yours,

/s/ Howard Meyerson

Howard Meyerson
Managing Director, Financial Information Forum

Cc: Hugh Beck, Securities and Exchange Commission
Brandon Becker, CAT NMS Plan Operating Committee

[49] Available at https://catnmsplan.com/sites/default/files/2023-03/03.27.23-Release-Plan-Transaction.pdf.
[50] Plan Participant RFQ Exemption Request, at 5.

Erika Berg, Securities and Exchange Commission
Shelly Bohlin, FINRA CAT
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Andrew Sherman, Securities and Exchange Commission
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