

September 8, 2022

VIA EMAIL

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

Re: Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail

Dear Ms. Countryman:

The Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (the “CAT”)² propose to amend the Plan pursuant to Rule 608 of Regulation NMS (“Rule 608”)³ under the Securities Exchange Act of 1934 (the “Exchange Act”).⁴ As described more fully below, the proposed amendment (the “Proposed Amendment”) would authorize Consolidated Audit Trail, LLC (“CAT LLC”) to revise the Consolidated Audit Trail Reporter Agreement (the “Reporter Agreement”) and the Consolidated Audit Trail Reporting Agent Agreement (the “Reporting Agent Agreement”) by removing the arbitration provision from each agreement and replacing it with a forum selection provision (the “Forum Selection Provision”). These provisions would require that any dispute regarding CAT reporting be filed in a United States District Court for the Southern District of New York (the “SDNY”), or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court within the First Judicial Department. The Proposed Amendment would also revise the existing choice of law clause to provide that any dispute will be governed by federal law (in addition to New York law).

¹ The twenty-five Participants of the CAT NMS Plan are: BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

² The National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”) is a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. See SEC, Joint Industry Plan; Order Approving the Nat’l Mkt. Sys. Plan Governing the Consol. Audit Trail, Release No. 34-79318; File No. 4-698 (Nov. 15, 2016), herein “Order Approving CAT NMS Plan”, available at <https://www.sec.gov/rules/sro/nms/2016/34-79318.pdf>, 81 Fed. Reg. 84696 (Nov. 23, 2016), available at <https://www.govinfo.gov/content/pkg/FR-2016-11-23/pdf/2016-27919.pdf>. The full text of the CAT NMS Plan as amended is available at https://www.catnmsplan.com/sites/default/files/2020-02/CAT-2.0-Consolidated-Audit-Trail-LLC%20Plan-Executed_%28175745081%29_%281%29.pdf.

³ 17 C.F.R. § 242.608.

⁴ Unless otherwise defined herein, capitalized terms used herein are defined as set forth in the CAT NMS Plan.

Requirements Pursuant to Rule 608(a)

A. Statement of Purpose of the Amendment to the CAT NMS Plan

The Proposed Amendment would ensure that a dispute arising out of CAT reporting would be addressed by either the SDNY or the New York State Supreme Court. Designating an Article III court and a sophisticated state court as potential forums for dispute resolution is plainly consistent with the Exchange Act.

Courts offer important substantive expertise and procedural mechanisms that would facilitate the fair and efficient resolution of claims in relation to CAT reporting. As an example, because a CAT technical issue, system failure, or data breach may impact thousands of potential parties, the ability of courts to consolidate and join claims and certify class actions would minimize costs of litigation for all potential parties (including Industry Members), which, in turn, furthers the market efficiency and fair competition objectives of the Exchange Act.

The importance of a court resolving claims regarding CAT reporting is underscored by the regulatory nature of the CAT. The Participants are implementing the requirements of Rule 613 and the CAT NMS Plan in their regulatory capacities. While cyber litigation frequently presents complex questions, the CAT's regulatory nature adds a further layer of complexity to any potential dispute. Among other issues, a tribunal would have to evaluate the relationships between the Commission, the Participants, and Industry Members and determine the applicability of any immunity claims. In connection with the Participants' limitation of liability proposal, both the Commission and the Securities Industry and Financial Markets Association ("SIFMA") recognized that regulatory immunity may be at issue in a dispute regarding CAT reporting. Utilizing courts to resolve such disputes will ensure that bedrock principles of the self-regulatory framework are adjudicated based on decades of binding precedent (often developed through the Commission's feedback via amicus briefs) and afford the parties critical appellate rights.

Notwithstanding the benefits of litigation, an arbitration provision was included in the original Reporter Agreement because the agreement initially disclaimed all direct and indirect damages and capped the Participants' liability to \$500 per Industry Member or Participant that entered into the Reporter Agreement ("CAT Reporter"). But considering the complex legal and factual issues likely implicated by a dispute concerning CAT reporting, in the absence of a robust limitation on liability, all parties should be able to rely on the protections available in litigation.

The Participants' proposed federal forum and alternative state forum are well equipped to handle any dispute relating to CAT reporting. The United States Court of Appeals for the Second Circuit, and the SDNY, have significant experience resolving securities matters and cyber claims. Likewise, the New York State Supreme Court in the First Judicial Department, and in particular its Commercial Division in New York County (Manhattan), is comprised of experienced judges who regularly preside over complex disputes. Both forums routinely adjudicate matters involving the Participants, Industry Members, and the Commission, and given the locations of potential parties to a CAT Data breach, New York would constitute a convenient forum for dispute resolution.

1) Background

On July 11, 2012, the Commission adopted Rule 613 of Regulation NMS to enhance regulatory oversight of the U.S. securities markets. The rule directed the Participants to create a “Consolidated Audit Trail” (also referred to herein as the “CAT”) that would strengthen the ability of regulators—including the Commission and the self-regulatory organizations—to surveil the securities markets.⁵ Following the adoption of Rule 613, the Participants prepared and proposed the CAT NMS Plan and then implemented—and continue to implement—the Plan’s extensive requirements.

In preparation for CAT reporting, the Operating Committee of CAT LLC approved a Reporter Agreement and Reporting Agent Agreement by unanimous written consent on August 29, 2019. Those agreements contained industry standard limitation of liability provisions that disclaimed all damages and capped the liability of CAT LLC, the Participants, and FINRA CAT to any CAT Reporter at \$500 per calendar year. The agreements also contained a mandatory arbitration provision with respect to any disputes in connection with CAT reporting and authorized an arbitrator to grant remedies that “the arbitrator deems just and equitable within the scope of [the] Agreement.”⁶

On April 22, 2020, SIFMA challenged the Reporter Agreement’s limitation of liability and indemnification provisions by filing an application for review of actions taken by CAT LLC and the Participants pursuant to Sections 19(d) and 19(f) of the Exchange Act (the “Administrative Proceeding”). On May 13, 2020, SIFMA and the Participants reached a settlement of the Administrative Proceeding that permitted Industry Members to report data to the CAT pursuant to a revised Reporter Agreement that did not contain a limitation of liability provision, while the Participants prepared a filing with the Commission to resolve the parties’ underlying disagreement regarding the proper allocation of liability.⁷

On December 18, 2020, the Participants proposed to amend the CAT NMS Plan to authorize CAT LLC to revise the Reporter Agreement and the Reporting Agent Agreement to insert limitation of

⁵ See 17 C.F.R. § 242.613 (2012).

⁶ See Consol. Audit Trail Rep. Agreement (“Reporter Agreement”) and Consol. Audit Trail Reporting Agent Agreement (“Reporting Agent Agreement”), § 7.9, available at <https://www.catnmsplan.com/sites/default/files/2020-02/Consolidated-Audit-Trail-Reporter-Agreement%2808-29-19%20FINAL%29.pdf> and https://www.catnmsplan.com/sites/default/files/2020-05/Consolidated-Audit-Trail-Reporting-Agent-Agreement-amended_0.pdf.

⁷ As part of the settlement of the Administrative Proceeding, SIFMA agreed to abandon its challenge to the industry standard indemnification provisions that were included in the original Reporter Agreement and Reporting Agent Agreement. See SIFMA Statement on Settlement on CAT Reporter Agreement, available at <https://www.sifma.org/resources/news/sifma-statement-on-settlement-on-cat-reporter-agreement/>. All CAT Reporters and CAT Reporting Agents eventually signed an agreement that contained those indemnification provisions.

liability provisions (the “Limitation of Liability Proposal”).⁸ SIFMA and various Industry Members submitted comment letters in response to the Limitation of Liability Proposal and in response to the Commission’s April 6, 2021 Order Instituting Proceedings.⁹ Multiple comment letters—including from SIFMA—discussed the applicability of regulatory immunity to a CAT Data breach, and demonstrated an assumption and understanding that assessments of immunity claims would be conducted by courts.¹⁰

On October 29, 2021, the Commission issued an order disapproving the Limitation of Liability Proposal (the “Disapproval Order”).¹¹ The Commission noted that the Participants may have limited liability through “court-established” regulatory immunity, and that the impact of the Limitation of Liability Proposal depended on assumptions about the applicability of regulatory immunity to a CAT Data breach.¹² Throughout the Disapproval Order, the Commission indicated that the applicability of regulatory immunity is appropriately decided by courts.¹³

On May 20, 2022, the Participants filed with the Commission a proposed amendment (the “May 2022 Proposed Amendment”) to the CAT NMS Plan to revise the Reporter Agreement and the

⁸ See Letter from Michael Simon, CAT NMS Plan Operating Comm. Chair to Vanessa Countryman, Sec’y, SEC (Dec. 18, 2020), available at <https://catnmsplan.com/sites/default/files/2020-12/12.18.2020-Proposed-Amendment-to-the-CAT-NMS-Plan.pdf>.

⁹ See SEC, Joint Indus. Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove an Amend. to the Nat’l Mkt. Sys. Plan Governing the Consol. Audit Trail, Release No. 34-391487; File No. 4-698 (Apr. 6, 2021), available at <https://www.sec.gov/rules/sro/nms/2021/34-91487.pdf>, 86 Fed. Reg. 19054 (Apr. 12, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-04-12/pdf/2021-07390.pdf>; 17 C.F.R. § 242.608(b)(2)(i).

¹⁰ See e.g., Letter from Ellen Greene, SIFMA to Vanessa Countryman, Sec’y, SEC, at 7 (May 3, 2021) (the “SIFMA Letter”), available at <https://www.sec.gov/comments/4-698/4698-8751243-237404.pdf> (discussing an indication that “courts are likely to view any regulatory activity the SROs conduct through CAT LLC as being subject to this judicial immunity”); Letter from Stephen John Berger, Citadel Sec. to Vanessa Countryman, Sec’y, SEC, at 5 (Feb. 23, 2021) (the “Citadel Letter”), available at <https://www.sec.gov/comments/4-698/4698-8411798-229501.pdf> (“[C]ourts must be careful not to extend the scope of the protection further than its purposes require.”) (citations omitted); Letter from Kelvin To, Data Boiler Techs., LLC to Vanessa Countryman, Sec’y, SEC, at 4 (May 3, 2021) (the “Data Boiler Letter”), available at <https://www.sec.gov/comments/4-698/4698-8749987-237362.pdf> (“How courts apply a ‘functional test’ to determine whether an SRO is entitled to immunity from burdens of litigation or civil damages suits may be a controversy here.”).

¹¹ SEC, Joint Industry Plan; Order Disapproving an Amend. to the Nat’l Mkt. Sys. Plan Governing the Consol. Audit Trail, Release No. 34-93484; File No. 4-698 (Oct. 29, 2021), available at <https://www.sec.gov/rules/sro/nms/2021/34-93484.pdf>, 86 Fed. Reg. 60,933 (Nov. 4, 2021), available at <https://www.govinfo.gov/content/pkg/FR-2021-11-04/pdf/2021-24015.pdf>.

¹² See Disapproval Order at 29 (“Even in the absence of the proposed Limitation of Liability Provisions, the Participants may have limited liability to Industry Members through court-established regulatory immunity.”) (citation omitted); see also *id.* at 42 (“The Commission believes that uncertainty regarding liability in case of a CAT Data breach thus serves as an incentive for the Participants to invest in data security to the extent that Participants believe a court might not uphold their regulatory immunity or it would be judged not to apply in a given case that was before the courts.”); *id.* at 35 (“Participants can assert regulatory immunity to the extent that the doctrine applies if there is a security breach that exposes CAT Data and Industry Members seek damages from the responsible Participants.”).

¹³ See, e.g., *supra* n.14.

Reporting Agent Agreement by removing the arbitration provision from each agreement and replacing it with a forum selection provision.¹⁴ The May 2022 Proposed Amendment also revised the existing choice of law clause to provide that any dispute will be governed by federal law (in addition to New York law). SIFMA did not oppose the May 2022 Proposed Amendment's forum selection and choice of law provisions, both of which are substantively identical to the Participants' current proposal.¹⁵

2) The Forum Selection Provision

The Forum Selection Provision is contained in Appendix A to this Proposed Amendment. In sum, the Forum Selection Provision provides that any dispute concerning CAT reporting must be filed in the SDNY if there is any basis for federal subject matter jurisdiction.¹⁶ The clause also provides that if federal courts lack jurisdiction over a dispute, plaintiffs must file suit in the New York State Supreme Court in New York County (Manhattan) within the First Judicial Department. The Proposed Amendment would require that the parties to any action filed in the New York State Supreme Court seek assignment to the court's Commercial Division if permitted by the Uniform Civil Rules for the Supreme and County Courts.¹⁷

The Forum Selection Provision also provides that the parties to any litigation agree to accept service of a complaint by U.S. registered mail and waive any objections based on venue. The Proposed Amendment would apply to any litigation commenced by any signatory to the CAT Reporter Agreement (or Reporting Agent Agreement).

3) The Nature of Potential Claims

The Participants believe that a court is the proper forum to resolve claims regarding CAT reporting, including claims in relation to potential technical issues, system failures, and data breaches. Although the specific claims asserted likely will depend on the nature of the incident, in the aftermath of high-profile data breaches (i.e., one category of potential claims), plaintiffs have brought common law claims of breach of contract and negligence as well as claims based on

¹⁴ Securities Exchange Act Rel. No. 34-95031 (June 3, 2022), 87 Fed. Reg. 35153 (June 9, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-06-09/pdf/2022-12398.pdf>. The May 2022 Proposed Amendment also proposed to add to the Reporter Agreement and the Reporting Agent Agreement a jury waiver provision and a disclaimer of warranties provision.

¹⁵ Letter from Ellen Greene, SIFMA to Vanessa Countryman, Sec'y, SEC (June 30, 2022) at 2, available at <https://www.sec.gov/comments/4-698/4698-20133896-303830.pdf>.

¹⁶ Section 11.5 of the CAT NMS Plan authorizes Industry Members to "seek redress from the SEC pursuant to SEC Rule 608 or in any other appropriate forum" with respect to any dispute regarding CAT fees. The Forum Selection Provision would not impact the ability of Industry Members to petition the Commission directly with respect to such disputes. CAT NMS Plan, *supra* n.2, § 11.5.

¹⁷ The Commercial Division has two jurisdictional requirements: (1) a monetary threshold, which is \$500,000 in Manhattan, and, provided that the monetary threshold is met (or equitable or declaratory relief is sought), (2) the principal claim must fall within an enumerated list of types of claims, which include, among others, claims for breach of contract. 22 N.Y.C.R.R. §§ 202.70(a), 202.70(b)(1)-(12). In addition, any party seeking assignment of a case to the Commercial Division must file a Commercial Division Request for Judicial Intervention Addendum certifying that the case meets those two jurisdictional requirements. 22 N.Y.C.R.R. § 202.70(d)(1).

various federal statutes including the Stored Communications Act, the Federal Wiretap Act, and the Computer Fraud and Abuse Act.¹⁸ In those matters, plaintiffs sought substantial monetary relief including compensatory, punitive, and statutory damages.

In any dispute regarding CAT reporting, CAT LLC will likely have defenses based on the CAT's robust—and SEC-approved—cybersecurity, and the Participants' regulatory role in implementing the CAT NMS Plan.¹⁹ Assessing these defenses will likely require a tribunal to resolve complex issues that implicate the Participants' status as self-regulatory organizations and the SEC's oversight of the CAT. Additionally, such disputes are likely to present complex legal and factual issues inherent in cyber litigation generally. As discussed *infra* at Section A(4), the Participants believe that a court is well-equipped to address and mitigate any challenges of adjudicating claims resulting from CAT reporting.

4) The Forum Selection Provision Would Promote the Fair, Expeditious, and Efficient Resolution of Any Claims Regarding CAT Reporting

The Proposed Amendment would lead to the fair and efficient resolution of potential disputes, ensure that issues implicating foundational principles of the self-regulatory framework are decided based on longstanding precedent, and provide the parties with important appellate rights. Litigating claims in an Article III court, or sophisticated state court, is plainly consistent with the Exchange Act.²⁰

a. Consolidation, Joinder of Claims, and Class Actions

Because certain potential claims arising out of CAT reporting—including technical issues, system failures, and data breaches—are likely to impact multiple parties, one important consideration is the extent to which a particular dispute resolution mechanism allows for consolidation of claims. Indeed, consolidating such claims would reduce costs of dispute resolution, enable CAT LLC to

¹⁸ See, e.g., *In re Google Assistant Privacy Litig.*, No. 19-cv-04286-BLF, 2021 WL 2711747, at *2 (N.D. Cal. July 1, 2021); *Cal-Cleve, Ltd. v. Wrag-Time Air Freight, Inc.*, No. 04-cv-10543 SJO (JTLx), 2005 WL 8157876, at *1 (C.D. Cal. June 1, 2005).

¹⁹ FINRA CAT has implemented robust controls to protect the security and confidentiality of CAT Data and the Commission has repeatedly concluded that the CAT NMS Plan incorporates “robust security requirements” that “provide appropriate, adequate protection for the CAT Data.” See Order Approving CAT NMS Plan, *supra* n.2, at 715; see also SEC, Proposed Amends. to the Nat'l Mkt. Sys. Plan Governing the Consol. Audit Trail to Enhance Data Sec., Release No. 34-89632; File No. S7-10-20, at 10 (Aug. 21, 2020) (the “Data Security Proposal”), available at <https://www.sec.gov/rules/proposed/2020/34-89632.pdf>, 85 Fed. Reg. 65990 at 65991 (Oct. 16, 2020), available at <https://www.govinfo.gov/content/pkg/FR-2020-10-16/pdf/2020-18801.pdf> (“CAT Data reported to and retained in the Central Repository is thus subject to what the Commission believes are stringent security policies, procedures, standards, and controls.”).

²⁰ The Participants recognize that certain individuals who serve as arbitrators may have experience with cybersecurity and securities matters. However, even if the parties to a CAT Data breach were able to ensure that such arbitrators presided over a potential dispute, litigation remains more suitable to resolve claims regarding CAT reporting for the reasons discussed in this submission, including (among other reasons) courts' mechanisms to consolidate claims, the presence of meaningful appellate rights, the role of legal precedent, the nature of the parties to a potential dispute, and the relevance of regulatory immunity to resolving claims.

focus on its regulatory mandate, and decrease the risk of disparate outcomes in similar cases, all of which promote the efficiency and fair competition objectives of the Exchange Act.

In court, litigants can rely on the applicability of the rules of consolidation and joinder to increase the likelihood that all cases arising out of one incident are heard together. Both federal and New York State rules of civil procedure provide mechanisms to consolidate cases and join parties to actions.²¹ Relatedly, both federal and New York State rules of civil procedure permit the use of class actions for certain disputes and both forums have substantial experience resolving such disputes.²² Selection of these forums, in light of both their experience and procedural rules, would promote consistency of outcomes and the efficient resolution of claims.

By contrast, under the AAA Commercial Arbitration Rules (the “AAA Rules”), which govern arbitration under the current Reporter Agreement and Reporting Agent Agreement, consolidation is a “suggest[ion] . . . that the parties and the arbitrator should address at the preliminary hearing,” and the ultimate decision regarding whether consolidation is appropriate is “subject to the discretion of the arbitrator.”²³ The AAA Rules are also silent on joinder. While parties to an arbitration agreement may agree that signatories will be required to join claims,²⁴ parties frequently face complications in joining non-signatories to an arbitration. This is particularly significant in the context of a potential claim arising out of CAT reporting because certain types of incidents may impact both Industry Members and other market participants (e.g., retail investors).

For those reasons, if the arbitration provision remains in the Reporter Agreement and Reporting Agent Agreement, actions involving the same common questions of law or fact or arising out of the same “transaction or occurrence” may be brought piecemeal, with signatories to the agreements arbitrating their claims or defenses and non-signatories litigating those claims or defenses in court. This can lead to illogical or unworkable outcomes,²⁵ indeed, cases arising out of the same facts or involving the same legal issues or even the same parties may result in entirely different outcomes, creating inconsistent rules, rendering inconsistent damages awards, or both.

b. Reliance on Precedent and the Expertise of Courts

A dispute regarding CAT reporting is likely to present complex legal and factual issues inherent in cyber litigation generally as well as in relation to the Participants’ regulatory roles in overseeing

²¹ See Fed. R. Civ. P. 19, 20, 42(a)(2); N.Y. C.P.L.R. §§ 602, 1001, 1002.

²² See Fed. R. Civ. P. 23; 28 U.S.C. § 1332(d)(2); N.Y. C.P.L.R. § 901(a); *see supra* § A(5).

²³ See AAA Rules P-2(a)(vi)(c).

²⁴ See, e.g., 9 U.S.C. § 2 (“A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”); *see also* AAA Rules R-1(a) (providing that the AAA Rules are deemed a part of parties’ agreement to arbitrate where the parties provide for AAA commercial arbitration).

²⁵ See Rick Fleming, Investor Advocate, SEC, Mandatory Arbitration: An Illusory Remedy for Public Company Shareholders (Feb. 24, 2018), <https://www.sec.gov/news/speech/fleming-sec-speaks-mandatory-arbitration> (“[I]t seems terribly inefficient to require multiple plaintiffs to prove up the same claims in separate proceedings.”).

the CAT. Allowing the parties to litigate in court would ensure that the forum charged with resolving disputes is bound by the substantial body of precedent that has been developed to address these issues.

Relatedly, the doctrine of regulatory immunity may play an important role in any dispute concerning CAT reporting. In connection with the Limitation of Liability Proposal, multiple comment letters discussed the applicability of regulatory immunity to a CAT Data breach and demonstrated an assumption and understanding that such a determination was the province of courts.²⁶ The Commission, likewise, recognized the importance of regulatory immunity claims and its Disapproval Order also indicated an expectation that such claims would be decided by courts.²⁷ Indeed, courts have developed a robust body of case law on the immunity doctrine, which provides parameters to courts as they analyze the applicability of regulatory immunity to the specific facts presented by a given case.

The ability to rely on binding precedent is even more critical in the event of a claim arising out of CAT reporting. As discussed *supra* at Section 3, certain incidents may lead to claims in which impacted parties seek substantial damages from CAT LLC. In light of the potential amount in controversy, coupled with the likely legal and factual issues presented by a dispute—including the applicability of immunity claims—all parties should be able to rely on the certainty of knowing that their conduct will be evaluated by developed legal standards. In addition to affording all parties the opportunity to rely on precedent, litigating disputes in court will also promote the development of precedent to guide the conduct of the Participants and Industry Members.

c. Appellate Review

Adjudicating claims in relation to CAT reporting in court provides all parties with critical appellate rights. While important for any high stakes dispute, appellate rights are particularly important in the event of a CAT system failure, technical issue, or data breach, considering the complicated legal and factual issues, the nature of the parties, and the potentially large amount in controversy. Regulatory immunity claims, for example, are often the subject of appellate review.²⁸

Direct appellate review is largely absent in arbitration.²⁹ Moreover, even if the parties to the Reporter Agreement or Reporting Agent Agreement were able to avail themselves of appellate rights, an appellate arbitration tribunal would be similarly unbound by precedent as the lower arbitration forum that rendered a potentially erroneous award.³⁰ With respect to judicial review of an arbitration award, the Federal Arbitration Act (the “FAA”) provides limited grounds for federal

²⁶ See *e.g.*, *supra* n.12.

²⁷ Disapproval Order, *supra* n.13, 14.

²⁸ See, *e.g.*, *D’Alessio v. N.Y. Stock Exchange, Inc.*, 258 F.3d 93 (2d Cir. 2001); *In re NYSE Specialists Sec. Litig.*, 503 F.3d 89 (2d Cir. 2007).

²⁹ AAA Rules only authorize appellate review of arbitration awards if the parties consent to appellate rights. See AAA Rules A-1.

³⁰ As the Supreme Court has explained, “[t]he arbitrator’s construction holds, however good, bad, or ugly.” *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 573 (2013).

courts to vacate, modify, or correct final arbitration decisions.³¹ In the absence of unusual circumstances, however, meaningful appellate review is generally unavailable: none of the grounds provided by the FAA would authorize a court to vacate an arbitration award that was premised on an error of law.³²

d. Rules Governing Discovery and Evidence

Considering the magnitude of data transmitted to the CAT, a dispute is likely to involve a substantial volume of documents and information. Additionally, many documents that might be the subject of discovery requests are likely to be either commercially sensitive for Industry Members or involve nonpublic, sensitive information regarding the CAT's security.

Parties to litigation are afforded the benefits of rules governing the discovery process and admissibility of evidence. These rules promote predictability of litigation, efficiency of resolutions, and fairness of results,³³ and provide mechanisms for facilitating discovery as well as the admission of evidence.³⁴ For example, litigants in court must comply with clear discovery rules, which govern the scope of discovery and the timing and content of disclosures, and facilitate communication among the parties and the court regarding these matters.³⁵ Litigants in court also have the benefit of a uniform set of rules governing the admissibility of evidence.³⁶ These

³¹ See 9 U.S.C. § 9 (providing that if the parties have contractually agreed that a specific federal court will enter judgment upon an arbitration award, then at any time within one year after the award is made, any party may apply to that court for an order confirming the award; if no court is specified, then the application may be made to the U.S. district court for the district within which the award was made); 9 U.S.C. § 10 (providing that the U.S. district court where the arbitration award was made may vacate the award upon an application of any party to the arbitration, where the award was "procured by corruption, fraud, or undue means," where there "was evident partiality or corruption in the arbitrators," where the arbitrators "were guilty of misconduct," or where the arbitrators "exceeded their powers" or "so imperfectly executed them that a mutual, final, and definite award" was not made); 9 U.S.C. § 11 (providing the following grounds for which a U.S. district court may upon the application of any party to an arbitration modify or correct an arbitration award: "an evident material miscalculation" or mistake in the award; an award upon a matter "not submitted" to the arbitrators; or "where the award is imperfect in matter of form not affecting the merits of the controversy").

³² See 9 U.S.C. § 11.

³³ See, e.g., Fed. R. Civ. P. 1 (noting that the purpose of the rules is to "secure the just, speedy, and inexpensive determination of every action and proceeding").

³⁴ See generally Fed. R. Civ. P. 26-28, 30-31, 33-34, 36; Fed. R. Evid. 101-02; N.Y. C.P.L.R. §§ 3101-02, 3122; 22 N.Y.C.R.R. §§ 202.11-12; Guide to N.Y. Evid. rule 1.03. Courts also have subpoena power over witnesses. See Fed. R. Civ. P. 30(a)(1), 45(a)(1)(B), 45(c)(1); N.Y. C.P.L.R. §§ 2301, 3106(b); 22 N.Y.C.R.R. § 202.20-d; see also 28 U.S.C. § 1783; Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Convention); Uniform Interstate Depositions and Discovery Act (the "UIDDA") (providing mechanism for New York State courts to serve out-of-state subpoenas; in the absence of the UIDDA, the provisions for service applicable in the out-of-state jurisdiction apply).

³⁵ See, e.g., Fed. R. Civ. P. 26; N.Y. C.P.L.R. § 3101; 22 N.Y.C.R.R. §§ 202.11-12.

³⁶ See Fed. R. Evid. 101, 102. New York State does not have a statutory code of evidence; instead, its rules of evidence reside in judicial precedent, the State constitution, and State statutes. The New York Unified Court System has compiled a guide setting forth current practice in New York State courts regarding the application of the rules of evidence. See generally Guide to N.Y. Evid. Rule 1.03, Note. New York evidence law is generally in accord with

protections do not exist under the AAA Rules,³⁷ which provide a more limited set of procedures pertaining to discovery and evidence.³⁸ Given the breadth and depth of the discovery and evidence rules in federal and state court, and the fact that courts are bound by precedent and subject to appellate review, *see supra* § A(4)(b)-(c), courts are better suited to handle disputes regarding CAT reporting.

5) Designating the SDNY and New York State Courts in a Forum Selection Provision is Consistent with the Exchange Act

The Proposed Amendment’s Forum Selection Provision designates the SDNY, or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court in New York County within the First Judicial Department as the venue for any dispute concerning CAT reporting. Both forums would provide the parties with a sophisticated tribunal that has experience adjudicating matters involving the federal securities laws, market structure, and cybersecurity.

As an initial matter, based on the potential parties to any lawsuit arising out of CAT reporting, New York is likely to be a convenient venue. As the reputed financial capital of the world, New York is home to the two largest securities exchanges and several other Participants. Additionally, many of the most prominent Industry Members by trading volume are located in New York.³⁹

The existing Reporter Agreement and Reporting Agent Agreement both provide that any claim must be commenced in New York (i.e., in the current arbitration provision) and that the Reporter Agreement and Reporting Agent Agreement are governed by New York law.⁴⁰ Relatedly, all dates and times referenced in the agreements are set to New York time.⁴¹

In addition to being a convenient venue for potential parties, the Participants’ proposed forum—and backup forum—have the requisite subject matter expertise to resolve claims in relation to CAT reporting fairly and efficiently. The Second Circuit has extensive experience with securities and

the Federal Rules of Evidence, including rules on relevance, prejudice, privilege, and hearsay. *See, e.g., id.* rules 4.01, 4.07, 5.01-09, and 8.00-01.

³⁷ AAA Rules P-1(b) (instructing parties to carefully “avoid importing procedures from court systems”).

³⁸ *See, e.g., id.* (disclaiming procedures from court systems), R-22 (providing for pre-hearing exchange and production of information), L-3(f) (noting that depositions are available only in “exceptional” circumstances), R-34 (governing the admissibility of evidence and noting conformity to the legal rules of evidence is not necessary); *see also* 9 U.S.C. § 7 (allowing arbitrator to subpoena witnesses to testify, but only in hearings, as opposed to depositions); *CVS Health Corp. v. Vividus, LLC*, 878 F.3d 703, 706, 708 (9th Cir. 2017) (holding that “section 7 of the FAA does not grant arbitrators the power to order third parties to produce documents prior to an arbitration hearing”); *Life Receivables Tr. v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 217 (2d Cir. 2008); *Hay Grp., Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 407 (3d Cir. 2004) (Alito, J.).

³⁹ Those Industry Members include, for example, Citigroup Global Markets, Inc., Goldman Sachs & Co. LLC, Morgan Stanley & Co. LLC, J.P. Morgan Securities, LLC, Deutsche Bank Securities, Inc., UBS Securities LLC, and Credit Suisse Securities USA, LLC.

⁴⁰ Reporter Agreement § 7.11; Reporting Agent Agreement § 7.11.

⁴¹ Reporter Agreement § 7.8; Reporting Agent Agreement § 7.8.

financial regulation matters.⁴² Moreover, applying the precedent set by the Second Circuit, the SDNY routinely handles complicated securities matters with broad implications for the national financial markets.

The Second Circuit—and the SDNY in particular—also has significant experience determining the rights and remedies of parties following data breaches, including in relation to critical issues such as standing and damages,⁴³ and balancing the competing interests involved in adjudicating sensitive and costly cybersecurity incidents.⁴⁴ In light of its extensive experience with securities, financial regulation, market structure, and cyber matters, it is beyond reasonable dispute that the Second Circuit and the SDNY have the appropriate expertise to resolve a dispute regarding CAT reporting.

As the Commission noted in its Disapproval Order, in the absence of a limitation on liability, the Participants can assert regulatory immunity in response to a claim for damages. The Second Circuit has authored several seminal opinions regarding the scope of regulatory immunity,⁴⁵ and courts in other jurisdictions often cite to and rely on the Second Circuit’s analyses to apply the regulatory immunity doctrine to cases pending before them.⁴⁶

New York State courts—particularly those within the Commercial Division of the First Judicial Department—are likewise well suited to address the complex issues that might arise during

⁴² The Supreme Court has referred to the Second Circuit as the “Mother Court” regarding securities matters. *See, e.g., Morrison v. Nat’l Austl. Bank*, 561 U.S. 247, 275–76 (2010) (Stevens, J., concurring in judgment) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975)).

⁴³ *See, e.g., McMorris v. Carlos Lopez & Assocs., LLC*, 995 F.3d 295, 300–03 (2d Cir. 2021) (standing); *In re GE/CBPS Data Breach Litig.*, No. 20-cv-2903 (KPF), 2021 WL 3406374, at *5–7 (S.D.N.Y. Aug. 4, 2021) (standing); *Sackin v. TransPerfect Glob., Inc.*, 278 F. Supp. 3d 739, 745 (S.D.N.Y. 2017) (damages); *Hammond v. Bank of New York Mellon Corp.*, No. 08-cv-6060 (RMB) (RLE), 2010 WL 2643307, at *4 (S.D.N.Y. June 25, 2010) (damages); *see also Smahaj v. Retrieval-Masters Creditors Bureau, Inc.*, 69 Misc.3d 597, 599–600, 604 (Sup. Ct. Westchester Cnty. 2020) (damages).

⁴⁴ *See, e.g., McMorris*, 995 F.3d at 302 (weighing relative sensitivity of certain types of data); *Wallace v. Health Quest Sys., Inc.*, No. 20-cv-545 (VB), 2021 WL 1109727, at *1 n.1 (S.D.N.Y. Mar. 23, 2021) (addressing claims for negligence, breach of implied contract, breach of contract, unjust enrichment, breach of confidence, bailment, and violations of New York’s General Business Law); *see also Pena v. British Airways, PLC (UK)*, No. 18-cv-6278 (LDH) (RML), 2020 WL 38989055, at *2 n.2, *3–4, *6 (E.D.N.Y. Mar. 30, 2020) (granting motion to dismiss for lack of standing, preemption, and failure to state a claim); *see also Keach v. BST & Co. CPAs, LLP*, 71 Misc.3d 1204(A), at *7 (Sup. Ct. Albany Cnty. 2021) (citations omitted).

⁴⁵ *See Standard Inv. Chartered, Inc. v. Nat’l Ass’n of Sec. Dealers, Inc.*, 637 F.3d 112, 116 (2d Cir. 2011) (noting Second Circuit decisions on regulatory immunity in the context of “(1) disciplinary proceedings against exchange members, [*Barbara v. NYSE*, 99 F.3d 49, 59 (2d Cir. 1996)]; (2) the enforcement of security rules and regulations and general regulatory oversight over exchange members, [*D’Alessio*, 258 F.3d at 106]; (3) the interpretation of the securities laws and regulations as applied to the exchange or its members, *id.*; (4) the referral of exchange members to the SEC and other government agencies for civil enforcement or criminal prosecution under the securities laws, *id.*; and (5) the public announcement of regulatory decisions, [*DL Cap. Grp., LLC v. Nasdaq Stock Mkt., Inc.*, 409 F.3d 93, 98 (2d Cir. 2005)].”).

⁴⁶ *See, e.g., In re Series 7 Broker Qualification Exam Scoring Litig.*, 548 F.3d 110, 113–15 (D.C. Cir. 2008) (citing *Barbara*, 99 F.3d 49; *Desiderio v. NASD*, 191 F.3d 198 (2d Cir. 1999); *DL Cap. Grp.*, 409 F.3d 93; *Feins v. Am. Stock Exch., Inc.*, 81 F.3d 1215 (2d Cir. 1996)).

litigation regarding a CAT Data breach. The court's judges focus primarily on complex cases and have developed sophisticated procedural rules designed to foster the efficient and fair resolution of disputes.⁴⁷ Relying in part on the Second Circuit's developed body of case law, the New York state courts within the First Judicial Department are one of only a few state courts that have addressed the scope of regulatory immunity.⁴⁸

6) Governing Law Provision

The Proposed Amendment modifies the governing law provision contained in the existing Reporter Agreement and Reporting Agent Agreement to provide that the agreements, and any matters between CAT LLC and either a CAT Reporter or a CAT Reporting Agent, will be governed by federal law and the laws of the State of New York. The existing governing law provision refers only to New York state law and, because CAT LLC was created pursuant to federal law and is subject to a federal regulatory regime, claims by or against CAT LLC could involve issues of federal law. Therefore, the Proposed Amendment modifies the existing governing law provision to clarify that any disputes arising out of or related to the agreements will be governed by both federal law and by New York state law.

B. Governing or Constituent Documents

Not applicable.

C. Implementation of Amendment

The Participants propose to implement the Proposed Amendment by making the revised agreements effective upon Commission approval of this Proposed Amendment, without requiring CAT Reporters and CAT Reporting Agents to re-sign the agreements.

D. Development and Implementation Phases

The Participants propose the revised agreements be effective upon Commission approval of this Proposed Amendment, without requiring CAT Reporters and CAT Reporting Agents to re-sign the agreements.

E. Analysis of Impact on Competition

The Participants do not believe the Proposed Amendment will have any impact on competition. The Proposed Amendment would mandate that all CAT Reporters and CAT Reporting Agents are bound by revised agreements that contain the amended provisions. Moreover, the Forum Selection Provision would apply equally to all Industry Members, the Participants, and CAT LLC, and would

⁴⁷ See generally 22 N.Y.C.R.R. § 202.70 (Rules of the Commercial Division of the Supreme Court). The Commercial Division “is an efficient, sophisticated, up-to-date court dealing with challenging commercial cases” and “its primary goal [is] the cost-effective, predictable and fair adjudication of complex commercial cases.” 22 N.Y.C.R.R. § 202.70(g) (Preamble to the Rules of practice for the Commercial Division).

⁴⁸ See *Wey v. Nasdaq, Inc.*, 188 A.D.3d 587 (1st Dep’t 2020).

not impact the relative competitive positions among different Industry Members. Additionally, as discussed above, adjudication of disputes relating to CAT reporting in courts promotes consistency of outcomes, which thereby promotes fair competition. Conversely, arbitration could lead to disparate and inconsistent outcomes of similar disputes, which would unfairly advantage certain parties over others.

F. Written Understanding or Agreements Relating to Interpretation of, or Participation in, Plan

Not applicable.

G. Approval by Plan Sponsors in Accordance with Plan

Section 12.3 of the CAT NMS Plan states that, subject to certain exceptions, the Plan may be amended from time to time only by a written amendment, authorized by the affirmative vote of not less than two-thirds of all of the Participants, that has been approved by the SEC pursuant to Rule 608 or has otherwise become effective under Rule 608. The Participants, by a unanimous vote of the Operating Committee obtained via written consent on September 6, 2022, have authorized the filing of this Proposed Amendment with the SEC in accordance with the Plan.

H. Description of Operation of Facility Contemplated by the Proposed Amendment and any Fees or Charges in Connection thereto

Not applicable.

I. Terms and Conditions of Access

Not applicable.

J. Method and Frequency of Processor Evaluation

Not applicable.

K. Dispute Resolution

Not applicable.

* * * * *

Thank you for your attention to this matter. Please contact me at (212) 229-2455 if you have any questions or comments.

Ms. Vanessa Countryman

September 8, 2022

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Respectfully submitted,

A handwritten signature in black ink, appearing to read "Michael Simon". The signature is fluid and cursive, with the first name "Michael" and last name "Simon" clearly distinguishable.

Michael Simon

CAT NMS Plan Operating Committee Chair

cc: The Hon. Gary Gensler, Chair
The Hon. Caroline A. Crenshaw, Commissioner
The Hon. Hester M. Peirce, Commissioner
The Hon. Mark T. Uyeda, Commissioner
The Hon. Jaime Lizarraga, Commissioner
Mr. Hugh Beck, Senior Advisor, Regulatory Reporting
Mr. Haoxiang Zhu, Director, Division of Trading and Markets
Mr. David S. Shillman, Associate Director, Division of Trading and Markets
Mr. David Hsu, Assistant Director, Division of Trading and Markets
Mr. Mark Donohue, Senior Policy Advisor, Division of Trading and Markets
Ms. Erika Berg, Special Counsel, Division of Trading and Markets

APPENDIX A

LIMITED LIABILITY COMPANY AGREEMENT OF CONSOLIDATED AUDIT TRAIL, LLC

* * * * *

ARTICLE XII

[proposed additions]

* * * * *

Section 12.15. Forum Selection; Governing Law. Each CAT Reporter shall be bound by an amended Consolidated Audit Trail Reporter Agreement containing, in substance, the forum selection provision and governing law provision in Appendix E to this Agreement. Each Person engaged by a CAT Reporter to report CAT Data to the Central Repository on behalf of such CAT Reporter shall be bound by an amended Consolidated Audit Trail Reporting Agent Agreement containing, in substance, the forum selection provision and governing law provision in Appendix F to this Agreement. The Operating Committee shall have authority in its sole discretion to make non-substantive amendments to the forum selection provision and governing law provision in the Consolidated Audit Trail Reporter Agreement and the Consolidated Audit Trail Reporting Agent Agreement.

* * * * *

APPENDIX E

[proposed additions]

* * * * *

Forum Selection Provision in the CAT Reporter Agreement

7.9. Forum Selection. EXCEPT AS OTHERWISE PROHIBITED BY FEDERAL LAW OR OTHERWISE PROVIDED BY SECTION 11.5 OF THE CAT NMS PLAN, FOR ANY DISPUTE, CONTROVERSY, OR CLAIM IN CONNECTION WITH, RELATING TO, OR ASSOCIATED IN ANY WAY WITH THIS AGREEMENT, CAT REPORTING, OR THE CAT SYSTEM, THE PARTIES IRREVOCABLY SUBMIT TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NEW YORK STATE SUPREME COURT FOR NEW YORK COUNTY IN THE BOROUGH OF MANHATTAN, INCLUDING THE COMMERCIAL DIVISION. Each Party hereby agrees to commence any such action, suit, or other proceeding in (i) the United States District Court for the Southern District of New York, or (ii) if such action, suit, or other proceeding cannot be brought in such court for jurisdictional reasons, to commence such suit, action, or other proceeding in the New York State Supreme Court for New York County, borough of Manhattan, and seek assignment to the New York County Commercial Division whenever the jurisdictional requirements for Commercial Division assignment are met. Service of

any process, summons, notice, or document by U.S. registered mail to such Party's respective address shall be effective service of process for any action, suit, or other proceeding in New York with respect to any matters to which it has submitted to jurisdiction in this Agreement. Each Party irrevocably and unconditionally waives any objection to the laying of venue of any action, suit, or other proceeding connected to, related to, or associated in any way with this Agreement, CAT Reporting, or the CAT System in the courts identified in items (i)-(ii) above, and hereby and thereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit, or other proceeding brought in any such court has been brought in an inconvenient forum. The provisions of this paragraph shall apply to any action, suit, or other proceeding commenced by any Party against any other Party to this Agreement, including those in which one or more Participants or the Plan Processor (or any Representatives of one or more Participants or the Plan Processor) are named as parties, regardless of whether CATLLC is also named as a party.

Governing Law Clause in the CAT Reporter Agreement

7.11. Governing Law. THIS AGREEMENT, AND ALL MATTERS BETWEEN CATLLC AND CAT REPORTER ARISING OUT OF OR RELATING TO THIS AGREEMENT, SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE FEDERAL LAWS OF THE UNITED STATES AND THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO ANY LAWS, RULES OR PROVISIONS THAT WOULD CAUSE THE APPLICATION OF LAWS OF ANY JURISDICTION OTHER THAN THE FEDERAL LAWS OF THE UNITED STATES AND THE LAWS OF THE STATE OF NEW YORK.

* * * * *

APPENDIX F

[proposed additions]

* * * * *

Forum Selection Provision in the CAT Reporting Agent Agreement

7.9. Forum Selection. EXCEPT AS OTHERWISE PROHIBITED BY FEDERAL LAW OR OTHERWISE PROVIDED BY SECTION 11.5 OF THE CAT NMS PLAN, FOR ANY DISPUTE, CONTROVERSY, OR CLAIM IN CONNECTION WITH, RELATING TO, OR ASSOCIATED IN ANY WAY WITH THIS AGREEMENT, CAT REPORTING, OR THE CAT SYSTEM, THE PARTIES IRREVOCABLY SUBMIT TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK AND THE NEW YORK STATE SUPREME COURT FOR NEW YORK COUNTY IN THE BOROUGH OF MANHATTAN, INCLUDING THE COMMERCIAL DIVISION. Each Party hereby agrees to commence any such action, suit, or other proceeding in (i) the United States District Court for the Southern District of New York, or (ii) if such action, suit, or other proceeding cannot be brought in such court for jurisdictional reasons, to commence such suit, action, or other proceeding in the New York State Supreme Court for New York County, borough of Manhattan, and seek assignment to the New York County Commercial Division whenever the jurisdictional requirements for Commercial Division assignment are met. Service of

any process, summons, notice, or document by U.S. registered mail to such Party's respective address shall be effective service of process for any action, suit, or other proceeding in New York with respect to any matters to which it has submitted to jurisdiction in this Agreement. Each Party irrevocably and unconditionally waives any objection to the laying of venue of any action, suit, or other proceeding connected to, related to, or associated in any way with this Agreement, CAT Reporting, or the CAT System in the courts identified in items (i)-(ii) above, and hereby and thereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit, or other proceeding brought in any such court has been brought in an inconvenient forum. The provisions of this paragraph shall apply to any action, suit, or other proceeding commenced by any Party against any other Party to this Agreement, including those in which one or more Participants or the Plan Processor (or any Representatives of one or more Participants or the Plan Processor) are named as parties, regardless of whether CATLLC is also named as a party.

Governing Law Clause in the CAT Reporting Agent Agreement

7.11. Governing Law. THIS AGREEMENT, AND ALL MATTERS BETWEEN CATLLC AND CAT REPORTING AGENT ARISING OUT OF OR RELATING TO THIS AGREEMENT, SHALL BE CONSTRUED AND ENFORCED IN ACCORDANCE WITH THE FEDERAL LAWS OF THE UNITED STATES AND THE LAWS OF THE STATE OF NEW YORK WITHOUT GIVING EFFECT TO ANY LAWS, RULES OR PROVISIONS THAT WOULD CAUSE THE APPLICATION OF LAWS OF ANY JURISDICTION OTHER THAN THE FEDERAL LAWS OF THE UNITED STATES AND THE LAWS OF THE STATE OF NEW YORK.