

VIA EMAIL (rule-comments@sec.gov)

May 18, 2023

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

Re: File Number 4-698 – Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail regarding CAT Funding Model

Dear Ms. Countryman:

On March 13, 2023, the Consolidated Audit Trail, LLC (“CAT LLC” or “Company”), on behalf of the Participants<sup>1</sup> in the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed amendment to the CAT NMS Plan.<sup>2</sup> The SEC published the proposed amendment for comment on March 15, 2023.<sup>3</sup> The proposal would amend the CAT NMS Plan<sup>4</sup> to implement a revised funding model (“Funding Proposal”) for the consolidated audit trail (“CAT”) and to establish a fee schedule for Participant CAT fees in accordance with the Funding Proposal.<sup>5</sup> Commenters have submitted three comment letters in response to the Proposing Release.<sup>6</sup> CAT LLC submits this letter to respond to topics raised in those comment letters, including (i) charging CAT fees to CAT Executing Brokers, (ii) the allocation of CAT costs among Industry Members and Participants, (iii) cost transparency, (iv) the implementation process for CAT fees, (v) collaboration with the industry regarding CAT fees, and (vi) CAT costs for 2022. CAT LLC notes that the responses set forth in this letter

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<sup>1</sup> 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., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc. (“FINRA”), Investors Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange 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, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc. and NYSE National, Inc.

<sup>2</sup> Letter from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, SEC (Mar. 13, 2023).

<sup>3</sup> Securities Exchange Act Rel. No. 97151 (Mar 15, 2023), 88 Fed. Reg. 17086 (Mar. 21, 2023) (“Proposing Release”).

<sup>4</sup> The Limited Liability Company Agreement of Consolidated Audit Trail, LLC is the CAT NMS Plan.

<sup>5</sup> Unless otherwise defined herein, capitalized terms are defined as set forth in the CAT NMS Plan and the Proposing Release.

<sup>6</sup> See Letter from Timothy Miller, Chief Operating Officer, DASH Financial Technologies LLC, to Vanessa Countryman, Secretary, SEC (Apr. 11, 2023) (“DASH Letter”); Letter from Marcia E. Asquith, Corporate Secretary, EVP, Board and External Relations, FINRA, to Vanessa Countryman, Secretary, SEC (Apr. 11, 2023) (“FINRA Letter”); and Letter from Ellen Greene, Managing Director, Equities & Options Market Structure and Joseph Corcoran, Managing Director, Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, SEC (May 2, 2023) (“SIFMA Letter”). The comment letters submitted in response to the Proposing Release are available at <https://www.sec.gov/comments/4-698/4-698-a.htm>.

represent the consensus of the Participants, but that all Participants may not fully agree with each response set forth in this letter.

To date, the significant economic costs of building and operating the CAT—more than \$500 million through the end of 2022 and growing<sup>7</sup>—have been borne entirely by the Participants. Over the past seven years, CAT LLC has gone through an extensive process of evaluating and seeking comment on various funding models. The Funding Proposal is now the fourth fee model proposal under consideration by the Commission. The continued funding of the CAT solely by the Participants was and is not contemplated by the CAT NMS Plan or Rule 613,<sup>8</sup> nor is it a financially sustainable approach. The Funding Proposal provides for an equitable allocation of reasonable dues, is not unfairly discriminatory and does not impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act, and should be approved by the Commission.

## **I. Charging CAT Fees to CAT Executing Brokers**

### **A. Support for Charging CAT Executing Brokers**

SIFMA argues in its comment letter that the proposed “definition of ‘executing broker’ in the proposal leads to the inequitable allocation of fees,”<sup>9</sup> and that CAT LLC has not engaged in a meaningful discussion with the industry regarding the Funding Proposal. However, CAT LLC has carefully considered the industry’s comments on the Funding Proposal and the prior funding proposals and specifically proposed charging executing brokers in direct response to SIFMA’s prior recommendation to use executing brokers. Indeed, SIFMA has consistently recommended charging executing brokers until its most recent comment letters:

- In its October 2022 comment letter, SIFMA stated that “the Executed Share Model takes a step backwards from the prior CAT funding model by changing the collection model process, switching it from the executing broker to the clearing broker.”<sup>10</sup> In response, CAT LLC adopted SIFMA’s recommendation to impose the payment obligation on the executing broker, rather than the clearing broker.<sup>11</sup>
- In its December 2022 comment letter, SIFMA stated that “we support changing the payment obligation to executing brokers.”<sup>12</sup> However, SIFMA further argued that,

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<sup>7</sup> The costs prior to 2022 are set forth in detail in the Proposing Release. Proposing Release at 17110-11. The costs for 2022 are set forth in Section VI of this letter.

<sup>8</sup> See Rule 613(a)(1)(vii)(D) of Regulation NMS under the Exchange Act.

<sup>9</sup> SIFMA Letter at 3.

<sup>10</sup> Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, and Joseph Corcoran, Managing Director, Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, SEC (Oct. 7, 2022) (“October 2022 SIFMA Letter”) at 5.

<sup>11</sup> See Letter from Mike Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, SEC (Nov. 15, 2022).

<sup>12</sup> See Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, and Joseph Corcoran, Managing Director, Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, SEC (Dec. 14, 2022) at 2.

because CAT LLC had adopted SIFMA’s recommendation, CAT LLC should be required “to withdraw the currently-pending proposed amendment and refile the proposed change as a completely new amendment to the NMS plan under Rule 608,”<sup>13</sup> which would restart the 300-day period for consideration under Rule 608(b)(2)(ii). SIFMA argued that, absent such a delay, Industry Members and the public would be deprived of “the opportunity to fully consider and meaningful comment on the contemplated change”<sup>14</sup> SIFMA itself had recommended.

SIFMA now argues that the Funding Proposal should be modified to charge “originating brokers,” in lieu of the executing broker. Because SIFMA previously argued that CAT LLC’s decision to adopt SIFMA’s own proposal to use executing brokers should trigger a new 300-day comment period, CAT LLC fears that SIFMA’s recent objection to its own proposal to use executing brokers is an attempt to delay further the approval of a funding model and the resultant payment of CAT fees by its members, rather than a concern about the merits of charging executing brokers.<sup>15</sup>

## **B. Charging a Subset of Industry Members**

SIFMA also criticizes the proposal to charge executing brokers because the fee would be charged to a subset of Industry Members and, as a result, that subset of Industry Members would incur expenses that other Industry Members would not incur.<sup>16</sup> CAT LLC continues to believe that charging CAT Executing Brokers would satisfy the requirements of the Exchange Act.

As a preliminary matter, charging a subset of broker-dealers a fee is appropriate under the Exchange Act. The SEC has regularly approved fees that are charged to some, but not all, broker-dealers. For example, any regulatory fee that is charged based on a transaction is charged to the broker-dealer(s) involved with the transaction; it is not charged to other broker-dealers that are involved in the origination, routing or other market activity related to the order. For example, FINRA’s trading activity fee is assessed to a subset of FINRA members – that is, it is assessed on the sell side of member transactions.<sup>17</sup> Similarly, the options exchanges charge options regulatory fees per executed contract side, and, for both options and equities, Section 31-related fees are charged to the sell-side in a transaction.<sup>18</sup> In each such case, the SEC determined that the fee was in compliance with the Exchange Act.

Moreover, charging all Industry Members a CAT fee would raise similar issues raised by the message traffic model set forth in the CAT NMS Plan. Under that model, all Industry Members submitting order and transaction data to the CAT would have been charged a CAT fee,

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> CAT LLC discusses issues with charging originating brokers below in Section I(C) of this letter. CAT LLC also previously addressed this comment in its prior response to comments. Letter from Mike Simon, CAT NMS Plan Operating Committee Chair Emeritus, to Vanessa Countryman, Secretary, SEC (Feb. 15, 2023) at 6.

<sup>16</sup> SIFMA Letter at 5.

<sup>17</sup> Section 1 of Schedule A of FINRA Bylaws.

<sup>18</sup> *See, e.g.*, MIA X Options Exchange, Fee Schedule, as of February 1, 2023; Nasdaq PHLX Rules, Options 7, Section 6(D); and Cboe EDGX Fee Schedule, effective April 28, 2023.

regardless of their role related to the order (*e.g.*, origination, routing, execution) and regardless of whether a transaction occurred. CAT LLC changed course from the original message traffic model for the following reasons, among others:

in general, Industry Member revenue, including revenue derived from fees Industry Members charge their clients, is often driven by transactions. Because the message traffic is separate from whether or not a transaction occurs, fees based on message traffic may not correlate with common revenue or fee models. As a result, CAT fees based on message traffic could impose an outsized adverse financial impact on certain Industry Members.<sup>19</sup>

Charging a CAT fee to all Industry Members, as SIFMA proposes, would raise this same issue.

CAT LLC recognizes that, under the proposal to charge CAT Executing Brokers, the CAT Executing Broker, but not other Industry Members involved in a given order lifecycle, would be required to pay the CAT fees, and that Industry Members that sought to recoup such fees would have to develop processes to collect such fees from their clients. CAT LLC does not believe that this regulatory requirement differs from the effect of other types of regulatory fees, such as the FINRA trading activity fee, the options regulatory fee and Section 31-related sales value pass-through fees. In each such case, a subset of broker-dealers is required to pay a transaction-based regulatory fee, and those broker-dealers seeking to recover such fees from other broker-dealers or non-broker-dealers have established processes with regard to the pass-through of such fees.

### **C. SIFMA’s Proposed Alternative Approach: Charging Originating Brokers**

SIFMA now recommends charging CAT fees to originating brokers instead of CAT Executing Brokers. Under this proposal, SIFMA would define “originating broker” as “the broker-dealer that first reported to CAT an associated order that resulted in the transaction (*e.g.*, “MENO” or “MONO” events under the CAT Reporting Technical Specifications for Industry Members).”<sup>20</sup> For the reasons discussed below, as well as those in the Proposing Release, CAT LLC continues to support charging CAT Executing Brokers.

#### **1. Subset of Industry Members**

Despite criticizing the Funding Proposal as “unfair” because it would charge a subset of Industry Members – executing brokers – a CAT fee (as discussed above), SIFMA nevertheless proposes to do the same thing by advocating that CAT LLC charge a different subset of Industry Members – “originating brokers.”<sup>21</sup> Contrary to SIFMA’s assertion, the proposal to charge originating brokers would not “subject all Industry Members that brought activity to the market

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<sup>19</sup> Securities Exchange Act Rel. No. 94984 (May 25, 2022), 87 Fed. Reg. 33226, 33232 (June 1, 2022).

<sup>20</sup> SIFMA Letter at 5.

<sup>21</sup> *Id.* at 5.

to CAT Fees.”<sup>22</sup> For example, such an approach would not include Industry Members involved in the routing or execution that were not also originating brokers. Indeed, some of the largest Industry Members are not involved in the origination of orders or originate few orders in relation to their overall activity. Moreover, under SIFMA’s proposal, the subset of Industry Members charged CAT fees – the originating brokers – would establish processes for paying the CAT fees, and, if they so choose, to pass-through the fees to their clients, similar to CAT Executing Brokers.

## 2. Implementation Issues

SIFMA argues that charging originating brokers a CAT fee would be simpler and easier to implement than the proposed use of the CAT Executing Broker.<sup>23</sup> However, there are already several existing examples of transaction-based fees being assessed to executing brokers as opposed to the originating broker. In addition, based on a deep understanding of the CAT System and an analysis of alternative approaches, CAT LLC disagrees with this conclusion. Charging the originating Industry Member would be difficult to implement and increase the costs of implementing CAT fees, whereas charging CAT Executing Brokers is simple, straightforward and in line with existing fee and business models.

An implementation of CAT fees that charges the originating broker on an executed trade introduces far more complexity than one that charges the CAT Executing Broker. For any given trade (buy or sell), there is only one CAT Executing Broker to which shares can be allocated.<sup>24</sup> As such, charging the CAT Executing Broker is simple and straightforward, and leverages a one-to-one relationship between billable events (trades) and billable parties. In contrast, there may be many originating brokers associated with a single trade event. Shares cannot be simply allocated to originating brokers in a one-to-one manner. Each trade must be broken down on a pro-rata basis, accounting for one or more layers of aggregation, disaggregation, and representation of the underlying orders. SIFMA’s suggestion of a model that begins the funding analysis with new order events (*e.g.*, MENO or MONO events) and then looks for any execution or fulfillment that is directly associated with that event<sup>25</sup> does not reduce or mitigate the complexity associated with aggregation. Furthermore, SIFMA’s recommendation is at odds with the design of the CAT System, from which the billable activity is sourced. While CAT is indeed designed to capture and unwind complex aggregation scenarios, the data and linkages are structured to facilitate regulatory use, and not a billing mechanism that assesses fees on a distinct set of executed trades; it is not simply a matter of using existing CAT linkages, as SIFMA proposes. Finally, charging originating brokers implicates issues related to lifecycle linkage rates, which are very high, but not 100%, as well as issues related to corrections, cancellations and allocations.

As noted, charging CAT Executing Brokers is not novel, would avoid these complications, would provide for an equitable allocation of reasonable dues, is not unfairly

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<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> For a description of the relevant specific fields, *see* Proposing Release at 17088.

<sup>25</sup> SIFMA Letter at 6.

discriminatory and does not impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act.

## II. Allocation of CAT Costs

### A. Allocation of CAT Costs to Industry Members

Under the Funding Proposal, the three main parties to each transaction – the CAT Executing Broker for the Buyer (“CEBB”), the CAT Executing Broker for the Seller (“CEBS”), and the related Participant where the transaction occurred or was reported – would each pay an equal amount per executed equivalent share. SIFMA objects to the resulting allocation of CAT costs to Industry Members (*i.e.*, one third to CEBBs and one-third to CEBSs, for a total of two-thirds to Industry Members), asserting that CAT LLC’s arguments in favor of the allocation, including arguments related to the complexity and of Industry Member CAT activity and the number and financial resources of Industry Members, do not support the proposed allocation.<sup>26</sup> As discussed below, CAT LLC continues to believe that the proposed allocation of CAT costs among Industry Members and Participants associated with each transaction satisfies the requirements of the Exchange Act for these and other reasons as discussed in detail in the Proposing Release.

#### 1. Complexity

CAT LLC believes that Industry Members’ chosen business models and their resulting trading activity are substantial drivers of CAT costs, and that, accordingly, it is reasonable to allocate a portion of the CAT cost to Industry Members (*i.e.*, one third to CEBBs and one-third to CEBSs, for a total of two-thirds to Industry Members), among other reasons. SIFMA, however, argues that Participant activity is similarly complex, and, therefore, Industry Member complexity should not be a basis for the two-thirds allocation to Industry Members.<sup>27</sup> This argument fails to recognize that the analysis is based on the effects of the business models on the costs of the CAT, not on the complexity of the market generally. The complexity of Industry Member activity adds significantly to the cost of the CAT in a way that Participant activity does not. Moreover, a Participant would also pay the same amount as each CEBB and CEBS for each transaction.<sup>28</sup>

The complexity and diversity of Industry Members’ chosen business models and order handling practices contributes substantially to the costs of the CAT. For example, in light of the complexity of Industry Member market activity, the CAT’s technical documentation must

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<sup>26</sup> *Id.* at 3, 6-8.

<sup>27</sup> *Id.* at 6-7.

<sup>28</sup> For comparison, for example, under the Section 31-related fee programs, the exchanges and FINRA are assessed fees by the SEC on sell-side transactions, which fees are then, in turn, passed-through 100% via sales value fee programs of each of the exchanges and FINRA to their members for the same sell-side transactions (*i.e.*, sell-side broker-dealers pay 100% of the fee under the current structures). It would seem to be very difficult to reconcile how the allocation under that funding model, which has been in operation for a significant period time, is fair and reasonable and consistent with the requirements of the Exchange Act but the allocation under the Funding Proposal would not be.

address hundreds of scenarios for Industry Members, including, for example, scenarios related to representative orders, internal routing, order modification, order cancellation, ATS scenarios, OTC scenarios, foreign scenarios, child orders, proprietary orders, fractional shares, stop and conditional orders, RFQs, floor activity and more. The processing and storage of data related to such a large number of complex reporting scenarios requires very complex algorithms, which, in turn, lead to significant data processing and storage costs. In contrast, the Participants do not originate market activity or orders or otherwise bring this level of complexity to CAT reporting. Although there are unique trading features across the different exchanges, such exchange features are not nearly as diverse as the ways in which Industry Members execute trades.

## **2. Ability to Pay**

SIFMA objects to CAT LLC taking into consideration the Participants ability to pay CAT fees in proposing the 1/3, 1/3, 1/3 allocation.<sup>29</sup> Yet, the Exchange Act specifically requires such fees to be fair and reasonable. Accordingly, CAT LLC believes that fairness issues require the Participants to consider the greater financial resources of Industry Members as one factor in creating a funding model. There are only 25 Participants and approximately 1100 Industry Members, and the Participants represent approximately 4% of the total CAT Reporter revenue while Industry Members represent 96% of the total CAT Reporter revenue. Moreover, SIFMA's position is at odds with its own comments asserting that an Industry Member's ability to pay is an important consideration in the context of CAT fees. For example, SIFMA previously objected to prior CAT funding model proposals, arguing that the proposed CAT fees "would create a significant burden on smaller ATs,"<sup>30</sup> or on market makers.<sup>31</sup>

## **3. Allocation Based on Cost**

SIFMA also objects to the proposed allocation of CAT costs because it "is inconsistent with the historical CAT decision to allocate costs to the parties responsible for generating them."<sup>32</sup> In making this statement, SIFMA references Section 11.2 of the CAT NMS Plan. Neither Section 11.2 of the CAT NMS Plan nor other sections of the CAT NMS Plan require CAT LLC to allocate CAT costs "to the parties responsible for generating them." Nevertheless, as discussed in the Proposing Release, the Funding Proposal incorporates the concept of the cost burden on the CAT in at least two ways. First, as discussed above, the allocation of CAT costs contemplates the effect of Industry Member activity on the cost of the CAT. Second, because trading activity provides a reasonable proxy for cost burden on the CAT, trading activity is an appropriate metric for allocating CAT costs among CAT Reporters. Moreover, there are several examples of other trading activity-based fees, so the model being contemplated is not novel or unique.

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<sup>29</sup> *Id.* at 7.

<sup>30</sup> Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, and Ellen Greene, Managing Director, Financial Services Operations, SIFMA, to Brent J. Fields, Secretary, SEC (June 6, 2017) at 4.

<sup>31</sup> *See, e.g.*, Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (July 28, 2017) at 4-6.

<sup>32</sup> SIFMA Letter at 7.

#### 4. SIFMA's Alternative Proposal: 50/50 Allocation

SIFMA recommends an alternative funding proposal which would allocate 50% of CAT costs to Participant exchanges and 50% of CAT costs to Industry Members, with FINRA assessed a nominal regulatory user fee to access CAT Data.<sup>33</sup> SIFMA did not offer a reasoned basis for why a 50-50 allocation would satisfy the standards set forth in the Exchange Act. SIFMA merely states that a mathematically equal split between the two groups would satisfy the Exchange Act requirements for fair and equitable fees. CAT LLC has previously considered and rejected a 50-50 allocation because, among other things, it would not provide a fair and equitable allocation between and among Industry Members and Participants. The proposed 50-50 allocation raises fairness issues as there are a far greater number of Industry Members than Participants, and Industry Members as a group have far greater financial resources than the Participants. In establishing fair and equitable fees under the Exchange Act, the Participants must consider the regulated entities ability to pay the fees. The proposed 50-50 allocation also fails to take into consideration the fact that the complexity of Industry Members' chosen business models contributes substantially to the costs of the CAT. Ultimately, CAT LLC also believes that the question before the Commission is whether the particular allocation and overall model being proposed is fair and equitable, not whether there may be other allocations or models that would also be fair and equitable. In that regard and for the reasons discussed in the Proposing Release and in this letter, we believe that the allocation and overall model being proposed is fair and equitable.

CAT LLC also disagrees with SIFMA's proposal to charge FINRA only a nominal regulatory fee.<sup>34</sup> There is no basis to distinguish FINRA from the exchanges in this context or suggest that a transaction fee should not be assessed to FINRA. The proposed transaction-based CAT fee is purposely agnostic as to the location of where a trade occurs, whether on or off exchange. An intent of this design is to avoid influencing whether or where any trading activity would take place. In addition, FINRA, like the exchanges, may choose to seek to pass its fee through to its members. Moreover, FINRA is no different from the exchanges in terms of its regulatory obligations with regard to the CAT. Indeed, Section 31 fees clearly demonstrate that there is no need to treat FINRA differently from the exchanges with regard to a transaction-based regulatory fee. Section 31 fees are charged in the same manner to both the exchange and FINRA. The proposed CAT fees would be no different. CAT LLC further discusses the CAT fees to be charged to the Participants in the next section.

#### B. Allocation of CAT Costs to Participants

The Funding Proposal would allocate a one-third portion of CAT costs to Participants – whether an exchange or FINRA – based on executed equivalent shares. In its comment letter on the Funding Proposal, FINRA objects to FINRA's proposed obligation to pay a CAT fee based on over-the-counter transactions, raises issues with the fact that costs allocated to FINRA under the Funding Proposal will be passed on to its members, thereby increasing its members share of

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<sup>33</sup> *Id.* at 7-8.

<sup>34</sup> *Id.* at 8.



CAT costs, and confirms that it plans to file a rule filing to pass to its members the CAT fees that would be charged to FINRA. FINRA also discusses a Section 31-style approach for the CAT funding model, noting that it believes that a Section 31 fee approach may satisfy the requirements of the Exchange Act.<sup>35</sup> CAT LLC notes that the very aspects of the Funding Proposal that FINRA objects to are comparable in its Section 31 fee proposal. For both the Funding Proposal and Section 31 fee approach:

- Similar to how an exchange would be obligated to pay a transaction fee based on transactions occurring on that exchange, FINRA would be obligated to pay a transaction fee based on transactions in the over-the-counter market; and
- Similar to how an exchange would be able to determine to pass the fee onto its members, FINRA would be able to determine to pass the fee on to its members.

Accordingly, if the Section 31 approach would comply with the Exchange Act, then the Funding Proposal would as well. Here, very similar to the Section 31 approach, CAT LLC is simply seeking to assess fees to CEBBs, CEBSs and Participants. CEBBs and CEBSs could determine whether to pass such fees onto their clients. Likewise, each of the Participants (*i.e.*, exchanges and FINRA) could determine to pass fees onto their members (through their respective fee schedules) and those members, in turn, could determine to pass those fees onto their clients as well.

### **C. Fee Pass-Throughs for Historical CAT Assessments**

CAT LLC again would like to correct a persistent misunderstanding by SIFMA regarding how the Historical CAT Assessment operates.<sup>36</sup> Contrary to the assertions in SIFMA's comment letter as well as prior SIFMA comment letters,<sup>37</sup> the Historical CAT Assessment would be assessed based on current market activity, not past market activity.<sup>38</sup> Specifically, the fee rate would be calculated based on Historical CAT Costs, but the fee rate would be applied to current market transactions. Accordingly, the process of assessing fees for the Historical CAT Assessment would be exactly the same as with CAT Fees related to Prospective CAT Costs, and could be accordingly passed through in the same manner if a CEBB or CEBS so chooses. As a result, in each case, the relevant data would be available to pass an Historical CAT Assessment though in the same manner as with Prospective CAT Fees, if a CAT Executing Broker chose to do so. Moreover, CAT LLC would provide CAT Executing Brokers with details regarding their CAT fees to assist with this process.

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<sup>35</sup> See FINRA Letter at 5.

<sup>36</sup> CAT LLC previously corrected this misunderstanding in an amendment to the prior funding proposal. Securities Exchange Act Rel. No. 96394 (Nov. 28, 2022), 87 Fed. Reg. 74183, 74185, n.15 (Dec. 2, 2022).

<sup>37</sup> See SIFMA Letter at 8; October 2022 SIFMA Letter at 4-5.

<sup>38</sup> For a description of the proposal for charging the Historical CAT Assessment, see Proposing Release at 17095-99.

### **III. Cost Transparency**

#### **A. Independent Cost Review Mechanism**

SIFMA recommended the adoption of “an independent cost review mechanism to help ensure that future CAT Fees are fair and reasonable and to ensure that controls are put into place to guard against unchecked spending.”<sup>39</sup> CAT LLC does not believe that such an independent cost review mechanism process is necessary or appropriate including for the following reasons:

- Such a budget review process would go beyond what is required or contemplated by Rule 613 or the Plan, and is unnecessary as any CAT fees proposed to be established pursuant to the CAT NMS Plan are already subject to the existing, well-established review practices under Rule 608 of Regulation NMS and Section 19(b) of the Exchange Act as applicable. Under those provisions, CAT fees must be filed with the SEC, thereby providing transparency and an opportunity for comment by the public, and may only be implemented if they satisfy the requirements of the Exchange Act. Moreover, the SEC has the ability to request budget and financial information from CAT LLC to the extent that it believes that such additional information is necessary for it to evaluate any CAT fee proposals.
- In addition to the fee filing process under the Exchange Act, CAT LLC provides significant cost transparency through the public disclosure of its quarterly budget information and financials.
- The Participants are required to comply with the regulatory requirements to implement the CAT and to oversee their members. They do not have discretion with regard to such compliance with CAT requirements. As such, the Participants cannot have their compliance with regulatory requirements subject to a third-party that does not have the same regulatory obligations.
- The Commission’s ability to oversee the securities markets could be undermined if the funding of the CAT is subject to a third-party that does not have the same regulatory obligations.
- CAT LLC is engaged actively in cost discipline efforts, including through a designated cost management working group and through other efforts.<sup>40</sup>

#### **B. Budget Disclosure Prior to Fee Filings**

SIFMA commented that the Participants “are not planning to include a mechanism for the public to review and provide input on the development of the annual CAT budget prior to it

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<sup>39</sup> SIFMA Letter at 3.

<sup>40</sup> For a discussion of CAT LLC’s cost management efforts, *see* Proposing Release at 17117.

being finalized”<sup>41</sup> and that “a post-hoc review of the CAT budget is not an effective mechanism to help ensure that future CAT Fees are fair and reasonable.”<sup>42</sup> This statement is inaccurate. CAT LLC is currently providing and will continue to provide such budget information to the public on an ongoing basis. CAT LLC publicly provides the annual operating budget for the CAT LLC as well as quarterly updates to the budget that occur during the year. This budget information is readily accessible to the public on a dedicated web page on the CAT NMS Plan. CAT LLC does not just provide the annual budget, or the mid-year budget, the two budgets that would be necessary for the fee filings; it also provides two other quarterly updates each year. Accordingly, Industry Members and other members of the public will have the opportunity to review regular updates of the budget more often than is necessary for the fee filings. Such transparency would allow Industry Members and other members of the public to understand the budget and changes thereto throughout the year.

### **C. Budget Line Item for SEC Costs**

SIFMA also commented about CAT LLC funding usage costs and system change costs related to the Commission’s use and design of the CAT system, given the SEC’s “conflicted role as a beneficiary of the CAT regulatory data and reviewer of the CAT budget and fee filings,”<sup>43</sup> and that this conflict “is only heightened due to a lack of a Commission funding obligation for CAT.”<sup>44</sup> As a result, SIFMA recommends that “the Participants’ proposed budget include as a separate line-item projected usage costs and system change costs related to the Commission’s use and design of the CAT system.”<sup>45</sup> However, all costs related to the functionality and use of the CAT ultimately relate to the Commission’s adoption of Rule 613, which imposed on the Participants the obligation to create, implement, and maintain the CAT. Total CAT costs are currently reflected in the CAT budget. Accordingly, CAT LLC believes breaking out SEC-specific CAT costs would be difficult to implement as a practical matter. Moreover, such a requirement would not be useful as a practical matter as the Participants are required to implement Plan requirements as set forth in the Plan, and CAT LLC does not currently have the authority to impose a funding obligation on the Commission.<sup>46</sup>

## **IV. Implementation of CAT Fees**

### **A. Billing Process for CAT Fees**

DASH commented about the billing and collection process for the Funding Proposal, arguing that clearing firms, not CAT Executing Brokers, are best suited to operational issues

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<sup>41</sup> *Id.* at 8.

<sup>42</sup> *Id.* at 9.

<sup>43</sup> *Id.* at 10.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Section 11.3 of the CAT NMS Plan permits CAT LLC to impose fees “based on access and use of the CAT for regulatory and oversight purposes”; however, “the Commission interprets the provisions in the Plan relating to the collection of fees as applying only to Participants and Industry Members, and thus the Commission would not be subject to such fees.” Exchange Act Release No. 79318 (November 15, 2016), 81 Fed. Reg. 84696 (November 23, 2016) at 84711 n.313, 84798-7 n.1815.

associated with the collection of CAT fees.<sup>47</sup> Under the Funding Proposal, CAT LLC proposes to charge CAT fees to CAT Executing Brokers. As a result, CAT Executing Brokers have the obligation to pay such fees under the Funding Proposal. The Funding Proposal, however, does not prescribe any particular process for the payment of such fees, that is, whether the CAT Executing Broker itself pays the CAT fees, or a clearing firm, or other third party, would pay such CAT fees on behalf of the CAT Executing Broker.

## **B. Timing of Commencement of CAT Fees**

SIFMA requested that CAT LLC provide Industry Members sufficient time to implement any necessary changes to systems and processes related to the payment of CAT fees, suggesting a minimum of one year for such implementation.<sup>48</sup> Given the significant delays in implementing a CAT funding model to date and the critical importance of commencing charging CAT fees, the Participants intend to commence the collection of CAT fees as expeditiously as possible. As noted in the Proposing Release, the Participants expect to implement the proposed CAT fees upon approval by the SEC, subject to applicable requirements for the implementation of the CAT fees, including the requirements of Section 19(b) of the Exchange Act with regard to Industry Member CAT Fees, the satisfaction of applicable Financial Accountability Milestones as set forth in Section 11.6 of the CAT NMS Plan, and the implementation of the billing and collection system for the CAT fees. Contrary to SIFMA's assertion, the practical implementation of a transaction-based fee by Industry Members does not require a year's worth of effort, and would introduce another unwarranted delay in charging Industry Member CAT fees. Indeed, as noted in the illustrative example in the Proposing Release, many of the Industry Members would receive small bills that would not need extensive new processes to pay.<sup>49</sup>

## **V. Collaboration with Industry**

SIFMA and DASH recommend further dialogue with the industry regarding CAT fees.<sup>50</sup> CAT LLC has engaged with the industry on the CAT funding model in a variety of ways over the last seven years as it has explored different approaches to CAT fees. CAT LLC has discussed funding model issues with the CAT Advisory Committee, which includes wide representation from the industry, analyzed and responded to the many comment letters submitted in response to multiple CAT fee proposals filed with the SEC, and held industry-wide webinars on funding issues. CAT LLC and its Participants have discussed funding model issues with industry associations, like SIFMA and Financial Information Forum, as well as individual Industry Members. CAT LLC has welcomed and continues to welcome such input from the industry on the critical issue of CAT funding, but a decision on an initial funding model is overdue and needs to be made. CAT LLC believes that the Funding Proposal complies with the Exchange Act and should be approved by the Commission without further delay.

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<sup>47</sup> DASH Letter at 1.

<sup>48</sup> SIFMA Letter at 2.

<sup>49</sup> Proposing Release at 17129-41.

<sup>50</sup> SIFMA Letter at 6; DASH Letter at 2.

## VI. CAT Costs for 2022

In the Funding Proposal, CAT LLC provides CAT cost information through 2021. FINRA requests that CAT LLC provide CAT cost data for 2022.<sup>51</sup> As a result, CAT LLC is providing the following update to the existing cost information as described in the Proposing Release to describe the CAT costs for 2022. The following table breaks down the CAT costs for 2022 into the categories set forth in Proposed Section 11.3(b)(iii)(B)(II) of the CAT NMS Plan.

<b>Operating Expense</b>	<b>Historical CAT Costs for 2022*</b>
Capitalized Developed Technology Costs	\$6,719,585
<b>Technology Costs:</b>	\$164,332,692
Cloud Hosting Services	\$129,627,775
Operating Fees	\$25,365,883
CAIS Operating Fees	\$9,231,034
Change Request Fees	\$108,000
Legal	\$5,750,375
Consulting	\$1,672,806
Insurance	\$1,898,827
Professional and administration	\$640,609
Public relations	\$92,400
<b>Total Operating Expenses</b>	<b>\$181,107,294</b>

\* The non-cash amortization of capitalized developed technology costs of \$5,274,009 incurred during 2022 have been appropriately excluded from the above table.

## VII. Conclusion

The Funding Proposal provides for an equitable allocation of reasonable dues, is not unfairly discriminatory and does not impose a burden on competition that is not necessary or appropriate in furtherance of the Exchange Act. The continued funding of the CAT solely by the Participants was and is not contemplated by the CAT NMS Plan, nor is it a financially sustainable approach. Moreover, the Funding Proposal would be consistent with past fee structures that have been approved by the Commission. It also is transparent, would be relatively easy to calculate and administer, and is designed to not have an impact on market activity because it is neutral as to the location and manner of execution. CAT LLC has gone through an extensive process of evaluating and seeking comment on various funding models since the inception of CAT. As the Commission is aware, the Exchange Act does not require CAT LLC to demonstrate that the Funding Proposal is superior to any other potential proposal. Instead, CAT LLC must demonstrate that the Funding Proposal is consistent with the Exchange Act and the

<sup>51</sup> FINRA Letter at 4-5.

Ms. Vanessa Countryman

May 18, 2023

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rules and regulations thereunder. CAT LLC believes that the Funding Proposal satisfies the requirements of the Exchange Act and should be approved by the Commission.

Respectfully submitted,

*/s/ Brandon Becker*

Brandon Becker  
CAT NMS Plan Operating Committee Chair

cc: The Hon. Gary Gensler, Chair  
The Hon. Hester M. Peirce, Commissioner  
The Hon. Caroline A. Crenshaw, Commissioner  
The Hon. Mark T. Uyeda, Commissioner  
The Hon. Jaime Lizárraga, Commissioner  
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