

VIA EMAIL (rule-comments@sec.gov)

July 28, 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 Participants¹ 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.² The SEC published the proposed amendment for comment on March 15, 2023.³ The proposal would amend the CAT NMS Plan⁴ 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.⁵ Commenters submitted three comment letters in response to the Proposing Release,⁶ and on May 18, 2023, CAT LLC submitted a letter responding to the 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 2022.⁷ SIFMA and FINRA submitted second comment letters on the Funding Proposal on June 5, 2023 and May 25, 2023,

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., 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.

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

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

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

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

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

⁷ Letter from Brandon Becker, Chair, CAT Operating Committee, to Vanessa Countryman, Secretary, SEC (May 18, 2023) (“First Response to Comments”).

respectively.⁸ On June 16, 2023, the SEC instituted proceedings to determine whether to approve or disapprove the Funding Proposal (“OIP”).⁹ Six additional comment letters were submitted in response to the OIP.¹⁰ CAT LLC submits this letter to respond to the topics raised in the comment letters to date. CAT LLC notes that the responses set forth in this letter 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—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 and, given its similarity to the immediately preceding funding proposal, effectively has been subject to public comment for more than 400 days.

The record is robust and a Commission vote on the Funding Proposal is clearly appropriate at this stage. The continued funding of the CAT solely by the Participants was and is not contemplated by the CAT NMS Plan or Rule 613, 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. The Funding Proposal should be approved by the Commission without further delay.

I. Allocation of CAT Fees to CAT Executing Brokers

Under the Funding Proposal, CAT Fees would be assessed on a given transaction to the CAT Executing Broker for the Buyer (“CEBB”), the CAT Executing Broker for the Seller (“CEBS”), and the associated Participant. Several commenters continue to argue that CAT fees should be allocated to the Industry Member originating the order (the “originating broker”),

⁸ See Letters to Vanessa Countryman, Secretary, SEC from Ellen Greene, Managing Director, Equities & Options Market Structure and Joseph Corcoran, Managing Director, Associate General Counsel, SIFMA (June 5, 2023) (“SIFMA Letter II”); Marcia E. Asquith, Corporate Secretary, EVP, Board and External Relations, FINRA, to Vanessa Countryman, Secretary, SEC (May 25, 2023) (“FINRA Letter II”).

⁹ Securities Exchange Act Release No. 97750 (June 16, 2023), 88 Fed. Reg. 41142 (June 23, 2023) (“Order Instituting Proceedings”).

¹⁰ See Letters to Vanessa Countryman, Secretary, SEC from Douglas A. Cifu, Chief Executive Officer, Virtu Financial (July 13, 2023) (“Virtu Letter”); Ellen Greene, Managing Director, Equities & Options Market Structure and Joseph Corcoran, Managing Director, Associate General Counsel, SIFMA (July 13, 2023) (“SIFMA Letter III”); Timothy Miller, Chief Operating Officer, DASH Financial Technologies LLC (July 13, 2023) (“DASH Letter II”); Kirsten Wegner, Chief Executive Officer, Modern Markets Initiative (July 13, 2023) (“MMI Letter”); Stephen John Berger, Managing Director, Global Head of Government and Regulatory Policy, Citadel Securities (July 14, 2023) (“Citadel Letter”); Joanna Mallers, Secretary, FIA Principal Traders Group (July 14, 2023) (“FIA Letter”). CAT LLC notes that several of these letters include comments that are beyond the scope of the proposed amendment and that may not be addressed in this response.

rather than the CAT Executing Broker as defined in the Funding Proposal.¹¹ Another commenter argues that clearing firms, not CAT Executing Brokers, are best suited to handle operational issues associated with the collection of CAT fees.¹²

CAT LLC previously responded to these proposals at length in its First Response to Comments.¹³ For the reasons discussed below, as well as those in the Proposing Release, CAT LLC continues to support charging CAT Executing Brokers over the “originating broker” proposal. In particular, based on a deep understanding of the CAT System and an analysis of alternative approaches, CAT LLC disagrees with the assertion that charging “originating brokers” a CAT fee would be simpler and easier to implement than the proposed use of the CAT Executing Broker. As previously described, charging the “originating broker” 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, and the concept is not new or novel.¹⁴ In addition, as previously described, an allocation to the “originating broker” as SIFMA now recommends would not include Industry Members involved in the routing or execution of orders that were not also originating brokers.¹⁵ Some of the largest Industry Members are not involved in the origination of orders or originate few orders in relation to their overall market activity. Moreover, under SIFMA’s proposal, “originating brokers” would need to establish processes for paying CAT fees and, if they so choose, to pass-through the fees to their clients, similar to CAT Executing Brokers. For these reasons, CAT LLC continues to support charging CAT Executing Brokers.

As previously described in the First Response to Comments, 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.¹⁶

A. Compatibility with CAT System

As described in the Proposing Release, one of CAT LLC’s objectives is to establish a funding model that is “simple to understand and implement.”¹⁷ Contrary to SIFMA’s assertions, identifying the “originating broker” on an executed trade based on an evaluation of CAT

¹¹ See Citadel Letter at 30; SIFMA Letter II at 5; Virtu Letter at 4-6. Specifically, SIFMA would define the “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).” SIFMA Letter I at 5.

¹² DASH Letter II at 1-2.

¹³ First Response to Comments at 2-6; 11-12. See also Letter from Mike Simon, CAT NMS Plan Operating Committee Chair Emeritus, to Vanessa Countryman, Secretary, SEC (Feb. 15, 2023) at 6.

¹⁴ First Response to Comments at 4-5.

¹⁵ *Id.*

¹⁶ *Id.* at 11-12.

¹⁷ Proposing Release at 17103.

linkages and allocating CAT costs to that “originating broker” introduces far more complexity than one that charges the CAT Executing Broker.

Under the Funding Proposal, for any given trade (buy or sell), the CAT Executing Broker can be readily, consistently and accurately identified.¹⁸ 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. This information is readily identifiable in CAT trade records as the broker’s identity is a required field in the relevant trade records.

In contrast, SIFMA’s most recent proposal to charge the “originating broker” presents several challenges to consistently and accurately assessing CAT fees. The first challenge is the dependency on linkages reported to CAT to identify the originating broker(s) for each executed trade. While CAT linkage rates are generally very high, they are not 100% accurate, and there will always be trades for which CAT is unable to accurately identify and bill the originating broker(s) (for example, in the case of a disconnected OMS/EMS where linkage is not possible).¹⁹ In addition to creating challenges relating to consistently and accurately assessing CAT fees, this dependency on linkages may create the wrong financial incentives by associating linkage errors with the avoidance of CAT fees. Another significant challenge involves the aggregation and disaggregation of orders from multiple originating brokers that occurs during certain workflows. For example, an executing broker may receive multiple orders from multiple introducing brokers, aggregate those orders into a single aggregated order, then route multiple child orders to various venues where they receive executions at various prices. This aggregation/disaggregation complexity not only introduces dependency on accurate linkages reported by Industry Members, which as noted above are not 100% accurate, but also requires CAT to determine how many shares of any given executed trade subject to the CAT fee should be allocated to each introducing broker participating in the execution. Each trade must be analyzed in conjunction with other CAT order events (e.g., Order Fulfillment, Allocation events) to determine how much of any given execution was allocated to a particular introducing broker. Such analysis introduces complex programming to the billing process. While CAT is indeed designed to capture and unwind complex aggregation scenarios, the data and linkages are structured to facilitate regulatory use, not as a billing mechanism to assess fees on a distinct set of executed trades; it is not simply a matter of using existing CAT linkages. In contrast to the “originating broker” model, the CAT Executing Broker model does not introduce these dependencies and allows for consistent and accurate identification of each CAT Executing Broker and the executed share quantity to be billed to each CAT Executing Broker.

¹⁸ For a description of the relevant specific fields, *see* Proposing Release at 17088.

¹⁹ The Commission has noted that the CAT is unable “to create lifecycles in certain representative order scenarios where Industry Members do not have a systematic or direct link between their order management systems and execution management systems,” and that this “breaks order event lifecycles, because regulatory users would not be able to recreate these parts of the order event lifecycles on their own.” *See* Securities Exchange Act Release No. 95234 (July 8, 2022), 87 Fed. Reg. 42247, 42256 (July 14, 2022).

B. Ease of Payment/Pass-Through for Industry Members

CAT LLC understands that it proposes to introduce a new transaction-based fee to the industry. Any funding model will involve some administrative cost on Industry Members to determine whether and, if so, how they might choose to pass through fees to their clients. Although charging a transaction-based fee is not new or novel for the industry, like any new transaction fee, CAT fees will naturally require the industry to understand the fee and to adopt processes regarding the CAT Fee, which may include passing through some comparable fee to others if they choose to do so. The Plan Processor is building a billing warehouse that will contain every trade, and plans to make available trade-by-trade data to CAT Executing Brokers for each CAT bill upon request. Such data may assist CAT Executing Brokers with identifying and validating the applicable trades for each CAT bill. In addition, the Plan Processor is developing a detailed training program to assist CAT Executing Brokers to understand their CAT bills. Again, this approach of assessing a transaction-based fee to an executing broker and an executing broker making some decision on whether and how to pass through any portion of the associated cost to its clients is not new or novel.

In addition, commenters have raised questions about how the Funding Proposal could create difficulties in reconciling the amount that the CAT Executing Broker would be required to pay per transactions with the amount that may be passed on to their clients. The Funding Proposal only places a payment obligation on CAT Executing Brokers. The Funding Proposal does not address whether or the manner or extent to which CAT Executing Brokers may seek to pass any such CAT costs on to their customers. Accordingly, CAT Executing Brokers have discretion as to whether and the manner and extent to which they pass on their CAT costs, if at all. For example, a CAT Executing Broker could round up its fees to the nearest cent, or decide to charge for, or not charge for, certain transactions, or assess a specific fee or incorporate the costs into other fee programs. Indeed, this type of discretion has been recognized for almost 20 years and is regularly exercised by broker-dealers that have determined to pass through fees to their customers related to the sales value fees they are assessed by national securities exchanges and associations for their Section 31 fee obligations to the SEC.²⁰

II. Allocation of CAT Costs to Industry Members

Several commenters reiterate prior objections to the proposed allocation of CAT costs between Industry Members and Participants (*i.e.*, one-third to the CAT Executing Broker for the Buyer, one-third to the CAT Executing Broker for the Seller, and one-third to the Participant associated with each transaction).²¹

²⁰ See, *e.g.*, Securities Exchange Act Release No. 49928 (June 28, 2004), 69 Fed. Reg. 41060, 41072 (July 7, 2004) (noting that broker-dealers may “over-collect” Section 31-related fees charged to their clients due to rounding practices, and double-counting with regard to certain transactions).

²¹ Citadel Letter at 16-22; FIA Letter at 2-3; SIFMA Letter II at 2-3; Virtu Letter at 4.

CAT LLC has previously responded to these objections several times, including in the First Response to Comments,²² the Proposing Release,²³ and each of the prior responses to comments.²⁴ 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 the reasons below and other reasons discussed in detail in the Proposing Release.

A. Justifications for Proposed Allocation

1. Complexity and Diversity of Industry Member Activity

As previously described, 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.²⁵ 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.²⁶ 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.

In its second comment letter, SIFMA concedes that Industry Members have implemented complex order "routing strategies designed to optimize exchange fees and rebates," but argues that the complexity and costs imposed on CAT by these business decisions are in fact attributable to "the exchanges' business decisions to establish these and other types of exchange fee structures."²⁷ SIFMA provides no analysis to demonstrate a causal connection between exchange fee structures and CAT costs. CAT LLC believes that Industry Members are solely responsible for their own business decisions, which CAT LLC had no role in designing or implementing, and a substantial portion of CAT costs originate directly from these business decisions. 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.²⁸

²² First Response to Comments at 6-8.

²³ Proposing Release at 17104-6.

²⁴ *See, e.g.*, Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Nov. 15, 2022) at 26-30 ("Response to OIP").

²⁵ *See, e.g.*, First Response to Comments at 6-8; Proposing Release at 17104-06; Response to OIP at 26-30.

²⁶ SIFMA Letter I at 6-7.

²⁷ SIFMA Letter I at 7.

²⁸ For comparison, under the Section 31 of the Exchange Act, the exchanges and FINRA are assessed fees by the SEC on sell-side transactions; in turn, in accordance with SRO rules, these fees are 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.

The complexity and diversity of Industry Members' chosen business models and order handling practices contributes substantially to the costs of the CAT.

- Diverse Industry Member Market Activity. In light of the complexity of Industry Member market activity, the CAT's technical documentation must 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. For example, in light of the complexity of Industry Member market activity, the CAT's order reporting and linkage scenarios document for Industry Members is over 800 pages in length, addressing nearly 200 scenarios.²⁹ 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, Participants do not bring this level of complexity to the markets.
- Late Data and Corrections. Industry Members have far more late data and corrections than Participants. The linker costs related to late data and corrections are significant.
- Customers. Unlike Participants, Industry Members have customers (as such term is defined in Rule 613(j)(3)). Customers lead to CAT costs related to FDIDs, CCIDs and CAIS, as well as varied investment strategies required by customers.

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 continues to object to CAT LLC taking into consideration the Participants ability to pay CAT fees in proposing the 1/3, 1/3, 1/3 allocation.³⁰ 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

²⁹ See CAT Industry Member Reporting Scenarios v.4.10 (Oct. 21, 2022), https://catnmsplan.com/sites/default/files/2022-10/10.21.22_Industry_Member_Tech_Specs_Reporting_Scenarios_v4.10_CLEAN.pdf.

³⁰ SIFMA Letter I at 7.

previously objected to prior CAT funding model proposals, arguing that the proposed CAT fees “would create a significant burden on smaller ATSS,”³¹ or on market makers.³²

3. Allocation Based on Cost

SIFMA also continues to object 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.”³³ 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.

B. Pass-Through of CAT Costs

1. Pass-Through by Industry Members to Their Customers

Several commenters mistakenly assert that, to the extent each Participant may determine to pass-through their CAT-related costs to Industry Members, then Industry Members would bear 100% of CAT costs.³⁴

CAT LLC has previously addressed this argument at length.³⁵ Specifically, these comments fail to recognize the basic fact that Industry Members may determine to pass their CAT fees through to their own customers, just as they do with Section 31-related fees and other fees.³⁶ It is common practice in the industry for broker-dealers to pass transaction-based fees through to their clients. Accordingly, the two-thirds allocation of CAT costs to Industry Members may be entirely passed through to investors, thereby alleviating Industry Members of any burden of funding the CAT. In this regard, a former member of the Advisory Committee for the CAT and the former Chief Economist of the Commission has previously argued, “[b]ecause the markets for exchange, dealing, and brokerage services are all highly competitive in the long

³¹ 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.

³² 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.

³³ SIFMA Letter I at 7.

³⁴ Citadel Letter at 16, 22; FIA Letter at 2.

³⁵ See, e.g., Proposing Release at 17103, 17106-07; First Response to Comments at 4; Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Feb. 15, 2023) at 26.

³⁶ See *supra* note 20 (noting that broker-dealers not only pass-through but often over-collect these fees from customers).

run, any fees imposed on any of these groups will ultimately pass through to the retail and institutional traders who use the markets.”³⁷

2. Pass-Through by Participants to Industry Members

Relatedly, several commenters argue that the Participants should be prohibited from passing-on any portion of CAT costs, directly or indirectly, to their members.³⁸

As previously discussed,³⁹ each Participant may determine to charge their members fees to fund their share of the CAT fees, and the Exchange Act specifically permits self-regulatory organizations to do so, provided the fee filing requirements of the Exchange Act are satisfied. Indeed, in approving the CAT NMS Plan, the Commission explained that “the Exchange Act specifically permits the Participants to charge members fees to fund their self-regulatory obligations.”⁴⁰ Any review of whether and how each Participant will obtain the funds to pay CAT fees is beyond the scope of the Funding Proposal.

CAT LLC notes that while CAT Executing Brokers have discretion as to whether and the manner and extent to which they pass on their CAT fees, if at all, the Participants must submit fee filings demonstrating that any proposed fee is consistent with the Exchange Act.

3. Need for Industry Members to Develop Cost-Recovery Processes

Finally, one commenter asserts that executing brokers do not currently have systems and processes in place to recover costs from their client firms and might choose to absorb those fees themselves or exit the business altogether due the technological and administrative investment necessary to develop such a cost-recovery process.⁴¹

CAT LLC has previously addressed this argument, as well.⁴² Although charging a transaction-based fee is not new or novel for the industry, CAT LLC recognizes that certain Industry Members that choose to pass-through CAT fees will have to develop processes to collect such fees from their clients. Nevertheless, CAT LLC does not believe that CAT fees differ from the effect of other fees, including regulatory-related fees, such as the FINRA trading activity fee (“TAF”), the options regulatory fee (“ORF”) 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.

³⁷ Letter from Larry Harris, Fred V. Keenan Chair in Finance, USC Marshal School of Business, to Vanessa Countryman, Secretary, SEC (June 21, 2022).

³⁸ Citadel Letter at 3, 22, 30; FIA Letter at 2-3.

³⁹ See, e.g., Proposing Release at 17107; Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Aug. 16, 2022).

⁴⁰ Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 Fed. Reg. 84696, 84794 (Nov. 23, 2016) (“CAT NMS Plan Approval Order”).

⁴¹ Virtu Letter at 5.

⁴² See, e.g., Proposing Release at 17106-07; First Response to Comments at 4.

As described above, the Plan Processor will provide trade-by-trade data to CAT Executing Brokers for each CAT bill and is developing a detailed training program to assist CAT Executing Brokers to understand their CAT bills. CAT LLC reiterates that CAT Executing Brokers have full discretion as to whether and the manner and extent to which they pass on their CAT fees, if at all. For example, a CAT Executing Broker could round up its fees to the nearest cent, or decide to charge for, or not charge for, certain transactions, or assess a specific fee or incorporate the costs into other fee programs.⁴³

C. Alternative Allocation Proposal: 50-50 Allocation

One commenter recommended allocating no more than 50% of CAT costs to Industry Members (including any allocation to FINRA).⁴⁴ This commenter did not offer a reasoned basis for why a 50-50 allocation would satisfy the standards set forth in the Exchange Act. The commenter merely proposes to provide a mathematically equal split between two groups without further justification, while simultaneously arguing that allocating any CAT costs to Industry Members raises constitutional concerns.⁴⁵

Notwithstanding the absence of any reasoned basis for a 50-50 allocation, CAT LLC has previously responded to this allocation proposal at length.⁴⁶ CAT LLC has previously considered and rejected a 50-50 allocation because, among other things, it would not provide an equitable allocation between and among Industry Members and Participants. Such an allocation raises fairness issues as Industry Members have far greater financial resources than the Participants, and the complexity of Industry Members' chosen business models contribute substantially to the costs of the CAT, as described above.

D. Alternative Allocation Proposal: Allocation Based on Benefits Received from the CAT

One commenter suggests an alternative allocation method in which CAT costs should be allocated between Participants and Industry Members based on who receives the benefits from CAT, objecting to the proposed allocation on the basis that "there is no suggestion that Industry Members somehow receive 67% of the benefits from CAT."⁴⁷ Another commenter argues that it is inappropriate to impose responsibility for funding the CAT "on industry members that do not stand to benefit from it."⁴⁸

CAT LLC disagrees with this proposal because it is not appropriate or practical to allocate costs based on who benefits from the CAT. The CAT is designed to benefit the national

⁴³ See, e.g., Securities Exchange Act Release No. 49928 (June 28, 2004), 69 Fed. Reg. 41060, 41072 (July 7, 2004) (noting that broker-dealers may "over-collect" Section 31-related fees charged to their clients due to rounding practices, and double-counting with regard to certain transactions).

⁴⁴ Citadel Letter at 31.

⁴⁵ Citadel Letter at 28-29.

⁴⁶ See, e.g., Funding Proposal at 17106; Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Feb. 15, 2023) at 28.

⁴⁷ Citadel Letter at 17.

⁴⁸ Virtu Letter at 2.

market system and all market participants. The Participants are not the only beneficiaries of the CAT because they, as regulators, make use of the data for surveillance and oversight. The SEC has repeatedly indicated that the CAT is critical for the protection of investors and to support fair and efficient capital markets—which directly benefits Industry Members.⁴⁹ Likewise, in adopting the CAT NMS Plan, the Commission explained that “[t]he CAT is expected to provide a more resilient audit trail system that may benefit broker-dealers,” that “more effective oversight of market activity may increase investor confidence and help expand the investment opportunity set through increased listings,” and that “broker-dealers may experience less burden, to the extent that data provided to the Central Repository reduces the number of direct requests by regulators for their surveillance, examination and enforcement programs.”⁵⁰ Additionally, it is impractical to determine a model that allocates a measurable amount of benefit that each market participant receives from the CAT. Accordingly, CAT LLC disagrees with the assertion that Industry Members do not directly benefit from the CAT.

E. Alternative Methodologies Considered

One commenter states that the allocation methodology should “be improved to ensure that (a) a small group of firms are not disproportionately bearing costs given that CAT is designed to facilitate market-wide surveillance across all market participants and (b) specific market segments, such as retail trading activity in NMS stocks, are not subject to an inequitable allocation.”⁵¹ Without providing sufficient detail or explanation, this commenter generally asserts that “[a] more thoughtful approach could include: (I) minimum and maximum fee levels, (II) appropriate calibrations for liquidity provision, (III) a volume component based on notional (instead of executed shares), and (IV) consideration of additional metrics that could achieve a more equitable outcome (e.g. broker-dealer capital).”⁵² This commenter does not offer an explanation for how these general suggestions would fit into any funding model, nor offer a reasoned basis for why a funding model incorporating these suggestions would satisfy the standards set forth in the Exchange Act.

As previously described at length, over the past seven years, CAT LLC has considered the advantages and disadvantages of a variety of possible alternative funding and cost allocation models for the CAT in detail.⁵³ After analyzing the various alternatives and considering comments on the previously proposed models, CAT LLC determined that, although various funding models may be reasonable and appropriate, the Executed Share Model provides a variety of advantages in comparison to the alternatives, and satisfies the requirements of the Exchange Act, including providing for an equitable allocation of reasonable fees among CAT Reporters, not being designed to permit unfair discrimination among CAT Reporters and not imposing any

⁴⁹ See, e.g., CAT NMS Plan Approval Order at 84727 (“The Commission believes that improved regulatory efforts [facilitated by the CAT] will strengthen the integrity and efficiency of the markets, which will enhance investor protection and increase capital formation.”).

⁵⁰ CAT NMS Plan Approval Order at 84993.

⁵¹ Citadel Letter at 30.

⁵² *Id.*

⁵³ See, e.g., Proposing Release at 17117-19; Appendix C of the CAT NMS Plan at C-88-C-89.

burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

F. Other Allocation Suggestions

1. Costs Exceeding the Approved Budget

One commenter asserts that “the exchanges should be responsible for any costs over the approved budget.”⁵⁴

CAT LLC does not believe this commenter’s proposal would result in a fair and reasonable allocation under the Exchange Act. As described above, Industry Member trading activity, which is outside of the Participants’ control, contributes significantly to the costs of the CAT. To the extent unexpected increases in trading volumes result in costs exceeding the approved budget, it would not be fair and equitable for the Participants to shoulder those costs alone. Relatedly, this proposal would create the wrong incentives by encouraging the Participants to base the budget on the most conservative projections for future Industry Member data volumes, so as not to be left solely responsible for any costs exceeding that budget.

As previously discussed, the Funding Proposal is designed to satisfy the funding principle set forth in Section 11.2(f) of the CAT NMS Plan, which requires the Operating Committee to seek “to build financial stability to support the Company as a going concern.”⁵⁵ The Funding Proposal includes a requirement to adjust the Fee Rate During the year in order to address any changes in the projected or actual total volume of transactions in Eligible Securities or the budgeted or actual CAT costs. In addition, the Funding Proposal would collect an operational reserve for CAT, which is intended to address potential shortfalls in collected CAT fees versus actual CAT costs.

2. Costs That “Primarily Benefit” the Participants

In addition, one commenter recommends that “Industry Members should not be allocated costs for matters that primarily benefit the CAT Operating Committee or the SROs, such as costs related to ongoing litigation or filings that are inconsistent with the Exchange Act.”⁵⁶

CAT LLC has previously addressed similar comments.⁵⁷ CAT LLC does not believe it is reasonable or practical to attempt to parse CAT costs by who “primarily benefits” from those costs. Notably, this commenter further argues that “by facilitating market surveillance and enforcement activities, CAT is a revenue generator for the exchanges,” implying that this commenter believes that *all* CAT costs primarily benefit the Participants.⁵⁸ Another commenter

⁵⁴ Citadel Letter at 32.

⁵⁵ Proposing Release at 17120-21.

⁵⁶ Citadel Letter at 32.

⁵⁷ Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Aug. 16, 2022) at 8.

⁵⁸ Citadel Letter at 17.

states that the industry “obtains no tangible benefit from its operation.”⁵⁹ As previously described, CAT LLC strongly disagrees with the contention that the Participants and the Commission are the only beneficiaries of the CAT because they, as regulators, make use of CAT data for surveillance and oversight. The Commission has repeatedly explained that the CAT is critical for the protection of investors and to support fair and efficient capital markets,⁶⁰ and it is impractical to attempt to allocate costs based on who “primarily benefits” from them.

3. Existing Regulatory Fees

Finally, one commenter argues that “Industry Members *already* provide the exchanges a substantial amount of funding for regulatory matters,” and that “[t]hose fees must be factored into any equitable or rational allocation of CAT costs.”⁶¹ This commenter further asserts that, “by facilitating market surveillance and enforcement activities, CAT is a revenue generator for the exchanges.”⁶² Another commenter argues that Industry Members “already provide the Plan Participants with a very substantial level of funding through membership fees, registration and licensing fees, dedicated regulatory fees and options regulatory fees.”⁶³

The Commission previously addressed similar comments when it approved the CAT NMS Plan. At that time, the Commission recognized that “[t]he Participants currently collect certain regulatory and other fees, dues and assessments from their members to fund their SRO responsibilities in market and member regulation,” but explained that “the proposed funding model reflects a reasonable exercise of the Participants’ funding authority to recover the Participants’ costs related to the CAT” specifically.⁶⁴ Moreover, the Commission noted that “adopting CAT-specific fees would provide greater transparency for market participants than a general regulatory fee.”⁶⁵ To this end, the Funding Proposal is designed to impose fees directly associated with the costs of establishing and maintaining the CAT, and not unrelated SRO services.

CAT LLC also disagrees with the commenter’s characterization of enforcement activity as simply a “revenue generator for the exchanges.” As an initial matter, CAT LLC notes that the Company is set up as a business league within the meaning of Section 501(c)(6) of the Internal Revenue Code.⁶⁶ More broadly, the Participants have a statutory obligation to regulate the securities markets. To this end, a primary and routine objective of the Commission and the SROs is to obtain restitution for investors and to deter future misconduct through enforcement

⁵⁹ Virtu Letter at 4.

⁶⁰ See, e.g., CAT NMS Plan Approval Order at 84727 (“The Commission believes that improved regulatory efforts [facilitated by the CAT] will strengthen the integrity and efficiency of the markets, which will enhance investor protection and increase capital formation.”).

⁶¹ Citadel Letter at 17.

⁶² *Id.*

⁶³ Virtu Letter at 2.

⁶⁴ CAT NMS Plan Approval Order at 84794.

⁶⁵ *Id.*

⁶⁶ See *generally* Proposing Release at 17121. As the SEC stated when approving the CAT NMS Plan, “the Commission believes that the Company’s application for section 501(c)(6) business league status addresses issues raised by commenters about the Plan’s proposed allocation of profit and loss by mitigating concerns that the Company’s earnings could be used to benefit individual Participants.” CAT NMS Plan Approval Order at 84793.

activity, not to generate revenue. As the Commission has explained, improved regulatory efforts through the use of CAT data “will strengthen the integrity and efficiency of the markets, which will enhance investor protection and increase capital formation,” thereby benefitting all market participants.⁶⁷ Accordingly, CAT LLC disagrees with the characterization of regulatory use of the CAT as a mere “revenue generator” for the Participants.

4. Allocation of CAT Costs “In Perpetuity”

One commenter argues that “[t]here is no precedent for the CAT fees that are proposed to be allocated to Industry Members in perpetuity under the 2023 Funding Model,” and that the Exchange Act does not permit CAT LLC “to require Industry Members to provide them with a blank check to fund all of their costs in perpetuity.”⁶⁸

These comments appear to reflect a misunderstanding of the basic mechanics of the Funding Proposal. Contrary to the assertion that Industry Members will fund “all” CAT costs, the Funding Proposal allocates one-third of CAT costs to Participants, one-third to CEBBs, and one-third to CEBSs. Additionally, the Funding Proposal does not provide for CAT fees to be adopted “in perpetuity.” As described in the Proposing Release, at the beginning of each year, the Operating Committee will calculate a new Fee Rate based on reasonably budgeted CAT costs for the year and reasonably projected total executed equivalent share volume of all transactions in Eligible Securities for the year.⁶⁹ This Fee Rate would be adjusted mid-year to address changes in the actual or budgeted costs or changes in the actual or projected executed equivalent share volume. Fee filings will be filed with the Commission under Rule 19b-4, thereby providing transparency and an opportunity for comment by the public, and such fees may only be implemented if they satisfy the requirements of the Exchange Act.⁷⁰

More generally, the Funding Proposal will operate in a manner similar to other funding models employed by the SEC and the Participants, including the SEC’s Section 31 fees and SROs’ related sales value fees, FINRA’s TAF, and the ORF utilized by options exchanges. The SEC previously has determined that the Participants’ sales value fees related to Section 31, the FINRA TAF and the ORF are consistent with the Exchange Act, and these fees do not have a built-in sunset provision.

Finally, as previously described, CAT LLC reiterates that these comments fail to recognize the basic fact that Industry Members may determine to pass their CAT fees through to their own customers, just as they do with Section 31-related sales value fees and other fees.

⁶⁷ CAT NMS Plan Approval Order at 84727.

⁶⁸ Citadel Letter at 27.

⁶⁹ Proposing Release at 17092.

⁷⁰ As described in the Proposing Release, the Participants separately intend to file rule filings under section 19(b) of the Exchange Act and Rule 19b-4(f)(2) thereunder to establish the CAT Fees and Historical CAT Assessments to be charged to Industry Members based on the Funding Proposal. See Proposing Release at 17086.

III. Historical CAT Costs

A. Industry Member Contributions to Historical CAT Costs

Several commenters reiterate prior objections to Industry Members contributing any Historical CAT Costs.⁷¹ To date, Historical CAT Costs (which total more than \$500 million through the end of 2022) have been borne entirely by the Participants. SIFMA mistakenly asserts that historical costs would be borne by “a small group” of broker-dealers and questions whether “the allocation of significant historical costs to a small group of executing broker firms based on current market volume is consistent with the Exchange Act.”⁷²

CAT LLC has previously addressed these comments at length.⁷³ In summary:

- The CAT NMS Plan, as approved by the Commission, specifically contemplates Industry Members contributing to the costs of the CAT.⁷⁴
- Contrary to commenters’ mistaken assertion that these costs would be allocated to a small group of broker-dealers, almost 700 of the 1100 Industry Members would have an obligation to contribute to Historical CAT Costs (per the illustrative example in the filing), not just a few CAT Executing Brokers.
- The fees vary in accordance with the market activity of the CAT Executing Brokers. Accordingly, certain CAT Executing Brokers will have large bills for very significant market activity. This only serves to emphasize the fairness of the proposal; Industry Members with significant market activity will have larger bills.
- We note that, based on requests by Industry Members that CAT LLC provide detailed data regarding their assessed fees, it appears that some CAT Executing Brokers may determine to pass these fees on, relieving them of any obligation with regard to CAT fees at all (other than the process of passing on the fees).

CAT LLC would also like to correct any misunderstanding that Historical CAT Costs would be allocated to Industry Members as a single lump sum. As described further below and in the Proposing Release, the Historical Recovery Period will be no less than 24 months and no more than five years.⁷⁵ In analyzing the potential Historical Recovery Periods, CAT LLC sought to weigh the need for a reasonable Historical Fee Rate that spreads the Historical CAT Costs

⁷¹ FIA Letter at 3-4; SIFMA Letter II at 4; Virtu Letter at 4.

⁷² SIFMA Letter II at 4. *See also* Virtu Letter at 4.

⁷³ Proposing Release at 17095-99; Letter from Mike Simon, CAT NMS Plan Operating Committee Chair Emeritus, to Vanessa Countryman, Secretary, SEC (Feb. 15, 2023) at 21-23.

⁷⁴ *See* Section 11.2(b) of the CAT NMS Plan (requiring the Operating Committee to seek “to establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act”).

⁷⁵ Proposing Release at 17096-97.

over an appropriate amount of time and the need to repay the loan notes to the Participants in a timely fashion.

B. Internal Cost of Compliance by Industry Members

One commenter mistakenly asserts that “Industry Members are already bearing nearly all of the total CAT-related costs.”⁷⁶ This commenter appears to conflate the internal compliance costs incurred by Industry Members to comply with CAT reporting requirements with the direct costs of the CAT, which are the subject of the Funding Proposal.

In fact, the Participants have funded 100% of the build, operation and other costs related to CAT to date, pending Commission approval of a fee model. Industry Members have not paid any of those costs to date. The Funding Proposal is intended to charge fees to pay for the direct costs of the CAT, not for the ancillary compliance costs of Industry Members or Participants.⁷⁷ Industry Members would incur compliance costs regardless of a funding model (and can choose to pass those compliance costs through to their customers as with any other costs). Indeed, the Participants have also incurred their own substantial internal compliance costs, which are not taken into consideration and thus are not included in the direct costs of the CAT covered by the Funding Proposal. As previously discussed, there is no precedent for regulatory fees to be determined based on the cost of compliance of the regulated entity.⁷⁸

C. Pass-Throughs for Historical CAT Assessments

As previously discussed at length, the Historical CAT Assessment would be assessed based on current market activity, not past market activity.⁷⁹ Specifically, the fee rate would be calculated based on Historical CAT Costs, but the fee rate would be applied to current market transactions.⁸⁰ SIFMA mistakenly asserts that “there appears to be little ability for [executing broker] firms to pass-on historical costs to anyone else.”⁸¹ In fact, 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

⁷⁶ Citadel Letter at 31.

⁷⁷ See CAT NMS Plan Approval Order at 84795 n.1749 (“The Participants stated that the funding model provides a framework for the recovery of the costs to create, develop and maintain the CAT, and is not meant to address the cost of compliance for Industry Members and Participants with the reporting requirements of Rule 613.”).

⁷⁸ See, e.g., Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Feb. 15, 2023) at 29.

⁷⁹ For a description of the proposal for charging the Historical CAT Assessment, see Proposing Release at 17095-99. See also First Response to Comments at 9 (correcting SIFMA’s misunderstanding that Historical CAT Costs would be based on past market activity); Securities Exchange Act Release No. 96394 (Nov. 28, 2022), 87 Fed. Reg. 74183, 74185, n.15 (Dec. 2, 2022).

⁸⁰ Note that CAT LLC addressed SIFMA’s comments regarding charging current Industry Member’s based on current market activity in detail in the Proposing Release, rather than charging Industry Member’s based on market activity at the time the certain historical costs were incurred. Proposing Release at 17113.

⁸¹ SIFMA Letter II at 4.

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.

D. Magnitude of Historical CAT Costs and Fees

1. Magnitude of Historical CAT Costs

CAT LLC believes it would be helpful to provide a comparison of Historical CAT Costs to Prospective CAT Costs. CAT costs incurred during 2022 were \$181,107,294. CAT LLC currently estimates that CAT costs for 2023 will be higher than 2022 costs, subject to potential additional cost management measures. The Historical CAT Costs through 2022 (except for certain Excluded Costs⁸²) are \$518,795,904:

- Historical CAT Costs Incurred Prior to June 22, 2020 (i.e., Pre-FAM Costs): \$143,919,521
- CAT Costs Incurred in Period 1 (June 22, 2020 – July 31, 2020): \$6,377,343
- CAT Costs Incurred in Period 2 (August 1, 2020 – December 31, 2020): \$42,976,478
- CAT Costs Incurred in Period 3 (January 1, 2021 – December 31, 2021): \$144,415,268
- CAT Costs Incurred in 2022: \$181,107,294

By way of comparison, Historical CAT Costs through 2022 (\$518 million) are approximately 2.2 times the 2023 CAT budget (\$233 million). Stated differently, the 2023 CAT budget (\$233 million) is approximately 45% of total Historical CAT Costs through 2022 (\$518 million).

2. Historical Recovery Period

CAT LLC proposes to establish a Historical Recovery Period of no less than 24 months or more than five years. In the Proposing Release, CAT LLC noted that, “[i]n analyzing the potential Historical Recovery Periods, CAT LLC sought to weigh the need for a reasonable Historical Fee Rate that spreads the Historical CAT Costs over an appropriate amount of time and the need to repay the loan notes to the Participants in a timely fashion.” CAT LLC determined to propose a range of two to five years as the amount of Historical CAT Costs had not yet been determined; they would increase as more time passed prior to an approval of the funding model. In setting this range, among other factors, CAT LLC considered the amount of the Historical CAT Costs in comparison to the Prospective CAT Costs. Currently, Historical CAT Costs are a little less than approximately three times annual Prospective CAT Costs. Accordingly, CAT LLC believes that it would potentially be appropriate to spread the Historical CAT Costs over a time period of a little less than three years, a time period which is within the two to five year range for the Historical Recovery Period. The exact Historical Recovery Period,

⁸² The Participants expect to propose that Historical CAT Costs would not include two categories of CAT costs (“Excluded Costs”): (1) \$48,874,937, which are all CAT costs incurred from November 15, 2017 through November 15, 2018, and (2) \$14,749,362 of costs related to the termination of the relationship with the Initial Plan Processor. The Participants expect to propose that the Participants would remain responsible for 100% of these costs, which total \$63,624,299. See Proposing Release at 17110.

however, would be determined in the context of the rule filing pursuant to Section 19(b) of the Exchange Act and Rule 19b-4 thereunder.

3. Magnitude of Historical Fee Rate

Although the actual Historical Fee Rates will be established via Participant rule filings pursuant to Section 19(b) and Rule 19b-4 thereunder, CAT LLC expects to propose a fee rate or rates per executed equivalent share that are comparable to or smaller than other transaction-based fees. Described below are two illustrative examples in which CEBBs and CEBSs would be charged less than 1/1000 of a penny per executed equivalent share.

In the Proposing Release, CAT LLC provided an illustrative example of potential fee rate per executed equivalent share that CAT Executing Brokers could pay with regard to Historical CAT Costs. The illustrative example was calculated based on the Historical CAT Costs for prior to 2022 (excluding certain Excluded Costs), which totaled \$337,688,610. In the calculation, CAT LLC used a Historical Recovery Period of two years, and projected the total executed equivalent share volume of transactions in Eligible Securities for two years based on the actual total executed equivalent share volume of transactions in eligible securities for 2022. With these assumptions as described in the Proposing Release, the Historical Fee Rate was \$0.0000417950 per executed equivalent share. Because the Historical Fee Rate is multiplied by one-third in calculating the Historical CAT Assessment, each CEBB and CEBS would pay \$0.00001393167 per executed equivalent share (that is, \$0.0000417950 per executed equivalent share multiplied by one-third).

CAT LLC believes that it would be helpful to provide another illustrative example of a fee rate per executed equivalent share that CAT Executing Brokers could pay with regard to Historical CAT Costs. This example is calculated based on the Historical CAT Costs for prior to 2023 (excluding certain Excluded Costs), which total \$518,795,904. In this calculation, CAT LLC uses a Historical Recovery Period of three years, and projected the total executed equivalent share volume of transactions in Eligible Securities for three years based on the actual total executed equivalent share volume of transactions in eligible securities for 2022. With these assumptions, the Historical Fee Rate would be \$0.0000428068 per executed equivalent share (which is calculated by dividing \$518,795,904 by three times the actual executed equivalent share volume of transactions in eligible securities for 2022).⁸³ Because the Historical Fee Rate is multiplied by one-third in calculating the Historical CAT Assessment, each CEBB and CEBS would pay \$0.0000142689 per executed equivalent share (that is, \$0.0000428068 per executed equivalent share multiplied by one-third).

Currently, broker-dealers are charged a variety of non-CAT related transaction-based fees that are higher than these proposed CAT fees. For example, Nasdaq charges various transaction-based equities fees, ranging from \$0.0005 per share to \$0.0030.⁸⁴ Cboe charges an options

⁸³ This Historical Fee Rate is calculated by dividing \$518,795,904 by three times the actual executed equivalent share volume of transactions in eligible securities for 2022 (or 3 times 4,039,821,841,560.31).

⁸⁴ Nasdaq BX U.S. Equities Pricing (http://www.nasdaqtrader.com/trader.aspx?id=bx_pricing).

regulatory fee that is \$0.0017 per contract,⁸⁵ and NYSE American charges an options regulatory fee of \$0.0055.⁸⁶

E. Excluded Costs

One commenter argues that it is inappropriate for Industry Members to bear any costs related to the engagement of Thesys CAT, LLC, the prior Plan Processor.⁸⁷ Another commenter questions whether Industry Members are being allocated any costs relating to the prior Plan Processor.⁸⁸

As clearly described in the Funding Proposal, Historical CAT Costs would not include two categories of CAT costs relating to the prior Plan Processor (“Excluded Costs”): (1) \$48,874,937, which are all CAT costs incurred from November 15, 2017 through November 15, 2018, and (2) \$14,749,362 of costs related to the termination of the relationship with the Initial Plan Processor. The Participants expect to propose that the Participants would remain responsible for 100% of these costs, which total \$63,624,299.⁸⁹

IV. Governance and Cost Management

A. Independent Cost Review Mechanism

Several commenters reiterate prior comments recommending the adoption of an “independent cost review mechanism” to oversee CAT costs.⁹⁰ Specifically, SIFMA asserts that “this independent body to oversee CAT costs must include industry representatives” and such body “should be responsible for determining an annual operating budget.”⁹¹

CAT LLC previously responded at length to this proposal in its First Response to Comments,⁹² and its other response to comments.⁹³ As previously noted, CAT LLC does not believe 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

⁸⁵ Cboe Exchange Fee Schedule (June 1, 2023) (https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf).

⁸⁶ NYSE American Options Fee Schedule (June 1, 2023) (https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf).

⁸⁷ FIA Letter at 4.

⁸⁸ Citadel Letter at 23, 31.

⁸⁹ See Proposing Release at 17110.

⁹⁰ Citadel Letter at 33; FIA Letter at 5; MMI Letter at 2; SIFMA Letter II at 2; Virtu Letter at 4.

⁹¹ SIFMA Letter II at 2 n.10. See *Nasdaq Stock Market LLC, et al v. SEC*, 38 F.4th 1126 (D.C. Cir. 2022) (holding that Section 11A of the Exchange Act does not permit non-SROs to participate in NMS plan governance).

⁹² First Response to Comments at 8.

⁹³ See, e.g., Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Feb. 15, 2023) at 29-30.

practices under Rule 608 of Regulation NMS and Section 19(b) of the Exchange Act as applicable. Under those provisions, changes to the CAT funding model must be filed with the SEC via Plan amendment, thereby providing transparency and an opportunity for comment by the public, and CAT fees for Industry Members may only be implemented if they are later filed with the SEC by the Participants and satisfy the requirements of the Exchange Act. Accordingly, Industry Members will have ample opportunity to comment on proposed Plan amendments and fee filings. 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.
- Providing a third-party with control over the annual budget could impermissibly restrict the Participants from discharging their regulatory obligations. 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.⁹⁴

B. Commission Approval of the CAT Budget

One commenter recommended that the Commission should formally approve the CAT budget on an annual basis.⁹⁵

As previously noted, CAT LLC does not believe that such an approval process is necessary or appropriate.⁹⁶ First, as a preliminary matter, CAT LLC is not a governmental entity; it is a private entity subject to the regulatory requirements of the Exchange Act. Second, such a budget review process 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

⁹⁴ For a discussion of CAT LLC's cost management efforts, *see* Proposing Release at 17117.

⁹⁵ Citadel Letter at 33.

⁹⁶ *See, e.g.*, Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Aug. 16, 2022).

practices under Rule 608 of Regulation NMS and Section 19(b) of the Exchange Act and Rule 19b-4 thereunder. 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. Third, 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.

C. CAT Governance Structure

1. Industry Member Representation

Several commenters reiterate prior objections relating to the lack of industry voting member representation on the CAT LLC Operating Committee. One commenter asserts that “the CAT Operating Committee should be reconfigured, with Industry Members comprising the percentage of the Committee equivalent to whatever cost allocation percentage is eventually allocated to them.”⁹⁷ Another commenter argues that “Industry Members should have voting representation commensurate with any costs allocated to them.”⁹⁸ Similarly, another commenter argues that “the representation of Industry Members on the CAT Operating Committee should be proportionate to the financial obligation of funding the CAT.”⁹⁹

CAT LLC does not believe these proposals are consistent with the Exchange Act.¹⁰⁰ More generally, allowing Industry Members to control CAT LLC as the commenters suggest could adversely affect the regulatory objectives of the CAT. Unlike the Participants, Industry Members have no statutory obligation to protect investors or to act in the public interest, nor do they have any regulatory obligation to operate the CAT System in a manner that is consistent with the Rule 613 and the CAT NMS Plan. The current governance structure provides Industry Members with the ability to provide meaningful input on CAT matters through the Advisory Committee and it does not compromise the key regulatory and oversight responsibilities related to the CAT, including the SEC and SRO oversight of Industry Members. Moreover, Industry Members have ample opportunity for comment on proposed Plan amendments and fee filings, thereby obviating the need for a voting presence on the Operating Committee.

2. Participant Voting Structure of the Operating Committee

One commenter argues that “voting rights should be allocated so that each exchange group and national securities association has one vote on the operating committee, with a second vote provided if the exchange group or national securities association has a market center or centers that trade more than 15 percent of consolidated equity and options market share,” similar to the NMS Plan for consolidated equity market data.¹⁰¹ As previously noted, CAT LLC

⁹⁷ FIA Letter at 4.

⁹⁸ Citadel Letter at 34.

⁹⁹ MMI Letter at 2.

¹⁰⁰ *See Nasdaq Stock Market LLC, et al v. SEC*, 38 F.4th 1126 (D.C. Cir. 2022) (holding that Section 11A of the Exchange Act does not permit non-SROs to participate in NMS plan governance).

¹⁰¹ Citadel Letter at 34.

believes that comments relating to the voting structure of the Operating Committee are beyond the scope of the establishment of the funding model.¹⁰²

This commenter further argues that “all actions by the CAT Operating Committee relating to funding should require authorization by a Supermajority vote.”¹⁰³ CAT LLC disagrees with this proposal because arguably every Operating Committee action directly or indirectly relates to CAT costs, and imposing a Supermajority requirement on all Operating Committee actions has the potential to undermine effective and efficient governance.¹⁰⁴

D. Cost Management Efforts

Several commenters raise concerns with increasing CAT operating costs.¹⁰⁵ CAT LLC has made cost management of the CAT a top priority, and has sought to reduce costs that are within its control without adversely affecting the regulatory goals of the CAT in a variety of ways. CAT LLC utilizes a Cost Management Working Group, populated by senior members of the Participants, to identify, evaluate and seek to address cost management needs, through a number of different methods.

CAT LLC emphasizes, however, that both Rule 613 and the CAT NMS Plan impose significant regulatory obligations on the Participants regarding how to design, build, and operate the CAT System.¹⁰⁶ To the extent CAT LLC and the Participants fail to comply with Rule 613 or the CAT NMS Plan, the Commission could seek to compel compliance by bringing enforcement actions. In furtherance of these regulatory obligations imposed by the Commission, CAT’s single largest cost driver is the processing and storage of CAT data on the cloud. Cloud costs represent approximately 75% of all CAT costs. When the Commission adopted the CAT NMS Plan in 2016, it estimated that the CAT would need to receive 58 billion records per day, that the cost to build the CAT would range from \$37.5 million to \$65 million, and that annual operating costs for the CAT would range from \$36.5 million to \$55 million. As of the fourth quarter of 2022, the CAT System receives, processes and loads an average of 418 billion records per day, with a record single-day peak of 613 billion records. That is 7-10 times the original estimated daily record count for the CAT. As a result, the 2023 CAT budget is approximately \$233 million, with CAT cloud costs alone budgeted for approximately \$176 million. The 2024 CAT budget is likely to be comparable or higher, notwithstanding cost savings measures.

¹⁰² See, e.g., Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Aug. 16, 2022) at 33.

¹⁰³ Citadel Letter at 34.

¹⁰⁴ See CAT NMS Plan Approval Order at 84845 (explaining that “voting thresholds that result in Operating Committee decision-making that balances the ability of minority members to have alternative views considered with the need to move forward when appropriate to implement needed policies can promote achievement of the Plan’s benefits in an efficient manner”).

¹⁰⁵ Citadel Letter at 7-9; MMI Letter at 1; SIFMA Letter II at 4; Virtu Letter at 4.

¹⁰⁶ “By statute, the Commission is the regulator of the Participants, and the Commission will oversee and enforce their compliance with the Plan.” CAT NMS Plan Approval Order at 84764. See also Letter from Brett Redfearn, Director, Division of Trading and Markets, to Michael J. Simon, Chair, CAT NMS Plan Operating Committee (May 1, 2018), <https://www.sec.gov/comments/s7-13-19/s71319-6090109-191884.pdf> (warning the Participants that “the requirements of the CAT NMS Plan cannot be interpreted away”).

1. Technological Cost Management Efforts within CAT LLC's Control

CAT LLC and the Plan Processor continue to actively pursue cost savings measures that are within their control and have identified savings related to compute and storage costs as well as to system architecture and process improvements, among others. But stringent CAT NMS Plan requirements enforceable by the Commission do not allow for any material flexibility in cloud architecture design choices, processing timelines (*e.g.*, the use of non-peak processing windows), or lower-cost storage tiers. As a result, CAT LLC is limited in the types of technological cost management efforts it may undertake without Commission action. Nevertheless, within these significant regulatory constraints, CAT LLC, through the Plan Processor, have proactively managed costs within a cloud design that supports compliance with the Plan requirements.

For example, CAT LLC and the Plan Processor's continuous efforts to refine and optimize cloud resource usage has, since 2022, resulted in over \$32 million in savings achieved as of May 2023 and will total a projected \$93 million in savings by end of 2024 even while data volumes have grown by over 80% since 2021. Examples of the types of cost savings efforts have included:

- Use of cost-effective storage tiers that are compliant with the CAT NMS Plan;
- Effectively using multiple server types and software;
- Spot versus on-demand pricing alternatives for lower time sensitive workloads;
- Entering into a three-year compute savings plan that will reduce compute fees by \$8-9 million annually based on current volumes;
- Negotiating further discounts to storage rates;
- On-going implementation of significant performance improvements that reduce compute time and improve reliability;
- Automatically adding and removing servers as demand requires (auto scaling); and
- Alternative methods for addressing late data.

CAT LLC and the Plan Processor, in consultation with technology experts from the Participants, will continue to regularly review the compute and storage options that may be used to lower compute and storage needs and that would be consistent with current CAT NMS Plan requirements, including such options as reservations, spot instances, lower cost storage services and data archival policies as well as software architecture and performance improvements.

2. Plan Amendment, Exemptive Requests and Other Cost Management Efforts Subject to Commission Action

As a regulatory matter, the Participants are required to comply with the strict CAT NMS Plan requirements. As a result, many additional cost savings measures require Commission action to permit their implementation, through amendments to the Plan, exemptive relief, no-action relief, or other Commission action. CAT LLC has submitted a variety of requests to the Commission to reduce CAT costs, and has identified additional changes that could significantly lower costs, but that would require either exemptive relief or a Plan amendment before such cost-saving measures could proceed. In each such case, CAT LLC does not believe that such action would adversely affect the regulatory goals of the CAT. For example:

- Retention of Industry Test Data. CAT LLC requested exemptive relief from Rule 17a-1 and certain provisions of the CAT NMS Plan relating to the retention of Industry Test Data. Such relief is estimated to provide approximately \$1 million per year in savings.¹⁰⁷
- 2X Load Testing. CAT LLC requested no-action relief regarding 2X load testing for the CAT System. Such relief is estimated to provide approximately \$1 - \$1.25 million per year in savings.¹⁰⁸
- Verbal Floor and Upstairs Activity. The SEC previously granted CAT LLC's exemptive request for a temporary exemption from the requirement to report certain verbal floor and upstairs activity to the CAT. CAT LLC has requested an extension of this relief through 2026, noting the prohibitive costs of reporting such verbal activity.¹⁰⁹

In addition, certain Participants have filed suit in the D.C. Circuit challenging the Commission's interpretation of certain Plan requirements, which such Participants believe would impose tens of millions of dollars in additional costs, as well as present technological obstacles and regulatory disadvantages.¹¹⁰ The relevant Participants and the SEC have been engaged in good faith discussions to resolve these issues, including issues related to additional cost savings.

Rather than proceed with building out the CAT System to conform to the Commission's interpretation of certain Plan requirements, the Participants believe that instead, the following

¹⁰⁷ Letter from Brandon Becker, Chair, CAT NMS Plan, Operating Committee, to Vanessa Countryman, Secretary, SEC (June 2, 2023), <https://www.catnmsplan.com/sites/default/files/2023-06/06.02.23-Exemptive-Request-Test-Data-Retention.pdf>.

¹⁰⁸ Letter from Brandon Becker, Chair, CAT NMS Plan Operating Committee, to Emily Westerberg Russell, Chief Counsel, Division of Trading and Markets, SEC (June 6, 2023), <https://www.catnmsplan.com/sites/default/files/2023-06/06.06.23-No-Action-Request-for-2X-Load-Testing.pdf>.

¹⁰⁹ Letter from Brandon Becker, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Mar. 31, 2023), <https://www.catnmsplan.com/sites/default/files/2023-03/03.31.23-CAT-Exemption-Request-Verbal-Floor-and-Upstairs-Activity.pdf>.

¹¹⁰ See Petition for Review, USCA Case No. 22-1234. The litigation covers a variety of CAT issues that bear directly on CAT costs, including (1) online query tool response times and concurrency testing; (2) incorporation of post T+5 corrections into existing lifecycles; (3) CAT Order ID assignment by T+1 noon; (4) order handling instructions communicated via port level settings; and (5) reporting and linkage of Participant rejects.

changes, if approved by the Commission, would result in significant cost savings without negatively impacting the regulatory goals of the CAT:

- Single Pass Options Quotes. Assembling options quote lifecycles only once, with the final CAT Order ID delivered by T+2 at 8 a.m. ET instead of T+5 at 8 a.m. ET, is estimated to save \$5.4 million per year. To facilitate these cost savings, CAT LLC intends to seek an exemption from the Commission's requirement that the Participants deliver an interim CAT Order ID by T+1 at 9 p.m. ET for options quotes. The Participants have identified additional methods to streamline the processing of options quotes that could provide an additional annual savings of \$3 million or more.
- Eliminate Interim CAT Order ID and Deliver Final CAT Order ID by T+3. Amending the CAT NMS Plan to revise the linkage timeline by clarifying that the Plan does not require assignment of an interim CAT Order ID and by providing a final CAT Order ID by T+3 at 8 a.m. ET, as opposed to T+5 at 8 a.m. ET, is estimated to save \$4.4 million per year.¹¹¹
- Linker in Industry Test Environment. Amending the CAT NMS Plan to reduce the number of days that linker is run in Industry Prod Mirror Test environment (CPTM) to two consecutive days/week (intrafirm linkage will run daily, interfirm linkage will run two consecutive days/week) is estimated to save \$700,000 per year.
- Exchange Rejections. Amending the CAT NMS Plan to clarify that exchanges are not required to report exchange rejections is estimated to save \$500,000 per year. The Participants note that a requirement to link exchange rejections to Industry Member data would further increase the scope and costs of operating the CAT.

One commenter recommends that CAT LLC work with the Commission to identify technical requirements that should be modified through a CAT NMS Plan amendment to materially reduce costs without sacrificing key benefits of the CAT system.¹¹² CAT LLC and the Plan Processor continue to identify and have raised with the Commission staff other potential, more fundamental changes to the CAT NMS Plan that would limit costs without compromising the regulatory goals of the CAT. Such fundamental changes, which would require Commission action to implement, could include, but are not limited to, the following:

- Relax one or more CAT processing and repair deadlines;
- Reduce the production and storage of copies of data required to support the Plan;
- Reduce the scope of certain required order events that may be of limited value to regulators;

¹¹¹ This cost savings estimate assumes the single pass options quotes proposal described in the preceding bullet is completed prior to implementation.

¹¹² Citadel Letter at 33.

- Eliminate requirements for six years of online access;
- Relax online query tool response times; and
- Eliminate requirements for seldom used regulator functionality.

E. Cost Management Incentives

One commenter questioned whether the Participants would have any incentive to ensure CAT costs are aggressively managed when most of the costs are being passed on to Industry Members.¹¹³ CAT LLC strongly disagrees with the suggestion that the Participants would not be incentivized to control CAT costs if they are only responsible for one-third of the CAT costs going forward. CAT LLC has had a strong focus on cost management while the Participants have had the responsibility for paying 100% of the CAT costs, and will continue to have a strong focus on cost management if they are responsible for one-third of the CAT costs. Paying \$78 million per year versus \$233 million per year (based on the 2023 budget) would still provide Participants with a significant incentive to keep costs at an appropriate level. In either scenario, the costs are substantial and will continue to receive critical review by the Participants as they have to date.

F. Publication of CAT Budget

One commenter recommends that all CAT operating budgets should remain published on the CAT website, and notes that only the current and immediately prior annual budget appear to be available.¹¹⁴

CAT LLC notes that the Company's annual financial statements from its inception in 2017 are available on the CAT website.¹¹⁵ As noted by the commenter, CAT LLC voluntarily publishes its annual operating budget (as well as updates to the budget that occur during the year).¹¹⁶ In response to this comment, CAT LLC intends that prior CAT operating budgets will remain available on the CAT website.

V. Collaboration with Industry

Several commenters mistakenly assert that CAT LLC has failed to collaborate with the industry in establishing a funding model for the CAT.¹¹⁷ CAT LLC has engaged with the industry regarding the Funding Proposal in good faith over the last seven years as it has explored

¹¹³ FIA Letter at 4-5.

¹¹⁴ Citadel Letter at 34.

¹¹⁵ See CAT Audited Financial Statements, <https://www.catnmsplan.com/audited-financialstatements>.

¹¹⁶ See CAT Financial and Operating Budget, <https://www.catnmsplan.com/cat-financial-and-operating-budget>.

¹¹⁷ MMI Letter at 2; SIFMA Letter II at 4.

different approaches to the funding of CAT. CAT LLC has discussed funding model issues with the CAT Advisory Committee, which includes wide representation from the industry, and held industry-wide webinars on funding issues. CAT LLC and its Participants also have discussed funding model issues with industry associations, like SIFMA and Financial Information Forum, as well as individual Industry Members.

Similarly, SIFMA asserts that CAT LLC has failed to respond to its prior comments regarding the issues it raised with regard to the amount of CAT costs allocated to Industry Members.¹¹⁸ Contrary to this assertion, CAT LLC responded at length to these comments in its First Response to Comments.¹¹⁹ Indeed, CAT LLC has responded to these comments a number of times, including in the Funding Proposal,¹²⁰ and each of the prior responses to comments.¹²¹ While CAT LLC recognizes that SIFMA disagrees with the proposed sharing of CAT costs between Industry Members and Participants, CAT LLC's determination not to adopt SIFMA's viewpoint does not mean that CAT LLC has not considered or responded to SIFMA's comments.

CAT LLC has analyzed more than 50 comment letters submitted in response to multiple CAT fee proposals filed with the SEC, and provided more than 10 responses to those comment letters. In response to industry input, CAT LLC repeatedly incorporated the ideas provided by the industry into revised versions of the model, including, for example:

- Charging the executing broker instead of the clearing broker;¹²²
- Providing illustrative examples and background data related thereto for Industry Members;¹²³
- Providing discounts to market makers (in a prior proposal);¹²⁴
- Providing special treatment for OTC transactions versus other Eligible Securities (in a prior proposal);¹²⁵
- Treating ATs as Industry Members rather than Participants (in a prior proposal);¹²⁶ and
- Eliminating the concept of fee tiers (in a prior proposal).¹²⁷

¹¹⁸ SIFMA Letter II at 2.

¹¹⁹ First Response to Comments at 6-8.

¹²⁰ Proposing Release at 17104-06.

¹²¹ *See, e.g.*, Response to OIP at 26-30.

¹²² Response to OIP at 5-6.

¹²³ *See, e.g.*, Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (May 5, 2021).

¹²⁴ Letter from Mike Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, SEC (Mar. 31, 2021) at 16-20.

¹²⁵ *Id.* at 26-27.

¹²⁶ *Id.* at 7-10.

¹²⁷ *Id.* at 13-14.

CAT LLC has repeatedly sought the views of SIFMA and other industry participants on specific aspects of the model. Responses to these requests for feedback makes clear that SIFMA members often have differing views on the best approach to particular aspects of the funding model, including, for example, whether to base industry member fees based on message traffic or based on executed share volume, or whether costs should be allocated to the executing broker or the originating broker.¹²⁸

Determining not to accept all suggestions and proposals from the industry does not mean that CAT LLC has not engaged in good faith discussions with the industry. It means that not all industry proposals have the same merit or are consistent with each other.

Completely contrary to SIFMA's suggestion that Commission would be "rushing" to approve the current funding model, the current model results from years of modifications that have been made in significant part in response to industry comments to earlier versions. The process that has resulted in the current proposal reflects an extraordinary degree of deliberation and revision in response to feedback. Moreover, and as discussed below, commenters have had more than 400 days to comment on the substance of the current proposal (which differs very little from the immediately preceding funding model that was published for comment). It simply is inaccurate to say that the Commission review process has been rushed.

VI. Operation of CAT in Compliance with the CAT NMS Plan and Rule 613

SIFMA argues that Rule 613 and the 2016 CAT NMS Plan are outdated and no longer reflect the current operation of the CAT. As examples, SIFMA mentions the current requirements to provide data prior to T+5, as well as the expansion of CAT to cover port-level settings and messages acknowledging the receipt of a cancel request. SIFMA states that it understands that many of these material decisions regarding the scope of information reported, reporting specifications, and system specifications changed from what was approved in the Commission's formal rulemakings through bilateral discussions between the Commission and Participants. SIFMA argues that these decisions have significantly increased CAT costs. As a result, SIFMA states that the Commission cannot "approve a Funding Proposal for a system that is not consistent with Commission Rule 613 and the CAT NMS Plan."¹²⁹

The CAT has been implemented in accordance with the requirements of Rule 613 and the CAT NMS Plan. The Funding Proposal seeks to recover costs reasonably incurred in the creation, implementation and maintenance of the CAT. The CAT NMS Plan specifically permits the recovery of such costs. Moreover, Rule 613 and the CAT NMS Plan specifically contemplate that there may be various approaches to funding of the CAT, which is why the amendment to implement the funding model is subject to approval after notice and comment.

¹²⁸ See First Response to Comments at 2-3 (summarizing SIFMA's previous statements expressing support for allocating costs to the executing broker).

¹²⁹ SIFMA Letter II at 7.

A. Commission Interpretations of the CAT NMS Plan

Relatedly, several commenters challenge the Commission's interpretation of various requirements of the CAT NMS Plan unrelated to the establishment of a funding model (*e.g.*, interim order IDs, assignment of new CAT Order IDs for post-T+5 error corrections, linkages of customer and representative orders, port-level settings, lifecycle linkages, query response times, non-actionable RFQ responses, collection and reporting of price negotiations done via verbal and unstructured communications) and the costs and benefits associated with such interpretations.¹³⁰ One commenter argues that the Operating Committee and the Commission should "cease making any further changes to the CAT at this time," arguing that "[a]dditional requirements arguably outside the scope of the approved NMS Plan . . . continue to be promulgated by Commission staff."¹³¹ Another commenter asserts that "informal reinterpretations" of the CAT NMS Plan by the Commission are a major driver of CAT costs.¹³²

CAT LLC believes that this rule proposal is not the appropriate forum to resolve these interpretive questions. As a general matter, CAT LLC notes that the Commission has enforcement authority to compel compliance with Rule 613 and the CAT NMS Plan. CAT LLC notes that certain Participants have petitions for judicial review with respect to certain Commission interpretations of CAT NMS Plan requirements, including with respect to several of the items noted by commenters. To the extent Industry Members disagree with the Commission's interpretation of certain reporting requirements under the CAT NMS Plan, they are similarly free to seek exemptive relief from the Commission or pursue their own legal challenges.

As for changes to the Plan, NMS plans are not intended to be static and the Participants are following the plan amendment process specifically required under Rule 608, where applicable. Those provisions are designed to allow for proposed changes to NMS plans, including the extensive public notice and comment period that have been afforded with respect to the current proposals.

Relatedly, one commenter asserts that "any material change to the CAT system, related technology contracts, or implementation scope should require the filing of an NMS Plan amendment," including a cost-benefit analysis.¹³³

CAT LLC agrees that any material change to the CAT system would require an amendment to the CAT NMS Plan. CAT LLC reiterates, however, that the Commission may have a different view from this commenter and/or the Participants regarding what functionality is currently required by the CAT NMS Plan. The Commission has repeatedly warned the Participants that it "will oversee and enforce [the Participants'] compliance with the Plan,"¹³⁴

¹³⁰ Citadel Letter at 32-34; FIA Letter at 3, 5; MMI Letter at 4.

¹³¹ Citadel Letter at 33.

¹³² FIA Letter at 5.

¹³³ Citadel Letter at 34.

¹³⁴ CAT NMS Plan Approval Order at 84764.

and that “the requirements of the CAT NMS Plan cannot be interpreted away.”¹³⁵ CAT LLC disagrees that any material change to a technology contract that would not require a change to the CAT NMS Plan would require an amendment to the CAT NMS Plan, as the Plan currently contemplates that the Operating Committee may enter into, modify or terminate any Material Contract.¹³⁶

B. Effect of Financial Accountability Milestones

One commenter asserts that the Funding Proposal “inadequately addresses the ‘Period 4’ expenses under the Financial Accountability Milestones contained in the current CAT NMS Plan.”¹³⁷

CAT LLC recognizes that the collection of CAT Fees and Historical CAT Assessments from Industry Members are subject to Section 11.6 of the CAT NMS Plan regarding the Financial Accountability Milestones. As previously described at length, Participants will not make CAT fee filings until they believe that any applicable Financial Accountability Milestone has been satisfied. The Commission has not made a determination regarding the Participants’ compliance or non-compliance with the Financial Accountability Milestones.

VII. Procedural Requirements of Rule 608

SIFMA argues that the CAT NMS Plan, and the CAT Operating Committee’s proposal to assess CAT fees directly on Industry Members through Rule 19b-4 filings likely violates the requirements of Rule 608 of Regulation NMS.¹³⁸ In so arguing, SIFMA notes that the Commission amended Rule 608 in 2020 to specifically require that fee changes made pursuant to NMS Plans be subject to a notice and comment process and specific Commission approval prior to becoming effective. CAT LLC disagrees with this argument and believes that the Funding Proposal complies with Rule 608 of Regulation NMS.

The CAT NMS Plan, as approved by the Commission, requires any Industry Member CAT fees to be filed pursuant to Section 19(b) of the Exchange Act.¹³⁹ Fee filings submitted by Participants pursuant to Section 19(b) of the Exchange Act would be required to be assessed consistent with the requirements of the CAT NMS Plan. Section 19(b) of the Exchange Act, in turn, permits fees to become effective upon filing.¹⁴⁰ Unlike the filing process under Rule 608,

¹³⁵ Letter from Brett Redfearn, Director, Division of Trading and Markets, to Michael J. Simon, Chair, CAT NMS Plan Operating Committee (May 1, 2018), <https://www.sec.gov/comments/s7-13-19/s71319-6090109-191884.pdf>.

¹³⁶ See Section 4.3 of the CAT NMS Plan.

¹³⁷ Citadel Letter at 24.

¹³⁸ SIFMA Letter II at 9.

¹³⁹ See Section 11.1(b) of the CAT NMS Plan. The Commission has previously explained that the Participants have the discretion to “choose to submit the proposed fee schedule to the Commission as individual SROs pursuant to Rule 19b-4 under the Exchange Act or jointly as Participants to an NMS plan pursuant to Rule 608 of Regulation NMS.” CAT NMS Plan Approval Order at 84793 n.1709. The Commission further noted that if the Participants individually file the proposed fee schedule pursuant to Section 19(b)(3)(A)(ii) of the Act, “the proposed fee filings will be eligible for immediate effectiveness.” *Id.*

¹⁴⁰ Section 19(b)(3)(A) of the Exchange Act.

the filing process under Section 19(b) was not amended by the Commission to eliminate the effective upon filing process for fees. Accordingly, the Participants may submit fee filings related to the CAT or otherwise for fees to be effective upon filing.

CAT LLC notes that the methodology for determining Participant CAT fees is proposed to be established via the amendment of the CAT NMS Plan, which has been filed in accordance with Rule 608 and has been subject to the extensive public notice and comment process described above. Accordingly, such fees would be adopted in accordance with the requirements of Rule 608. While Industry Member CAT fees will be filed pursuant to Rule 19b-4, such Rule 19b-4 filings will be based on the overall funding model, which must be approved under Rule 608. In other words, any Industry Member CAT fees will have been subject to the same extensive notice and comment process as Participant CAT fees and must satisfy the requirements of the Exchange Act.

VIII. Constitutional Issues

SIFMA newly argues that requiring Industry Members to contribute to CAT costs raises constitutional issues.¹⁴¹ Specifically, SIFMA states that the Commission's extensive involvement in the design and implementation of the system demonstrates that the CAT is a Commission system used for enforcement, and therefore, the funds to build it must be approved by Congress. SIFMA further states that the Constitution does not permit the Commission to fund its own enforcement apparatus through the backdoor—to require the SROs to raise and spend hundreds of millions of dollars to build a new law enforcement tool for the Commission. SIFMA states that Section 11A of the Exchange Act requires regulated entities to act jointly; it does not require them to pay for a government resource. Although SIFMA's prior comments recognized that Industry Member contributions to the CAT are “justifiable under the Exchange Act,”¹⁴² SIFMA now states that “the expropriation of these funds from private parties—especially the imposition of retroactive liability for monies spent that the private parties had no control over—for public purposes poses a Takings problem.”¹⁴³ Other commenters reiterate SIFMA's newly-found constitutional arguments.¹⁴⁴

CAT LLC believes that SIFMA's constitutional arguments are directed primarily at the Commission. However, CAT LLC notes that SIFMA has not previously challenged the constitutionality of Rule 613 or the CAT NMS Plan. When Rule 613 was proposed in 2010,

¹⁴¹ SIFMA Letter II at 7-9.

¹⁴² Letter from Ellen Greene, Managing Director, Equities & Options Market Structure and Joseph Corcoran, Managing Director, Associate General Counsel, SIFMA, to Vanessa Countryman, Secretary, SEC at 5 (June 22, 2022) at 5 (“June 2022 SIFMA Letter”), <https://www.sec.gov/comments/4-698/4698-20132695-303187.pdf>.

¹⁴³ SIFMA Letter II at 8.

¹⁴⁴ Citadel Letter at 28-29; FIA Letter at 3; Virtu Letter at 2. Relatedly, one commenter recommended allocating a portion of CAT costs to the Commission. Citadel Letter at 31. The Commission is not a party to the CAT NMS Plan and not subject to Rule 608 of Regulation NMS or Section 19(b) of the Exchange Act. Similarly, one commenter suggests that the CAT should be reconstituted as a Commission database subject to congressional oversight, and another commenter suggests that an NMS Plan is not the appropriate vehicle to govern CAT. MMI Letter at 2; Citadel Letter at 34. CAT LLC believes that these comments are outside the scope of the establishment of the funding model.

SIFMA called the CAT an “important regulatory initiative”¹⁴⁵ and stated that it “fully supports the SEC’s objective of providing timely access to a robust, cross-market audit trail for NMS securities and ultimately other securities.”¹⁴⁶

CAT LLC believes that the fact that this additional argument is being raised at this late date suggests that SIFMA’s primary objective is to delay the approval of any mechanism that would require the industry to contribute to the funding of the CAT. SIFMA has long made clear that its fundamental concern with the CAT is not a constitutional concern but rather a financial one. It has long argued that Industry Members should not have any obligation to contribute to the funding of the CAT.

- SIFMA argued as early as 2016 that “SIFMA cannot at this time support any SRO fee for the CAT.”¹⁴⁷
- In June 2017, SIFMA reiterated its position on CAT funding, stating that “the Plan Participants have no justification for imposing a CAT fee at all.”¹⁴⁸
- In October 2019, SIFMA reiterated that “the SROs have never provided a financial justification for imposing a CAT fee at all.”¹⁴⁹

Nevertheless, in June 2022, SIFMA changed course, specifically arguing that a 50%-50% allocation would be “justifiable under the Exchange Act.”¹⁵⁰ Similarly, as recently as May 2023, SIFMA argued that “we recognize and accept that Industry Members will be responsible for a portion of CAT costs,”¹⁵¹ and reiterated its belief that “assigning 50% of CAT costs to the Participant Exchanges and 50% to Industry Members is a more fair and reasonable way to allocate CAT costs than what is proposed in the Funding Proposal.”¹⁵² In neither instance did SIFMA provide a substantive rationale for why its proposed allocation was fair and reasonable, but SIFMA nevertheless expressly recognized that the concept of an industry contribution is “justifiable under the Exchange Act”.

CAT LLC notes that at no time over the past year that the Funding Proposal has been under consideration did SIFMA previously raise the argument that *any* contribution by broker-

¹⁴⁵ Letter James T. McHale, Managing Director and Associate General Counsel, SIFMA, to David Shillman, Associate Director, Division of Trading and Markets, SEC (Jan. 12, 2011) at 1, <https://www.sec.gov/comments/s7-11-10/s711110-83.pdf>.

¹⁴⁶ *Id.*

¹⁴⁷ Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, and Ellen Greene, Managing Director, Equities & Options Market Structure, SIFMA, to Brent J. Fields, Secretary, SEC (July 18, 2016) at 14, <https://www.sec.gov/comments/4-698/4698-11.pdf>.

¹⁴⁸ Letter from Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, to Brent J. Fields, Secretary, SEC (June 6, 2017) at 2, <https://www.sifma.org/wp-content/uploads/2017/06/SIFMA-Submits-Comments-to-the-SEC-on-CAT-NMS-Plan-Fee-Filings-for-Industry-Members.pdf>.

¹⁴⁹ Letter from Theodore R. Lazo, Managing Director and Associate General Counsel and Ellen Greene, Managing Director, SIFMA, to Vanessa Countryman, Secretary, SEC (Oct. 28, 2019) at 2, <https://www.sec.gov/comments/s7-13-19/s71319-6366765-195937.pdf>.

¹⁵⁰ June 2022 SIFMA Letter at 5.

¹⁵¹ SIFMA Letter I at 2.

¹⁵² *Id.*

dealers to CAT costs poses a constitutional takings problem. SIFMA’s strategic decision to inundate the Commission with these arguments—which directly contradict its prior statements that industry contributions are “justifiable under the Exchange Act”—just two days before a scheduled SEC Open Meeting to consider the Funding Proposal suggests their ultimate strategy is to delay the Commission’s review and approval of any funding model that would require the industry to contribute to the funding of the CAT. The Commission should not allow SIFMA to continue to delay its consideration of the Funding Proposal by strategically introducing comments that could have been made months or years ago.

In adopting Rule 613, the Commission imposed significant obligations on the Participants. The Participants have created, implemented and maintained the CAT in accordance with Rule 613 and the CAT NMS Plan approved by the SEC, spending hundreds of millions of dollars to do so, in reliance on the Commission’s longstanding assurances that Industry Members would contribute to funding such efforts, as contemplated by Rule 613 and the CAT NMS Plan.¹⁵³ Therefore, regardless of how the constitutional argument is resolved, the Participants must be able to recover the hundreds of millions of dollars they have invested in CAT as a result of being required to comply with the SEC’s rule, whether under the Funding Proposal or otherwise.

IX. Data Security Issues

Several commenters argue that the Commission should prioritize data security concerns associated with the CAT.¹⁵⁴ For example, SIFMA asserts that “[t]he Commission has also failed to address the significant data security concerns associated with mandating this massive surveillance database, even though it has previously acknowledged the legitimacy of these concerns, and even though the Commission’s ability to secure its systems continues to be drawn into question.”¹⁵⁵

Like with the constitutionality arguments, CAT LLC notes that the decision to adopt Rule 613 is under the SEC’s purview. CAT security is of paramount importance, and the CAT System is protected by a comprehensive information security program required by the CAT NMS Plan and overseen by a dedicated CISO, as well as via SEC oversight, through its general supervision of SROs as well as more targeted mechanisms, such Regulation SCI. However, general security concerns regarding the CAT should not be used to prevent appropriate funding of the CAT. Indeed, appropriate funding will only be advantageous in ensuring the security of CAT Data.

¹⁵³ See Section 11.1(b) of the CAT NMS Plan. See also Rule 613(a)(1)(vii)(D) of Regulation NMS under the Exchange Act.

¹⁵⁴ Citadel Letter at 35; SIFMA Letter II at 2; Virtu Letter at 4.

¹⁵⁵ SIFMA Letter II at 2.

X. SEC Market Structure Proposals

Several commenters raise issues regarding the SEC moving forward with the Funding Proposal at the same time it is considering many additional market structure rule proposals.¹⁵⁶ CAT LLC does not believe that the SEC's consideration of other market structure proposals should be an impediment to making a decision on the Funding Proposal. The SEC should consider how any such market structure proposals are likely to affect CAT or would be affected by CAT if adopted. However, such considerations should not prevent the SEC from ensuring the appropriate funding of the CAT. They are separate decisions.

XI. Trading Activity as a Reasonable Cost Proxy

FINRA's second comment letter raises issues with proposed method for calculating CAT fees because "TRF volume contributes to only a very small percentage of annual CAT compute and storage costs"¹⁵⁷ but "FINRA would be assessed 34% of total CAT costs to be borne amongst the 25 Participants, and more than all options exchanges combined."¹⁵⁸ CAT LLC continues to believe that the Funding Proposal provides for an appropriate approach for allocating CAT costs among CAT Reporters.

FINRA's comments focus on whether the CAT fee is directly correlated to its cost burden on the CAT. A fee does not need to be directly correlated to costs created by the person charged the fee to be compliant with the Exchange Act. As the Commission noted in approving FINRA's TAF, "while trading activity is not wholly correlated to the full range of [FINRA] responsibility for members in all instances, the Commission believes that they are closely enough connected to satisfy the statutory standard."¹⁵⁹ Similarly, CAT LLC has indicated repeatedly that it is difficult to determine the precise cost burden imposed by each individual CAT Reporter on the CAT.¹⁶⁰ Although executed equivalent share volume is not an exact proxy for the cost burden (nor need it be to satisfy the statutory standard), trading activity provides a reasonable proxy for cost burden on the CAT. Increased trading activity impacts message traffic, data processing, storage and other factors, and thus necessarily correlates with increased cost burden on the CAT. Moreover, Industry Member activity in the market generally is for the purpose of effecting transactions, and, as a result, it is common for Participants to use transaction-based fees. Therefore, executed

¹⁵⁶ Citadel Letter at 26 n.112; SIFMA Letter II at 3; Virtu Letter at 4. *See, e.g.*, Securities Exchange Act Release No. 96495 (Dec. 14, 2022), 88 Fed. Reg. 128 (Jan. 3, 2023) (Order Competition Rule); Securities Exchange Act Release No. 96494 (Dec. 14, 2022), 87 Fed. Reg. 80266 (Dec. 29, 2022) (Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders); Securities Exchange Act Release No. 96496 (Dec. 14, 2022), 88 Fed. Reg. 5440 (Jan. 27, 2023).

¹⁵⁷ FINRA Letter II at 2.

¹⁵⁸ *Id.*

¹⁵⁹ Securities Exchange Act Release No. 47946 (May 30, 2003), 68 Fed. Reg. 34021, 34024. FINRA argued in the context of its TAF that "the statutory requirement that fees be reasonable and equitably allocated does not require a pricing structure so specific and complex as to tie specific self-regulatory programs and related expenses to specific business lines within a firm." Letter from Barbara Z. Sweeney, Senior Vice President and Corporate Secretary, NASD, to Katherine A. England, SEC (Mar. 18, 2003), <https://www.finra.org/sites/default/files/RuleFiling/p001023.pdf>.

¹⁶⁰ *See, e.g.*, Proposing Release at 17105.

share volume is an appropriate metric for reasonably allocating CAT costs among CAT Reporters.

Furthermore, CAT LLC believes that FINRA’s allocation is fair and reasonable as FINRA is currently, and is expected to continue to be, one of the largest regulatory users of the CAT, and it is responsible for the oversight of the very large over-the-counter securities market.

XII. Relevant Fee Precedent

In its second comment letter, FINRA objects to CAT LLC’s reference to FINRA’s TAF as relevant precedent. FINRA asserts that, unlike the proposed CAT fees, the TAF is intended to “recover the costs of FINRA’s regulatory activities, while the Fee Proposal ostensibly is designed to ‘align with the anticipated costs to build, operate, and administer the CAT.’”¹⁶¹ There is no distinction between those two points. The CAT only has a regulatory purpose. The Commission has explained that “[t]he purpose of the Plan, and the creation, implementation and maintenance of a comprehensive audit trail for the U.S. securities markets described therein, is to ‘substantially enhance the ability of the SROs and the Commission to oversee today’s securities markets and fulfill their responsibilities under the federal securities laws.’”¹⁶² Therefore, the costs to build, operate and administer the CAT are the same as regulatory costs for the CAT.

Second, FINRA attempts to distinguish the TAF from the proposed CAT fees by stating that that the TAF is “used in combination with other funding mechanisms and metrics to support an overall funding framework.”¹⁶³ The fact that FINRA has chosen to use a transaction-based fee to pay for a portion of its regulatory costs, rather than all of its regulatory costs, does not change the general conclusion that a transaction-based fee complies with the Exchange Act.

* * * * *

Without a Commission-approved funding model, the financial viability of the CAT is at risk. To date, the Participants have borne 100% of the costs of building and operating the CAT—more than \$500 million through the end of 2022, with additional \$233 million in costs expected through the end of 2023. Continuing to require the Participants to shoulder these costs will jeopardize the regulatory goals of Rule 613 and the CAT NMS Plan.

CAT LLC acknowledges that funding the CAT involves significant and complicated trade-offs, and that some commenters have long opposed any contribution to CAT costs by Industry Members. Over the past seven years, CAT LLC has considered all views and has offered a proposal that reasonably balances all considerations while achieving the financial

¹⁶¹ FINRA Letter II at 3.

¹⁶² CAT NMS Plan Approval Order at 84698 (citing Securities Exchange Act Release No. 67457, 77 Fed. Reg. 45722, 45726 (Aug 1, 2012)). Similarly, “Rule 613 requires that the information to be collected and electronically provided to the Central Repository would only be available to the national securities exchanges, national securities association, and the Commission for the purpose of performing their respective regulatory and oversight responsibilities pursuant to the federal securities laws, rules and regulations.” CAT NMS Plan Approval Order at 84943.

¹⁶³ FINRA Letter II at 3.

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stability necessary to achieve the regulatory goals of the CAT. CAT LLC notes that 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 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, a decision on an initial funding model is overdue and needs to be made.

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
Mr. Hugh Beck, Senior Advisor for 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
CAT NMS Plan Participants