



asset management group

September 5, 2023

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

Re: *Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail; File No. 4-698*

Dear Ms. Countryman:

On August 30, 2023, the Securities and Exchange Commission (“Commission”) announced an open meeting to consider whether to approve the Funding Proposal¹ for the consolidated audit trail (“CAT”).² Before adopting the Funding Proposal, the Asset Management Group of the Securities Industry and Financial Markets Association (“SIFMA AMG”)³ urges the Commission to ensure that the concept of passing through CAT costs to end-investors, including asset managers that belong to SIFMA AMG and their clients, has been sufficiently addressed. This concept was discussed in recent materials submitted by the CAT NMS Plan Participants (“Participants”), and in our view must be appropriately analyzed in order to determine whether the Funding Proposal meets the required standards under the Securities Exchange Act of 1934 (“Exchange Act”).⁴

The Participants Have Failed to Address the Impact of CAT Costs on Investors

In recent materials submitted to the Commission to support the Funding Proposal, the Participants have suggested that broker-dealers (“Industry Members”) could pass on CAT costs to investors. Specifically, the Participants’ most recent comment letter states:

¹ See Release No. 34-97750 (June 16, 2023), 88 FR 41142 (June 23, 2023). Capitalized terms not otherwise defined in this letter have the same meanings as they do in the CAT NMS Plan and/or the Funding Proposal.

² The Commission’s open meeting announcement can be found here (<https://www.sec.gov/os/sunshine-act-notice/sunshine-act-notice-open-090623>).

³ SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG’s members represent U.S. and global asset management firms whose combined assets under management exceed \$45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds.

⁴ Under the Exchange Act, the Participants are required to demonstrate that the proposal: (1) provides “for the equitable allocation of reasonable dues, fees, and other charges,” (2) is “not designed to permit unfair discrimination between customers, issuers, brokers or dealers,” and (3) does not “impose any burden on competition not necessary or appropriate in furtherance of the purposes” of the Exchange Act. See, e.g., Sections 6 and 15A of the Exchange Act. See also Section 200.700(b)(3)(iii) of the Commission’s Rules of Practice (“The burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans is on the plan participants that filed the NMS plan filing”).

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. CAT LLC has previously addressed this argument at length. 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. 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 run, any fees imposed on any of these groups will ultimately pass through to the retail and institutional traders who use the markets.”⁵ [Emphasis added.]

Implicit in these suggestions is the Participant’s view that it ultimately does not matter how the Funding Proposal is structured, as CAT costs will be passed along to investors. The problem with this suggested approach is that the Participants have completely failed to analyze how passing through CAT costs to investors is consistent with the Exchange Act fee standards, particularly the requirements that the proposal provides “for the equitable allocation of reasonable dues, fees, and other charges among [exchange] members and issuers and other persons using” exchange facilities and does not “impose any burden on competition not necessary or appropriate in furtherance of the purposes” of the Exchange Act.⁶

Given the enormous size of prior CAT Costs (more than \$500 million through the end of 2022 according to the Participants) and current and future CAT Costs (almost \$240 million for 2023 and materially increasing each year), SIFMA AMG members are concerned with the supposition that CAT costs will be passed on to investors, either directly or indirectly by affecting the prices at which equities are transacted. For long-term investors (including retail investors) that are the clients of AMG members, this could negatively impact investment returns. None of these potential effects are discussed or addressed in the Funding Proposal.

The Commission must find that the Funding Proposal is consistent with the Exchange Act fee standards and promotes “efficiency, competition, and capital formation” as required by

⁵ See, e.g., the Participants’ response to comments dated July 28, 2023 (<https://www.sec.gov/comments/4-698/4698-237380-495743.pdf>), at pages 8-9.

⁶ See *supra* note 4.

Section 3(f) of the Exchange Act.⁷ In doing so, it must take the Participants’ suggestion that Industry Members might pass CAT costs through to investors seriously, and must analyze whether that would be consistent with the Exchange Act fee standards, and if so, what its impact on “efficiency, competition, and capital formation” would be. To our knowledge, even after nearly a decade of debating the CAT and CAT funding, the Commission has not fully considered these ultimate economic effects on Industry Members’ clients and other end investors.

CAT Needs an Independent Cost Review Mechanism

SIFMA AMG, like other commenters, is very concerned about the ever-escalating CAT costs and the lack of any mechanism to help control such costs. Regardless of who ultimately pays for CAT funding, the costs will have an economic impact on trading. Asset managers, therefore, share the significant concerns about the lack of an independent cost review mechanism for the CAT budget, which would help ensure that future CAT Fees are fair and reasonable. Suggestions have been made by commenters on different approaches to help manage CAT costs, yet all of these suggestions have been disregarded by the Participants. Given that there is no end date for the CAT, SIFMA AMG believes that it is critically important for the CAT to have an independent cost review mechanism to help ensure that the CAT engages in appropriate and cost-effective spending, consistent with the Exchange Act.

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Unless the Commission can demonstrate that it has fully considered the ultimate economic impacts of the CAT Funding Proposal, including the impacts on end-investors as a result of passed-through costs, the Commission should not approve it.

If you have any questions or require additional information, please do not hesitate to contact us by calling Lindsey Keljo at (202) 962-7312.

Sincerely,



Lindsey Weber Keljo
Head - Asset Management Group
SIFMA

⁷ See, e.g., Section 200.700(b)(3)(iii) of the Commission’s Rules of Practice (“The description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the plan participants that filed the NMS plan filing to provide such detail and specificity may result in the Commission not having a sufficient basis to make an affirmative finding that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans”).

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 Lizarraga, Commissioner
Mr. Haoxiang Zhu, Director, Division of Trading and Markets