



August 29, 2024

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

Re: Request for the Commission to Suspend, Institute Proceedings, and Disapprove the Self-Regulatory Organizations' ("SROs") Fee Proposals for Certain Prospective and Historical Costs Related to the Consolidated Audit Trail ("CAT")

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")¹ respectfully submits this letter to the U.S. Securities and Exchange Commission (the "Commission") in opposition to the recently submitted rule filings by the SROs to establish both prospective and historical fees for Industry Members related to certain costs of the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan").² The SROs started submitting filings with the Commission for prospective CAT fees on August 15, 2024 (referred to by the SROs as "CAT Fee 2024-1"), and the filings would "establish fees for Industry Members related to reasonably budgeted CAT costs of the [CAT NMS Plan] for the period from July 16, 2024 through December 31, 2024."³

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² Capitalized terms not otherwise defined in this letter have the same meanings as they do in the CAT NMS Plan and/or the CAT Funding Model.

³ See Cboe EDGX Exchange, Inc., File No. SR-CboeEDGX-2024-052; Cboe EDGA Exchange, Inc., File No. SR-CboeEDGA-2024-033; Cboe Exchange, Inc., File No. SR-CBOE-2024-037; Cboe BYX Exchange, Inc., File No. SR-CboeBYX-2024-029; Cboe BZX Exchange, Inc., File No. SR-CboeBZX-2024-076; Cboe C2 Exchange, Inc., File No. SR-C2-2024-013; The Nasdaq Stock Market LLC, File No. SR-NASDAQ-2024-047; Nasdaq PHLX LLC, File No. SR-Phlx-2024-42; NASDAQ BX, Inc., File No. SR-BX-2024-030; Nasdaq GEMX, LLC, File No. SR-GEMX-2024-29; Nasdaq ISE, LLC, File No. SR-ISE-2024-41; Nasdaq MRX, LLC, File No. SR-MRX-2024-32; Investors Exchange LLC, File No. SR-IEX-2024-14; MEMX LLC, File No. SR-MEMX-2024-33; Miami

The SROs started submitting filings with the Commission for historical CAT fees on August 22, 2024 (referred to by the SROs as “Historical CAT Assessment 1”), and the filings would (1) “establish fees for Industry Members related to certain historical costs of the [CAT NMS Plan] incurred prior to January 1, 2022,”⁴ and (2) withdraw and replace the SROs’ original fee filings for Historical CAT Assessment 1, which the Commission suspended in January 2024 to review whether the filings complied with the Securities Exchange Act of 1934 (“Exchange Act”).⁵ For the reasons set forth below, the Commission should disapprove both the CAT Fee 2024-1 and Historical CAT Assessment 1 fee filings (together, the “CAT Fee Filings”) because they do not meet the requirements governing SRO fees set forth in the Exchange Act, which mandates that such fees be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition.

Executive Summary

As further discussed below, similar to other commenters,⁶ SIFMA urges the Commission to suspend the CAT Fee Filings pursuant to Section 19(b)(3)(C) of the Exchange Act and issue orders instituting proceedings (“OIPs”) to determine whether to approve or disapprove the proposals under the Exchange Act, for following reasons:

International Securities Exchange, LLC, File No. SR-MIAX-2024-33; MIAX Emerald, LLC, File No. SR-EMERALD-2024-23; MIAX PEARL, LLC, File Nos. SR-PEARL-2024-34 and -35; MIAX Sapphire LLC, File No. SR-SAPPHIRE-2024-24; BOX Exchange LLC, File No. SR-BOX-2024-20; The Financial Industry Regulatory Authority (“FINRA”), File No. SR-FINRA-2024-011; New York Stock Exchange LLC, File No. SR-NYSE-2024-46; NYSE American LLC, File No. SR-NYSEAMER-2024-50; NYSE Arca, Inc., File No. SR-NYSEARCA-2024-69; NYSE National, Inc., File No. SR-NYSESTAT-2024-23; NYSE Chicago, Inc., SR-NYSECHX-2024-26; and Long Term Stock Exchange, Inc., File No. SR-LTSE-2024-04.

⁴ See Cboe EDGX Exchange, Inc., File No. SR-CboeEDGX-2024-054; Cboe EDGA Exchange, Inc., File No. SR-CboeEDGA-2024-035; Cboe Exchange, Inc., File No. SR-CBOE-2024-038; Cboe BYX Exchange, Inc., File No. SR-CboeBYX-2024-031; Cboe BZX Exchange, Inc., File No. SR-CboeBZX-2024-078; Cboe C2 Exchange, Inc., File No. SR-C2-2024-014; The Nasdaq Stock Market LLC, File No. SR-NASDAQ-2024-049; Nasdaq PHLX LLC, File No. SR-Phlx-2024-43; NASDAQ BX, Inc., File No. SR-BX-2024-032; Nasdaq GEMX, LLC, File No. SR-GEMX-2024-30; Nasdaq ISE, LLC, File No. SR-2024-42; Nasdaq MRX, LLC, File No. SR-MRX-2024-33; Investors Exchange LLC, File No. SR-IEX-2024-[xx]; MEMX LLC, File No. SR-MEMX-2024-[xx]; Miami International Securities Exchange, LLC, File No. SR-MIAX-2024-34; MIAX Emerald, LLC, File No. SR-EMERALD-2024-24; MIAX PEARL LLC, File Nos. SR-PEARL-2024-36 and -37; MIAX Sapphire LLC, File No. SR-SAPPHIRE-2024-27; BOX Exchange LLC, File No. SR-BOX-2024-21; FINRA, File No. SR-FINRA-2024-[xxx]; New York Stock Exchange LLC, File No. SR-NYSE-2024-[xx]; NYSE American LLC, File No. SR-NYSEAMER-2024-[xx]; NYSE Arca, Inc., File No. SR-NYSEARCA-2024-[xx]; NYSE National, Inc., File No. SR-NYSESTAT-2024-[xx]; NYSE Chicago, Inc., SR-NYSECHX-2024-[xx]; and Long Term Stock Exchange, Inc., File No. SR-LTSE-2024-[xx].

⁵ On January 17, 2024, the Commission suspended the initial CAT fee proposals to collect certain historical CAT costs and instituted proceedings pursuant to Section 19(b)(3)(C) of the Exchange Act “to determine whether to approve or disapprove” the proposals. See, e.g., 89 Fed. Reg. 10,887 (Feb. 13, 2024).

⁶ See Citadel Securities letter to the Commission re: “Time-Sensitive Request Regarding Self-Regulatory Organizations’ Rule 19b-4 Filings Relating to the Consolidated Audit Trail” (Aug. 28, 2024); Virtu Financial letter to the Commission re: “Opposition to Consolidated Audit Trial (“CAT”) Fee Proposals By Self-Regulatory Organizations (“SROs”) And Request For Temporary Suspension” (Aug. 28, 2024).

- *First*, the CAT Fee Filings would impose hundreds of millions of dollars in CAT fees per year on Industry Members, yet the SROs have submitted these proposals with the Commission under an Exchange Act provision that allows them to immediately impose the fees without any Commission review of the fees for compliance with the Exchange Act fee requirements, in contravention of the revised funding model for the CAT (“CAT Funding Model”).⁷
- *Second*, the CAT NMS Plan Participants and Plan Processor have not fulfilled their obligations to provide Industry Members with adequate data that would allow them to determine whether CAT invoices they receive are accurate.
- *Third*, while the Commission previously suspended the SROs’ prior fee filings to recover historical CAT costs and issued OIPs to determine whether to approve or disapprove them, the SROs have submitted virtually identical filings regarding Historical CAT Assessment 1 without answering the questions the Commission raised in its prior OIPs.
- *Fourth*, the Commission should suspend the CAT Fee Filings until the Eleventh Circuit rules on the legality of the CAT Funding Model, on which the fee filings are based.⁸

Discussion

The CAT Fee Filings follow the Commission’s approval in September 2023 of the SROs’ revised CAT Funding Model, which created the framework for the SROs as the CAT NMS Plan Participants (“Participants”) to establish and collect fees from Industry Members to cover both historical and prospective CAT costs incurred by the Participants. The fees imposed on Industry Members under the CAT Fee Filings would be payable to Consolidated Audit Trail, LLC. As noted, CAT Fee 2024-1 is designed to cover CAT costs incurred by the Participants from July 16, 2024 through December 31, 2024, and would be assessed starting in September 2024 (i.e., beginning next week) based on that month’s trading activity, with the first bill to Industry Members coming in October 2024. CAT Fee 2024-1 also would continue to be in effect indefinitely until the Participants adopt a new CAT fee to cover ongoing CAT costs, which the SROs must do under the CAT NMS Plan at least once each year based on that year’s CAT budget.

Historical CAT Assessment 1 is designed to recover CAT costs incurred by the Participants prior to January 1, 2022, and would be assessed starting in October 2024 based on that month’s trading activity, with the first bill to Industry Members coming in November 2024. The Historical CAT Assessment 1 fees would be in effect until \$212,039,879.34 is collected from Industry Members, which is anticipated to take around two years. The Historic CAT Assessment 1 fee filing is virtually identical to the prior Historical CAT Assessment 1 fee filing that was suspended by the Commission and now withdrawn by the Participants, except for the new unexplained exclusion for \$19,628,791 in fees that now will not be passed along to Industry Members (further discussed below).

⁷ See Release No. 34-98290 (September 6, 2023), 88 Fed. Reg. 62628 (September 12, 2023).

⁸ Am. Sec. Ass’n et al. v. SEC, No. 23-13396 (11th Cir.) (filed Oct. 17, 2023).

As a threshold matter, we continue to believe the CAT Funding Model is not consistent with the Exchange Act and the CAT Fee Filings are further evidence of the Participants' failure to comply with the applicable law. In the CAT Funding Model, the Commission approved and committed to a process in which it would evaluate the reasonableness of CAT fees and their satisfaction of the other Exchange Act fee requirements through rule filings submitted by the SROs under Section 19(b) of the Exchange Act.⁹ The process established by the current CAT Fee Filings, however, would permit the SROs to file CAT fees for immediate effectiveness under Section 19(b)(3)(A) of the Exchange Act without any requirement that the Commission affirmatively determine that the fees meet the applicable Exchange Act requirements.¹⁰ Immediately effective SRO rule filings are not the appropriate mechanism for imposing transaction-based fees across the entire securities industry that are in the hundreds of million dollars per year. Adopting that process for CAT fees violates the Exchange Act and is inconsistent with the terms of the CAT Funding Model approved by the Commission. Unless the Commission suspends the newly proposed CAT Fee Filings and institutes proceedings, there will be no Commission finding that the fees are reasonable, equitably allocated, not unfairly discriminatory, and do not impose undue burdens on competition, as required by the Exchange Act.

As noted in multiple comment letters and in multiple meetings with Commission staff, the CAT Funding Model is also flawed because Industry Members continue to have issues reconciling the mock CAT invoices received from FINRA CAT, the Plan Processor, with their trading records.¹¹ In response to these concerns, the Participants have taken the position that their only reconciliation obligation under the CAT NMS Plan is to provide data that allows for the reconciliation of the "CAT invoice amount to the underlying trades provided by CAT."¹² While we do not agree with this position, we note that the Participants through their agent FINRA CAT also are failing in this obligation. In particular, FINRA CAT indicated in conversations with members that they were planning changes to the CAT Fee detail file they provide with the invoice

⁹ In this regard, for example, the Commission noted in its CAT Funding Model approval order that "[o]nce the proposed Section 19(b) fee filings are filed by the Participants, the Commission will review them for consistency with the Exchange Act and the CAT NMS Plan." *See* CAT Funding Model at 62663. The Commission also noted that "[e]ven if the Participants decide to pass-through the costs of CAT to Industry Members, however, in our view, the rule filing process under Section 19(b) and Rule 19b-4 will still incentivize the Participants to control costs. Any effort to pass-through costs will be subject to that process and, if the Participants fail to control costs, their ability to demonstrate that a proposed fee is reasonable and consistent with the Exchange Act may be compromised." *See* CAT Funding Model at 62636.

¹⁰ This approach is the opposite of the one the Commission took in amending Rule 608 of Regulation NMS, in which the Commission eliminated the ability of NMS plan participants to file fee changes for fees charged under the plans for immediate effectiveness. *See* Release No. 34-89618 (August 19, 2020), 85 Fed. Reg. 65470 (October 15, 2020). Now, such fee filings must be published for comment and approved by the Commission before they can become effective.

¹¹ *See, e.g.*, SIFMA letter to the Commission (Mar. 5, 2024), available at <https://www.sec.gov/comments/sr-finra-2024-002/srfinra2024002-442279-1128282.pdf>; FIF letter to the Commission (Mar. 4, 2024), available at <https://www.sec.gov/comments/sr-finra-2024-002/srfinra2024002-440739-1104464.pdf>.

¹² *See* letter from Brandon Becker, CAT NMS Plan Operating Committee Chair to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, at 37 (June 13, 2024), available at <https://catnmsplan.com/sites/default/files/2024-07/CAT%20LLC-Response-to-Comments-Historical-CAT-Assessment-1-%286.13.2024%29.pdf>.

that would add a “net quantity” field to each row. This field would effectively populate a value on only one row for trades that had been canceled or amended with the proper final quantity being used for the invoice, which would allow firms to aggregate the equivalent share quantities to match the quantities in the invoice itself. The reason this field is important is that a canceled, busted, or amended trade gets listed multiple times in the detail file (once for the original trade, and again for the cancellation of that trade, and a third time if it was amended), and this field would allow firms to review whether the CAT invoice is correct for such trades. This task has not been completed. Without such data, firms will have problems conducting even the reconciliations that the Participants believe they should provide.¹³

The CAT Fee Filings further demonstrate the fundamental flaws with the CAT Funding Model. Notwithstanding the Commission’s commitment to review CAT fees for compliance with the Exchange Act requirements, Industry Members are now faced with Historical CAT Assessment 1 fee filings that are virtually identical to the ones the Commission suspended at the beginning of this year via orders instituting proceedings to determine whether to approve or disapprove the filings, each of which included “notice of the grounds for possible disapproval under consideration” by the Commission.¹⁴ The only apparent difference between the current Historical CAT Assessment 1 fee filings and the prior ones (which, as noted, the SROs’ withdrew upon submitting the new CAT fee filings) is the exclusion of \$19,628,791 in fees without any public explanation of why these fees were excluded from the current filings but included in prior filings. This lack of transparency surrounding nearly \$20 million in proposed fees is deeply concerning and highlights the serious flaw in the CAT Funding Model. Furthermore, the exclusion of these fees in the current filings, which does not appear to be the result of any Commission review, also is concerning because the SROs asserted in the prior filing that the fees they were proposing were fair and reasonable. This exclusion raises unanswered questions such as how a process that allows fees to have such large unexplained variances can be consistent with the public interest or otherwise in furtherance of the purposes of the Exchange Act, and what assurances exist that other elements of the Historical CAT Fee Assessment 1 filings are accurate.

More importantly, the CAT Fee Filings also do not include any explanation by the Commission or the SROs regarding the reason or reasons the grounds for possible disapproval under consideration in the Commission’s review of the prior filings apparently have been addressed via this change. Industry members and other interested parties devoted significant time and effort commenting in response to the OIPs the Commission published in the prior filing, but it does not appear these comments were considered by the Commission or its staff. Such an approach is not consistent with the notice and comment requirements of the Administrative Procedure Act (“APA”). Moreover, instead of justifying fees consistent with Exchange Act requirements, the Participants in the current Historical CAT Assessment 1 fee filings continue to rely on the Commission’s findings in the CAT Funding Model approval order that it is appropriate for the Participants to be able to recover certain costs, such as legal costs, and then

¹³ We also understand that Participants also have not addressed the issue with the Nasdaq options exchanges reporting to CAT the “give up” clearing firm as the Executing Broker for certain trades such as floor transactions, even though the clearing firm was not involved in executing the transaction at all (other than clearing it). SIFMA and other commenters flagged this issue in March 2024. See supra note 12.

¹⁴ See supra note 5.

effectively assert that any legal costs they seek to recover through the CAT Fee Filings must be reasonable because the Commission approved the recovery of such costs in the CAT Funding Model approval order.

A process which allows Participants to successfully withdraw and refile virtually identical fee filings, seemingly for the purpose of avoiding Commission review and disapproval, is not an appropriate review process for CAT fees under the CAT Funding Model. Absent Commission intervention and review, the Participants' approach and rationale employed in the Historical CAT Assessment 1 fee filings could be used by the Participants in all future CAT fee filings, as evidenced by the CAT Fee 2024-1 fee filings. Unless the Commission approves or disapproves a particular CAT fee filing and publishes its reasons for doing so, the public will have no way of understanding in the future how a particular CAT fee met the Exchange Act fee standards. Moreover, absent such a Commission review process, market participants will have no way of challenging such filings if they believe the fees imposed are unreasonable or otherwise violate the Exchange Act fee requirements.

Throughout the process of developing the CAT Funding Model and after its approval, SIFMA members were assured by Commission staff that the concerns regarding the reasonableness of proposed CAT fees, their compliance with the Exchange Act fee requirements, and transparency around the Participants' fee setting process would be addressed through the Exchange Act rule filing process governing CAT fees, and not through the Commission's review and approval of the CAT Funding Model. We respectfully request that the Commission make good on those assurances, particularly at this critical juncture.

The Commission also should suspend the CAT Fee Filings because the CAT Funding Model, which the SROs are relying on to proceed with the CAT Fee Filings, is currently under review via litigation pending in the Eleventh Circuit. SIFMA, together with other interested parties, filed an amicus brief in support of setting aside the Commission's approval of the funding model, and the arguments of petitioners and amici in that litigate demonstrate that the Commission's imposition of uncontrolled CAT costs on broker-dealers and investors through the approval of the CAT Funding Model is unlawful.¹⁵ The Commission should suspend the CAT Fee Filings until the Eleventh Circuit rules on the legality of the CAT Funding Model.¹⁶ As noted above, the Commission is empowered under Section 19(b)(3)(C) of the Exchange Act to "suspend" a proposed SRO fee if it appears "that such action is necessary or appropriate in the public interest for the protection of investors, or otherwise in furtherance of the purposes" of the Exchange Act. To provide the court the opportunity to rule on the lawfulness of the CAT Funding Model, the Commission should exercise its authority to suspend the CAT Fee Filings.

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¹⁵ Dkt. 61, Am. Sec. Ass'n et al. v. SEC, No. 23-13396 (11th Cir.) (filed Feb. 15, 2024).

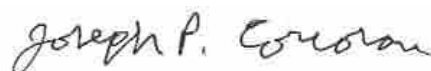
¹⁶ We note that the Commission issued an order on April 4, 2024 staying its climate disclosure rules adopted on March 6, 2024 in light of the multiple challenges to those rules filed in various circuit courts. 89 Fed. Reg. 25804 (Apr. 12, 2024).

For the reasons set forth above and those set forth in our March 5, 2024 comment letter and the comment letters of other SIFMA members, as well as the earlier comment letters on the CAT funding,¹⁷ we urge the Commission to suspend the CAT Fee 2024-1 and Historical CAT Assessment 1 fee filings, initiate proceedings and disapprove the filings, as the Participants have not met their burden of demonstrating that the proposed fees are consistent with Exchange Act fee requirements. In addition, a suspension is appropriate to give the Eleventh Circuit an opportunity to rule on the lawfulness of the CAT Funding Model under which the current CAT Fee Filings have been made prior to imposing fees on the industry pursuant to that model. If you have any questions or need any additional information, please contact Ellen Greene at (212) 313-1287 or Joe Corcoran at (202) 962-7383.

Sincerely,



Ellen Greene
Managing Director
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Joseph Corcoran
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Counsel
SIFMA

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
Mr. David Saltiel, Deputy Director, Division of Trading and Markets
Mr. David Shillman, Associate Director, Division of Trading and Markets

¹⁷ See SIFMA Comment Letter (Mar. 5, 2024), <https://www.sec.gov/comments/sr-finra-2024-002/srfinra2024002-442279-1128282.pdf>; SIFMA Comment Letter (June 5, 2023), <https://www.sec.gov/comments/4-698/4698-199319-399182.pdf>; SIFMA Comment Letter (May 2, 2023), <https://www.sec.gov/comments/4-698/4698-182799-335422.pdf>; SIFMA Comment Letter (Jan. 12, 2023), <https://www.sec.gov/comments/4-698/4698-20154753-322976.pdf>; SIFMA Comment Letter (Dec. 14, 2022), <https://www.sec.gov/comments/4-698/4698-20152795-320485.pdf>; SIFMA Comment Letter (Oct. 7, 2022), <https://www.sec.gov/comments/4-698/4698-20145239-310561.pdf>; SIFMA Comment Letter (June 22, 2022), <https://www.sec.gov/comments/4-698/4698-20132695-303187.pdf>; Virtu Comment Letter (Mar. 5, 2024), <https://www.sec.gov/comments/sr-finra-2024-002/srfinra2024002-441719-1121682.pdf>; Virtu Comment Letter (July 13, 2023), <https://www.sec.gov/comments/4-698/4698-222219-467223.pdf>; Virtu Comment Letter (June 22, 2022), <https://www.sec.gov/comments/4-698/4698-20132715-303206.pdf>; Virtu Comment Letter (May 12, 2021), <https://www.sec.gov/comments/4-698/4698-8790127-237768.pdf>; Citadel Comment Letter (Mar. 5, 2024) <https://www.sec.gov/comments/sr-finra-2024-002/srfinra2024002-442099-1120722.pdf>.