



November 11, 2019

The Honorable Jay Clayton  
Chairman  
U.S. Securities & Exchange Commission  
100 F Street, N.W.  
Washington, D.C. 20549

**Re: Consolidated Audit Trail – Liability and Access Issues**

Dear Chairman Clayton:

Thank you for your continued engagement with SIFMA on the development of the Consolidated Audit Trail (“CAT”). This letter is to follow up on recent communications we have had with your office, including with Manisha Kimmel, as well as with Brett Redfearn on the CAT Reporter Agreement that the self-regulatory organizations (“SROs”) are requiring broker-dealers to sign. In addition, we continue to have significant concerns about the potential access to CAT data by the SROs.

We believe the SROs’ exemptive request to limit the CAT’s collection of personally identifiable information, or “PII” to customer name, address, and year of birth, is an important step in reducing the CAT’s PII risk, and we encourage the Securities and Exchange Commission (“Commission”) to grant that request. In addition, our firms are preparing diligently for CAT reporting, are they are hoping that the Commission can help us find a way to allow broker-dealers to establish connectivity and be ready for testing of their CAT reporting. In the meantime, however, recent events have highlighted the need for the Commission to address issues of liability and access in connection with the CAT.

The SROs have prepared a CAT Reporter Agreement for broker-dealers reporting to the CAT Processor, which will be operated by FINRA CAT LLC.<sup>1</sup> The SROs will not allow broker-dealers to establish any connectivity to the CAT Processor or conduct any test reporting unless they execute the agreement. However, the agreement includes provisions effectively shielding

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<sup>1</sup> The CAT Reporter Agreement is available at [https://www.catnmsplan.com/wp-content/uploads/2019/09/Consolidated-Audit-Trail-Reporter-Agreement\(08-29-19%20FINAL\).pdf](https://www.catnmsplan.com/wp-content/uploads/2019/09/Consolidated-Audit-Trail-Reporter-Agreement(08-29-19%20FINAL).pdf).

the SROs from any liability in connection with CAT reporting. Specifically, Section 5.5 of the CAT Reporter agreement states:

TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL THE TOTAL LIABILITY OF CATLLC OR ANY OF ITS REPRESENTATIVES TO CAT REPORTER UNDER THIS AGREEMENT FOR ANY CALENDAR YEAR EXCEED THE LESSER OF THE TOTAL OF THE FEES ACTUALLY PAID BY CAT REPORTER TO CATLLC FOR THE CALENDAR YEAR IN WHICH THE CLAIM AROSE OR FIVE HUNDRED DOLLARS (\$500.00).

We have had numerous communications with the SROs about our objections to the CAT Reporter Agreement based on liability issues, including a telephone conference of October 23, 2019. To date, the SROs' response has been simply that firms have previously signed regulatory agreements with similar limitations on liability. However, the CAT is a much different, and much more extensive reporting system. Our member firms will be reporting a significant amount of sensitive transaction data and, ultimately, a significant amount of sensitive customer information. In other circumstances, the firms would conduct extensive due diligence of the party receiving the information, which they are not permitted to do with the CAT Processor.

In addition, we now have reason to understand that the SROs plan to engage in bulk downloading of CAT data from the CAT Processor from the outset of CAT reporting, which is scheduled to begin in early 2020. This is surprising, and until very recently, we had understood that the CAT Processor would develop a secure analytics environment to allow the SROs to use the CAT data without bulk downloading. While the CAT NMS Plan allows for such downloading, SIFMA has repeatedly objected to the ability of SROs to download CAT data onto their own systems. Furthermore, we continue to advocate for strict limitation of access to such data, including within a separate, secure environment maintained by the CAT Processor. As a result, broker-dealers signing the CAT Reporter Agreement would be waiving claims of liability not only against the CAT Processor, but also against the two dozen SROs that would be downloading the data.

These recent actions by the SROs are simply unacceptable. The Commission should direct the SROs to remove the liability provisions of the CAT Reporter Agreement and address liability issue separately and comprehensively. At the very least, the Commission should direct the SROs to allow firms to set up connectivity and testing without an agreement, or with a streamlined agreement that addresses the necessities of connectivity, without limiting the reporting firms' liability protections.

SIFMA has raised issues about liability and access to the Commission multiple times. Our June 19, 2019 letter to you provides detailed recommendations on liability and access in connection with the CAT. These are critical issues, and they should be addressed in a serious and comprehensive manner, not through a contract of adhesion that broker-dealers are required to

sign under threat of regulatory action. Once again, we recommend that the Commission take the following actions to lead to smooth and expeditious CAT implementation:

**Liability:**

- The Commission should direct the SROs to amend the CAT NMS Plan (or amend the CAT NMS Plan itself) to waive regulatory immunity for data breach claims, thereby allowing broker-dealers or customers to seek indemnification or pursue a lawsuit against the SROs. In the alternative, the Commission should direct FINRA CAT not to assert regulatory immunity for data breach claims arising out of FINRA CAT’s role as the CAT plan processor or amend the CAT NMS Plan to include such a provision.
- The Commission should direct (or amend the CAT NMS Plan to direct) the SROs to establish a mechanism to reimburse broker-dealers for reasonable expenses arising out of a CAT data breach. Examples of such a mechanism would include:
  - Cash reserves to compensate affected firms;
  - Insurance coverage that covers claims against broker-dealers for breach of any CAT database; and/or
  - “Negative Reimbursement” – permitting broker-dealers to withhold payment of CAT fees to offset expenses incurred in connection with a CAT data breach.

**CAT data:**

- The Commission should clarify the meaning of the term “surveillance and regulatory purposes” for purposes of the CAT. In doing so, the Commission should ensure that the SROs will be clearly prohibited from using CAT data for any commercial purpose.
- The Commission should restrict each exchange’s access to CAT data only for trading activity conducted on its exchange. In addition, the Commission should designate a single SRO to perform cross-market surveillances. These clarifications are critical not only for limiting access to PII, but also to assure that multiple SROs will not be able to use the CAT to bring multiple regulatory actions for the same conduct.
- The Commission and the SROs should access results from CAT inquiries only in a secure analytics environment that is managed by FINRA CAT. CAT data (both customer and transactional) should never be extracted from the secure analytics environment within the CAT to Commission’s or SROs’ own systems.

We appreciate your consideration of these important issues.

With kindest personal regards,

A handwritten signature in blue ink, appearing to read "Ken Bentsen". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Kenneth E. Bentsen, Jr.  
President and CEO

cc: Bryan Wood, Deputy Chief of Staff  
Manisha Kimmel, Senior Policy Advisor to the Chairman  
Brett W. Redfearn, Director, Division of Trading & Markets