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Invested in America

June 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:

In discussions during the week of May 30, 2023, the U.S. Securities and Exchange Commission (the "Commission") invited the Securities Industry and Financial Markets Association ("SIFMA")[1] to submit a comment letter to the Commission in further response to the proposal by the self-regulatory organizations ("SROs") to establish a funding model ("Funding Proposal") for the consolidated audit trail ("CAT").[2] SIFMA thus submits this letter.

For the reasons set forth in our prior comment letters,[3] including those regarding the SROs' immediately prior Executed Share Model,[4] the Commission should disapprove the Funding Proposal because the SROs, as CAT NMS Plan Participants ("Participants"), have not demonstrated that the Funding Proposal meets the required standards under the Securities Exchange Act of 1934 ("Exchange Act"). In particular, the Participants have not demonstrated 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

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[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 is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] See Release No. 34-97151 (March 15, 2023), 88 FR 17086 (March 21, 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.

[3] See (https://www.sec.gov/comments/4-698/4698-20132695-303187.pdf) ("June 2022 Comment Letter"), (https://www.sec.gov/comments/4-698/4698-20145239-310561.pdf) ("October 2022 Comment Letter"), (https://www.sec.gov/comments/4-698/4698-20152795-320485.pdf) ("December 2022 Comment Letter"), (https://www.sec.gov/comments/4-698/4698-20154753-322976.pdf) ("January 2023 Comment Letter"); and (https://www.sec.gov/comments/4-698/4698-182799-335422.pdf) ("May 2023 Comment Letter".

[4] The Funding Proposal replaces and is virtually identical to the prior "Executed Share Model" that was withdrawn by the SROs on March 1, 2023. See Release No. 34-97212 (March 28, 2023), 88 FR 19693 (April 3, 2023).

appropriate in furtherance of the purposes" of the Exchange Act.[5] The Proposal, moreover, strays far beyond the CAT plan the Commission contemplated in 2012 and 2016 and raises significant constitutional issues.

While we would typically let our prior comments speak for themselves, the CAT Operating Committee in a recent letter ("CAT Response Letter") has misrepresented and disregarded the positions we took in those comments,[6] particularly with respect to the Proposal's central definition of an "executing broker" that we address in more detail below.[7] Unfortunately, in their haste to get the Commission to approve the Funding Proposal, and the Commission's similar zeal to do so as evidenced by the recent announcement of an open meeting on June 7, 2023 to vote on the Proposal,[8] we note that the CAT Operating Committee has not meaningfully addressed many points in our comment letters (nor the questions raised by the Commission in its Order Instituting Proceedings for the immediately prior funding proposal).[9] These include our significant concerns about the allocation of CAT costs between Participants and Industry Members, the lack of any type of cost review or cost control mechanism,[10] and the inability of firms defined as "executing brokers" to transfer fees to those who may be more appropriate to bear certain historical CAT costs in the first place. The Funding Proposal continues to be replete with conclusory statements regarding its satisfaction of core Exchange Act requirements that remain unsupported by the record.[11] The 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,[12] and even though the Commission's ability to secure its systems continues to be drawn into question.[13]

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[5] See, e.g., Sections 6 and 15A of the Exchange Act.

[6] See (https://www.sec.gov/comments/4-698/4698-191099-378422.pdf).

[7] The CAT Operating Committee has also misrepresented positions taken by FINRA in its comment letter on the Funding Proposal. See (https://www.sec.gov/comments/4-698/4698-194699-386902.pdf).

[8] See (https://www.sec.gov/os/sunshine-act-notices/sunshine-act-notice-open-060723).

[9] See (https://www.sec.gov/rules/sro/nms/2022/34-95634.pdf).

[10] SIFMA has repeatedly stressed the need for an independent cost oversight function, whereby the annual budget can be reviewed and approved, given the past missteps. To reasonably ensure the Funding Proposal provides "for the equitable allocation of reasonable dues, fees and other charges" and is "not designed to permit unfair discrimination between customers, issuers, brokers or dealers" this independent body to oversee CAT costs must include industry representatives. This body should be responsible for determining an annual operating budget, and unplanned overages should not be passed along to Industry Members. See, e.g., (https://www.waterstechnology.com/regulation/4152906/cats-tale-how-thesys-the-sros-and-the-sec-mishandled-the-consolidated-audit-trail).

[11] For example, the Funding Proposal broadly claims that allocating a greater percentage of CAT costs to Participants "would raise fairness issues" because there "are only 25 Participants and approximately 1,100 Members." 88 FR 17104. The Funding Proposal, however, completely fails to analyze how CAT costs will distributed across the 1,100 Members, which could pose significant fairness and competition concerns. Additionally, the Funding Proposal broadly asserts "a substantial portion of CAT costs originates from Industry Members." Id. It then concedes that "costs are dominated by technology costs," all of which the Participants (and the Commission) had sole responsibility for designing, building, and implementing.

[12] See (https://www.sec.gov/news/public-statement/clayton-kimmel-redfearn-nms-cat-2020-08-21).

[13] See (https://www.sec.gov/files/Eval-of-the-EDGAR-Systems-Governance-and-Incident-Handling-Processes.pdf; https://www.sec.gov/news/statement/second-commission-statement-relating-certain-administrative-adjudications).

We express the industry's significant surprise, that after the Commission rejected or orchestrated the withdrawal of, at least four prior attempts by the CAT Operating Committee to implement a CAT funding model that allocates the vast majority of CAT costs to industry firms, it now appears as though the Commission is rushing forward to approve the latest proposal without taking advantage of the allotted time under the Exchange Act for careful consideration. Given the magnitude of the costs that are proposed to be passed-on to the industry, the potential grave impacts on market efficiency, competition, and capital formation, and the significant concerns expressed in the administrative record, we are extremely surprised that the Commission is not, at a minimum, instituting proceedings to consider this filing more thoroughly. As noted above, the latest Funding Proposal fails to adequately respond to concerns raised in the administrative record and key questions raised by the Commission in its Order Instituting Proceedings for the prior proposed funding model (which remain equally relevant).

We are also troubled that the Commission appears to be prematurely moving forward with this Proposal at the same time it is considering a massive re-write of the rules governing the structure of the equity and options markets (many of which may impact liquidity and competition in these markets),[14] as well as numerous other proposals as part of an aggressive regulatory agenda that will collectively impose significant costs on industry members.[15] The unequitable distribution of CAT costs contemplated by the Funding Proposal will exacerbate these problems, harming the functioning of U.S. securities markets. The Commission cannot determine whether the proposed distribution of CAT costs will be equitable without assessing the distribution of costs and benefits under the Commission's other pending proposals, many of which appear slanted in favor of the SROs.

Key unanswered questions in the record include how it could be consistent with the Exchange Act to allocate approximately 80% of total CAT costs to the industry (taking into account the proposed allocation to FINRA, which is expected to be passed on to industry firms), when the industry has absolutely no role in the governance, oversight, or design of CAT and obtains no tangible benefits from its operation (indeed, the industry has not even been permitted to obtain or review CAT data used in the context of Commission regulatory initiatives).[16] Instead of benefiting the industry, the CAT system is being used to surveil and fine industry members, which generates additional revenue for the Commission (and the SROs) but is not used to defray the costs of operating CAT. Therefore, CAT can accurately be characterized as a revenue generating Commission system that the industry is being obligated to fund.

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[14] See Release No. 34-96495 (December 14, 2022), 88 FR 128 (January 3, 2023) (Order Competition Rule); Release No. 34-96494 (December 14, 2022), 87 FR 80266 (December 29, 2022) (Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders); Release No. 34-96496 (December 14, 2022), 88 FR 5440 (January 27, 2023).

[15] See (https://www.sifma.org/resources/news/the-secs-current-far-ranging-aggressive-rulemaking-agenda-will-raise-regulatory-uncertainty-and-risks-unintended-negative-consequences/).

[16] See SIFMA FOIA Request Re: Information Regarding the Data Relied upon by the Commission in Proposing Certain Commission Rulemaking Related to Market Structure dated Feb. 8, 2023.

The record details that current CAT costs include approximately $350 million in historical costs that are proposed to be allocated to a small group of executing broker firms based on current market volumes. The CAT Operating Committee has failed to explain why allocating these significant costs to this group of firms is consistent with the Exchange Act (or how it may affect market liquidity and competition), taking into account that the allocation is being made based on current market share (and therefore bears no relation to the firms and/or activities that may have contributed to these historical costs) and that there appears to be little ability for these firms to pass-on historical costs to anyone else.

In addition, the record details that current CAT costs include annual operating costs of approximately $240 million, which represents more than 10% of the Commission's 2023 budget request to Congress.[17] We note that the CAT annual budget increased over 30% just in the last year, and the industry has no role in the governance, oversight, or approval of this budget. Approving a proposal that would allocate 80% of these costs to the industry in perpetuity, with no mechanism to control or limit the budget, directly threatens efficiency, competition, and capital formation in U.S. securities markets. The CAT Operating Committee has not explained why such an approach is consistent with the Exchange Act, including the Commission's guidance on SRO filings relating to fees,[18] in particular when the Commission has previously acknowledged that "the SROs have potential conflicts of interest with respect to allocating costs related to the CAT Plan because both SRO participants and Industry Members are responsible for paying fees related to the CAT Plan; however, the CAT Operating Committee, whose voting participants are all SROs, decides how these fees should be split."[19]

Finally, we also briefly discuss below another issue regarding the Funding Proposal's approach of assessing CAT Fees through fee filings submitted by each exchange under Rule 19b-4. As a preliminary matter, we believe that this proposed process is inconsistent with Rule 608 of Regulation NMS, which now requires NMS plan fee changes to go through a notice and comment process and to be approved by the Commission prior to becoming effective. This inconsistency calls into question the entire process for establishing and assessing CAT Fees under the CAT NMS Plan and Funding Proposal.

We recognize the frustration the SROs are experiencing in connection with their failure to obtain approval for a CAT funding model. But that is due in large part to their lack of engagement and collaboration with the industry on establishing a viable funding model. As indicated in our May 2023 Comment Letter, it is also due in large part to the SROs' inability to directly manage the CAT, which has now effectively become a Commission system. We continue to emphasize Industry Members' willingness to work with the Commission and the SROs to develop a CAT funding model. Nonetheless, we continue to be placed in the position of having to respond to formal proposals by the CAT Operating Committee through the notice and comment process for NMS Plan amendments, rather than through a dialogue in which consensus is sought prior to filing formal proposals with the Commission. This has led to the inefficient and drawn-out process we have been facing time and time again over the last several years.

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[17] See (https://www.sec.gov/files/fy-2023-congressional-budget-justification-annual-performance-plan_final.pdf).

[18] See (https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees).

[19] See Release No. 34-89618 (August 19, 2020), 85 FR 65470 (October 15, 2020).

Accordingly, we again call on the SROs to engage in meaningful dialogue and collaboration with the industry prior to submitting formal a CAT funding model with the Commission. As evidenced by the significant delays, we believe such a process would lead to a better outcome for all interested parties.

I. The CAT Operating Committee Mischaracterizes SIFMA's Position on Executing Brokers

The CAT Operating Committee begins the CAT Response Letter by noting SIFMA's recommendation in our May 2023 Comment Letter that the SROs withdraw the latest funding proposal in order to allow the industry to fully consider and meaningfully respond to the changes that are being put forward, including the scope of firms that will be assessed the extremely significant CAT costs. The CAT Operating Committee then asserts that we have switched our position on assessing firms designated as "executing brokers" in an attempt to further delay the adoption of a CAT funding model.

However, the CAT Operating Committee has significantly mischaracterized our position on the approach of assessing CAT Fees to firms designated as "executing brokers." This is especially disappointing as we conveyed our position reflected in our May 2023 Comment Letter in a meeting with representatives of the CAT Operating Committee on April 14, 2023. In our December 2022 Comment Letter, we noted that the SROs have yet to "provide any definition on who would be treated as an 'executing broker' in a transaction" and that "[a] clear definition is critical for Industry Members to understand when and in what situations they would be assessed costs under the New Executed Share Model." We also noted that, "[t]he term 'executing broker' is used in a variety of contexts in the industry and is sometimes applied to various brokers who have a role in the lifespan of a single order." We made these points again in our January 2023 Comment Letter, and further stated that SIFMA understood the concept of an executing broker to "generally refer to the Industry Member **initiating the order**." (emphasis added)

The CAT Operating Committee only provided a definition of who they considered to be an "executing broker" in the most recent Funding Proposal, filed in March 2023.[20] This finally allowed SIFMA and other industry members to more fully understand which firms would be assessed CAT Fees under the proposal. After thoughtful consideration of the proposal, we provided for the first time detailed comments setting forth our concerns with the proposed definition of "executing broker" in our May 2023 Comment Letter, in which we noted, among other things, the undue burdens placed on the firms designated as executing brokers by the CAT Operating Committee under the proposed definition, the challenges these firms would face in allocating historical CAT costs, and our preliminary recommendation that the definition be changed to refer to the broker that originated the order (subject to further data and analysis).

[20] They first included a definition of "executing broker" in a February 15, 2023 amendment to the Executed Share Model that the SROs subsequently withdrew, perhaps in response to concerns about not providing the public with a meaningful opportunity to comment on the proposed definition in light of the impending final date by which the Commission would need to act on the Executed Share Model (i.e., 300 days after the Executed Share Model was noticed in the Federal Register, which would have fallen on or about March 28, 2023 and which was a little over a month after which the CAT Operating Committee had actually provided a definition of who would be an executing broker under the proposal).

Rather than engaging in a thoughtful approach in response to this recommendation, the CAT Operating Committee resorted to mischaracterizing our position. It seems clear that the CAT Operating Committee is doing so to press the Commission to rush to a decision on their Funding Proposal, which apparently is working.

II. The Commission Should Not Rush a Decision on the Funding Proposal

The Proposal strays far beyond the CAT plan the Commission contemplated in 2012 and 2016 and raises significant constitutional issues. The Commission should send the proposal back to the drawing board, not rush ahead with an approval.

A. Rule 613 and the CAT NMS Plan do not Support the Proposal

The Commission adopted Rule 613 to create the CAT in 2012.[21] The Commission contemplated prompt action.[22] But it's now been more than a decade, and the CAT structure is *still* not finalized. The 2012 rule and the 2016 approval of the CAT NMS Plan are so outdated and so unconnected to the current system, that they no longer support the CAT, as it currently stands. The Commission should go back to the drawing board. After a decade of errors, mismanagement, and hundreds of millions of dollars wasted, the Commission should take the lessons learned and come up with a structure that might actually work.[23]

By their own terms, Rule 613 and the 2016 CAT NMS Plan no longer supports the CAT. The CAT NMS Plan, for example, contemplates that data will be available to the SEC on a T+5 basis,[24] but the Commission (including its Staff) have insisted on structural changes to ensure that certain data be made available to the SEC at specific times, so they can start using CAT *before* the T+5 deadline. Similarly, Rule 613, for example, contemplates the reporting of every "material" term of an "order."[25] But, again, the Commission has insisted that CAT be expanded, so that it covers not only the material terms of each order, but also the general parameters (so-called port-level settings) that are collectively applied to all orders sent to a given port on an exchange. Theses settings are not handled on an order-by-order basis and are generally not communicated as part of the FIX message transmitting an order. Rule 613 also requires the reporting of specific events[26] and provides that the events must be "linked" to their "originating order,"[27] but, again, over time, the Commission has greatly expanded CAT's scope, requiring the reporting of events that are not linked to particular orders and that are not CAT-reportable events. While Rule 613, for instance, contemplates the reporting of the cancellation of an

[21] 17 C.F.R. § 242.613.

[22] See id. § 242.613(a)(1) (requiring filing of a plan within 270 days).

[23] See, e.g., (https://www.waterstechnology.com/regulation/4152906/cats-tale-how-thesys-the-sros-and-the-sec-mishandled-the-consolidated-audit-trail).

[24] CAT NMS Plan, Appendix C, at 15.

[25] 17 C.F.R. § 242.613(c)(7)(i)(F).

[26] See id. § 242.613(c)(1).

[27] See id. § 242.613(e)(1).

order,[28] the Commission has insisted that messages acknowledging the receipt of a cancel-request—precursor messages that may (or may not) lead to the cancellation of an order—be reported as well. The Commission has also expanded CAT to include OTC equities and request-for-quotes. We understand 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. These decisions have significantly increased CAT costs, the vast majority of which the Participants have now proposed to allocate to Industry Members, who have had no voice and little transparency throughout the building of the system (in all of its permutations). Given all these changes, Rule 613 and the 2016 CAT NMS Plan no longer supports CAT as it currently stands, a view apparently shared by even the SROs who are supposed to be in charge of operating the system.[29]

The Commission cannot just ignore the rules and orders that are still on the books to approve a Funding Proposal for a system that is not consistent with Commission Rule 613 and the CAT NMS Plan. Doing so constitutes clearly arbitrary and capricious action. Rather than barreling ahead to approve a plan that is no longer supported by even the Commission's own precedent, the Commission should return to the drawing board.

B. The Funding Proposal Raises Significant Constitutional Issues

In our system of separated powers and checks and balances, the Commission does not have the unilateral authority to spend hundreds of millions of dollars to create one of the largest surveillance databases ever constructed. The CAT system tracks every equity and option trade and order, by every account, at every broker-dealer, by every investor. This "comprehensive surveillance tool" presents a serious risk "to Americans' liberty and privacy,"[30] and, under our system of government, if the Commission wants to build such a database, the Commission needs to receive an appropriation from Congress, not end run the Constitution's separation of powers by forcing the SROs to raise and spend money for the Commission's purposes.

As the Fifth Circuit recently explained, the "separation of" the spending power (the power over the "purse") and the executive power (the power over the "sword") was the Framers' "strongest rejoinder to … fears of a tyrannical" executive branch.[31] The Framers "viewed Congress's exclusive 'power over the purse' as an indispensable check on 'the overgrown prerogatives of the'" executive branch.[32]

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[28] See id. § 242.613(c)(1).

[29] See Petition for Review, USCA Case No. 21-1065; Petition for Review, USCA Case No. 21-1066.

[30] See "Statement of Hester M. Peirce in Response to Release No. 34-88890, File No. S7-13-19" (May 15, 2020).

[31] Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB, 51 F.4th 616, 636 (5th Cir. 2022), cert. granted, 143 S. Ct. 978 (2023).

[32] Id. (quoting The Federalist No. 58 (J. Madison)).

The proposal here would sever this "vital" check.[33] Law enforcement is an executive prerogative.[34] And the CAT is a law enforcement tool.[35] The Commission's extensive involvement in the design and implementation of the system, as detailed above, clearly demonstrates that, regardless of how it was originally conceived, CAT is a Commission system used for enforcement. The funds to build it, therefore, must be approved by the people's elected representatives in Congress. 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.[36] The Constitution's separation of powers cannot be evaded that easily.

If the Commission thinks the CAT is needed to serve its enforcement agenda, then it must provide for the database with public funds approved by Congress in the appropriations process. Indeed, if Congress *were* to appropriate money to build a massive, extremely intrusive surveillance tool, one would "expect Congress to speak clearly,"[37] not bury such an "[e]xtraordinary" action in "modest words," "vague terms," or "subtle device[s]."[38] Yet that is exactly what the proposal here is based on. In Section 11A of the Exchange Act, Congress authorized the Commission to "require self-regulatory organizations to act jointly with respect to matters as to which they share authority."[39] Requiring regulated entities to act jointly is a far cry from requiring them to pay for a government resource.[40] Congress does not "typically use [such] oblique or elliptical language" to authorize an agency to spend, directly or indirectly, hundreds of millions of dollars on a project that potentially endangers the liberty and privacy of every American.[41] For that type of funding, the Commission must go back to Congress and seek an explicit appropriation.[42]

For similar reasons, 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.[43]

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[33] CFPB v. All Am. Check Cashing, Inc., 33 F.4th 218, 231 (5th Cir. 2022) (Jones, J., concurring).

[34] See, e.g., John Thomas Capital Mgmt. Grp. LLC, 2020 WL 5291417, at *25 & n.166 (SEC Sept. 4, 2020).

[35] See, e.g., Consolidated Audit Trail, 77 FR 45,722, 45,731 (Aug. 1, 2012).

[36] Cf. SAS Inst., Inc. v. Iancu, 138 S. Ct. 1348, 1358 n.* (2018) (questioning an agency's "power to do indirectly what it cannot do directly").

[37] West Virginia v. EPA, 142 S. Ct. 2587, 2605 (2022).

[38] Id. at 2609.

[39] 15 U.S.C. § 78k-1(a)(3)(B).

[40] Cf. Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 373 (D.C. Cir. 2022) (Walker, J., dissenting) (authorization to require fishermen to carry federal inspectors does not include the requirement to "force the fishermen to pay the wages of [the] federally mandated monitors").

[41] West Virginia, 142 S. Ct. at 2609.

[42] See 15 U.S.C. § 78k-1(a)(3)(C) (authorizing the Commission "to make recommendations to the Congress" about ways to "modif[y]" the "scheme of self-regulation provided for in [the Exchange Act]").

[43] Cf. Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893) (the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he

The Commission should not rush through an approval now, with such serious constitutional issues at stake.

C. The Funding Proposal Likely Violates Rule 608 of Regulation NMS

After further considering the flawed process to establish and assess CAT Fees under the proposed Funding Model that we have addressed in our prior comment letters, we preliminarily believe 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, run afoul of the requirements of Rule 608 of Regulation NMS. Rule 608 of Regulation NMS was adopted pursuant to Section 11A of the Exchange Act. Among other things, that provision provides protection for SROs engaged in collective activity, including fee setting, that might otherwise run afoul of other laws. Absent this protection, SROs could be exposed to potential liability for engaging in such collective activity.

In 2020, the Commission amended Rule 608 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.[44] Prior to this change, changes to fees assessed under NMS Plans were immediately effective under Rule 608(b)(3)(i). Moreover, the Commission's amendments to Rule 608 specifically contemplate that CAT fees would be subject to Rule 608 of NMS, stating for instance that:

> The Fee Exception has been available for NMS plans that charge or intend to charge fees. Currently, these are: (i) the NMS plans that govern the facilities through which registered securities information processors ("SIPs") collect, consolidate, and distribute real-time market information (also known as "core data"); and (ii) the plan that governs the consolidated audit trail ("CAT").

Accordingly, we believe that the entire process for establishing and assessing CAT Fees under the Funding Proposal could potentially run afoul of Rule 608 of Regulation NMS.[45] Ironically, the Commission amended Rule 608 to remove the effective upon filing fee provision in response to concerns about the SROs being able to change market data fees under the SIPs without a meaningful review opportunity. Yet, such a process is exactly what the Commission is considering approving here with regard to CAT Fees. Given the infirmities with the process for establishing and assessing CAT Fees under the Funding Proposal, it appears that the CAT Operating Committee needs to go back to the drawing board and establish a new process consistent with Rule 608. It would also mean that the Commission could not find that the Funding Proposal is consistent with the Exchange Act.

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surrenders to the public something more and different from that which is exacted from other members of the public").

[44] See supra note 19.

[45] While the Commission-approved CAT NMS Plan contemplates fee filings under Section 19(b) of the Exchange Act, the plan is silent on whether these filings would need to be made after the CAT Operating Committee first obtained approval to assess such fees under Rule 608 of Regulation NMS.

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SIFMA greatly appreciates the opportunity to comment on the Funding Proposal. For the reasons discussed above, as well as in our prior comment letters on the Executed Share Model, we strongly urge the Commission to disapprove the proposed model. If you have any questions or require additional information, please do not hesitate to contact us by calling Ellen Greene at (212) 313-1287 or Joe Corcoran at (202) 962-7383.

Sincerely,

Ellen Greene
Managing Director
Equities & Options Market Structure

Joseph Corcoran
Managing Director, Associate General 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