



December 19, 2023

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

Re: The Participants' Request for an Extension of Time Related to Financial Accountability Milestone 4 in the in the National Market System Plan Governing the Consolidated Audit Trail

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ is submitting this letter to the U.S. Securities and Exchange Commission (“Commission”) to urge the Commission to deny or reject the May 22, 2023 exemptive relief request (“Exemptive Request”) from the Participants in the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”) to “extend until August 31, 2024 the target deadline in Section 11.6(a)(i)(D) of December 30, 2022 for Full Implementation of CAT NMS Plan Requirements.”² If the Commission were to grant the Exemptive Request, the Participants would be able to recoup 100% of CAT-related costs incurred by them since December 30, 2022 despite failing to deliver a fully functional CAT by this date as required by CAT NMS Plan. As set forth below, we believe the Exemptive Request is contrary to the public interest and the protection of investors, as the Commission is required to find under Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”) and/or Rule 608(e) of Regulation NMS, and therefore should be denied or rejected by the Commission. At a minimum, this issue is of great economic significance to all investors, and must be addressed through the NMS plan amendment process that provides a formal notice and comment period for interested parties.

I. Background

The CAT is a regulatory system designed to allow the Commission and Participants to track equity and listed options order and trading activity across all equity and listed options

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 See (<https://www.catnmsplan.com/sites/default/files/2023-06/05.22.23-Exemption-Request-Regarding-FAM-4.pdf>).

markets in the U.S.³ Due to significant delays by the Participants in developing the CAT, the Commission amended the CAT NMS Plan in May 2020 (“May 2020 Amendments”) to include financial accountability milestones to increase “the Participants’ financial accountability for the timely completion of the consolidated audit trail.”⁴ In proposing the financial accountability milestones, the Commission observed that “the Participants had neither met the deadlines set forth in the CAT NMS Plan nor their own proposed extensions of those deadlines.”⁵ The Commission noted in adopting the milestones that “proposed amendments also will help to ensure that the Participants fulfill their obligations to deliver a functional CAT on a reasonably achievable timeframe.”⁶

The May 2020 Amendments incorporated four financial accountability milestones in the CAT NMS Plan. Each milestone requires a certain level of development of the CAT system by a certain date. If the Participants fail to achieve that level of development by the milestone date, the amount of money they can recoup from Industry Members (i.e., “Post-Amendment Industry Member Fees”) to cover their expenditures on developing the CAT system to achieve that milestone will be reduced. With regard to each of the second through the fourth milestones, if they fail to achieve that milestone by 270 days after the milestone date, they will not be able to recover any Post-Amendment Industry Member Fees related to that milestone.

The fourth (and final) financial accountability milestone (“FAM 4”) effectively requires the Participants to complete the CAT system by December 30, 2022. The amended CAT NMS Plan refers to this milestone as “Full Implementation of CAT NMS Plan Requirements,” which is defined as:

the point at which the Participants have satisfied all of their obligations to build and implement the CAT, such that all CAT system functionality required by Rule 613 and the CAT NMS Plan has been developed, successfully tested, and fully implemented at the initial Error Rates specified by Section 6.5(d)(i) or less, including functionality that efficiently permits the Participants and the Commission to access all CAT Data required to be stored in the Central Repository pursuant to Section 6.5(a), including Customer Account Information, Customer-ID, Customer Identifying Information, and Allocation Reports, and to analyze the full lifecycle of an order across the national market system, from order origination through order execution or order cancellation, including any related allocation information provided in an Allocation Report. This Financial Accountability Milestone shall be considered complete as of the date identified in a Quarterly Progress Report meeting the requirements of Section 6.6(c). [underlining added]

This milestone includes the development of a separate customer database, referred to as the Customer Account and Information System (“CAIS”). As indicated in the underlined part of the

³ See, e.g., Release No. 34-79318 (November 15, 2016), 81 FR 84696 (November 23, 2016).

⁴ See Release No. 34-88890 (May 15, 2020), 85 FR 31322 (May 22, 2020).

⁵ Id.

⁶ Id.

definition above, it also includes the ability of the Commission and the Participants to be able to fully use the system for its intended regulatory purposes.

II. Discussion

In submitting the Exemptive Request, the Participants admit that they have not met FAM 4 by the December 30, 2022 date. They primarily point to continuing defects with the CAIS database as being the reason they have failed to meet this milestone. The Participants note in the Exemptive Request that these defects fall into five categories, including one in which:

accepted CAIS data is not currently being loaded each day into the necessary data stores to make it available for query in the CAIS Regulator Portal and to make FDID/CCID associations available to the transaction data. As a result, although data has been accepted and processed by CAIS, a subset of accepted data is not currently available for query in the CAIS Regulator Portal and could result in a regulator not being able to see all FDID or CCID information, or not seeing the most recent version of an FDID or CCID. In addition, a subset of FDID/CCID associations are not enriched on transaction data. Absence of complete FDID/CCID associations could result in one or more CCIDs not being associated to a particular transaction record.

Other CAIS defects include the inability of the CAT to properly provide error feedback and report cards to Industry Members regarding their CAIS reporting and the failure to provide fully usable search functionality for regulators including the Commission to search records in CAIS. The Participants in their Exemptive Request are asking that the FAM 4 milestone be extended until August 31, 2024 to fix the defects in the CAIS system.

The Participants argue in their Exemptive Request that they have made “substantial progress” toward satisfaction of FAM 4, including the build of the CAIS system. Without opining on whether the Participants have met milestones one through three, the Participants’ descriptions of the CAIS defects in the relief request strongly suggest otherwise. The defects described by the Participants are serious defects that limit the usability of the CAT system by regulators including the Commission. Moreover, they are preventing the retirement of the Commission’s electronic blue sheet system, which the Commission has noted could be retired in connection with the rollout of CAT.⁷ Based on the description of the defects, the Commission has reason to be wary of the CAIS data, and the CAIS system is nowhere near its end state of being able to allow regulators to confidently link trading activity of an individual or entity across different accounts held at different broker-dealers. This is one of the primary reasons why the CAT was created in the first place.

Relatedly, with regard to meeting the milestones, SIFMA is troubled by the Commission’s statement in its recent exemptive order granting conditional relief from certain CAT NMS Plan requirements that, “[i]n connection with issuing this Order, the Commission has determined that the Participants have sufficiently complied with the conditions set forth in the prior Orders and with the technical requirements for Quarterly Progress Reports set forth in

⁷ See Release No. 34-67457 (July 18, 2012), 77 FR 45722 (August 1, 2012).

Section 6.6(c) of the CAT NMS Plan, including for purposes of determining compliance with any applicable Financial Accountability Milestones.”⁸ While the Commission includes limiting language after this statement, SIFMA is very concerned that the Commission is prejudging whether the Participants have met any of the requisite Financial Accountability Milestones. According to the Commission’s contemplated process, such a showing needs to be made by the Participants in connection with submitting a rule filing to collect fees related to a milestone such as FAM 4,⁹ and subject to public comment and properly supported by an economic analysis. Therefore, the Commission’s statement in this exemptive order seems premature and inconsistent with the relief the Participants are seeking in the Exemptive Request.

The Participants also argue in their Exemptive Request that the Commission has indicated that it would consider exemptive relief from the financial accountability milestones in the event of reasonable delays. While the concept of the Commission being able to provide exemptive relief was discussed by the Commission in the May 2020 Amendments, it is important to recite the Commission’s full discussion of this concept to provide the proper context. In particular, the Commission stated,

Although it is sensitive to the concerns expressed by commenters, the Commission is adopting a mechanism that would not allow further delays to occur without consequence. The Participants have already missed the Commission-approved deadlines set forth in the CAT NMS Plan. The Participants are responsible for timely CAT implementation, including selecting and managing the Plan Processor, and the process is fundamentally within their control. Delays to CAT implementation have serious consequences; they prevent regulators and market participants from reaping the regulatory benefits of the CAT, as well as potentially increase costs for Industry Members attempting to comply with the Participants’ projected timelines. However, the Commission has the authority to grant exemptive relief from any requirement associated with a particular Financial Accountability Milestone. The Commission believes that this ability, in particular, should alleviate the Participants’ concerns regarding the potential impact of unforeseeable or reasonable delays.¹⁰

In the Exemptive Request, the Participants provide no rationale or reasoning as to why the delays in implementing CAIS were unforeseeable or reasonable. They merely recite the defects that currently exist in CAIS, suggest that building the CAT system is an enormous and complicated undertaking, and ask for more time.

The delay in CAIS is not incremental, nor a result of unforeseen circumstances. The Participants provided themselves with more than sufficient time to create the CAIS system and initially set reasonably conservative deadlines for the system to be fully operational by July 2022, and after realizing this date was not achievable, by December 2022.¹¹ As the production

⁸ See Release No. 34-98848 (November 2, 2023), 88 FR 77128 (November 8, 2023).

⁹ See Release No. 34-98290 (September 6, 2023), 88 FR 62628 (September 12, 2023).

¹⁰ See *supra* note 4.

¹¹ See (<https://catnmsplan.com/sites/default/files/2022-07/07.06.22-CAIS-Checkpoint.pdf>). SIFMA also notes that the direct “CAT Alert” source document from the CAT website has been updated and revised multiple times since it

deadline neared, the Participants did not simply find they needed another week to finalize some last-minute tweaks. Rather, the problems with CAIS were so significant, and identified so close to the deadline, that the Participants determined that they could neither provide the industry nor the Commission with even an estimate as to when the issues would be resolved.¹² After some time, the Participants provided initial estimates that the system would likely be ready by the end of 2023, but months after the December 2022 deadline, the Participants finally determined that the system would not be ready for production until the end of May 2024.¹³

Considering the scope and extensive lead time for developing and deploying the final phase of CAT, a delay of this magnitude is hugely significant, both for the Commission's use of CAT as well as for Industry Members to become fully compliant with the requirements of CAT. The Participants have not argued that the delays were a result of an external, unforeseeable event, and the concept of "substantial progress" does not appear to be the type of mitigating factor the Commission contemplated during the adoption of FAM 4. Rather, it appears that FAM 4 was specifically designed to prevent this exact type of significant and categorical failure to deliver a key component of CAT. Exempting the Participants from the penalties of this milestone at this time would render the milestone and its purpose meaningless.

Moreover, what the Participants fail to mention in their Exemptive Request is that prior to the Commission adopting the milestones in May 2020, they had three and a half years since the approval of the CAT NMS Plan (November 2016 – May 2020) to work on the CAT system, including CAIS. They did not use this time productively, as evidenced by their failed initial effort to hire Thesys as the plan processor. They also repeatedly refused to accept Industry Member help on most aspects of the CAT build, despite significant and substantial Industry Member expertise with the subject matter, and with large system builds in general. The lack of action during this timeframe is precisely why the Commission adopted the financial accountability milestones in the May 2020 Amendments.

Despite having seven years and counting (November 2016 to now), the Participants still have not completed the CAT system. Moreover, their argument that Industry Members will be unjustly enriched absent relief fails to take into account the fact the Participants had and continue to have complete control over all CAT decisions, including the hiring of technology vendors (such as the one to build the CAIS system) and the associated spend on them. In this regard, the Participants had full decision-making autonomy on CAT-related platform, architecture, and staffing decisions, and on which, as noted, they refused Industry Member assistance and input. This Participant control has led to excessive costs and delays in building the CAT. And through their Exemptive Request, the Participants are not owning the outcome of their decision-making and now are asking the Commission to bail them out from their poor choices and delays.

was originally published in July 2022 to reflect new deadlines for CAIS reporting and completion (<https://www.catnmsplan.com/sites/default/files/2023-08/8.2.23-CAT-Alert-2022-01.pdf>).

¹² It is troubling that the Participants did not seem to discover the extent CAIS defects until they started receiving live industry data in the latter half of 2022, which calls into question the adequacy of their testing processes. This is further troubling because the CAIS build does not appear to be as nearly complex as the CAT transactional database build, which includes more complex data structures and more complicated Linking methodology.

¹³ See (<https://www.catnmsplan.com/sites/default/files/2023-08/8.2.23-CAT-Alert-2023-01.pdf>).

As discussed above, the defects in the CAIS database are significant and prevent regulators from fully using the CAT system as it was intended to be used. For example, the Commission indicated that one of the critical regulatory functions of the CAT is to allow the Commission to track problematic equity or listed options trading activity by an individual or entity across multiple brokerage accounts held by that person,¹⁴ which does not seem possible in the CAT's current state. Moreover, given the Participants' track record regarding the CAIS rollout, SIFMA remains concerned that more defects may be discovered in the CAIS system, and notes that as of the date of this letter, Full CAIS still has not been delivered. In sum, the current defects in CAIS do not allow the CAT to fully support its regulatory mandate. This is exactly why the Commission implemented the Financial Accountability Milestones in the first place and why it should not provide a blanket exemption to allow the CAT Operating Committee to allocate hundreds of millions of dollars to Industry Members due the Participants mismanagement.

Accordingly, we believe the Participants have failed to demonstrate that granting their Exemptive Request is consistent with the public interest and the protection of investors. We therefore urge the Commission to deny or reject the Participants' Exemptive Request. We also urge the Commission to reject any attempt by the Participants to seek to recover costs related to FAM 4 in connection with a fee filing with the Commission under Section 19(b) of the Exchange Act.

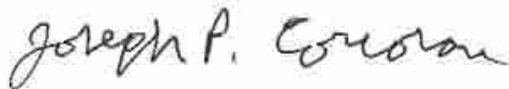
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SIFMA appreciates the opportunity to submit this letter to the Commission regarding the Participants' Exemptive Request. For the reason set for above, we urge the Commission to deny or reject the Participants' request, as well as any subsequent attempt by them to recoup FAM 4-related fees in a fee filing submitted to the Commission under the Exchange Act. 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
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Joseph Corcoran
Managing Director, Associate General Counsel

¹⁴ See supra note 3.

SIFMA

Cc: 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
Mr. David Hsu, Assistant Director, Division of Trading and Markets