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Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Via Email to rule-comments@sec.gov

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

Dear Ms. Countryman:

The Financial Industry Regulatory Authority, Inc. (“FINRA”)¹ appreciates the opportunity to provide the Securities and Exchange Commission (“Commission”) with additional comments on the above-referenced proposed amendments to the National Market System Plan Governing the Consolidated Audit Trail (“Plan” or “CAT NMS Plan”), which supplements the information included in FINRA’s April 11, 2023 comment letter.²

As noted in FINRA’s April 2023 Comment Letter, the Operating Committee for the Consolidated Audit Trail, LLC (“Operating Committee”) filed proposed amendments to the Plan on March 15, 2023, over FINRA’s objections, to implement a funding model that is based on the executed equivalent share volume of transactions in eligible securities

¹ FINRA is submitting this letter solely in its capacity as a participant of the CAT NMS Plan. This letter does not reflect or represent the views of FINRA CAT, LLC (“FINRA CAT”), which is a distinct corporate subsidiary of FINRA that acts as the CAT Plan Processor pursuant to an agreement with the self-regulatory organization (“SRO”) participants to the CAT NMS Plan (“Participants”).

² See Letter from Marcia Asquith, Executive Vice President, FINRA, to Vanessa Countryman, Secretary, SEC, dated April 11, 2023 (“April 2023 Comment Letter”).

(“Funding Model”).³ Under the Fee Proposal, FINRA’s allocation of total CAT costs for listed securities would be based on transactions that are reported to FINRA trade reporting facilities (“TRFs”).⁴ In the Fee Proposal, the Operating Committee sought to justify the Funding Model by, among other things, stating that “trading activity provides a reasonable proxy for cost burden on the CAT, and therefore is an appropriate metric for allocating CAT costs among CAT Reporters.”⁵ However, FINRA believes that this statement is materially inconsistent with detailed information that FINRA is aware of through its role as a Participant relating to cost burdens—information that indicates that the TRF volume contributes to only a very small percentage of annual CAT compute and storage costs. This information aligns with FINRA’s prior statements on this topic:

“[U]nder the Funding Model, FINRA would be allocated the largest portion of CAT fees of any single Participant or Participant group—largely based on transaction volume reported to the TRFs. However, TRF transactions correspond to a relatively low burden on CAT, from a cost-generation perspective, compared to other cost drivers, such as options activity. Thus, while roughly 75% of total SRO fees under the Fee Proposal would be for equities activity and only 25% for options activity, this distribution does not correspond to actual cost generation.”⁶

The detailed compute and storage cost information supports the above excerpt from FINRA’s April 2023 Comment Letter and further underscores the significant misalignment between the Funding Model and CAT cost-generation. Nonetheless, under the Fee Proposal, despite the minimal data compute and storage costs for transactions reported to the TRF, FINRA would be assessed an estimated 34% of the total CAT costs to be borne amongst the 25 Participants, and more than all options exchanges combined. As such, FINRA cannot support the statement in the Fee Proposal that trading activity provides a reasonable proxy for cost burden. This outcome simply cannot be reconciled with the Plan and Exchange Act requirements concerning fair, reasonable, and equitable fee distribution. FINRA has raised these specific concerns unsuccessfully to the Participants.

In a recent letter, CAT LLC continues to assert that there are relevant similarities between the Funding Model and existing transaction-based fees, such as FINRA’s Trading Activity Fee (TAF) and the SEC’s Section 31 fee, sufficient to justify the

³ See Securities Exchange Act Release No. 97151 (March 15, 2023), 88 FR 17086 (March 21, 2023) (Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail) (“Fee Proposal”).

⁴ See Fee Proposal, *supra* note 3, at 17107.

⁵ See Fee Proposal, *supra* note 3, at 17103.

⁶ See April 2023 Comment Letter, *supra* note 2.

appropriateness of the Funding Model in the CAT context.⁷ CAT LLC’s observations superficially focus on the fact that these fees also use transaction-based metrics (and may be assessed on members) and neglects other factors relevant to the analysis including, for example, that these fees are used in combination with other funding mechanisms and metrics to support an overall funding framework.⁸ As FINRA has stated previously:

“[T]he Fee Proposal overlooks another critical distinction—namely, that FINRA’s TAF is designed to recover the costs of FINRA’s regulatory activities, while the Fee Proposal ostensibly is designed to ‘align with the anticipated costs to build, operate, and administer the CAT,’ consistent with the CAT NMS Plan’s approved funding principles. FINRA has stated previously that it is not opposed to fees based on regulatory usage, provided such fees are not applied on an unsupported and ad hoc basis solely to FINRA. As was the case with previous CAT fee proposal iterations, the Fee Proposal does not meaningfully address these points. The Fee Proposal also states that trading activity ‘provides a reasonable proxy’ for costs associated with the CAT, and ‘therefore is an appropriate metric for allocating CAT costs among CAT Reporters;’ and that ‘executed equivalent share volume is related to, but not precisely linked to, the CAT Reporter’s burden on the CAT.’ However, the Fee Filing

⁷ See Letter from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, SEC, dated May 18, 2023 (“CAT LLC Letter”).

⁸ The CAT LLC Letter also states that:

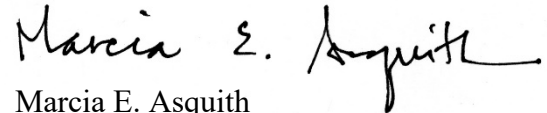
“FINRA also discusses a Section 31-style approach for the CAT funding model, noting that it believes that a Section 31 fee approach may satisfy the requirements of the Exchange Act. CAT LLC notes that the very aspects of the Funding Proposal that FINRA objects to are comparable in its Section 31 fee proposal. ... Accordingly, if the Section 31 approach would comply with the Exchange Act, then the Funding Proposal would as well.”

This statement misrepresents FINRA’s comment in that it suggests that FINRA’s letter advocated for a specific approach that was similar to the Section 31 fee. Instead, FINRA stated that “the Fee Proposal fails to adequately consider and address potential alternatives that, unlike the Funding Model, may meet Exchange Act standards.” FINRA also pointed out that the Commission received comments suggesting a model similar to Section 31 fees but that these alternatives were not meaningfully analyzed in the Fee Proposal, and the Commission should require that an analysis of these alternatives be undertaken. A determination of whether a Section 31 alternative is consistent with the Exchange Act can only follow a thorough analysis, which CAT LLC has yet to perform.

neither explains how nor the extent to which this is the case.”⁹

Given these concerns, and others expressed in FINRA’s prior comment letters,¹⁰ FINRA urges the Commission to disapprove the Fee Proposal because it fails to provide for reasonable fees that are equitably allocated and not unfairly discriminatory, does not reflect a reasonable approach to allocating costs amongst the Participants, nor does it transparently or accurately present information regarding the true sources of cost burdens on the CAT. FINRA thanks the Commission for its attention to FINRA’s comments on the Fee Proposal and looks forward to continued engagement on this important matter.

Sincerely,



Marcia E. Asquith
Corporate Secretary, EVP
Board and External Relations

⁹ See April 2023 Comment Letter, *supra* note 2.

¹⁰ See April 2023 Comment Letter, *supra* note 2. See also Letter from Marcia Asquith, Executive Vice President, FINRA to Vanessa Countryman, Secretary, Commission, dated May 12, 2021 (“FINRA Comment Letter”), discussing Securities Exchange Act Release No. 91555 (April 14, 2021), 86 FR 21050 (April 21, 2021).