



January 31, 2023

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

**RE: Notice of Filing of Partial Amendment No. 1 to an Amendment to the National Market System Plan Governing the Consolidated Audit Trail; November 28, 2022, File No. 4-698**

Dear Ms. Countryman:

Wolverine Execution Services, LLC (“WEX” or the “Firm”) appreciates the opportunity to submit this comment to the U.S. Securities and Exchange Commission (the “Commission”) related to the November 28, 2022 Amendment No 1. to an Amendment to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan or “Plan” or “CAT”).<sup>1</sup>

WEX generally supports the proposed distribution of costs among Plan Participants and Industry Members in the revised funding model (“Executed Shares Model”) for the CAT NMS Plan. However, the Firm submits significant objections to the new proposal, which changes the obligation of paying CAT fees from the Clearing Brokers<sup>2</sup> to the Executing Brokers<sup>3</sup> for each transaction. Changing the party responsible for CAT fees does not constitute a minor amendment, but rather a substantial change for which a full review of this new rule must be made. For the reasons set out below, WEX disagrees with this proposed change and believes that Clearing Brokers should remain responsible for CAT fees because Clearing Brokers are in the best position to “pass-through” or collect CAT fees from other industry participants. Additionally, because of the significant nature of the rule change, we strongly urge that a full comment period be allowed for a full review of the change’s impact on small broker-dealers to be performed.

Clearing Brokers have unique advantages over Executing Brokers, such that they are far better positioned to perform this important role with respect to fees. Currently, Clearing Brokers are responsible for collecting fees such as Options Regulatory Fees, OCC and SEC-related fees and have demonstrated their ability to both pay and “pass-through” fees to their clients in a timely and efficient manner. The responsibility for CAT fees should be no different than these other fees. These proposed changes to the fee collection structure would push the significant costs and operational burdens onto a segment of the industry – Executing Brokers – that is far less equipped to handle the unique challenges of the role. The proposal would functionally require Executing Brokers to guarantee the CAT fees for their clients, many of which are other industry members who have CAT reporting obligations. Unlike Clearing Brokers, Executing Brokers do not custody client funds or positions, and rather than debit client accounts, Executing Brokers

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<sup>1</sup> See Release No. 34-96394 (November 28, 2022), 87 FR 74183 (December 2, 2022).

<sup>2</sup> “Clearing Broker” will collectively refer to both the “clearing buying broker” or “clearing selling broker” to each transaction.

<sup>3</sup> “Executing Broker” will collectively refer to both the “executing buying broker” or “executing selling broker” to each transaction.



would invoice and collect past-due fees, thereby putting Executing Brokers in the worst position to be responsible for CAT fees vis-à-vis Clearing Brokers.

WEX urges the Commission to revisit its proposed amended structure in which Executing Brokers are responsible for CAT fees, and return to the original proposal in which those fees are collected by Clearing Brokers.

### **Excessive Financial Burden**

Regardless of whether the CAT fees are initially assessed to the Executing Brokers or Clearing Brokers, either of those entities are very likely to pass those fees through to the end client(s) that initiated the transaction, rather than incur such costs themselves on behalf of those clients. The proposal states:

“CAT LLC acknowledged, however, that this approach may impose an excessive financial burden on clearing firms and noted that they may pass-through the CAT fees to their clients, who may passthrough their CAT fees until the fees are imposed on the account that executed the transaction.”

The above statement directly acknowledges the presumed “excessive financial burden” on entities that do not pass-through CAT Fees. Therefore, the decision on which segment of the market should collect those fees should instead be based on which entity is better equipped, better capitalized, and better staffed to collect, process, and pay out these fees in an operationally efficient manner. Clearing Brokers are clearly better suited to that role.

### **Debiting vs. Invoicing**

Clearing Brokers tend to be much larger and well-capitalized entities than Executing Brokers. Many Executing Brokers operate from exchange trading floors, often with limited staff and operational scope. Clearing Brokers are generally large national or multinational firms with branch offices located in many cities and employ sizeable workforces. Clearing Brokers are currently in the business of assessing their client activity and positions, and performing financial calculations related to margin, stock lending, and the assessment of regulatory fees on their client accounts. Most importantly, Clearing Brokers have control over the posted capital and positions of their clearing clients, and, thus, are naturally better equipped to debit the CAT fees incurred by each client as part of their normal billing process.

Alternatively, many Executing Brokers, including WEX, do not hold or custody any funds or securities on behalf of their clients. Executing Brokers are compensated through the post-trade invoicing of trading commissions that they charge their brokerage clients. Executing Brokers typically issue monthly invoices to clients for those brokerage fees due and owing. Unfortunately, these monthly invoices do not always lead to prompt payments from clients. If Executing Brokers are required to collect CAT fees from their brokerage clients, those Executing Brokers will have no means of automatically debiting or otherwise compelling the prompt payments of due funds.

### **Net Capital Implications of This Proposal**

Another key difference in these proposals is that assessing CAT fees to Executing Brokers could have an adverse effect on the net capital of those firms, whereas requiring Clearing Brokers to collect the fees would not affect the net capital of any industry member. Under net capital rules, certain accounts receivable at a broker-dealer must be treated as non-allowable assets. These include both any accounts receivable from a non-broker-dealer client, and any accounts receivable from a broker-dealer that is more than 30 days old.



If Executing Brokers become responsible for the payment of CAT fees on behalf of their brokerage clients, then those Executing Brokers would be required to use their own firms' capital to pay for certain client CAT fees, essentially guaranteeing their clients' due bill, while awaiting payment from clients to reimburse the Executing Brokers for remuneration of those fees. Requiring Executing Brokers to functionally bridge the payments due from customer to CAT NMS will adversely affect the net capital of those Executing Brokers, particularly when considering that many accounts receivable for which a given Executing Broker is awaiting reimbursement must be treated as non-allowable assets.

### **Operational Proficiencies of Clearing Brokers**

Requiring Executing Brokers to collect CAT fees shifts this obligation to an industry group that, unlike Clearing Brokers, has invoicing and back office systems that are likely to vary in terms of sophistication, frequency and methodology. Because industry members generally use multiple Executing Brokers but relatively fewer Clearing Brokers (in many cases a single Clearing Broker) the numerous differences between various Executing Broker systems will pose additional challenges to entities that may receive CAT fee invoices from multiple Executing Brokers, each through different means of delivery, covering different billing periods, and likely requesting payments through different systems. In particular, the process for an Executing Broker will add an *additional step* of recouping funds from any end client, as the Executing Brokers will be required to fund the CAT costs regardless of the time horizon at which any Clearing Broker should resolve their contribution and any relevant client contributions of funds. Clearing Brokers are better positioned to leverage their existing processes to more efficiently navigate this process than Executing Brokers, who, due to the potential issues noted above may risk months of delays in their standard accounting operations as a result.

Clearing Brokers, on the other hand, each have an existing framework of assessing regulatory fees to their clients through the direct debiting of those custodied accounts, such that invoices and collection departments are not needed, and the funds can seamlessly be debited from the accounts that owe them and promptly delivered to CAT. Today, Clearing Brokers collect several regulatory fees from their clients, including Options Regulatory Fees, OCC and SEC-related fees. The inclusion of a single additional fee to this process should be virtually seamless for all similarly-situated Clearing Brokers. It should also be noted that because there are far fewer Clearing Brokers than there are Executing Brokers operating in the U.S. financial markets, the collection of CAT fees would presumably run more efficiently if it were performed by a relatively small number of established institutional clearing entities, rather than a disparate set of Executing Brokers who may each handle this post-hoc billing in their own manner, leading to inconsistencies and delays in this part of the CAT process.

### **Impact on Competition on Small Executing Brokers**

WEX does not believe that the existing proposal has sufficiently analyzed the costs and benefits of imposing the burden of CAT fee collection on Executing Brokers. In the justification as to why Clearing Brokers will no longer be assessed CAT fees, the amended proposal states that, "CAT LLC acknowledged, however, that this approach may impose an excessive financial burden on clearing firms..." This statement does not appear to contemplate the next logical point in the argument, which is that, imposing the same obligations on Executing Brokers would impose the very same "excessive financial burden" on such Executing Brokers, a segment of the market for which such a burden would be *far more excessive* than it would be on Clearing Brokers.



More specifically, imposing these additional burdens of CAT fee charges and collection upon Executing Brokers, as opposed to much larger, better-capitalized and better-staffed Clearing Brokers, presents significant operational cost burdens on smaller firms that are, on the whole, less likely to be able to handle such an increase. These increased costs may challenge the ability of small Executing Brokers to remain financially viable. Not only will they be responsible for ongoing CAT Fees, but the current proposal will make Executing Brokers responsible for historic accrued CAT fees which they may not be able to recoup from their end clients. Lastly, this proposal would serve as a future barrier to entry for new potential brokerage firms looking to enter the space.

In conclusion, WEX strongly objects to the current proposal to have Executing Brokers collect CAT fees and believes that the industry should instead use the existing structures in place for the effective collection of regulatory fees, namely through Clearing Brokers. The Firm appreciates the opportunity to comment on this important matter and hopes that the Commission will consider this and other feedback from the industry to adopt a plan that does not place an undue burden on Executing Brokers.

Respectfully submitted,

A handwritten signature in blue ink, appearing to be 'PM' or similar initials, written over a faint grid.

Patrick Murphy  
Chief Operating Officer  
Wolverine Execution Services, LLC