



February 25, 2021

Via E-Mail (rule-comments@sec.gov)

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

Re: Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail by the Plan Participants (Release No. 34-90826; File No. 4-698)

Dear Ms. Countryman:

Citigroup Global Markets Inc. (“CGMI”)¹ appreciates the opportunity to comment on the above-referenced Amendment to the National Market System Plan Governing the Consolidated Audit Trail (“CAT”) by the Plan Participants (the “CAT Amendment”), issued by the U.S. Securities and Exchange Commission (the “SEC” or “Commission”) on December 30, 2020.² Citi also participated in the preparation of a separate comment letter on the CAT Amendment submitted by the Securities Industry Financial Markets Association (“SIFMA”), dated as of January 27, 2021 (the “SIFMA Letter”).³ We generally support the views set forth in the SIFMA Letter, but are writing separately to highlight additional comments with regard to the issues described below.

The CAT Amendment requires all industry members that are obligated to report to the CAT to assume all of the liability associated with a breach or misuse of data in the CAT. As described in the SIFMA Letter, CAT LLC’s Operating Committee in August 2019 approved a draft CAT Reporter Agreement that included broad limitation of liability provisions similar to those contained in this CAT Amendment. CGMI was one of those firms that executed that agreement because we understood such agreement to be a required

¹ Citigroup Inc. (“Citi”) is a diversified global financial services holding company whose businesses provide a broad range of financial services to consumer and corporate clients as well as governments and other institutions. Citi has some 200 million client accounts and does business in more than 100 countries. Citi’s primary U.S. broker-dealer subsidiary, Citigroup Global Markets Inc. (“CGMI”), is registered as a broker-dealer in all 50 states, the District of Columbia, Puerto Rico, Taiwan and Guam, and is also a primary dealer in U.S. Treasury securities and a member of the principal United States futures exchanges. CGMI’s affiliate, Citigroup Derivatives Markets Inc., is actively engaged in U.S. options market making. Additional information may be found at www.citigroup.com or www.citi.com.

² <https://www.sec.gov/rules/sro/nms/2020/34-90826.pdf>

³ <https://www.sec.gov/comments/4-698/4698-8298026-228278.pdf>

condition to obtaining access to the CAT System necessary to comply with our CAT reporting obligations. It was only later, after SIFMA challenged these actions taken by the SROs and reached a settlement with them resulting in a removal of the liability limitation provisions in the CAT Reporter Agreement, that CGMI then rescinded its execution of the agreement. This process highlights the flaws inherent in the NMS Plan construct, i.e., industry members feel obligated to agree to whatever terms are presented by the SROs or risk violating their regulatory obligations. If the Commission were to approve this CAT Amendment, it would compel industry members involuntarily to contractually absorb all of the risk associated with satisfying their regulatory obligations.

At the outset, we point out that CAT has been developed and operated exclusively by the self-regulatory organizations (“SROs”). Nonetheless, in order to maintain their current status in the marketplace, the CAT Amendment requires industry members to agree to accept economic and reputational responsibility for the ability of the CAT to maintain the economic data carried by CAT in a secure and confidential manner. This mandated arrangement imposes the burden of maintaining a secure and effective CAT system on those who have no insight into, nor ability to oversee, the security or confidentiality of the CAT. At the same time, it creates a disincentive on the part of the SRO operators of the CAT. With no potential for penalty either fiscal or reputational, the SRO operators of the CAT have no financial incentive to invest in appropriate security measures to efficiently secure this sensitive economic data. Their failures can and will simply be passed along to the CAT participants. In an effort to socialize the risk of a CAT security breach, the CAT Amendment imposes liability on those with no ability to control or otherwise oversee the risks they are responsible for, while exempting those who have that ability from any responsibility, financially or otherwise.

On the other hand, CAT participants are often required by their investor clientele (which, among others, includes managers of publicly traded ETFs and mutual funds, and insurance company and pension plan separate accounts) to agree to accept financial responsibility for overseeing the confidentiality of investor trade data and thereby investor insight and objectives as evidenced by investor data flows

CGMI believes this economic structure supports the wrong results and creates a moral hazard. We therefore urge the Commission to reject this proposal.

The Commission itself acknowledged these realities last May when it adopted long-awaited changes to the governance structure of one such NMS Plan that operates the securities information processors (“SIPs”). In its Order Directing the Exchanges and the Financial Industry Regulatory Authority to Submit a New National Market System Plan Regarding Consolidated Equity Market Data⁴, the Commission expanded voting representation on the Operating Committees of the SIPs to include industry members who

⁴ <https://www.sec.gov/rules/sro/nms/2020/34-88827.pdf>

had previously not be afforded such voting rights. CGMI strongly supported that proposed Order⁵, and commends the Commission for its boldness in adopting those crucial governance changes.

CGMI has for many years written and spoken publicly regarding the flaws inherent in the current self-regulatory structure of equities and listed options markets, where SROs are afforded the privileged position of having exclusive voting representation on the Operating Committees of a number of National Market System (“NMS”) Plans, including the CAT. In several previous comment letters, CGMI has indicated support for changes to NMS Plan Governance and other related issues, including unfair limitations of liability.⁶ Exchanges, which were once mutualized entities comprised of their members, have long ago become for-profit, publicly-traded companies that rightfully answer to their shareholders – not the broader public markets – and in many cases compete directly with the members whom they regulate. The construct of self-regulation by these for-profit entities is outdated and in need of modernization in light of these commercial realities. Despite this, these same for-profit exchanges continue to shield themselves from liabilities in a way that other market participants are unable to do, either as a matter of law or business practice.

In our August 2012 Letter, CGMI argued that one of these for-profit exchanges, Nasdaq, should not be afforded regulatory immunity for their mishandling of the Facebook IPO. Both that judicial doctrine, as well as the contractual limitations on liability that the for-profit exchanges impose as part of their rulebooks and member agreements, essentially shift liability to their members in a way that their members cannot. Under Regulation NMS Rule 611 (the Order Protection Rule), market participants are required to access quotes on the exchanges, and so have little ability to negotiate these contractual limitations on liability. In stark contrast, if CGMI were to attempt to contractually transfer liability for its own data security to CGMI’s customers, those customers would refuse to accept those terms and in all likelihood choose to do business elsewhere. That possibility does not exist in the case of CAT; CGMI and other industry members are required by regulation to report to the CAT System, whose security is in the exclusive control of the SROs. Without assuming liability for issues the SROs themselves cause, these SROs are not adequately incentivized to prevent harm from their actions in the way that other market participants are.

While the specific circumstances are different in the case of this CAT Amendment and Nasdaq is certainly not the only exchange attempting to transfer its liability through

⁵ See Letter from Daniel Keegan, Managing Director, Citigroup Global Markets Inc. (March 2, 2020), available at <https://www.sec.gov/comments/4-757/4757-6904770-211156.pdf>

⁶ See, e.g., Letter from Daniel Keegan, Managing Director, Citigroup Global Markets Inc. (August 22, 2012), available at <https://www.sec.gov/comments/sr-nasdaq-2012-090/nasdaq2012090-5.pdf> (our “August 2012 Letter”).



this CAT Amendment, the argument is virtually the same as stated in our August 2012 letter:

“Allowing Nasdaq to avoid or limit its liability by hiding behind a regulatory shield in cases like this would contravene public policy. Crediting Nasdaq's groundless assertion of immunity would, among other things: (i) encourage Nasdaq to continue to make high-risk business decisions without regard for the integrity of the market and without fear of adverse consequences; (ii) cement an unfair competitive advantage for Nasdaq over broker-dealers and other market participants, whose business decisions are subject to liability; and (iii) impair confidence in the integrity of the market by signaling that market participants will not be made whole in situations like this, even if their losses are caused by Nasdaq's reckless and grossly negligent behavior.”⁷

A number of recent well-publicized information security breaches demonstrate that the threat of attack is very real, especially when one considers the CAT to be the largest financial database in the world. We agree with SIFMA that the “guiding principal in this context should be that the party in control of the CAT System – CAT LLC – must assume liability for any failure to maintain CAT data security.”

We respectfully encourage the Commission to reject this CAT Amendment and allow the assumption of liability by the exchanges to be an incentive to maintain the security of this key industry utility.

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⁷ See our August 2012 Comment Letter at pages 3-4.

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We sincerely appreciate the opportunity to comment on this proposal and all equity and listed option market structure issues, and we welcome feedback from all market participants on our above recommendations. Citi looks forward to continuing its dialogue on these matters with the Commission and its Staff. If you have any comments or questions, please do not hesitate to contact me.

Sincerely,

/s/ Daniel Keegan

Daniel Keegan
Managing Director, Head of North America
Markets & Securities Services

cc: The Honorable Allison Herren Lee, Acting Chair
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
Mr. Christian Sabella, Acting Director, Division of Trading and Markets