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[redacted]

May 12, 2021

Submitted electronically

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

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

Dear Ms. Countryman,

Fidelity Investments ("Fidelity")[1] appreciates the opportunity to provide comments on the recently proposed amendment to the national market system plan governing the consolidated audit trail ("CAT").[2] The Proposal was filed by the CAT NMS Plan Operating Committee ("Operating Committee") on behalf of the Plan Participants to the CAT NMS Plan ("Plan Participants") and seeks Securities and Exchange Commission ("SEC") approval to implement a revised funding model ("Proposed Funding Model") for the CAT and to establish a fee schedule for Participant CAT fees in accordance the Proposed Funding Model.

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[1] Fidelity and its affiliates are leading providers of mutual fund management and distribution, securities brokerage, and retirement recordkeeping services, among other businesses. Fidelity submits this letter on behalf of National Financial Services LLC ("NFS"), a Fidelity Investments company, a SEC registered broker-dealer clearing firm and FINRA member; Fidelity Brokerage Services LLC ("FBS"), a SEC registered introducing broker-dealer, FINRA member, and affiliate of NFS; and Fidelity Management & Research Company ("FMR"), the investment adviser to the Fidelity family of mutual funds. NFS is a CAT Reporter on behalf of itself and one hundred and forty-six (146) correspondent broker-dealers that clear and custody through NFS, including FBS. NFS is a former member of the CAT Development Advisory Group, which provided suggestions to the Plan Participants in the development of the Proposed CAT NMS Plan. FMR has served as an institutional investor representative to the CAT NMS Plan Advisory Committee and NFS, through Matthew Price, currently serves as a broker-dealer representative to the CAT NMS Plan Advisory Committee.

[2] *See* Securities Exchange Act Release No. 91555, 86 FR 20150 (April 21, 2021) (the "Proposal"). Fidelity generally agrees with the views expressed by the Securities Industry and Financial Markets Association ("SIFMA") and Financial Industry Forum ("FIF") in their comment letters to the SEC on the Proposal. We submit this letter to supplement the SIFMA and FIF letters on specific issues. Capitalized terms have the meaning ascribed to them in the Proposal and the CAT NMS Plan.

Fidelity has long supported the development of the CAT as a means to minimize regulatory reporting burdens for broker-dealers through the elimination of multiple rules and systems made redundant by the CAT.[3] Delays in CAT implementation have cost Industry Members both in hard dollars and opportunity costs. Like many firms, we have dedicated operational and compliance resources to the implementation of the CAT and delays in the development of the CAT have prevented us from deploying these resources to other efforts. We are also at a point in time where we are simultaneously building and using a new regulatory reporting system (the CAT), while maintaining older regulatory reporting systems (OATS, Electronic Blue Sheets). The sooner the CAT is fully implemented, the sooner these duplicative reporting systems can be retired, and internal resources devoted to building the CAT, reallocated to other projects and initiatives to the benefit of our customers.

Both Plan Participants and Industry Members have spent a great deal of time and money building the systems and processes to comply with the requirements of CAT. Unlike the Plan Participants, however, under the Proposal Industry Members will not be reimbursed for any of these historic costs. Fidelity recognizes that Industry Members must contribute to the cost of implementing the CAT but recommends the SEC disapprove the Proposal for the following reasons.

Executive Summary

- The Proposal lacks sufficient information to properly analyze the Proposed Funding Model and it presents little justification for Industry Members to bear the majority of CAT costs. We recommend the SEC require Plan Participants to revise the Proposal to provide further basis for the Proposed Funding Model.

- If the Proposed Funding Model continues to use message traffic as the basis for allocating costs to Industry Members, Plan Participants should provide Industry Members their historical message traffic information in order for Industry Members to better evaluate the spectrum of their potential fees. Given its importance to Industry Member fee allocations, message traffic should be defined in the CAT NMS Plan, not the CAT Technical Specifications document.

- The Proposal would allocate 75% of historic and future costs of the CAT to Industry Members and 25% to Plan Participants. The Proposal provides little justification for this lopsided apportionment of fees and Industry Members were not provided an opportunity to meaningfully work with the Plan Participants on the Proposed Funding Model. Plan Participants should revise the Proposed Funding Model to provide greater justification for

[3] *See* Fidelity comments on *Securities and Exchange Commission Proposed Amendments to the National Market System Plan Governing the Consolidated Audit Trail*, 84 FR 48458 (September 13, 2019) https://www.sec.gov/comments/s7-13-19/s71319-6357608-196387.pdf; Fidelity comments on *Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Eliminate Requirements That Will Be Duplicative of CAT*, 82 FR 25423 (June 1, 2017) https://www.sec.gov/comments/sr-finra-2017-013/finra2017013-1821724- 154264.pdf and Fidelity comments on *Joint Industry Plan; Notice of Filing of the National Market System Plan Governing the Consolidated Audit Trail*; 81 FR 30614 (May 17, 2016) https://www.sec.gov/comments/4-698/4698- 14.pdf

the allocation methodology and allow Industry Members to meaningfully contribute to a revised Proposal.

- The Proposal does not provide incentives for FINRA CAT or the Plan Participants to efficiently manage CAT costs. Future CAT fees will be based on budgeted costs, but Industry Members have no visibility into that budget because it is not made public. The Proposal does not explain what happens if the CAT NMS Plan is over-budget or how the Plan Participants and FINRA CAT will curtail costs. The Proposal should provide incentives for FINRA CAT and Plan Participants to manage CAT costs and a revised Proposal should provide further details on the CAT budget and potential budget surpluses.

- Industry Members should not be responsible for historical costs associated with Plan Participant selection of a prior Plan Processor (*i.e.*, Thesys CAT LLC). The Proposal should be revised to consider the historical costs paid by Industry Members to implement the CAT.

Each of these recommendations is discussed in greater detail below.

Anticipated Message Traffic

Under the Proposal, 75% of the costs associated with CAT (including historical costs dating back to 2012) will be allocated to Industry Members and each Industry Member, in turn, would be required to pay a percentage of those costs based on their message traffic.

Despite the fact that message traffic will serve as the basis for Industry Member CAT fees, the Plan Participants did not provide Industry Members with their message traffic data in the Proposal.[4] Without this information, Industry Members have no way to determine their proposed share of the costs of the CAT or evaluate the reasonableness of the Proposed Funding Model. Once Industry Members have this data, and are provided sufficient time to analyze it, a more informed evaluation of the reasonableness of the Proposed Funding Model can occur.

We also note that message traffic is defined as Reportable Events in the CAT Reporting Technical Specifications, which may be amended from time to time by the Plan Participants without the rigor and benefit of the rulemaking notice and comment process. If Industry Member costs will be based on message traffic, we recommend that the NMS Plan, and not the technical specifications document, define the events that will be considered message traffic.

Justification for the Proposed Model

The Proposal would allocate 75% of historic and future costs of the CAT to Industry Members and 25% to Plan Participants. The Proposal provides little justification for this

[4] We note that the Operating Committee amended the Proposal on May 5, 2020 to state that Industry Members would be provided their message traffic data. This information was subsequently provided to Industry Members upon their request.

lopsided apportionment of fees and Industry Members were not provided an opportunity to meaningfully participate in discussions concerning the Proposed Funding Model.

While this allocation percentage has been proposed in prior funding models that were subsequently withdrawn by the Plan Participants, Industry Members continue to see little justification regarding the equity of bearing 75% of the cost of the CAT. While the Proposal indicates that other allocation models were considered but that the 75/25% proved to be the most equitable, the Proposal does not elaborate on these other funding models nor does it substantiate the claim that the 75/25% split is equitable.

Moreover, the limited justifications provided for the proposed allocation are inadequate and flawed. In an effort to explain the proposed 75/25% cost split, the Proposal states that there are far more Industry Members than Participants – *i.e.*, 1,237 Industry Members versus 25 Plan Participants as of December 2020 and that Plan Participants only represent 4% of the total CAT revenue while some Industry Members have total revenue in excess of some or all of the Plan Participants. The logical inference from this explanation is that Industry Members are better positioned from a revenue perspective to pay for the CAT. It is unclear from the Proposal, however, why the ability to pay is a corollary to CAT costs and an appropriate factor in justifying the split. This is particularly true when CAT fees are assessed on equity and listed option transactions which may only represent a portion of an Industry Member's revenue.

The Proposed Funding Model provides that the 75/25% split will be further allocated to Industry Members based on message traffic and Plan Participants based on market share. The Proposal does not effectively explain why these different standards are used to allocate costs. It is not clear why it is appropriate for Plan Participants to pay for the CAT based on market share, while in contrast Industry Members must pay based on message traffic.

We also note that FINRA is a Plan Participant and, under the Proposal, will be responsible for paying the majority of the 25% allocated Participant CAT fees. FINRA, however, is funded by Industry Members who anticipate that FINRA will raise member firm fees to help FINRA cover their allocation of Participant CAT fees. The Proposal thus creates a double tax on Industry Members who will not only pay their own CAT fees, but also a proportion of the Plan Participants' allocation through increased FINRA fees.

We believe the SEC should disapprove the proposed allocation methodology and require the Plan Participants to submit a new proposal with a more robust explanation for the cost methodology. Plan Participants must provide a cost allocation methodology that is supported by data made available to Industry Members to evaluate. Given the percentage of overall costs that will fall to Industry Members, we also recommend that the SEC require Plan Participants to meaningfully work with Industry Members to determine the appropriate allocation methodology particularly as it relates to the Industry Members' portion of CAT costs.

Greater Transparency into the Budget and Costs

Industry Members should have greater visibility into the costs accrued to date by Plan

Participants for the CAT and any future budgets proposed by the CAT. The Proposal provides little detail as to what costs comprise the Historical CAT Assessment of $193,273,342. Plan Participants should provide Industry Members a complete breakdown of these costs and the opportunity to review the historical costs, particularly cost incurred prior to the approval of the CAT NMS Plan in 2016. These historical costs are particularly important as they may originate from expenses associated with Plan Participant selection the original CAT Plan Processor and other similar costs of doing business. Industry Members should have the opportunity to refute the validity of any cost and its allocation to Industry Members.

Plan Participants should be solely responsible for paying all costs associated with the original CAT Plan Processor, Thesys CAT LLC. Industry Members played no role in the engagement and eventual termination of Thesys CAT LLC to be the operator of the CAT. The decision to move forward with Thesys CAT LLC was borne solely by Plan Participants and was generally opposed by Industry Members. For these reasons, Industry Members should not be responsible for paying any costs associated with Thesys CAT LLC.

In the future, the CAT will bill Industry Members based on a proposed budget that is not made public. Industry Members will bear the heaviest burden in paying for the costs associated with CAT but will have no ability to influence the budget proposed by CAT or the decisions that are made regarding the costs and expenses that comprise the budget.

To provide appropriate checks and balances, Industry Members should have greater visibility into the costs and expenses of the CAT. This visibility would seek to increase overall accountability of FINRA CAT and Plan Participants to effectively manage costs. In addition, the Proposal should explain what happens if costs of operating the CAT exceed the proposed budget, how those additional costs may be allocated between Industry Members and Plan Participants, and whether any accountability measures will be put into place to guard against such events. To the extent CAT is under budget, we believe the Industry Members should be provided a proportional rebate on any fees that they have already paid to the CAT.

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Fidelity would be pleased to provide further information and participate in any direct outreach efforts the Commission undertakes regarding the CAT.

Sincerely,

Matthew Price

Matthew Price

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Elad L. Roisman, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Allison Herren Lee, Commissioner

Christian Sabella, Acting Director, Division of Trading and Markets
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