UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of: The Application of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, For Review of Action Taken by CAT LLC and Certain Self-Regulatory Organizations in Violation of Exchange Act Sections 19(d) and 19(f)	Admin. Proc. File No. 3-19766

SIFMA'S MOTION TO STAY SRO ACTION PENDING COMMISSION REVIEW OF SIFMA'S APPLICATION PURSUANT TO EXCHANGE ACT SECTIONS 19(d) AND 19(f) AND INCORPORATED MEMORANDUM OF LAW

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Dated: New York, New York
April 22, 2020

MOTION TO STAY

Securities Industry and Financial Markets Association ("SIFMA") respectfully requests pursuant to Commission Rule of Practice 401 that the Securities and Exchange Commission (the "Commission") issue a stay of action by certain self-regulatory organizations (the "SROs") described in SIFMA's Application for Review of SRO Action That Violates Exchange Act Sections 19(d) and 19(f) (the "Application"). As set forth in the Application, the challenged SRO action improperly prohibits and limits access of SIFMA members ("Industry Members") to the Consolidated Audit Trail ("CAT") System.

Specifically, SIFMA seeks a stay of SRO action prohibiting the submission of order and trade data to the CAT System unless the reporting Industry Member executes a proposed CAT Reporter Agreement (the "CRA") developed by the SROs. As described in the Application and accompanying Declaration of Lorin L. Reisner, the SRO action limiting access to the CAT System absent execution of the CRA violates Exchange Act Sections 19(d) and 19(f) and should be set aside by the Commission. SIFMA respectfully requests that the challenged SRO action limiting access to the CAT System be stayed until the Commission has an opportunity to consider and rule on SIFMA's Application. A stay will enable Industry Members to submit CAT data and advance the purposes of the CAT without the improper limitations on access to the CAT System imposed by the SROs. Alternatively, SIFMA respectfully requests that the Commission issue a stay of CAT deadlines that require access to the CAT System.

For the reasons set forth in SIFMA's accompanying memorandum of law, all four factors that are properly considered by the Commission weigh heavily in favor of a stay: (i) SIFMA is likely to succeed on the merits of its Application to set aside the SRO action; (ii) SIFMA members will face irreparable harm in the absence of a stay; (iii) a stay will not harm other parties; and (iv) a stay will serve the public interest.

Dated: New York, New York
April 22, 2020

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON &
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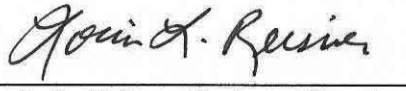
By: 

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MEMORANDUM OF LAW IN SUPPORT OF SIFMA'S MOTION TO STAY SRO ACTION PENDING COMMISSION REVIEW OF SIFMA'S APPLICATION PURSUANT TO EXCHANGE ACT SECTIONS 19(d) AND 19(f)

Securities Industry and Financial Markets Association ("SIFMA") respectfully submits this memorandum of law in support of its motion to stay action by certain self-regulatory organizations (the "SROs") until the Commission has an opportunity to consider and rule on SIFMA's Application for Review of SRO Action That Violates Exchange Act Sections 19(d) and 19(f) (the "Application"). Specifically, SIFMA respectfully requests that the Commission stay SRO action prohibiting the submission of order and trade data to the Consolidated Audit Trail ("CAT") System unless an Industry Member signs a proposed CAT Reporter Agreement (the proposed "CRA").[1] As described in the Application, the SRO action violates Sections 19(d) and 19(f) of the Exchange Act because it improperly limits and prohibits access to services offered by

[1] The "CAT System" is operated and managed by the SROs through Consolidated Audit Trail, LLC ("CAT LLC") and defined in the Limited Liability Company Agreement of CAT LLC (the "LLC Agreement" or the "CAT NMS Plan") as "all data processing equipment, communications facilities, and other facilities, including equipment, utilized . . . in connection with operation of the CAT and any related information or relevant systems pursuant to this Agreement." (Ex. 1, § 1.1.) Exhibit references refer to the Appendix of Exhibits to the Declaration of Lorin L. Reisner ("Reisner Dec.") in support of SIFMA's Application submitted herewith.

the SROs. In the alternative, SIFMA seeks a stay of CAT deadlines that require access to the CAT System.

PRELIMINARY STATEMENT

As described in the Application, the SROs improperly have prohibited and limited access by Industry Members to the CAT System by requiring Industry Members to execute the CRA as a condition of submitting order and trade data to the CAT. The CRA contains terms that are unfair, inappropriate and bad policy. For example, the CRA improperly purports to impose a limitation of liability for CAT LLC, its participant SROs, and their officers, employees and agents in the event of a CAT data breach. The CRA also purports to require Industry Members to indemnify CAT LLC, its participant SROs, and their officers, employees and agents against various third-party claims relating to the misuse of CAT data. The SROs, however, maintain and control the CAT System, the data in the CAT System and the transmission of data from the CAT System. The SROs also designed the CAT System and related security protocols. As a matter of fairness and good policy, the SROs should not be permitted to require Industry Members to assume the additional risks and responsibilities relating to a potential CAT data breach incorporated in the CRA when the SROs control the CAT System and are responsible for ensuring the security of the data it contains.

The SROs lack any proper basis under the Exchange Act to prohibit or limit Industry Member access to the CAT System by requiring execution of the CRA. The practices, policies and standards that the SROs seek to establish through the CRA can only be developed through a rule-making process. Where, as here, the CRA and its terms were not filed by the SROs or approved by the Commission pursuant to Exchange Act Section 19(b), the SRO action must be set aside under Section 19(f) of the Exchange Act.

A stay is necessary to allow Industry Members to receive a fair and meaningful review of the challenged SRO action. It will enable Industry Members to submit CAT data and advance the purposes of the CAT without the improper limitations on access to the CAT System imposed by the SROs. It would be unfair and inconsistent with the purposes of the Exchange Act if Industry Members were forced to sign the CRA (which is improper and invalid under the Exchange Act) in order to remain in compliance with applicable regulatory requirements. A stay of the challenged SRO action is therefore warranted pending the Commission's review of SIFMA's Application. Alternatively, the Commission should stay CAT deadlines that require access to the CAT System until the Commission has an opportunity to consider and rule on SIFMA's Application. Each of the four factors to be considered weighs heavily in favor of issuing a stay.

First, SIFMA is likely to succeed on the merits of its Application to set aside the SRO action that limits Industry Member access to the CAT System absent execution of the CRA. The CRA and its terms were never filed or approved pursuant to Section 19(b) of the Exchange Act. Exchange Act Section 19(f) therefore requires that the SRO action be set aside. The Commission previously has set aside SRO action that similarly limited access to SRO services without engaging in the rule-making process. *See In re Bloomberg L.P.*, Exchange Act Release No. 49076, 2004 WL 67566, at *3 (Jan. 14, 2004).

Second, the Industry Members on whose behalf SIFMA seeks a stay will suffer substantial and irreparable harm in the absence of a stay. Without access to the CAT System, SIFMA members will be unable to submit CAT data in accordance with CAT reporting requirements under applicable SEC and SRO rules. To access the CAT System, Industry Members would be required to forego their rights and expose themselves to unwarranted liability risks and

indemnification obligations by executing a CRA that the SROs seek to impose in violation of the Exchange Act.

Third, no harm to the SROs would result from a stay. The SROs failed to pursue the rule-making process required for them to establish the practices, policies and standards that they seek to impose under the CRA. The SROs cannot suffer any cognizable harm from a stay of action that they cannot undertake consistent with the requirements of the Exchange Act.

Fourth, the public interest is served by a stay that prevents the SROs from limiting access to the CAT System absent execution of the CRA while the Commission considers the important policy issues raised by SIFMA's Application. The CAT System is likely to be the largest collection of order and trade data ever collected and consolidated. It will contain extraordinarily sensitive and proprietary data that must be carefully and aggressively protected against exploitation by hackers and bad actors, as well as misuse for improper competitive purposes. The allocation of potential liability in the event of a data breach and the resulting incentives present significant policy decisions. A stay is particularly appropriate so that these policy issues can be addressed through a rule-making process that affords notice and an opportunity to comment to affected members of the public, rather than through the unilateral imposition of standards in violation of the Exchange Act.

BACKGROUND

A. The CAT System

Rule 613 was adopted by the Commission to establish a comprehensive consolidated audit trail that would allow regulators efficiently and accurately to track all activity throughout the national securities markets in the United States. 17 C.F.R. § 242.613. The rule required that self-regulatory organizations jointly submit a plan to create, implement and maintain the CAT. *Id.* § 242.613(a)(1). The SROs thereafter submitted a proposed CAT NMS Plan and

various proposed CAT NMS Plan amendments. The SROs are responsible for the operation of the CAT and manage the CAT System through CAT LLC. (*See* Ex. 1.)

The CAT NMS Plan requires the SROs to promulgate rules requiring that their members deliver certain order and trade data to the CAT System. (*See id.* at § 6.4.) Each SRO has adopted rules requiring its members to comply with various aspects of SEC Rule 613 and the CAT NMS Plan. *See, e.g.*, FINRA Rules 6830, 6893. It is expected that the CAT will collect, store and distribute information delivered by Industry Members on a number of market events, including but not limited to quotes, orders, routes, and trade executions for all exchange-listed equities and options throughout the National Market System ("NMS").[2] As a result, the CAT likely will be the most extensive collection of order and trade data ever assembled and will include highly sensitive and proprietary information relating to Industry Members and their customers.

For this reason, data security and data protection issues relating to the CAT System have been paramount for SIFMA members, the SROs and the Commission. As Chairman Clayton has observed, "the SROs must be mindful of the volume of data that the CAT collects, and its sensitive nature, and be responsible in their collection and use of that data" as "the nature of the data to be included in the CAT necessitates robust security protections." (Ex. 4 at 1–2.) A CAT data breach could have a devastating impact on market integrity, impose significant harm to market participants and inflict serious competitive harm to Industry Members if their proprietary information is misused or misappropriated. A CAT data breach also could expose those responsible for the CAT and data contained in the CAT to significant legal risk and potential liability. *See, e.g., In re Equifax Inc. Customer Data Security Breach Litigation*, No. 1:17-md-

[2] The CAT NMS Plan sets forth at Section 6.4(d) the extensive data that Industry Members are required to submit to the CAT for various reportable events. (Ex. 1, § 6.4(d).)

2800-TWT, 2020 WL 256132, at *2 (N.D. Ga. Mar. 17, 2020) ($380.5 million payment by Equifax relating to data breach that affected 150 million individuals in U.S.).

B. The SROs Condition Industry Member Access To The CAT System Upon The Execution Of The CRA

The SROs, through CAT LLC, have announced that they will prohibit Industry Members from submitting order and trade data to the CAT System unless the reporting Industry Member has executed the CRA. The CRA, however, includes a number of provisions that are unfair, inappropriate and bad policy.

For example, the CRA purports to effectively extinguish any liability for the SROs, CAT LLC, and their officers, employees and agents in the event of a CAT data breach or other conduct for which CAT LLC or the SROs are responsible. (*See* Ex. 2, § 5.5.) In particular, Section 5.5 of the proposed CRA provides:

> Limitation of Liability. TO THE EXTENT PERMITTED BY LAW, UNDER NO CIRCUMSTANCES SHALL THE TOTAL LIABILITY OF CATLLC OR ANY OF ITS REPRESENTATIVES TO CAT REPORTER[3] UNDER THIS AGREEMENT FOR ANY CALENDAR YEAR EXCEED THE LESSER OF THE TOTAL OF THE FEES ACTUALLY PAID BY CAT REPORTER TO CATLLC FOR THE CALENDAR YEAR IN WHICH THE CLAIM AROSE OR FIVE HUNDRED DOLLARS ($500.00).

In addition, the proposed CRA requires Industry Members to indemnify CAT LLC, the SROs, their employees, and others against various third-party claims relating to the misuse of CAT data. (*See id.* at § 5.2.)

The SROs have refused to permit Industry Members access to the CAT System absent execution of the CRA. In fact, the proposed CRA itself provides that its execution is a condition of access to the CAT System. It states: "Whereas, [the Industry Member] desires to

[3] A "CAT Reporter" is defined in the CRA as "the Industry Member or Participant that enters into this Agreement." (Ex. 2, § 1.2.)

access and use the CAT System to comply with its obligations under the CAT NMS Plan, SEC Rule 613 and [SRO] rules, as applicable, . . . *CATLLC is making the CAT System available to [the Industry Member] pursuant to the terms and conditions of this [CAT Reporter] Agreement.*" (*Id.* at 1 (emphasis added).) Formal industry alerts published by CAT LLC set forth similar conditions and limitations. For example, a December 2019 CAT Alert provides: "Before Industry Member (IM) CAT Reporters can be entitled to access the CAT Reporter Portal and the IM Test Environment and submit data for testing, they have been required to sign a CAT Reporter Agreement." (Ex. 3 at 1.) That alert further asserts that Industry Members "may not submit production data" to the CAT System absent an executed CRA. (*Id.*)

The liability limitation and indemnification provisions of the proposed CRA are fundamentally unfair and inappropriate from a policy standpoint. CAT LLC and the SROs maintain and control the CAT System. Pursuant to Rule 613 and the CAT NMS Plan, CAT LLC and the SROs are responsible for ensuring the security and confidentiality of the information reported to the CAT System. (*See* Ex. 1, §§ 6.5(f), (g); 17 C.F.R. § 242.613(e)(4)(i).) It is therefore entirely inappropriate for the SROs to force Industry Members to assume the additional risks and responsibilities relating to a potential CAT data breach contemplated by the CRA. The SROs should not be permitted to disclaim liability in the event of a data breach—let alone shift liability risk to Industry Members—when the SROs control the CAT System and are responsible for establishing and maintaining the information security safeguards designed to prevent a breach.

C. The SROs Prohibit Industry Members From Supplying Production Data To The CAT System

In December 2019, a number of Industry Members executed a CAT Industry Member Limited Testing Acknowledgement Form (the "CAT LTA Form"), which allowed Industry Members to deliver obfuscated data ("Test Data") to the CAT System but, at the insistence

of the SROs, expressly prohibited the delivery of actual customer data ("Production Data"). (*See* Ex. 8.) Subsequent negotiations between SIFMA and the SROs that would allow Industry Members to submit Production Data into the CAT test environment without executing the CRA failed.

On and after April 15, 2020, a number of Industry Members provided notice to the SROs that they were rescinding their execution of the CAT LTA Form and intended to begin the submission of Production Data to the CAT System without executing the CRA. (Reisner Dec. ¶ 23.) In response, the limited CAT System access that had been provided under the CAT LTA Form was terminated and Industry Members were blocked entirely from any use of the CAT System. A notice on behalf of CAT LLC sent to Industry Members following revocation of the CAT LTA Form stated: "In absence of a signed CAT Reporter Agreement or Limited Testing Acknowledgement form, access to CAT systems will be removed for [Firm]. Access to the CAT test environment can be restored by signing a CAT Reporter Agreement or a Limited Testing Acknowledgement form." As a result, those Industry Members are unable to submit Production Data to the CAT System. (*Id.* at ¶ 24.)

D. Industry Members Cannot Meet CAT Reporting Requirements Without Access To The CAT System

CAT LLC has established deadlines for Industry Members relating to, among other things, testing, production readiness certification, and data reporting to the CAT System. (*See* Ex. 11.) Industry Members must access the CAT System to meet those deadlines. For example, a timetable published by the SROs requires that Industry Members certify readiness to submit CAT data by May 6, 2020 and begin to submit CAT data by May 20, 2020.[4] Although the Commission

[4] On March 17, 2020, following a no-action letter from the SEC, *see* Ex. 10, the SROs confirmed that they would not take disciplinary action against Industry Members before May 20, 2020 with respect to CAT deadlines. *See*

granted a request for exemptive relief from the SROs on April 20, 2020 such that the deadline for initial equities reporting by Industry Members was extended to June 22, 2020, without access to the CAT System, Industry Members cannot meet CAT deadlines. The denial of access to the CAT System by the SROs thus prevents Industry Members from meeting regulatory requirements.

ARGUMENT

A stay pending Commission consideration of SIFMA's Application should be issued so that the challenged SRO action does not prevent Industry Members from submitting CAT data or force Industry Members into non-compliance with applicable regulatory requirements while the Commission considers SIFMA's Application. Four factors are properly considered in deciding whether to grant a stay:

i. The likelihood that the moving party will succeed on the merits;

ii. The likelihood that the moving party will suffer irreparable harm without a stay;

iii. The likelihood that another party will suffer substantial harm as a result of a stay; and

iv. A stay's impact on the public interest.

See In re Bloomberg L.P., Exchange Act Release No. 83755, 2018 WL 3640780, at *7 (July 31, 2018); *see also* 17 C.F.R. § 201.401, cmt. 1 (2003). "[I]n order to grant a stay, all four factors do not have to be present in equal proportions," *In re PalmWorks, Inc.*, Exchange Act Release No. 43294, 2000 WL 1335343, at *3 (Sept. 15, 2000), and "not all four factors must favor a stay for a stay to be granted." *In re Scottsdale Capital Advisors Corp.*, Exchange Act Release No. 83783, 2018 WL 3738189, at *2 (Aug. 6, 2018) (internal quotation marks omitted). Here, all four factors strongly favor the issuance of a stay.

Ex. 9. The SROs stated, however, that Industry Members must complete testing and certification fourteen calendar days prior to the date on which they intend to begin reporting. (*See id.*)

I. SIFMA Is Likely To Succeed On The Merits

SIFMA is likely to succeed on the merits of its Application because the challenged SRO action plainly violates Sections 19(d) and 19(f) of the Exchange Act. The SROs may not prohibit or limit access to the CAT System by requiring that Industry members sign the CRA, which has not been filed or approved in accordance with the rule-making process set forth in Exchange Act Section 19(b). (*See* Application at 1–2; Reisner Dec. ¶¶ 25–38.)

Section 19(d)(1) of the Exchange Act provides that: "[i]f any [SRO] . . . denies membership or participation to any applicant, or ***prohibits or limits any person in respect to access to services offered by such organization*** . . . the [SRO] shall promptly file notice thereof with the appropriate regulatory agency." 15 U.S.C. § 78s(d)(1) (emphasis added).[5] Section 19(d)(2) of the Exchange Act provides that "any action" for which an SRO is required to file notice "shall be ***subject to review by the appropriate regulatory agency*** for such member, participant, applicant, or other person, on its own motion, or upon ***application by any person aggrieved thereby*** filed within thirty days after the date such notice was filed . . . or within such longer period as such appropriate regulatory agency may determine." *Id.* § 78s(d)(2) (emphasis added). The Industry Members on whose behalf SIFMA filed its Application are aggrieved by the challenged SRO action because it limits their access to the CAT System, imposes unfair and unreasonable conditions, and improperly seeks to establish practices, policies and standards pursuant to the CRA that may only be established through a rule-making process.

The SRO action requiring that Industry Members sign the CRA as a condition of access to the CAT System improperly "prohibits or limits" Industry Member "access to services

[5] The SROs were required to, but did not, file notice of their denial of access in the manner set forth in Section 19(d)(1).

offered by" the SROs. The CAT System is clearly a service offered by the SROs. As the Commission has observed, the CAT is a facility of the SROs and "a facility of an SRO is subject to the rule filing requirements of Section 19(b) of the Exchange Act." Exchange Act Release No. 67457, at 202 (July 18, 2012), 77 Fed. Reg. 45722, at 45775 (Aug. 1, 2012) (approving Rule 613).

An application for review of SRO action under Section 19(d) is subject to the standard set forth in Section 19(f). Specifically, the Commission "shall set aside the action of the [SRO] and require it to . . . grant . . . access to services offered by the [SRO]" unless it finds that: "[1] the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, [2] that such denial, bar, or prohibition or limitation is in accordance with the rules of the [SRO], and [3] that such rules are, and were applied in a manner, consistent with the purposes of this chapter." 15 U.S.C. § 78s(f). No such finding can be made here.

The CRA and its terms were not filed by the SROs or approved by the Commission pursuant to Exchange Act Section 19(b). The SRO action therefore cannot possibly be sustained under Section 19(f) as in "accordance with the rules of the [SRO]," because there are no rules that authorize the imposition of the CRA or its terms. *Id.* For similar reasons, the SROs could not have applied "such rules" in a manner "consistent with the purposes of" the Exchange Act. *Id.* The challenged action of the SROs therefore likely will be set aside.[6]

There can be little doubt that the CRA and its objectionable terms involve standards, policies and practices that require rule-making. Under the Exchange Act, a rule includes any "stated policy, practice or interpretation" of an SRO and is defined as: (i) "[a]ny material aspect of the operation of the facilities of the [SRO]," or (ii) "[a]ny statement made generally

[6] The SROs also have sought to use click-through agreements to impose conditions of use on the CAT System. Insofar as the SROs seek to use click-through agreements to impose the same or similar terms to those found in the CRA, it would be improper for the same reasons.

available to the membership of, to all participants in, or to persons having or seeking access . . . to facilities of, the [SRO] that establishes or changes any standard, limit, or guideline with respect to: (A) [t]he rights, obligations, or privileges of specified persons or . . . persons associated with specified persons; or (B) [t]he meaning, administration, or enforcement of an existing rule." 17 C.F.R. § 240.19b-4(a)(6); *see also In re Bloomberg L.P.*, 2004 WL 67566, at *3.

The CRA and its terms purport to govern key aspects of SRO facility operations (the "rules of the road" of CAT access by Industry Members), as well as establish standards, limits and guidelines for the rights and obligations of Industry Members with respect to liability, indemnification, and other issues. 17 C.F.R. § 240.19b-4(a)(6). As described above, the CRA provisions directly and significantly impact the rights and obligations of Industry Members and impose obligations and responsibilities that are unfair and inappropriate.[7]

Thus, in order to impose the CRA and its terms on Industry Members, the SROs are required, but failed, to pursue a rule-making process that provides interested stakeholders with notice and the opportunity to comment, and affords the SEC the opportunity to consider and determine whether such rules should be adopted.[8] 15 U.S.C. § 78s(b)(1).

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[7] The proposed CRA and its terms do not fall within the narrow exceptions to required rule-making because they are not "reasonably and fairly implied by an existing rule" of the SRO or "concerned solely with the administration" of the SRO and not "a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule" of the SRO. 17 C.F.R. § 240.19b-4(c). As the Commission explained in *In re Bloomberg*, limitations that are "not apparent from the face" of an existing rule are not "reasonably and fairly implied" by a rule, and the "concerned solely with the administration" exception applies narrowly to "deal solely with 'housekeeping matters.'" *In re Bloomberg L.P.*, 2004 WL 67566, at *4; *see id.* at *5 ("The restrictions involve far more than, and have policy implications that extend beyond, mere 'housekeeping' matters"). The CRA and its terms are not apparent from the face of any existing rule and do not deal solely with housekeeping matters.

[8] Section 19(b)(1) of the Exchange Act provides that each SRO "shall file with the Commission . . . any proposed rule or any proposed change in, addition to, or deletion from the rules of such [SRO] . . . accompanied by a concise general statement of the basis and purpose of such proposed rule change." 15 U.S.C. § 78s(b)(1). As soon as practicable after receipt of the SRO's filing, the Commission shall "publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved," and "give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change." *Id.* "No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of [Section 19(b)]." *Id.*

The Commission previously has set aside SRO action under Sections 19(d) and 19(f) in similar circumstances where an SRO sought to impose rules by contract without engaging in the required rule-making process. In *In re Bloomberg*, Bloomberg, L.P. commenced a Section 19(d) proceeding alleging that the New York Stock Exchange ("NYSE") improperly denied access to services by restricting the display and use of liquidity data. *See In re Bloomberg L.P.*, 2004 WL 67566. The NYSE had required that Bloomberg execute a "Vendor Agreement" that contained restrictions on the dissemination of such data and rejected particular data displays proposed by Bloomberg. *Id.* at *2.

The Commission ruled that the NYSE limitations and restrictions on data usage amounted to a "denial of access" to SRO services and had no proper basis because they amounted to "rules" imposed without following the required rule-making process. *Id.* at *3. In reaching that conclusion, the Commission noted that the proposed restrictions related to a "material aspect" of the NYSE operations and also established a "standard, limit, or guideline" affecting vendor rights, obligations and privileges. *Id.* Accordingly, the Commission concluded that "the NYSE's action was not taken in accordance with the Exchange's rules and, therefore, should be set aside under Section 19(f)." *Id.*

It is likely that SIFMA will prevail on the merits of its Application for similar reasons. This factor accordingly strongly favors a stay.

II. Industry Members Will Suffer Irreparable Harm In The Absence Of A Stay

SIFMA members will suffer substantial and irreparable harm absent a stay. The CAT System is the sole means by which Industry Members can deliver data to the CAT. The SRO limitation on access to the CAT System accordingly has left Industry Members unable to meet their reporting obligations under applicable SRO rules. The Commission has recognized that the denial of access to SRO services in the absence of alternative means by which Industry Members

can replicate the purposes of those services itself constitutes irreparable harm warranting a stay. *See, e.g.*, *In re Bloomberg L.P.*, Exchange Act Release No. 47891, 2003 WL 21184560, at *2 (May 20, 2003) (staying the launch of NYSE's "Liquidity Quote Service" in part on the ground that Bloomberg would be irreparably harmed by restrictions that limited its access to data for which it "ha[d] no effective alternative source"); *In re Bunker Ramo*, Exchange Act Release No. 14606, 1978 WL 197047, at *4 (Mar. 24, 1978) (staying Options Price Reporting Authority's decision to terminate petitioners' access to OPRA's "retransmission service," because "OPRA is the exclusive processor of [required information and] there is no alternative source other than retransmission of lost data which would enable petitioners to complete and maintain an accurate data base").

Moreover, Industry Members should not face the prospect of potential enforcement action by the SROs as a result of the improper denial of access imposed by the SROs. It would be entirely unfair and inconsistent with the purposes of the Exchange Act if Industry Members are forced to sign the CRA (which is improper and invalid under the Exchange Act) in order to remain in compliance with applicable regulatory requirements. In addition to flouting the purposes and requirements of the Exchange Act, imposing the CRA prior to Commission consideration of the Application would expose Industry Members to unwarranted (and potentially enormous) liability risks and indemnification obligations that are groundless and inconsistent with good policy.

This factor accordingly strongly favors a stay.

III. A Stay Will Not Harm Other Parties

There is no harm to the SROs from a stay because, as set forth above, the SROs may not, and have no authority to, impose the CRA as a condition of access to the CAT System. (*See supra* at 10–13.) A stay of the SRO action requiring the execution of the CRA as a condition of submitting CAT data cannot constitute a cognizable harm because the SROs are not entitled to impose the terms of the CRA. Instead, a stay of the SRO action is entirely consistent with SEC

and SRO rules that require Industry Members to deliver order and trade data to the CAT System, and nowhere authorize the imposition of the CRA or its terms.

A stay pending Commission consideration of SIFMA's Application likewise would result in no harm to other parties. Industry Members individually and through SIFMA have cooperated extensively with the SROs and will continue to cooperate to advance the goals of the CAT. A stay of the SRO action limiting access to the CAT System (or of deadlines requiring access to the CAT System) while the Commission considers the significant legal and policy issues presented by SIFMA's Application will not result in any significant harm, and is consistent with the Commission's commitment to the critical data security issues associated with the CAT and the fair allocation of risk relating to potential data breaches.

This factor accordingly strongly favors a stay.

IV. A Stay Will Serve The Public Interest

The public interest likewise favors a stay that prevents the SROs from limiting access to the CAT System absent execution of the CRA while the Commission considers and rules on SIFMA's Application. The CAT will contain sensitive information concerning market activity associated with countless individuals and market participants. The public has a significant interest in the allocation of risk (and resulting incentives) relating to a potential CAT data breach to ensure that data is not misused, misappropriated or lost.

The CRA is not the appropriate method for addressing these important policy issues. Instead, the standards, policies and practices that the SROs seek to impose in the CRA may only be established by an appropriate rule-making process, including an opportunity for the public to "submit written data, views, and arguments." 15 U.S.C. § 78s(b)(1); *see In re Bloomberg L.P.*, 2003 WL 21184560, at *2 (stay served public interest by "permit[ting] [the Commission] to

consider and more fully evaluate" the "complicated and important public policy issues" raised in the application).

The public interest also is served by granting a stay that ensures that Industry Members are able to obtain a fair review of the issues raised in SIFMA's Application. The Commission has recognized a public interest in ensuring fair and adequate review of SRO action that prohibits or limits access to SRO services. *See In re PalmWorks, Inc.*, 2000 WL 1335343, at *2 (finding that stay would "serve the public interest by ensuring that persons denied access to [National Association of Securities Dealers] services will be given fair review procedures and by allowing the Commission to resolve the novel issues presented here"); *In re Intelispan, Inc.*, Exchange Act Release No. 42738, 2000 WL 511471, at *3 (May 1, 2000) (finding that a stay served the public interest because "Congress expressed its clear intent that persons denied access to the services of self-regulatory organizations or their members be given fair review procedures."). A stay will enable Industry Members to submit CAT data and advance the purposes of the CAT without the improper limitations on access to the CAT System imposed by the SROs.

CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that the Commission issue a stay until the Commission has an opportunity to consider and rule on SIFMA's Application. The Commission should stay the SRO action denying Industry Members access to the CAT System absent execution of the CRA. Alternatively, the Commission should stay CAT deadlines that cannot be met by Industry Members without access to the CAT System.

Dated: New York, New York
April 22, 2020

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON &
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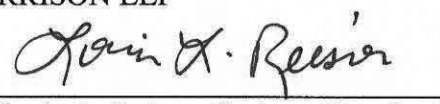
By: 

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UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of:

The Application of SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION,

For Review of Action Taken by CAT LLC and Certain Self-Regulatory Organizations in Violation of Exchange Act Sections 19(d) and 19(f)

Admin. Proc. File No. _____

CERTIFICATE OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule 154(c) of the Commission's Rules of Practice, I hereby certify that SIFMA's Motion to Stay SRO Action Pending Commission Review of SIFMA's Application Pursuant to Exchange Act Sections 19(d) and 19(f) and Incorporated Memorandum of Law contains 5,750 words, according to the word-processing system used to prepare the brief, exclusive of the cover page, table of contents, and table of authorities.

Dated: New York, New York
April 22, 2020

Jeffrey J. Recher