

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95634; File No. 4-698)

August 30, 2022

Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove an Amendment to the National Market System Plan Governing the Consolidated Audit Trail

I. Introduction

On May 13, 2022, the Operating Committee for Consolidated Audit Trail, LLC (“CAT LLC”), on behalf of the following parties to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”):¹ BOX Exchange LLC; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors Exchange LLC; Long-Term Stock Exchange, Inc.; MEMX, LLC; Miami International Securities Exchange LLC; MIAX Emerald, LLC; MIAX PEARL, LLC; Nasdaq BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; Nasdaq PHLX LLC; The NASDAQ Stock Market LLC, New York Stock Exchange LLC; NYSE American LLC; NYSE Arca, Inc.; NYSE Chicago, Inc.; and NYSE National, Inc. (collectively, the

¹ The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (“CAT NMS Plan Approval Order”). The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (“Company”). On August 29, 2019, the Participants replaced the CAT NMS Plan in its entirety with the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC (“CAT LLC”), which became the Company. The latest version of the CAT NMS Plan is available at <https://catnmsplan.com/about-cat/cat-nms-plan>.

“Participants,” “self-regulatory organizations,” or “SROs”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 (“Exchange Act”),² and Rule 608 thereunder,³ a proposed amendment to the CAT NMS Plan (“Proposed Amendment”) to implement a revised funding model (“Executed Share Model”) for the consolidated audit trail (“CAT”) and to establish a fee schedule for Participant CAT fees in accordance with the Executed Share Model (“Proposed Participant Fee Schedule”).⁴ The Proposed Amendment was published for comment in the Federal Register on June 1, 2022.⁵

This order institutes proceedings, under Rule 608(b)(2)(i) of Regulation NMS,⁶ to determine whether to disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate.

II. Background

On July 11, 2012, the Commission adopted Rule 613 of Regulation NMS, which required the SROs to submit a national market system (“NMS”) plan to create, implement and maintain a consolidated audit trail that would capture customer and order event information for orders in

² 15 U.S.C. 78k-1(a)(3).

³ 17 CFR 242.608.

⁴ See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission (May 13, 2022) (“Transmittal Letter”).

⁵ See Securities Exchange Act Release No. 94984 (May 25, 2022), 87 FR 33226 (“Notice”). Comments received in response to the Notice can be found on the Commission’s website at <https://www.sec.gov/comments/4-698/4-698-a.htm>.

⁶ 17 CFR 242.608(b)(2)(i).

NMS securities.⁷ On November 15, 2016, the Commission approved the CAT NMS Plan.⁸

Under the CAT NMS Plan, the Operating Committee of the Company, of which each Participant is a member, has the discretion (subject to the funding principles set forth in the Plan) to establish funding for the Company to operate the CAT, including establishing fees to be paid by the Participants and Industry Members.⁹

The Plan specified that, in establishing the funding of the Company, the Operating Committee shall establish “a tiered fee structure in which the fees charged to: (1) CAT Reporters¹⁰ that are Execution Venues,¹¹ including ATs,¹² are based upon the level of market share; (2) Industry Members’ non-ATS activities are based upon message traffic; and (3) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members).”¹³ Under the Plan, such fees are to be

⁷ 17 CFR 242.613.

⁸ See supra note 1.

⁹ See CAT NMS Plan, supra note 1, at Section 11.1(b). The CAT NMS Plan defines “Industry Member” as “a member of a national securities exchange or a member of a national securities association.” See also id., at Section 1.1.

¹⁰ The CAT NMS Plan defines “CAT Reporter” as “each national securities exchange, national securities association and Industry Member that is required to record and report information to the Central Repository pursuant to SEC Rule 613(c).” Id. at Section 1.1.

¹¹ The CAT NMS Plan defines “Execution Venue” as “a Participant or an alternative trading system (‘ATS’) (as defined in Rule 300 of Regulation ATS) that operates pursuant to Rule 301 of Regulation ATS (excluding any such ATS that does not execute orders).” Id.

¹² Id.

¹³ Id. at Section 11.2(c). See Article XI of the CAT NMS Plan for additional detail.

implemented in accordance with various funding principles, including an “allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations” and the “avoid[ance of] any disincentives such as placing an inappropriate burden on competition and reduction in market quality.”¹⁴

On May 15, 2020, the Commission adopted amendments to the CAT NMS Plan designed to increase the Participants’ financial accountability for the timely completion of the CAT (“Financial Accountability Amendments”).¹⁵ The Financial Accountability Amendments added Section 11.6 to the CAT NMS Plan to govern the recovery from Industry Members of any fees, costs, and expenses (including legal and consulting fees, costs and expenses) incurred by or for the Company in connection with the development, implementation and operation of the CAT from June 22, 2020 until such time that the Participants have completed Full Implementation of CAT NMS Plan Requirements¹⁶ (“Post-Amendment Expenses”). Section 11.6 establishes target

¹⁴ See CAT NMS Plan, supra note 1, at Section 11.2(b) and (e).

¹⁵ See Securities Exchange Act Release No. 88890, 85 FR 31322 (May 22, 2020).

¹⁶ “Full Implementation of CAT NMS Plan Requirements” means “the point at which the Participants have satisfied all of their obligations to build and implement the CAT, such that all CAT system functionality required by Rule 613 and the CAT NMS Plan has been developed, successfully tested, and fully implemented at the initial Error Rates specified by Section 6.5(d)(i) or less, including functionality that efficiently permits the Participants and the Commission to access all CAT Data required to be stored in the Central Repository pursuant to Section 6.5(a), including Customer Account Information, Customer-ID, Customer Identifying Information, and Allocation Reports, and to analyze the full lifecycle of an order across the national market system, from order origination through order execution or order cancellation, including any related allocation information provided in an Allocation Report. This Financial Accountability Milestone shall be considered complete as of the date identified in a Quarterly Progress Report meeting the requirements of Section 6.6(c).” See CAT NMS Plan, supra note 1, at

deadlines for four critical implementation milestones (Periods 1, 2, 3 and 4)¹⁷ and reduces the amount of fee recovery available to the Participants if these deadlines are missed.¹⁸

III. Summary of Proposal

The Operating Committee proposes to replace the funding model set forth in Article XI of the CAT NMS Plan (the “Original Funding Model”) with the Executed Share Model. The Original Funding Model uses a bifurcated funding approach in which costs associated with building and operating the CAT would be borne by (1) Industry Members (other than ATs that execute transactions in Eligible Securities¹⁹ (“Execution Venue ATs”)) through fixed tiered fees based on message traffic for Eligible Securities, and (2) Participants and Industry Members that are Execution Venue ATs for Eligible Securities through fixed tiered fees based on market share. Unlike the Original Funding Model, the Executed Share Model would assess fees on clearing firms and Participants based on the executed equivalent share volume of transactions in Eligible Securities.

The Operating Committee also proposes to adopt a fee schedule to establish the CAT fees applicable to Participants based on the Executed Share Model. The Participant Fee Schedule would establish the process for calculating the CAT fees applicable to Participants under the Executed Share Model.

Section 1.1.

¹⁷ Id. at Section 11.6(a)(i).

¹⁸ Id. at Section 11.6(a)(ii) and (iii).

¹⁹ The CAT NMS Plan defines “Eligible Securities” as including all NMS securities and all OTC Equity Securities. See CAT NMS Plan, supra note 1, at Section 1.1. See also Notice, supra note 5, 87 FR at 33228.

A. Description of Amendments

1. Allocation of Fee among Participants and Industry Member Clearing Brokers

Pursuant to the Proposed Amendment, a CAT fee would be imposed on all transactions in Eligible Securities, whether occurring on-exchange or over-the-counter.²⁰ For each transaction, the applicable Participant,²¹ the Industry Member clearing broker for the seller (“CBS”) and the Industry Member clearing broker for the buyer (“CBB”) would each pay a fee equal to the number of executed equivalent shares in the transaction²² multiplied by one-third and a specified fee rate (“Fee Rate”).²³ According to the Operating Committee, requiring the CBS, the CBB and the Participant in a transaction to pay one-third of the fee recognizes their roles in the transaction²⁴ and would increase the Participants’ cost responsibility to 33% from the 25% proposed in the prior fee proposals.²⁵ The Operating Committee explains that it decided to assess

²⁰ See Notice, supra note 5, 87 FR at 33228. Specifically, CAT fees would be charged with regard to trades reported to CAT by the national securities exchanges and by FINRA via the Alternative Trading Facility (“ADF”), Over-the-Counter Reporting Facility (“ORF”) and the Trade Reporting Facilities (“TRF”). Id. at 33234.

²¹ The applicable Participant for the transaction would be the national securities exchange on which the transaction was executed or FINRA for a transaction that was not executed on an exchange. Id. at 33226, 33227.

²² CAT Data would be used to calculate the CAT fees. Specifically, CAT Data would be used to identify the clearing brokers for each transaction. Id. at 33234. CAT Data is defined as “data derived from Participant Data, Industry Member Data, SIP Data, and such other data as the Operating Committee may designate as ‘CAT Data’ from time to time.” See CAT NMS Plan, supra note 1, at Section 1.1. The Participants explain that using CAT Data for CAT fee calculations provides administrative efficiency since the data is accessible through the CAT. See Notice, supra note 5, 87 FR at 33234.

²³ See Notice, supra note 5, 87 FR at 33226, 33229.

²⁴ Id. at 33232.

²⁵ Id. at 33233. See also infra note 118.

fees upon clearing firm Industry Members because this is the current practice for fees such as the options regulatory fee (“ORF”) and would reduce administrative burdens.²⁶ The Operating Committee acknowledges that this approach “may impose an excessive financial burden” on clearing firms and suggests that they pass-through the CAT fees to their client, who may pass-through their CAT fees until the fees are imposed on the account that executed the transaction.²⁷

2. Calculation of the Fee Rate

The Executed Share Model would apply to the recovery of certain CAT costs that have already been paid by the Participants (“Past CAT Costs”) through the assessment of a fee on the CBS and the CBB in a transaction.²⁸ Participants, CBSs and CBBs would be subject to fees for the ongoing budgeted costs of the CAT, as determined by the Operating Committee, after the implementation of the CAT fees (“Prospective CAT Costs”).²⁹

For Prospective CAT Costs, under the Proposed Amendment, at the beginning of each year, the Operating Committee would set the Fee Rate to be used to determine CAT fees³⁰ and would announce the applicable Fee Rate via a CAT alert.³¹ Specifically, the Operating Committee would calculate the Fee Rate applicable to Participants and clearing brokers by dividing the CAT costs budgeted for the upcoming year by the projected total executed

²⁶ See Notice, supra note 5, 87 FR at 33233.

²⁷ Id. The Operating Committee explains that this pass-through process would be similar to how Industry Members handle other fees, such as Section 31 fees and the ORF. Id.

²⁸ Id. at 33227.

²⁹ Id. at 33226.

³⁰ The Fee Rate would be established through a majority vote of the Operating Committee. See Notice, supra note 5, 87 FR at 33227.

³¹ Id.

equivalent share volume of all transactions in Eligible Securities for that year.³² In addition to setting the Fee Rate at the beginning of a year, the Operating Committee may, but is not required to, adjust the Fee Rate once during the year either to coordinate the CAT fees with adjustments to budgeted or actual CAT costs or volume projections during the year.³³ The Operating Committee explains that this would avoid too frequent Fee Rate changes for CAT Reporters.³⁴ Once set, a Fee Rate would remain in effect until a new Fee Rate is adopted.³⁵ The Operating Committee asserts that this would prevent periods without the collection of CAT fees, which would “adversely affect the ability of the CAT to fund its operations and, therefore, would have a significant negative effect on the CAT’s ability to fulfill its regulatory purpose.”³⁶ The Operating Committee will not file an amendment to the CAT NMS Plan every time it adopts or adjusts the Fee Rate.³⁷ However, the Participants would each submit fee filings under Section 19(b) to implement any new Fee Rates or adjustments to the Fee Rate applicable to Industry Members.³⁸

³² Id. at 33226–27.

³³ Id. at 33227.

³⁴ Id.

³⁵ Id. The Operating Committee states that that the Fee Rate would not automatically terminate. See Notice, supra note 5, 87 FR at 33227.

³⁶ Id. The Operating Committee also states that this would ensure that it would have the CAT budget and CAT Data to collect CAT fees. Id.

³⁷ Id.

³⁸ Id. at 33227, n.12; id. at 33229. The Participants expect to provide advance notice of Fee Rate changes before implementing such changes. See Notice, supra note 5, 87 FR at 33229, n.23.

a. Executed Equivalent Share Volume

Under the Proposed Amendment, executed equivalent share volume would be used both to determine the CAT fee for a transaction in Eligible Securities and to calculate the applicable Fee Rate. The Operating Committee states 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.”³⁹

The Operating Committee explains that the Executed Share Model would use the concept of executed equivalent share volume because NMS Stocks, Listed Options and OTC Equity Securities, which comprise Eligible Securities, each have different trading characteristics.⁴⁰ For NMS Stocks, each executed share for a transaction would be counted as one executed equivalent share.⁴¹ For Listed Options, each executed contract for a transaction would be counted using the contract multiplier applicable to the specific Listed Option in the transaction (one Listed Option typically represents 100 shares, but it may represent a different number of shares).⁴² Each executed share for a transaction in OTC Equity Securities would be counted as 0.01 executed equivalent shares.⁴³ The Operating Committee states that a “disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks” because many OTC Equity Securities are priced below one-dollar per share and lower priced

³⁹ Id. at 33232.

⁴⁰ Id. at 33228.

⁴¹ Id.

⁴² Id.

⁴³ Id.

shares trade in larger quantities.⁴⁴ Therefore, the Operating Committee proposes to apply a discount to executed shares for transactions in OTC Equity Securities as otherwise, CAT Reporters transacting in OTC Equity Securities would incur higher CAT fees under the Executed Share Model.⁴⁵ The Operating Committee explains that the discount was based on an analysis of different metrics comparing the markets for OTC Equity Securities and NMS Stocks.⁴⁶

As discussed above, the Operating Committee would calculate the Fee Rate applicable to Participants and clearing brokers by dividing the CAT costs budgeted for the upcoming year by the projected total executed equivalent share volume of all transactions in Eligible Securities for that year.⁴⁷ To determine the projected total executed equivalent share volume of transactions in Eligible Securities for a year, the Operating Committee would double the total executed equivalent share volume from the prior six months.⁴⁸ The Operating Committee explains that data from the prior six months “provides an appropriate balance between using data from a period that is sufficiently long to avoid short term fluctuations while providing data close in time to the upcoming year.”⁴⁹ The Operating Committee represents that it would regularly monitor the actual total executed equivalent share volume for deviations from the projected volume.⁵⁰

⁴⁴ See Notice, supra note 5, 87 FR at 33228.

⁴⁵ Id. at 33228–29.

⁴⁶ Id. at 33229.

⁴⁷ Id. at 33226–27.

⁴⁸ Id. at 33228. The Participants state that CAT Data would be used in the calculation of the projected total executed equivalent share volume for the Fee Rate. Id. at 33234.

⁴⁹ See Notice, supra note 5, 87 FR at 33228.

⁵⁰ Id.

The Operating Committee would be permitted to adjust the projected volume as it reasonably deems appropriate for the prudent operation of the Company, basing the adjusted projection on the total executed equivalent share volume of transactions from six months prior to the date of the determination of the new projection.⁵¹ If the Operating Committee adjusts the projection during the year and decides to adjust the Fee Rate, the adjusted projection would be used to calculate the new Fee Rate for the remaining months in the year.⁵² The Operating Committee would provide the projected total executed equivalent share volume for transactions in Eligible Securities and any adjustments to the projections on the CAT NMS Plan website.⁵³

The Operating Committee asserts that the use of executed equivalent share volume would be an improvement to the Original Funding Model's use of message traffic.⁵⁴ First, the Operating Committee states that a study of CAT cost drivers demonstrated that, while message traffic is a factor in CAT costs, technology costs, such as data processing and storage costs, are the primary factors in CAT costs.⁵⁵ Second, the Operating Committee explains that fees based on message traffic could adversely impact certain Industry Member because such fees "may not correlate

⁵¹ Id. The projected volume would be adjusted to address potential deviations of the projections from actual transactions during the year. Id.

⁵² Id.

⁵³ Id.

⁵⁴ The Original Funding Model uses message traffic as the basis of Industry Member CAT fees. See Section 11.3(b) of the CAT NMS Plan, supra note 1. In a response to comments on the CAT NMS Plan Approval Order, the Participants stated that, "because there is a strong correlation between message traffic and the size of a broker-dealer and because message traffic is a key component of the costs of operating the CAT, message traffic is an appropriate criteria for placing broker-dealers in a particular fee tier." See Letter from the Participants to Brent J. Fields, Secretary, Commission, at 23 (Sept. 23, 2016), available at <https://www.sec.gov/comments/4-698/4-698.shtml>.

⁵⁵ See Notice, supra note 5, 87 FR at 33232.

with common revenue or fee models.”⁵⁶ Third, the Operating Committee asserts that fees based on message traffic could increase complexity and adversely impact “competition, liquidity, or other aspects of market structure.”⁵⁷ One example would be market makers who typically generate high levels of message traffic, and would likely have “outsized fees” with message traffic-based fees.⁵⁸ Further, the Operating Committee explains that because the number of messages vary per order, the use of message traffic to determine CAT fees could result in unpredictable fees for Industry Members.⁵⁹ The Operating Committee also states that the Commission has recognized the use of transaction volume in setting fees, providing FINRA’s Trading Activity Fee (“TAF”) as an example.⁶⁰

In addition, the Operating Committee asserts that the Executed Share Model would not unfairly burden or favor a product or product type⁶¹ because the model recognizes the different types of securities by counting executed equivalent share volume differently for NMS Stocks, Listed Options and OTC Equity Securities.⁶²

b. Budgeted Costs

Section 11.1(a) of the CAT NMS Plan requires the Operating Committee to annually approve an operating budget for the Company which would include projected costs to develop

⁵⁶ Id.

⁵⁷ Id.

⁵⁸ Id. The Operating Committee states that it had proposed a discount on market maker fees in prior models, but such a discount would add complexity. Id.

⁵⁹ Id.

⁶⁰ See Notice, supra note 5, 87 FR at 33232.

⁶¹ Id. at 33233–34.

⁶² Id.

and operate the CAT for the year, the sources of revenue to cover the costs, and the funding of any reserve the Operating Committee reasonably deems appropriate for the prudent operation of the Company.⁶³ The Operating Committee proposes that the budgeted costs set forth in the annual operating budget would be used to determine the Fee Rate.⁶⁴ The budgeted costs would comprise estimated fees, costs and expenses to be incurred by the Company for the development, implementation and operation of the CAT during the year, which would include costs for the Plan Processor, insurance, and third-party support, as well as an operational reserve.⁶⁵ The Operating Committee states that using budgeted CAT costs to determine the Fee Rate would allow the Company to collect fees before bills become payable.⁶⁶

Under the Proposed Amendment, the budgeted CAT costs for the year could be adjusted to address potential changes related to the CAT as the Operating Committee reasonably deems appropriate for the prudent operation of the Company.⁶⁷ If the Operating Committee adjusts budgeted CAT costs during the year, the adjusted budgeted CAT costs would be used to calculate a new Fee Rate for the remaining months of the year.⁶⁸

⁶³ See CAT NMS Plan, supra note 1, at Section 11.1(a).

⁶⁴ See Notice, supra note 5, 87 FR at 33227.

⁶⁵ Id. Any surpluses collected will be treated as an operational reserve to offset future fees and will not be distributed to the Participants as profits, in accordance with Section 11.1(c) of the CAT NMS Plan. Id. at 33228.

⁶⁶ Id. at 33227.

⁶⁷ Id. at 33228. The Operating Committee explains that an adjustment to the budget may be necessary if actual costs are more or less than the budget or if there are unanticipated expenditures. Id.

⁶⁸ See Notice, supra note 5, 87 FR at 33228.

3. Past CAT Costs

The Operating Committee proposes that CBBs and CBSs would be required to pay CAT fees related to Past CAT Costs, which are certain costs that the Participants have already paid prior to the effectiveness of the CAT fees pursuant to the Executed Share Model.⁶⁹ The Operating Committee states that Past CAT Costs incurred prior to January 1, 2022 are \$337,688,610, which does not include \$48,874,937 of excluded costs that the Participants do not intend to collect from Industry Members (“Excluded Costs”).⁷⁰ Under the Executed Share Model, \$225,125,740 of the \$337,688,610 in Past CAT Costs would be paid by CBBs and CBSs. Specifically, CBBs would pay one-third of \$337,688,610 (\$112,562,870), and CBSs would pay one-third of \$337,688,610 (\$112,562,870).⁷¹ The Operating Committee states that the Participants would not pay the remaining one-third because they have already paid this amount,⁷² explaining that they have paid all CAT costs to date.⁷³ The Participants would not be reimbursed for the remaining one-third⁷⁴ and they would be responsible for 100% of the Excluded Costs as well as certain costs related to the conclusion of the relationship with the Initial Plan Processor.⁷⁵ CBBs and CBSs would also be required to pay CAT fees for CAT costs incurred between

⁶⁹ Id. at 33230.

⁷⁰ Id. The Proposed Amendment states that the Excluded Costs were incurred from November 15, 2017 through November 15, 2018 and are related to the delay in the start of reporting to the CAT.

⁷¹ Id.

⁷² Id.

⁷³ Id. at 33227.

⁷⁴ See Notice, supra note 5, 87 FR at 33230.

⁷⁵ Id.

January 1, 2022 and the implementation of the CAT fee.⁷⁶ The actual CAT costs for 2022 will be available in audited financial statements after the end of the year.⁷⁷

The CAT fee for Past CAT Costs would be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate approved by the Operating Committee.⁷⁸ Current CBSs and CBBs would pay a CAT fee for Past CAT Costs calculated by multiplying the executed equivalent share volume of the transactions they cleared in the past month by the applicable Fee Rate (calculated based on Past CAT Costs and current projected total equivalent share volume) and by one-third.⁷⁹ The Operating Committee explains that it is appropriate to impose fees for Past CAT Costs on current Industry Members, and not on Industry Members active when the Past CAT Costs were incurred, using their current activity since they would be benefiting from the CAT.⁸⁰ The Operating Committee further explains that it would be difficult to impose fees on Industry Members for their activity in the past because some Industry Members may no longer be in business and it might be difficult to establish transactions from years past.⁸¹ The Operating Committee adds that Industry Members would not have taken into consideration retroactive fees when entering into the past transactions.⁸²

⁷⁶ Id.

⁷⁷ Id.

⁷⁸ Id.

⁷⁹ Id.

⁸⁰ See Notice, supra note 5, 87 FR at 33230.

⁸¹ Id.

⁸² Id.

The Fee Rate for Past CAT Costs would be calculated by dividing the Past CAT Costs for a period determined by the Operating Committee (“relevant period”) by the projected total executed equivalent share volume of all transactions in Eligible Securities for the relevant period.⁸³ The Fee Rate for CAT fees related to Past CAT Costs would be calculated using the actual past costs and not budgeted costs.⁸⁴

The Proposed Amendment states that “[t]he CAT fees related to past CAT Costs would be calculated based on current transactions, not transactions that occurred in the past when the costs were incurred, and collected from current Industry Members, not Industry Members active in the past when the costs were incurred.”⁸⁵ The Proposed Amendment provides the following example of the calculation of CAT fees for Past CAT Costs: “if the CAT fee were in place for June 2022, each CBB and CBS with transactions in Eligible Securities in May 2022 would pay a CAT fee related to Past CAT Costs calculated by multiplying the executed equivalent share volume of the transactions they cleared in May 2022 by the applicable Fee Rate (calculated based on Past CAT Costs and current projected total equivalent share volume) and by one-third.”⁸⁶

The one-third of Past CAT Costs that are not allocated to Industry Members would not be allocated to the Participants under the Executed Share Model.⁸⁷ The Operating Committee instead proposes that CAT fees for such Past CAT Costs that are collected from Industry

⁸³ Id.

⁸⁴ Id.

⁸⁵ Id.

⁸⁶ See Notice, supra note 5, 87 FR at 33230.

⁸⁷ Id.

Members would be allocated to the Participants on a pro rata basis to repay outstanding loan notes of the Participants to the Company.⁸⁸

4. Assessment and Collection of Fees

The Operating Committee proposes to establish a system for the collection of CAT fees from Participants and Industry Members in compliance with Section 11.4 and Section 3.7(b) of the CAT NMS Plan. Participants would be required to pay monthly fees based on transactions in Eligible Securities from the prior month.⁸⁹ The Plan Processor would calculate the CAT fees for each Participant using transaction data based on CAT Data for the Participant.⁹⁰ Participants would be required to begin paying CAT fees in the first month after the conclusion of the period covered by the Financial Accountability Milestones, subject to Commission approval of the Proposed Amendment and the CAT fees becoming effective for Participants and Industry Members.⁹¹ Unless a longer period is indicated, within thirty days of receiving an invoice or other notice requesting payment, each Participant would be required to pay all fees or other amounts required to be paid, and interest on an outstanding balance until such fee or amount is paid at a per annum rate the lesser of (i) the Prime Rate plus 300 basis points, or (ii) the maximum rate permitted by applicable law.⁹²

⁸⁸ Id.

⁸⁹ Id. at 33229.

⁹⁰ Id.

⁹¹ Id.

⁹² See Notice, supra note 5, 87 FR at 33229.

5. Industry Member CAT Fees

As proposed, the Participants would each submit fee filings under Section 19(b) to adopt CAT fees for their Industry Members and would also submit a fee filings under Section 19(b) to implement any new Fee Rates or adjustments to the Fee Rate.⁹³ The Participants would submit Section 19(b) fee filings for Industry Member CAT fees related to Prospective CAT Costs⁹⁴ and Section 19(b) fee filings for Industry Member CAT fees related to Past CAT Costs.⁹⁵ For Prospective CAT Costs, the fee filings would require CBBs and CBSs to pay a monthly fee for each transaction they clear from the prior month.⁹⁶

6. Cost Discipline Mechanisms

The Operating Committee states that CAT cost discipline mechanisms—specifically, a cost-based funding structure, cost transparency, cost management efforts, and oversight—help ensure the ongoing reasonableness of CAT costs and fees.⁹⁷ With respect to the funding structure, the Operating Committee states that, pursuant to the CAT NMS Plan, the Company operates on a break-even basis and as a business league under Section 501(c)(6) of the Internal Revenue Code.⁹⁸ On transparency, the Operating Committee states that the Company makes detailed financial information about the CAT publicly available, including maintaining a

⁹³ Id. at 33226–29. The Participants expect to provide advance notice of Fee Rate changes before implementing such changes. Id. at 33229, n.23.

⁹⁴ Id. at 33229.

⁹⁵ Id. at 33230.

⁹⁶ Id. at 33229. The CAT fees would be calculated by the Plan Processor using transaction data in CAT Data. See Notice, supra note 5, 87 FR at 33229–30.

⁹⁷ Id. at 33234.

⁹⁸ Id. at 33234–35.

webpage that makes publicly available consolidated annual financial statements.⁹⁹ The Company also publishes on the webpage the Company’s annual operating budget and updates to the budget.¹⁰⁰ In addition, the Operating Committee states that it has held webinars for the industry that covered CAT costs and potential alternative funding models and that they intend to hold additional webinars on cost and funding in the future.

With respect to cost management efforts, the Operating Committee maintains that it regularly undertakes efforts to reduce CAT costs and oversees the CAT’s annual budget with input from several CAT working groups, including a Cost Management Working Group. The Operating Committee also states that the Plan Processor engages in efforts to provide its services cost-effectively, such as by “review[ing] options to lower computer and storage needs.”¹⁰¹ Finally, the Operating Committee explains that the Commission has oversight over the CAT’s

⁹⁹ Id. at 33235.

¹⁰⁰ Id.

¹⁰¹ Id.

funding and operations and that proposed amendments to the Plan to implement fees and cost management efforts are subject to review by the Commission and the public.¹⁰²

7. Conforming Changes to CAT NMS Plan

In order for the Executed Share Model to be consistent with the terms of the CAT NMS Plan, the Operating Commission proposes to amend certain sections to the CAT NMS Plan, as described below.

a. Definition of Execution Venue

The Operating Committee proposes to delete the term “Execution Venue” from Section 1.1 of the CAT NMS Plan.¹⁰³ The Operating Committee explains that the concept of an Execution Venue was relevant to the Original Funding Model which would have charged fees to Execution Venues fees based on market share, but is not relevant for the Executed Share Model because CAT fees would be allocated based on executed equivalent shares in transactions by Participants, CBBs and CBSs.¹⁰⁴

b. Use of Executed Equivalent Shares for CAT Fees

The Operating Committee also proposes to amend Sections 11.2(b) and (c) and Sections 11.3(a) and (b) of the CAT NMS Plan to incorporate the use of executed equivalent shares in transactions in Eligible Securities to calculate CAT fees.¹⁰⁵ The proposed amendments to Section 11.2 of the CAT NMS Plan would revise the CAT NMS Plan’s funding principles which were

¹⁰² See Notice, supra note 5, 87 FR at 33235.

¹⁰³ Id. at 33237.

¹⁰⁴ Id.

¹⁰⁵ Id. at 33237–38.

intended to be used to establish a fee structure that is equitable.¹⁰⁶ The Operating Committee proposes to amend Section 11.2(b) to remove the requirement that in establishing funding for the Company, the Operating Committee would seek to take into account distinctions in the securities trading operations of Participants and Industry Members.¹⁰⁷ The Operating Committee explains that this provision was related to the use of message traffic and market share to calculate CAT fees because these related to the impact of CAT Reporters on the Company's resources and operations.¹⁰⁸ The Operating Committee states that this provision is not relevant under the Executed Share Model, which would not use message traffic or market share to calculate CAT fees.¹⁰⁹

The Operating Committee further proposes to amend Section 11.2(c) to remove statements that fees charged to Industry Members and Execution Venues would be based on message traffic and level of market share, respectively.¹¹⁰ The statements would be replaced with the requirement that fees charged to Industry Members and Participants would be based on executed equivalent share volume of transactions in Eligible Securities.¹¹¹

Section 11.3(a) of the CAT NMS Plan describes how fees will be assessed and calculated for Execution Venues and Section 11.3(b) describes how fees will be assessed and calculated for

¹⁰⁶ See CAT NMS Plan, supra note 1, at Appendix C-85.

¹⁰⁷ See Notice, supra note 5, 87 FR at 33238.

¹⁰⁸ Id.

¹⁰⁹ Id.

¹¹⁰ Id.

¹¹¹ Id.

Industry Members.¹¹² The Operating Committee proposes to delete the text of Section 11.3(a) and (b) and replace it with a description of how fees would be assessed and calculated for Participants and clearing brokers under the Executed Share Model.¹¹³ The Operating Committee also proposes to add to Section 11.3(a) new Sections 11.3(a)(ii), (a)(iii) and (a)(iv) to require the Participants to pay Prospective CAT Costs, to describe how the Fee Rate will be calculated for Prospective CAT Costs, and to state that the Participants are not required to pay a CAT fee related to Past CAT Costs and that the two-thirds of the Past CAT Costs collected from Industry Members would be allocated on a pro rata basis to the Participants for repayment of outstanding loan notes to the Company.¹¹⁴ In addition, the Operating Committee proposes to add to Section 11.3(b) new Sections 11.3(b)(iii) and (b)(iv) to require clearing brokers to pay CAT fees related to Past CAT Costs, to describe how the Fee Rate will be calculated for Past CAT Costs, and to describe the clearing brokers' obligation to pay a CAT fee for Prospective CAT Costs.¹¹⁵

c. Elimination of Tiered Fees

The Operating Committee proposes to remove references to tiered fees and related concepts from Sections 11.1(d), 11.2(c), 11.3(a) and 11.3(b) of the CAT NMS Plan.¹¹⁶ The Operating Committee explains that the Executed Share Model would not charge a tiered fee and would instead charge Participants, CBBs and CBSs a CAT fee that is based on their executed

¹¹² See CAT NMS Plan, supra note 1, at Sections 11.3(a) and 11.3(b).

¹¹³ See Notice, supra note 5, 87 FR at 33238, 33239.

¹¹⁴ Id. at 33238.

¹¹⁵ Id. at 33239.

¹¹⁶ Id.

equivalent share volume.¹¹⁷ The Operating Committee asserts that this would address commenters’ concerns about the use of tiering in the Participants’ proposed 2018 and 2021 funding models.¹¹⁸

d. No Fixed Fees

The Operating Committee proposes to replace references to “fixed fees” in Section 11.3(a) of the CAT NMS Plan with “fees.”¹¹⁹ The Operating Committee explains that the concept of a fixed fee is not relevant under the Executed Share Model, under which fees for Participants, CBBs and CBSs would vary in accordance with the executed equivalent share volume of transactions.¹²⁰

8. Alternative Models Considered

The Operating Committee describes several other potential funding models that it considered but dismissed and explains why the Executed Share Model was the best choice. The alternative models discussed are the Participants’ proposed 2018 and 2021 funding models,¹²¹ a model in which Industry Members and Participants would pay fees solely based on revenue,¹²² a

¹¹⁷ Id.

¹¹⁸ Id. See also Securities Exchange Act Release Nos. 82451 (Jan. 5, 2018), 83 FR 1399 (Jan. 11, 2018) (notice of filing of the 2018 proposed CAT funding model); 91555 (Apr. 14, 2021), 86 FR 21050 (Apr. 21, 2021) (notice of filing of the 2021 proposed CAT funding model). Both prior funding model proposals were withdrawn by the Participants. See Securities Exchange Act Release Nos. 82892 (Mar. 16, 2018), 83 FR 12633 (Mar. 22, 2018) (withdrawal of the 2018 proposed CAT funding model); 93817 (Dec. 17, 2021), 86 FR 72656 (Dec. 22, 2021) (withdrawal of the 2021 proposed CAT funding model).

¹¹⁹ See Notice, supra note 5, 87 FR at 33240.

¹²⁰ Id.

¹²¹ Id. at 33235–36.

¹²² Id. at 33236.

model in which both Industry Members and Participants would pay fees based on message traffic in the CAT,¹²³ and a model that would calculate a CAT fee similar to the proposed Executed Share Model except only the CBS would be assessed a fee and not the CBB or Participant in a transaction.¹²⁴ The Operating Committee also briefly describes other possible funding models it considered but concluded that the Executed Share Model was the most advantageous model and that it provides an equitable allocation of reasonable fees among CAT Reporters.¹²⁵

9. Consistency with the CAT NMS Plan and the Exchange Act

The Operating Committee attests that the Executed Share Model satisfies the CAT NMS Plan funding principles and other requirements, as proposed to be amended by the Proposed Amendment, as well as requirements of the Exchange Act.¹²⁶ Specifically, the Operating Committee explains that the Executed Share Model satisfies the funding principles in Section 11.2(a)–(f) of the CAT NMS Plan, as proposed to be amended by the Proposed Amendment,¹²⁷ and that the Executed Share Model would satisfy Section 11.1(c) of the CAT NMS Plan, which requires the Company to time the imposition and collection of fees in a manner reasonably related to the timing when the Company expects to incur development and implementation costs, and which requires that any surplus of Company resources over its expenses be treated as an operational reserve to offset future fees.¹²⁸ The Operating Committee adds that the Company

¹²³ Id. at 33237.

¹²⁴ Id.

¹²⁵ See Notice, supra note 5, 87 FR at 33237.

¹²⁶ Id. at 33241.

¹²⁷ Id. at 33241–42.

¹²⁸ Id. at 33242.

intends to operate as a business league within the meaning of Section 501(c)(6) of the Internal Revenue Code, as stated in Article VIII. of the CAT NMS Plan, which requires the Company to not be organized for profit and that no part of its net earnings can inure to the benefit of any private shareholder or individual.¹²⁹

The Operating Committee also argues that the Executed Share Model is consistent with Exchange Act requirements. Specifically, the Operating Committee explains that the proposed CAT fees would provide for the equitable allocation of reasonable dues, fees and other charges,¹³⁰ that the Executed Share Model would provide for reasonable fees,¹³¹ and that it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.¹³² Further, the Operating Committee attests that the Executed Share Model would not impose any burden on competition that is not necessary or appropriate,¹³³ and that the proposed fee schedule fairly and equitably allocates costs among CAT Reporters.¹³⁴

In further support of the Proposed Amendment, the Operating Committee asserts that the Executed Share Model is similar to existing fees,¹³⁵ is a straightforward approach,¹³⁶ results in

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Id.

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Id. See also 15 U.S.C. 78f(b)(4), 15 U.S.C. 78o-3(b)(5).

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See Notice, supra note 5, 87 FR at 33242.

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Id. at 33243. See also 15 U.S.C. 78f(b)(5), 15 U.S.C. 78o-3(b)(6).

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See Notice, supra note 5, 87 FR at 33243. See also 15 U.S.C. 78f(b)(8), 15 U.S.C. 78o-3(b)(9).

134

See Notice, supra note 5, 87 FR at 33243.

135

Id. at 33231–32.

136

Id. at 33233.

predictable fees,¹³⁷ is easy to administer,¹³⁸ and treats different trading products and venues equally.¹³⁹ The Operating Committee explains that the Executed Share Model would operate similarly to sales value fees that the Commission previously determined were consistent with the Exchange Act: specifically, Section 31 fees, FINRA’s TAF, and the ORF.¹⁴⁰ The Operating Committee represents that the number of executed equivalent shares in a transaction and the Fee Rate would be made readily available and the adjustments for Listed Options and for OTC Equity Securities would be straightforward calculations.¹⁴¹ The Operating Committee further asserts that the fees would be predictable because the Fee Rate would be established in advance so CAT Reporters could calculate for themselves the applicable fees and can estimate and validate their fees using their trading data,¹⁴² and that customers who would be the recipient of pass-through CAT fees could also calculate their own fees.¹⁴³ Additionally, the Operating Committee represents that administration of CAT fees would be simple because the Executed Share Model relies on a basic calculation and a predetermined Fee Rate, and fees would be collected in a manner similar to the collection of other Industry Member fees.¹⁴⁴ The Operating Committee also attests that the Executed Share Model would treat transactions equally regardless of the venue on which they are executed by applying the same Fee Rate to securities executed

¹³⁷ Id.

¹³⁸ Id.

¹³⁹ Id. at 33233–34.

¹⁴⁰ See Notice, supra note 5, 87 FR at 33231–32.

¹⁴¹ Id. at 33233.

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Id.

on-exchange or over-the-counter and regardless of how the trade occurred.¹⁴⁵ Further, the Operating Committee explains that the Executed Share Model would recognize the different trading characteristics of different securities by counting executed equivalent share volume differently for NMS Stocks, Listed Options and OTC Equity Securities.¹⁴⁶

B. Proposed Participant Fee Schedule

The Operating Committee proposes to adopt a fee schedule that would describe how fees for Participants would be calculated and collected.

1. Participant CAT Fee

Proposed provision (a) of the Proposed Participant Fee Schedule describes how the CAT fee for national securities exchange and national securities association Participants would be calculated. Specifically, provision (a)(1) states that national securities exchange Participants would pay a fee for each transaction in Eligible Securities executed on the exchange based on CAT Data, where the fee for each transaction would be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate.¹⁴⁷

Proposed provision (a)(2) states that national securities association Participants would pay a fee for each transaction in Eligible Securities executed otherwise than on exchange based on CAT Data and, as for national securities exchange Participants, the fee would be calculated

¹⁴⁵ The Operating Committee states that the Fee Rate would be the same even if a trade was completed in a manner that generates more message traffic. Id.

¹⁴⁶ See Notice, supra note 5, 87 FR at 33233–34.

¹⁴⁷ Id. at 33246.

by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate.¹⁴⁸

2. Fee Rate

Proposed provision (b) of the Proposed Participant Fee Schedule would describe how the Fee Rate would be calculated. Proposed provision (b)(1) states that the Fee Rate will be calculated by the Operating Committee at the start of the year by dividing the budgeted CAT costs for the year by the projected total executed equivalent share volume of all transactions in Eligible Securities for the year.¹⁴⁹ The provision also states that, if necessary, the Fee Rate may be adjusted once in the year due to changes in the budgeted or actual costs or projected or actual total executed equivalent share volume during the year.¹⁵⁰

Proposed provision (b)(2) explains how executed equivalent shares would be counted for transactions in NMS Stocks, Listed Options, and OTC Equity Securities. For NMS Stocks, each executed share in a transaction would be counted as one executed equivalent share.¹⁵¹ For Listed Options, each executed contract for a transaction would be counted based on the multiplier

148 Id.

149 Id.

150 Id.

151 Id.

applicable to the specific Listed Option.¹⁵² For OTC Equity Securities, each executed share for a transaction would be counted as 0.01 executed equivalent share.¹⁵³

Proposed provision (b)(3) explains the composition of the budgeted CAT costs for the year. These would be comprised of all fees, costs and expenses budgeted to be incurred by or for the Company in connection with the development, implementation and operation of the CAT as set for in the annual operating budget approved by the Operating Committee pursuant to Section 11.1(a) of the CAT NMS Plan, or as adjusted during the year by the Operating Committee.¹⁵⁴

Proposed provision (b)(4) states that the projected total executed equivalent share volume of all transactions in Eligible Securities for each relevant period would be determined by the Operating Committee based on the executed equivalent share volume of all transactions in Eligible Securities for the prior six months.¹⁵⁵

3. Fee Payments/Collection

Proposed provision (c) of the Proposed Participant Fee Schedule requires that each Participant pay the CAT fee described in proposed provision (a) to Consolidated Audit Trail, LLC on a monthly basis based on the transactions in the prior month.¹⁵⁶

¹⁵² See Notice, supra note 5, 87 FR at 33246.

¹⁵³ Id.

¹⁵⁴ Id.

¹⁵⁵ Id.

¹⁵⁶ Id.

IV. Summary of Comments

A. Consistency with the Exchange Act

Commenters object to the Proposed Amendment.¹⁵⁷ Several commenters argue the Proposed Amendment is generally inconsistent with the Exchange Act.¹⁵⁸ One commenter states that the Proposed Amendment lacks sufficient information for the Commission to determine whether the Executed Share Model is consistent with the Exchange Act.¹⁵⁹ Another commenter states that the Executed Share Model is arbitrary and “largely unfounded on principles upon which the Commission could reasonably conclude that CAT NMS would be fairly funded.”¹⁶⁰ Two commenters disagree with the Participants’ assertion that the Executed Share Model is similar to other transaction-based fees approved by the Commission is adequate justification for consistency with the Exchange Act.¹⁶¹ One of these commenters states that, although the Proposed Amendment asserts that the Executed Share Model is fair because it operates in a manner that is similar to other fee rules that the Commission found consistent with the Exchange

¹⁵⁷ See Letters to Vanessa Countryman, Secretary, Commission from Larry Harris, Fred V. Keenan Chair in Finance, USC Marshall School of Business (June 21, 2022) (“Harris Letter”); Kirsten Wegner, Chief Executive Officer, Modern Markets Initiative (June 21, 2022) (“MMI Letter”); Marcia E. Asquith, Corporate Secretary, Executive Vice President, Board and External Relations, FINRA (June 22, 2022) (“FINRA Letter”); Ellen Greene, Managing Director, Equities & Options Market Structure, and Joseph Corcoran, Managing Director, Associated General Counsel, Securities Industry and Financial Markets Association (June 22, 2022) (“SIFMA Letter”); and Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (June 22, 2022) (“Virtu Letter”). All comments received in response to the Notice can be found on the Commission’s website at <https://www.sec.gov/comments/4-698/4-698-a.htm>.

¹⁵⁸ See Harris Letter at 1; FINRA Letter at 4; SIFMA Letter at 1–2, 3, 4; Virtu Letter at 7.

¹⁵⁹ See SIFMA Letter at 1–2, 3.

¹⁶⁰ See Harris Letter at 1.

¹⁶¹ See FINRA Letter at 4; SIFMA Letter at 4.

Act, like the TAF, Section 31 fee and the ORF, the Proposed Amendment fails to provide “insight as to why these other fee frameworks, which apply to completely different contexts, should serve as a model here.”¹⁶² Two commenters state that the Proposed Amendment lacks sufficient detail for the Commission to articulate a satisfactory explanation for approval, as required by Susquehanna Int’l Grp., LLP v. SEC, 866 F.3d 442, 443 (D.C. Cir. 2017).¹⁶³

In its response to comments,¹⁶⁴ CAT LLC maintains that the Executed Share Model satisfies the requirements of the Exchange Act and should be approved by the Commission.¹⁶⁵ CAT LLC states, “[t]he Executed Share Model would provide reasonable fees that are equitably allocated, not unfairly discriminatory, and do not impose an undue burden on competition, in that the model reflects a reasonable effort to allocate costs based on the extent to which different CAT Reporters participate in and benefit from the equities and options markets.”¹⁶⁶ CAT LLC reiterates that the Executed Share Model would be consistent with past fee structures that have been approved by the Commission and argues that the Executed Share Model is “transparent, would be relatively easy to calculate and administer, and is designed not to have an impact on market activity because it is neutral as to the location and manner of execution.”¹⁶⁷ CAT LLC

¹⁶² See FINRA Letter at 4.

¹⁶³ See SIFMA Letter at 3; Virtu Letter at 7.

¹⁶⁴ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, Commission (Aug. 16, 2022) (“Response Letter”). The Response Letter states, “CAT LLC notes that these responses represent the consensus of the Participants, but that all Participants may not fully agree with each response set forth in this letter.” Id. at 2.

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ Id.

states that its obligation is to demonstrate that the proposed model is consistent with the Exchange Act and the rules and regulations thereunder, not to prove that the proposed model is superior to other proposals.¹⁶⁸

Commenters also argue that the Proposed Amendment generally does not result in an equitable allocation of reasonable dues, fees and other charges.¹⁶⁹ One commenter states that the Proposed Amendment fails to meet the requirements under the Exchange Act that CAT funding provides “for the equitable allocation of reasonable dues, fees and other charges.”¹⁷⁰ Another commenter argues that the Proposed Amendment provides no support for why using executed share volume as the basis for the cost allocation methodology, instead of message traffic, is equitable.¹⁷¹ The commenter adds that the argument that executed share volume is related to cost generation is not enough to demonstrate that use of it is reasonable and equitable.¹⁷² This commenter further states that the Executed Share Model is inconsistent with the Exchange Act because it abandons cost alignment principles and lacks transparency about its impact.¹⁷³

Several commenters question the proposed cost allocation between Industry Members and Participants.¹⁷⁴ One commenter states that the Proposed Amendment offers no justification why allocating costs by thirds to the Participant, the buy-side, and the sell-side is equitable in the

¹⁶⁸ Id.

¹⁶⁹ See FINRA Letter at 2, 3–4; Virtu Letter at 2.

¹⁷⁰ See Virtu Letter at 2.

¹⁷¹ See FINRA Letter at 3.

¹⁷² Id. at 3–4.

¹⁷³ Id. at 2.

¹⁷⁴ See FINRA Letter at 3, 4; Virtu Letter at 1–4; SIFMA Letter at 1–5.

context of the CAT NMS Plan.¹⁷⁵ The commenter argues that “the Proposal also does not provide adequate support for the overall allocation between Participants and industry members or the allocation of costs between equity and options.”¹⁷⁶ Another commenter argues that the fee structure disproportionately shifts CAT costs to Industry Members and investors.¹⁷⁷ The commenter states that the proposed allocation is arbitrary, lacks justification and does not account for the fees the Participants already collect from the industry.¹⁷⁸ The commenter believes the two-thirds allocation was only chosen because it appears somewhat better for Industry Members than the 75%/25% (Industry Member/Participant) cost allocation proposed in the prior model, and that none of the arguments used by the Participants provide a reasonable basis why a two-thirds/one-third split is appropriate.¹⁷⁹

One commenter argues that the proposed cost allocation methodology is inconsistent with Exchange Act fee standards because most costs would be imposed on Industry Members.¹⁸⁰ The commenter states that the Participants do not account for “the time and expense Industry Members have devoted to developing and maintaining internal systems to be able to report the CAT, as well as the time and expense Industry Members have devoted to assisting the Operating Committee with its job of developing reporting specifications that allow the CAT to achieve its

¹⁷⁵ See FINRA Letter at 3.

¹⁷⁶ Id. at 4.

¹⁷⁷ See Virtu Letter at 1.

¹⁷⁸ Id. at 2.

¹⁷⁹ Id. at 3–4.

¹⁸⁰ See SIFMA Letter at 1–2.

regulatory purpose.”¹⁸¹ The commenter states that the Participants have not taken Industry Members’ time and expenses into account when deciding to allocate two-thirds of the CAT costs to Industry Members and that “this omission is a flaw with the Participants’ decision to allocate two-thirds of the CAT costs to Industry Members and its inclusion would demonstrate that the Participants’ Executed Share Model does not provide for the equitable allocation of reasonable fees.”¹⁸²

In response to comments requesting further justification for the proposed allocation of one-third of the CAT fee to the CBB, CBS and Participant in a transaction, and for allocating two-thirds of the costs to Industry Members,¹⁸³ CAT LLC states that the proposed allocation satisfies the Exchange Act and that the proposed allocation recognizes the three primary roles in a transaction and assesses an equal fee to each role, taking a similar approach to the TAF, ORF and Section 31 fees, but also assigning a fee to the Participant and the buyer.¹⁸⁴ CAT LLC adds that the proposed two-thirds allocation to Industry Members reflects the greater level of CAT costs that are created by Industry Members as compared to Participants.¹⁸⁵ CAT LLC explains that Industry Members originate trading activity, which necessitates message traffic, and that CAT costs are dominated by data processing and storage costs, which are related to message traffic.¹⁸⁶ CAT LLC also states that the complexity of Industry Member business models impacts

¹⁸¹ Id. at 4.

¹⁸² Id. at 4–5.

¹⁸³ See FINRA Letter at 3, 4; SIFMA Letter at 4; Virtu Letter at 3–4.

¹⁸⁴ See Response Letter at 5.

¹⁸⁵ Id.

¹⁸⁶ Id.

the complexity of CAT reporting requirements, and that the processing and storage of complex reporting scenarios requires the use of complex algorithms, which result in substantial CAT data processing and storage costs.¹⁸⁷ In comparison, CAT LLC represents that Participant activity is not as complex.¹⁸⁸ Accordingly, CAT LLC believes that because the complexity of Industry Members’ business models contribute significantly to the costs of the CAT, it is “reasonable and equitable to require that Industry Members pay a substantial portion of those costs.”¹⁸⁹

CAT LLC further adds that allocating to Participants a greater percentage of CAT costs would be inequitable because: (1) there are 25 Participants and 1,100 Industry Members; (2) Participants only represent 4% of total CAT Reporter revenue while Industry Members represent 96%; and (3) certain individual Industry Members “have revenue in excess of some or all of the Participants.”¹⁹⁰

In response to the comment that the Proposed Amendment does not take into account internal costs incurred by Industry Members to comply with CAT reporting requirements,¹⁹¹ CAT LLC states that “there is no precedent for regulatory fees to be determined based on the cost of compliance of the regulated entity”¹⁹² and that it disagrees with the approach.¹⁹³ CAT LLC states that the CAT funding model is designed to assess fees to recover direct CAT costs

¹⁸⁷ Id. at 6.

¹⁸⁸ Id.

¹⁸⁹ Id.

¹⁹⁰ See Response Letter at 6.

¹⁹¹ See SIFMA Letter at 4–5.

¹⁹² See Response Letter at 9.

¹⁹³ Id.

and not Industry Members' costs to comply with CAT.¹⁹⁴ Additionally, CAT LLC argues that it is infeasible to accurately determine each Industry Member's compliance costs "without recordkeeping requirements and appropriate standards to determine expenses accurately."¹⁹⁵ CAT LLC adds that the Participants' own "substantial internal compliance costs" are not accounted for by the proposed Executed Share Model.¹⁹⁶

One commenter objects to the proposed allocation of costs among the Participants.¹⁹⁷ The commenter argues that the Proposed Amendment disproportionately allocates the increase in the Participants' allocation to FINRA instead of equitably among the Participants.¹⁹⁸ The commenter states that, compared to the prior proposal, FINRA's share would increase from 4.1% of total costs to 10.8%, whereas the share for options exchanges would decrease from 10.4% to 8.9% and the share for equities exchanges would increase modestly from 10.5% to 13.6%.¹⁹⁹ The commenter argues that the Proposed Amendment only addresses this increase in FINRA's allocation through a footnote stating that "FINRA's contribution would likely increase in comparison to prior models."²⁰⁰ The commenter adds that FINRA would have to fund any costs that are not recovered through TRF contractual arrangements through increases to FINRA member fees, and that the downstream impact of FINRA's allocation is not acknowledged in the

¹⁹⁴ Id.

¹⁹⁵ Id.

¹⁹⁶ Id. at n.46, at 10.

¹⁹⁷ See FINRA Letter at 5–8.

¹⁹⁸ Id.

¹⁹⁹ Id. at 5.

²⁰⁰ Id. at 5–6.

Proposed Amendment.²⁰¹ The commenter also questions the rationale in the Proposed Amendment that FINRA’s allocation is appropriate because of its “responsibility for securities traded in the over-the-counter market,” stating that the proposed funding model is supposed to recover the costs of CAT’s operation as a system and not the costs of using CAT data for regulatory purposes.²⁰²

In response to the comment objecting to the rationale provided for FINRA’s allocation in the Proposed Amendment,²⁰³ CAT LLC states that FINRA’s allocation is appropriate because it reflects FINRA’s role in transactions taking place on the over-the-counter market as allocations to exchanges under the Executed Share Model reflect their role in transactions taking place on their markets.²⁰⁴ CAT LLC also responds to the criticism that the increase in FINRA’s allocation was not made readily apparent by stating that the Proposed Amendment explained that each Participant’s contributions would change under the Executed Share Model, based on types and amounts of securities trading on-exchange or over-the-counter, and that the Proposed Amendment contained a chart listing illustrative fees for the Participants.²⁰⁵ CAT LLC also states that it could not definitively represent in the Proposed Amendment that FINRA’s contribution would always be increased over prior models in any given time period.²⁰⁶

201 Id. at 7.

202 Id. at 6.

203 See FINRA Letter at 6.

204 See Response Letter at 11.

205 Id.

206 Id.

Commenters also express concerns about the allocation of Prospective and Past CAT Costs.²⁰⁷ Two commenters question whether the allocation of Prospective CAT Costs is consistent with the Exchange Act.²⁰⁸ One commenter argues that the Participants have not provided a reasonable basis to conclude that the proposed two-thirds allocation to Industry Members and one-third allocation to Participants is appropriate in light of the statement in the Proposed Amendment²⁰⁹ that prospective operational costs are estimated to be \$110 million in a year and that certain Industry Members would pay almost \$12 million per year.²¹⁰

Another commenter states that the Participants are unable to show that the proposed methodology for Prospective CAT Costs is an equitable allocation of reasonable fees²¹¹ and therefore “do not address the fact that the Executed Share Model for Prospective CAT Costs allocates two-thirds of CAT costs to Industry Members for exchange transactions and more for off-exchange transactions.”²¹² The commenter states that Industry Members, who would be subject to two-thirds of Prospective CAT Costs under the Executed Share Model, already pay FINRA’s operating costs through regulatory fines and fees; therefore, Industry Members would additionally be indirectly assessed FINRA’s one-third CAT fee for off-exchange transactions.²¹³ Similarly, another commenter notes that the proposed allocation would result in two-thirds of

²⁰⁷ See SIFMA Letter at 4–6, 7; Virtu Letter at 3–5.

²⁰⁸ Id.

²⁰⁹ See Virtu Letter at 3.

²¹⁰ Id.

²¹¹ See SIFMA Letter at 4.

²¹² Id.

²¹³ Id.

CAT costs for exchange transactions being imposed on Industry Members, and that this amount would be higher for off-exchange transactions as FINRA would be assessed one-third as the venue fee and Industry Members would be indirectly assessed FINRA’s portion of CAT costs as they pay the entire costs of operating FINRA.²¹⁴

In response to the comment stating that Industry Members will be allocated more than two-thirds of Prospective CAT Costs since they pay FINRA’s operating costs through regulatory fees and fines,²¹⁵ CAT LLC states that “this argument inappropriately looks to how any fee is ultimately paid for, rather than the fee at issue.”²¹⁶ CAT LLC explains that under the proposed Executed Share Model, CAT fees would be the same whether a transaction took place over-the-counter or on an exchange and all Participants would be subject to the same fee treatment to avoid CAT fees becoming a competitive issue among the Participants.²¹⁷ CAT LLC states that each Participant, not just FINRA, will have to determine how it will pay its CAT fees and may pass-through to its members its own CAT fees through regulatory, trading or other fees.²¹⁸ CAT LLC asserts that “[a]ny review of how the Participants obtain their funds to pay CAT fees is beyond the scope of the CAT fee filing.”²¹⁹ CAT LLC adds that Industry Members may determine themselves to pass their CAT fees to their customers, as they do with Section 31 fees;

²¹⁴ See FINRA Letter at 4.

²¹⁵ See SIFMA Letter at 4.

²¹⁶ See Response Letter at 7.

²¹⁷ Id.

²¹⁸ Id. at 7–8.

²¹⁹ Id. at 8.

therefore, the Industry Member allocation of CAT costs could be passed entirely through to investors.²²⁰

Commenters also question whether the allocation of Past CAT Costs is consistent with the Exchange Act.²²¹ One commenter argues that Industry Members should not be assessed any fees related to the decision to employ Thesys Technologies, LLC as the Plan Processor or legal or consulting fees incurred by the Participants in the creation of the CAT NMS Plan.²²² The commenter states that the Proposed Amendment fails to provide how of much of the allocation to Industry Members is related to Thesys Technologies, LLC, and, therefore, the Participants have not demonstrated how the Executed Share Model is consistent with the Exchange Act.²²³ The commenter also argues that Industry Members were not subject to CAT obligations before the CAT NMS Plan's approval, had no input into the selection of the service providers, and that "it is difficult to envision how the Participants could demonstrate that such an allocation provides for the equitable allocation of reasonable fees due to the fact that the CAT NMS Plan did not exist during the period prior to its approval."²²⁴

In response to this comment,²²⁵ CAT LLC states that the Participants would be fully responsible for all CAT costs incurred from November 15, 2017 through November 15, 2018 due to the one-year delay in the start of reporting to the CAT, as well as costs related to the

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Id.

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See SIFMA Letter at 6, 7; Virtu Letter at 4.

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See SIFMA Letter at 7.

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Id.

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Id.

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See SIFMA Letter at 7.

conclusion of the relationship with the initial plan processor, which were \$14,749,362.²²⁶ CAT LLC adds that Section 11.1(c) of the CAT NMS Plan authorizes the imposition of fees on Industry Members for costs incurred prior to the date of approval of the CAT NMS Plan, including legal and consulting costs.²²⁷ CAT LLC states that it is therefore appropriate to recover these costs from Industry Members.²²⁸

Two commenters argue that the Proposed Amendment is deficient in justifying why Industry Members should have to pay two-thirds of Past CAT Costs because the Participants were solely responsible for the decision-making that created the costs.²²⁹ One commenter states that the Participants have mismanaged the CAT project “with cost overruns and problematic spending decisions”²³⁰ and that Industry Members “had absolutely no decision-making authority.”²³¹

In response to the comment arguing that Industry Members should not be responsible for Past CAT Costs for which they had no decision-making authority,²³² CAT LLC states that Industry Members are expected to contribute to the costs of CAT, including historical costs.²³³

²²⁶ See Response Letter at 28–29. CAT LLC explains that these costs could be reasonably identified and are more appropriately borne by the Participants. Id. at 29.

²²⁷ Id.

²²⁸ Id.

²²⁹ See SIFMA Letter at 6–7; Virtu Letter at 4.

²³⁰ See Virtu Letter at 4.

²³¹ Id.

²³² Id.

²³³ See Response Letter at 22.

Several commenters list additional concerns about the proposed cost allocation.²³⁴ One commenter states that fees should only be assessed on the sell-side, not the buy-side as Section 31 fees are assessed only on sellers.²³⁵ The commenter states that charging the buy-side would require expensive modifications to existing systems, and recommends either the inclusion of a cost-benefit analysis on charging both the buy-side and sell-side, or amending the Proposed Amendment to exclude the buy-side.²³⁶ Another commenter contrasts the Executed Share Model against existing transaction-based fee models, stating that the proposed model requires clearing firms to assess fees on buyers and sellers in transactions, unlike fees such as the Section 31 fee, which is only assessed on the seller in the transaction.²³⁷

In response to the comments questioning the assessment of CAT fees on the buy-side instead of solely on the sell-side,²³⁸ CAT LLC states that transaction-based fees that are charged to both sides of the transaction, such as the ORF and Participant-imposed trading fees, are regularly used in the industry.²³⁹

One commenter states that it is impossible to determine whether the allocation to Industry Members and investors is fair and equitable because the Proposed Amendment fails to include details about CAT operating costs.²⁴⁰ This commenter also states that the Proposed Amendment

²³⁴ See FINRA Letter at 4; Harris Letter at 11–13; Virtu Letter at 2–4; MMI Letter at 3, 4; SIFMA Letter at 9–10.

²³⁵ See MMI Letter at 4.

²³⁶ Id. at 3.

²³⁷ See SIFMA Letter at 9–10.

²³⁸ See MMI Letter at 3; SIFMA Letter at 9–10.

²³⁹ See Response Letter at 12.

²⁴⁰ See Virtu Letter at 4.

fails to address that costs on Industry Members may be passed on to investors, which would make it more expensive for investors to access the markets.²⁴¹ This commenter additionally questions why Industry Members and investors should be responsible for a CAT fee when the Participants are already funded by market participants through membership fees, registration and licensing fees, regulatory fees, and proprietary market data and market access fees.²⁴²

In response to the comment objecting to the imposition of a CAT fee on Industry Members because they are already subject to other Participant fees,²⁴³ CAT LLC states that Rule 613 and the CAT NMS Plan permit the assessment of a CAT-specific fee on Industry Members to contribute to the funding of the CAT.²⁴⁴ CAT LLC adds that “existing regulatory fees are not designed to address the substantial additional costs related to CAT.”²⁴⁵ CAT LLC also states that adopting a CAT-specific fee would be more transparent than a general regulatory fee designed to cover a variety of regulatory costs because CAT LLC would be fully transparent about the costs of the CAT.²⁴⁶

One commenter argues that the Proposed Amendment lacks adequate support for the cost allocation between equities and options.²⁴⁷ Another commenter expresses concerns about the Proposed Amendment’s treatment of options transactions and the proposed discount for OTC

²⁴¹ Id.

²⁴² Id. at 2–3.

²⁴³ See Virtu Letter at 2–3.

²⁴⁴ See Response Letter at 13–14.

²⁴⁵ Id. at 13.

²⁴⁶ Id. at 14.

²⁴⁷ See FINRA Letter at 4.

Equity Securities.²⁴⁸ For example, the commenter states that the proposed assignment of equivalent shares to options trades based on their nominal multiplier is arbitrary and that options trades would be unfairly burdened as fees collected for options would be twice the fees for equities.²⁴⁹ The commenter also states that the proposed 0.01 equivalent share factor for OTC Equity Securities is arbitrary²⁵⁰ and argues that a discount for OTC equities for identical-sized transactions in OTC and NMS stocks trading at the same price would unfairly subsidize the OTC market.²⁵¹

In response to the comment stating that the Proposed Amendment does not provide adequate support for the allocation of costs between equities and options,²⁵² CAT LLC states that the Executed Share Model would use equivalent executed share volume to “normalize options and equities in the calculation of fees.”²⁵³ Further, CAT LLC explains that the equivalent executed share volume approach recognizes the different trading characteristics of options, equities and OTC Equity Securities by counting transactions in each of these types of securities differently for purposes of calculating CAT fees.²⁵⁴

Commenters also question whether other aspects of the Proposed Amendment are consistent with the Exchange Act.²⁵⁵ One commenter states that the Proposed Amendment

²⁴⁸ See Harris Letter at 11–13.

²⁴⁹ Id. at 12.

²⁵⁰ Id. at 13.

²⁵¹ Id. at 12.

²⁵² See FINRA Letter at 4.

²⁵³ See Response Letter at 10.

²⁵⁴ Id.

²⁵⁵ See Virtu Letter at 2; FINRA Letter at 6–8; SIFMA Letter at 9–10; Harris Letter at 12.

subjects market participants to unfair discrimination because it fails to meet the requirements under the Exchange Act that CAT funding not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.²⁵⁶

Several commenters suggest the Proposed Amendment imposes a burden on competition.²⁵⁷ One commenter states generally that the Proposed Amendment fails to meet the requirements under the Exchange Act that CAT funding does not “impose any burden on competition not necessary or appropriate in furtherance of the purposes” of the Exchange Act.²⁵⁸ One commenter believes the Proposed Amendment would impose an undue burden on FINRA by shifting nearly all of the Participants’ increased share of the costs to FINRA.²⁵⁹ The commenter states that FINRA will need to fund the costs through increases to its member fees, and that the potential impacts on the industry arising from FINRA’s allocation are not addressed in the Proposed Amendment.²⁶⁰ Another commenter states that the Proposed Amendment imposes an undue burden on clearing firms by not sufficiently addressing the impact of the Executed Share Model on clearing firms, which would have to pay their share of costs as well as act as fee collectors, requiring them to develop new systems and processes to implement the model.²⁶¹ Finally, one commenter argues that the Proposed Amendment imposes an undue burden on the options markets, stating that proposed fees for options trades under the Executed

²⁵⁶ See Virtu Letter at 2.

²⁵⁷ See Virtu Letter at 2; FINRA Letter at 6–8; SIFMA Letter at 9–10; Harris Letter at 12.

²⁵⁸ See Virtu Letter at 2.

²⁵⁹ See FINRA Letter at 6–8.

²⁶⁰ Id.

²⁶¹ See SIFMA Letter at 9–10.

Share Model would always be greater on a risk-transferred basis than fees for equities trades because options trades transfer less risk than equity trades of the same number of shares in the underlying security.²⁶² The commenter states that fees collected for options would average twice the fees for equities and options trades would be unfairly burdened.²⁶³

In response to the comment stating that the Executed Share Model would impose an undue burden on FINRA,²⁶⁴ CAT LLC states that the Executed Share Model assesses CAT fees in the same manner regardless of whether a transaction is executed over-the-counter or on an exchange,²⁶⁵ and treats each Participant in the same manner as all have the same regulatory obligations under the Exchange Act and use CAT Data for the same regulatory purposes,²⁶⁶ and that the same treatment would avoid making CAT fees a competitive issue among the Participants.²⁶⁷ CAT LLC states that FINRA's fee is calculated based on substantial activity in the over-the-counter market, explaining that 34% of executed equivalent share volume in Eligible Securities took place in the over-the-counter market in 2021.²⁶⁸

In response to the comment arguing that the Proposed Amendment does not sufficiently address the impact of the Executed Share Model on clearing firms, which would have to act as fee collectors under the model and develop new systems and processes accordingly,²⁶⁹ CAT LLC

²⁶² See Harris Letter at 12.

²⁶³ Id.

²⁶⁴ See FINRA Letter at 6.

²⁶⁵ See Response Letter at 10.

²⁶⁶ Id.

²⁶⁷ Id. at 11.

²⁶⁸ Id.

²⁶⁹ See SIFMA Letter at 9.

states that “CAT LLC proposes to make use of clearing firms for fee collection as this proposal would make use of existing industry collection systems for efficiency and cost purposes.”²⁷⁰

B. Transparency

Several commenters discuss a lack of transparency in the Proposed Amendment into actual costs and anticipated costs.²⁷¹ Three commenters state that the Proposed Amendment is lacking detail about the makeup of the actual and anticipated costs that will be incurred in operating the CAT.²⁷² One commenter states that this lack of detail makes it impossible for Industry Members and the Commission to determine whether the proposed allocation to the Industry Members is fair and equitable.²⁷³ Another commenter argues that the level of CAT cost transparency is insufficient to allow Industry Members and the Commission to determine whether the costs incurred and fees imposed by the CAT are fair and reasonable.²⁷⁴

In response to comments arguing that a lack of transparency into CAT costs prevents Industry Members and the Commission from determining whether the proposed allocation, costs incurred and CAT fees satisfy the requirements of the Exchange Act,²⁷⁵ CAT LLC attests that “CAT LLC provides substantial cost transparency for CAT costs, including transparency above and beyond what is required, and more than other national market system plans.”²⁷⁶ CAT LLC

²⁷⁰ See Response Letter at 12.

²⁷¹ See Harris Letter at 14; MMI Letter at 3–5; Virtu Letter at 3–6, 7; SIFMA Letter at 8–9.

²⁷² See MMI Letter at 4–5; Virtu Letter at 4; SIFMA Letter at 8.

²⁷³ See Virtu Letter at 4.

²⁷⁴ See SIFMA Letter at 8.

²⁷⁵ See SIFMA Letter at 8, Virtu Letter at 4–7.

²⁷⁶ See Response Letter at 18.

states that the Commission does not need additional public cost transparency, such as the detailed cost information requested by the commenters, to evaluate the Proposed Amendment under the Exchange Act,²⁷⁷ arguing that “[k]nowledge of every minute detail about the inner operation of CAT LLC is not necessary to evaluate the proposed fee.”²⁷⁸ CAT LLC states that it makes publicly available, in accordance with Section 9.2(a) of the CAT NMS Plan, an audited balance sheet, income statement, statement of cash flows and statement of changes in equity, and has published on the CAT NMS Plan website consolidated annual financial statements from 2017 through 2021.²⁷⁹ Additionally, CAT LLC states that it voluntarily provides its annual operating budget and periodical updates to the budget on the CAT NMS Plan website.²⁸⁰ CAT LLC also states that the Commission and the Advisory Committee attend Operating Committee meetings, which discuss financial matters,²⁸¹ and adds that it has held webinars detailing CAT costs and alternative funding models.²⁸²

One commenter specifically states that the Proposed Amendment “lacks adequate information about the anticipated annual fees and costs to run the CAT for Industry Members and investors (i) to project with any degree of confidence what they will be obligated to pay each year or (ii) to assess the reasonableness of the projected costs... Furthermore, our understanding is that the budget for 2022 is not a fixed amount and could in fact result in significantly higher

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Id.

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Id.

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Id. at 19.

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Id.

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Id.

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See Response Letter at 19–20.

costs to the Industry Members and investors than projected. Without reasonable transparency into the costs and drivers of the costs, how will Market Participants and investors know how much expense to expect in 2023 or beyond?”²⁸³ Another commenter suggests that rate-setting be done on a rolling 12-month (or longer) basis rather than every year, to ensure that fees are more stable while producing financing costs and investment returns that the CAT can accommodate.²⁸⁴

In response to the comment questioning how market participants could budget for costs that significantly exceed projections,²⁸⁵ CAT LLC states that it provides budget updates on the CAT NMS Plan website to inform CAT reporters and investors of any budget changes.²⁸⁶

Another commenter states that “the level of CAT cost transparency continues to be insufficient...for example, the CAT operating budget provides only the following, high-level categories of technology costs related to actual and Prospective CAT Costs: (i) cloud hosting services; (ii) operating fees; (iii); CAIS operating fees; and (iv) change request fees...In addition, under general and administrative expenses, there is a category for public relations costs. Yet nowhere in the budget are these categories further defined or explained.”²⁸⁷ In addition, the commenter recommends that the CAT operating budget be subject to an annual public review process overseen by the Commission.²⁸⁸ The commenter suggests that the review process

²⁸³ See Virtu Letter at 4–5.

²⁸⁴ See Harris Letter at 14.

²⁸⁵ See Virtu Letter at 5.

²⁸⁶ See Response Letter at 20.

²⁸⁷ See SIFMA Letter at 8.

²⁸⁸ Id. at 8–9.

includes annual Commission approval of the CAT operating budget, similar to how the Commission’s annual budget is subject to Congressional review.²⁸⁹

In response to the comment recommending that the Commission oversee an annual public review process of the CAT operating budget,²⁹⁰ CAT LLC states that: (1) the suggested budget review process is not necessary or appropriate as CAT is a private entity subject to the requirements of the Exchange Act, not a governmental entity responsible to the taxpaying public; (2) CAT fees are already subject to review and public comment under Rule 608 of Regulation NMS and Section 19(b) of the Exchange Act and Rule 19b-4 thereunder; and (3) the Commission can request budget and financial information if it believes it is necessary for the Commission to review any CAT fee proposals.²⁹¹

One commenter states that they asked FINRA for more detailed information surrounding both historical and future operational costs, but were only provided high-level budget information.²⁹² The commenter states that the lack of detail on costs that the Industry Members are projected to bear causes the commenter to feel that they “are being asked to hand over a blank check with the amount to be filled in later.”²⁹³ The commenter argues that due to the lack of detail on the historical and projected costs, “the Executed Share Model lacks sufficient detail to allow the Commission to articulate a satisfactory explanation for its approval as required by

²⁸⁹ Id. at 9.

²⁹⁰ See SIFMA Letter at 8–9.

²⁹¹ See Response Letter at 21.

²⁹² See Virtu Letter at 7.

²⁹³ Id.

the D.C. Circuit’s opinion in Susquehanna Int’l Grp., LLP v. SEC, 866 F.3d 442, 443 (D.C. Cir. 2017).”²⁹⁴

Another commenter addresses the refund mechanism for excess collections, stating that the Proposed Amendment does not offer detail regarding the reconciliation of fees if actual CAT costs exceed or are less than the budgeted CAT costs.²⁹⁵ The commenter states that because CAT LLC operates as a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Code, it should not have the ability to keep profits by building up excessive reserves for fees paid in excess of actual expenses.²⁹⁶ The commenter asserts that when excessive fees are collected, there should be a refund mechanism,²⁹⁷ and without such a refund mechanism, the CAT may be able to collect excessive reserves from the fees paid by Industry Members that “would allow it, for example, to adopt some form of self-insurance to the extent it experienced a data breach.”²⁹⁸ The commenter believes that the Participants should provide greater transparency into what happens when excess fees are collected so that the Commission can understand the fee reconciliation process and determine whether the inclusion of a refund mechanism is necessary for the Proposed Amendment to meet the Exchange Act fee standards.²⁹⁹

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Id.

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See SIFMA Letter at 9.

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Id.

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Id.

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Id.

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Id.

In response to the comment,³⁰⁰ CAT LLC states that CAT fees collected in excess of costs would not be refunded to any CAT Reporters.³⁰¹ CAT LLC explains that it operates on a break-even process with fees to cover costs and an appropriate reserve.³⁰² According to CAT LLC, surpluses would not be distributed to the Participants as profits³⁰³ and would be treated as an operational reserve to offset future fees.³⁰⁴ CAT LLC further states that it would be required to recalculate the fee rate each year based on the budget for the upcoming year, and the budget would include excess fees collected the prior year.³⁰⁵ CAT LLC also notes that the fee rate would be subject to a mid-year review to determine whether an adjustment would be necessary and such reviews would take any excess fees collected from the prior period into consideration.³⁰⁶ With respect to a shortfall in CAT fees, CAT LLC explains that the operational reserve may be used in a shortfall, and that, in addition to recalculating the Fee Rate every year based on the upcoming year's budget (reflecting any shortfall in fees collected in the prior year), it may adjust the Fee Rate once per year to coordinate the fees with changes to the budget, actual CAT costs, or volume projections.³⁰⁷

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Id.

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See Response Letter at 21. CAT LLC also states that, with other fees, such as Section 31-related fees, there are no refunds for over or under-collection of fees; the fee rate would be adjusted going forward. Id. at 22.

302

Id.

303

CAT LLC states that it is organized as a business league to mitigate concerns that its earnings could be used to benefit the Participants. Id. at 20, 21.

304

Id.

305

Id. at 22.

306

See Response Letter at 22.

307

Id.

Two commenters express concerns about a lack of transparency in the Proposed Amendment with respect to Past CAT Costs.³⁰⁸ One commenter states that the Participants did not provide a detailed breakdown of historical costs that would allow one to examine the reasonableness of costs incurred.³⁰⁹ Rather, according to the commenter, the financial statements made available by the Participants “only include top-line, categorical expense information – not a detailed breakdown of costs and expenditures that would allow a third-party to make an objective determination about the reasonableness and appropriateness of costs incurred,” and lack customary related-party transaction disclosures and “disclosure of how much revenue and profit is generated by Plan Participants from services they provide to the CAT.”³¹⁰

In response to the comment stating that the Proposed Amendment does not provide customary related-party transaction disclosures,³¹¹ CAT LLC states that it has provided “substantial disclosures about CAT costs,” that it is organized as a business league, which prevents earnings from being used to benefit the Participants, and that FINRA CAT expenses are disclosed within the public financial statements and budget disclosed for the CAT.³¹²

With respect to Past CAT Costs, one commenter argues that the Participants are treating Industry Members unfairly by not providing them enough detail and transparency to understand the costs they are being asked to pay.³¹³ The commenter states that the proposed allocation of

³⁰⁸ See SIFMA Letter at 6–7; Virtu Letter at 6, 7.

³⁰⁹ See Virtu Letter at 6.

³¹⁰ Id.

³¹¹ Id. at 6, 7.

³¹² See Response Letter at 20.

³¹³ See SIFMA Letter at 6–7.

Past CAT Costs cannot be supported under the Exchange Act due to the lack of detail provided on such costs.³¹⁴ The commenter states that the Participants have not provided any detail or discussion of how they concluded that Excluded Costs are \$48,874,937 or how CAT costs prior to January 1, 2022 are \$337,688,610 (two-thirds of which Industry Members would be allocated under the Proposed Amendment).³¹⁵ The commenter adds, “in fact, the proposal contains no discussion of these cost amounts at all, or even a definition for the term ‘Excluded Costs.’”³¹⁶ According to this commenter, the Proposed Amendment’s “lack of discussion and information does not afford the Commission or the public the ability to evaluate whether the allocation of Past CAT Costs meets the Exchange Act fee standards.”³¹⁷

This commenter states that the Proposed Amendment lacks transparency into how much of the Industry Member cost allocation is related to “the Participant’s failed decision to initially designate Thesys Technologies, LLC as the CAT Plan Processor.”³¹⁸ The commenter states that, given this lack of transparency, the Participants have not demonstrated that the Executed Share Model is consistent with Exchange Act fee standards.³¹⁹ The commenter also argues that the Proposed Amendment lacks a discussion of how quickly the Participants plan to recoup Past CAT Costs, stating that if the Participants want to recoup the costs over a short period of time,

³¹⁴ Id. at 6.

³¹⁵ Id.

³¹⁶ Id.

³¹⁷ Id.

³¹⁸ Id. at 7.

³¹⁹ See SIFMA Letter at 7.

the result will be higher fees on Industry Members.³²⁰ The commenter believes that without this discussion, the Commission cannot evaluate whether the Executed Share Model meets Exchange Act fee standards.³²¹

In response to the comment about the lack of transparency into the amount of costs proposed to be allocated to Industry Members attributed to the selection of the initial plan processor,³²² CAT LLC states that the Participants would be fully responsible for all CAT costs incurred from November 15, 2017 through November 15, 2018 due to the one-year delay in the start of reporting to the CAT, which were \$48,874,937, as well as costs related to the conclusion of the relationship with Thesys Technologies, LLC, which were \$14,749,362.³²³

In response to the comment noting a lack of detail in the Proposed Amendment about how quickly the Participants intend to recoup Past CAT Costs,³²⁴ CAT LLC states that only Industry Members would be subject to fees to recover Past CAT Costs and details of those fees, including the periods over which the fees would be recovered, would be contained in the Participants' fee filings pursuant to Section 19 of the Exchange Act and Rule 19b-4 thereunder.³²⁵ CAT LLC adds that Past CAT Costs will be broken out into six periods and

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Id.

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Id.

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Id.

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See Response Letter at 28–29. CAT LLC explains that these costs could be reasonably identified and are more appropriately borne by the Participants. Id. at 29.

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See SIFMA Letter at 6, 7 and 9.

325

See Response Letter at 23. CAT LLC explains that it would be required to establish any Fee Rate, which would have to be approved by a majority of the Operating Committee. Id. at 33. Each of the Participants would file fee filings pursuant to Section 19(b) and Rule 19b-4 thereunder to establish the initial Fee Rate (for fees related to Past CAT Costs or going forward costs) for Industry Member CAT fees and for any changes to those

provides proposed allocations.³²⁶ CAT LLC also explains how the Fee Rate for Past CAT Costs would be calculated.³²⁷

CAT LLC explains that CAT fees would be designed to collect certain costs paid by the Participants prior to the effectiveness of the CAT fees pursuant to the Executed Share Model.³²⁸ CAT LLC states, “[t]he Past CAT Costs would include a portion of certain costs incurred prior to January 1, 2022 as well as costs incurred after January 1, 2022 but prior to the effectiveness of the CAT fees pursuant to the Executed Share Model. With regard to costs incurred prior to January 1, 2022, the Participants would remain responsible for 100% of \$48,874,937 of Excluded Costs and \$14,749,362 of costs related to the conclusion of the relationship with the Initial Plan Processor.”³²⁹ CAT LLC states that the actual costs prior to 2022 are detailed in audited financial statements provided on the CAT NMS Plan website.³³⁰

C. Input from Industry Members

Four commenters state that the Proposed Amendment lacks Industry Member input.³³¹ The commenters believe that the Participants and the industry should work together to develop a

initial rates. Id. at 33–34. CAT LLC states that it does not plan to submit an amendment to the CAT NMS Plan each time the Fee Rate is established or changed as the Participants are signatories to the Plan and would be required to comply with the Fee Rate pursuant to the process set forth in the Plan. Id. at 33.

³²⁶ Id. at 23–28. See also infra Section IV.H. for detail on the Past CAT Costs provided by CAT LLC.

³²⁷ See Response Letter at 23.

³²⁸ Id.

³²⁹ Id.

³³⁰ Id.

³³¹ See FINRA Letter at 8–9; Virtu Letter at 7; MMI Letter at 2, 5; SIFMA Letter at 2.

funding model.³³² Two commenters state that the Participants did not allow Industry Member involvement in the Proposed Amendment.³³³ Two commenters urge the Commission to encourage the Participants to work with the Industry Members on developing a funding model.³³⁴

In response to comments stating that Industry Members were not permitted to provide substantive input on the Executed Share Model,³³⁵ CAT LLC states that Industry Members and other market participants have been able to provide meaningful input into the funding model through participation on the Advisory Committee, which has had the opportunity to participate in Operating Committee meetings where funding proposals were discussed,³³⁶ webinars held by CAT LLC on CAT costs and potential alternative funding models, and through the notice and comment processes afforded by Rule 608 of Regulation NMS and Section 19 of the Exchange Act for the CAT NMS Plan, the current and prior proposed funding models and the related Participant fee filings.³³⁷

D. Comments Regarding Conflict of Interest

Several commenters assert that the Participants have a conflict of interest in assessing fees to fund the CAT.³³⁸ One commenter states that the Participants are “seeking to advance their

³³² Id.

³³³ See Virtu Letter at 7; SIFMA Letter at 2.

³³⁴ See MMI Letter at 2, 5; Virtu Letter at 7.

³³⁵ See FINRA Letter at 8–9; MMI Letter at 2.

³³⁶ The Response Letter states “CAT LLC notes that the Advisory Committee has not indicated support for the Executed Share Model or any other funding model.” See Response Letter at 32, n.115.

³³⁷ Id. at 31–32.

³³⁸ See FINRA Letter at 8; MMI Letter at 2; SIFMA Letter at 8; Virtu Letter at 1, 4.

own commercial interests at the expense of the Industry Members and the investors by proposing a fee structure that disproportionately shifts the costs for the CAT onto the Industry Members and the investors they serve.”³³⁹ Two commenters state that the Participants, with the exception of FINRA, are for-profit entities.³⁴⁰ One commenter states that certain Participants, voting as a bloc on the Proposed Amendment, in affiliated exchange groups, have substantially greater influence over the funding model and how fees will be charged.³⁴¹ The commenter also states that Industry Members cannot vote on CAT NMS Plan matters and that pursuant to this voting structure, the Operating Committee approved a funding model that allocates to FINRA a disproportionate share of CAT costs.³⁴² Similarly, another commenter argues that the Industry Members are not voting members of the Operating Committee, and thus have no way to direct the cost control efforts of the Participants or change their course if the cost control efforts prove to be unsuccessful.³⁴³

In response to the comment criticizing the voting structure of the Operating Committee and Industry Member representation on the Operating Committee,³⁴⁴ CAT LLC states that the voting structure and composition of the Operating Committee are outside of the scope of the

³³⁹ See Virtu Letter at 1.

³⁴⁰ See FINRA Letter at 8, Virtu Letter at 1.

³⁴¹ See FINRA Letter at 8.

³⁴² Id.

³⁴³ See SIFMA Letter at 8.

³⁴⁴ See FINRA Letter at 8.

Proposed Amendment.³⁴⁵ CAT LLC asserts that the composition of the Operating Committee is consistent with the Exchange Act.³⁴⁶

One commenter states that, while the Proposed Amendment addresses the fact that a clearing firm is free to pass its CAT fees through to its broker-clients, and the broker-clients are then free to pass them through to the end account, it is silent about whether the SROs may do the same.³⁴⁷ This commenter “supports the inclusion of clear language that SROs may not pass through CAT fees, either directly or as an increase to Section 31 fee recapture.”³⁴⁸ The commenter explains that if the Participants are permitted to pass through their fees, they may bear none of the costs or responsibilities for CAT.³⁴⁹ The commenter argues proposed funding model will be “more robust” if key participants have “skin in the game.”³⁵⁰ Another commenter argues that the Proposed Amendment fails to state that the costs imposed on Industry Members may ultimately be passed on to the investing public.³⁵¹ The commenter states that these would be substantial costs that will make it more expensive for investors to access capital markets.³⁵²

In response to comments expressing concern about passing through CAT fees, CAT LLC states that it supports the concept of pass-through fees because: (1) in adopting Rule 613, the Commission contemplated that the Participants would be able to recover the costs of funding the

³⁴⁵ See Response Letter at 33.

³⁴⁶ Id. at 32–33.

³⁴⁷ See MMI Letter at 2.

³⁴⁸ Id.

³⁴⁹ Id.

³⁵⁰ Id.

³⁵¹ See Virtu Letter at 4.

³⁵² Id.

central repository from their members;³⁵³ (2) the Commission stated in the CAT NMS Plan adopting release that Industry Members may seek to pass on to investors their costs of building and maintaining the CAT, which may include their costs as well as costs passed on to them by the Participants;³⁵⁴ (3) pass-through fees are commonly used, with Section 31 fees and the TAF and ORF fees being current examples of other fees that are regularly passed-through;³⁵⁵ (4) commenters on prior proposals suggested a model similar to the Section 31 fees that would allow the fee to be passed through to Industry Members and their customers;³⁵⁶ and (5) regulatory costs increase costs for all market participants and “[e]ven if such pass throughs were limited or prohibited, CAT costs would be distributed in other ways.”³⁵⁷

E. Alternative Models

Commenters also recommend that the Proposed Amendment pursue alternative funding models to the Executed Share Model.³⁵⁸ Two commenters suggest funding models using message traffic as the basis of fees.³⁵⁹ One commenter states that it had presented a message traffic alternative that would provide for more predictable fees than prior message traffic models and was based on prospective rates.³⁶⁰ However, the commenter states that some Industry Members believe that message-traffic models are too complex so the commenter is open to

³⁵³ See Response Letter at 15.

³⁵⁴ Id.

³⁵⁵ Id. at 15–16.

³⁵⁶ Id. at 17.

³⁵⁷ Id.

³⁵⁸ See FINRA Letter at 4, 8; Harris Letter at 4, 5, 8, 13; SIFMA Letter at 5–6.

³⁵⁹ See FINRA Letter at 8; Harris Letter at 4, 5, 8, 13.

³⁶⁰ See FINRA Letter at 8.

alternative models that use “workable cost proxy metrics” that are consistent with the Exchange Act.³⁶¹

In response to the comment presenting a message traffic model, CAT LLC states that executed share volume is an improvement on the message traffic model suggested by the commenter.³⁶² CAT LLC states that technology costs, such as data processing and storage, comprise the majority of CAT costs, not message traffic, and are driven by the CAT NMS Plan requirements, data complexity, and timelines.³⁶³ CAT LLC explains that, due to these costs and requirements and “other issues with the message traffic model and other considerations”³⁶⁴ it is focusing instead on the Executed Share Model instead of the message traffic and market share metrics used in the Original Funding Model.³⁶⁵

The other commenter states that a model that uses message traffic would result in more predictable fees than the Executed Share Model by producing less variable cash flow.³⁶⁶ The commenter further states that the Proposed Amendment dismisses the use of message traffic fees because they would require discounting certain activity to avoid fees that would adversely impact market making activity.³⁶⁷ However, the commenter states that not using the Message Traffic Model would result in an unfair and inefficient outcome.³⁶⁸ The commenter states that if

³⁶¹ Id.

³⁶² See Response Letter at 3.

³⁶³ Id. at 4.

³⁶⁴ Id. at 3.

³⁶⁵ Id. at 3–4.

³⁶⁶ See Harris Letter at 4.

³⁶⁷ Id. at 5.

³⁶⁸ Id.

options market participants do not pay all of the costs they impose on CAT NMS, entities in the equity markets would subsidize options market trading and options market entities would have little incentive to control their costs.³⁶⁹ The commenter recommends that the CAT collect a fixed fee per message from all entities creating messages, and collect a fee from traders that is proportional to the value of the underlying equity risk exchanged under the commenter's suggested Risk Transfer Model (in which users would be assigned funding in proportion to usage and the fees would be proportional to the dollar value of the risk transferred in each transaction).³⁷⁰ The commenter states that the funding model should allocate 75% of CAT funding to cost recovery fees based on message count, putting a substantial fraction of funding costs on equity options markets because they generate a disproportionate share of messages.³⁷¹ The commenter states that if message traffic is not used as a basis for fees, the funding model should instead use the commenter's suggested Risk Transfer Model.³⁷²

One commenter suggests an alternative allocation where the Participants and Industry Members would be allocated 50% of Prospective CAT Costs.³⁷³ The Industry Member allocation would take into account Industry Member funding of FINRA.³⁷⁴ The commenter states that this alternative would provide for an equal sharing of such CAT costs between Participants and Industry Members and would also appear to be justifiable under the Exchange Act fee standards

³⁶⁹

Id.

³⁷⁰

Id. at 13.

³⁷¹

Id.

³⁷²

See Harris Letter at 8, 13.

³⁷³

See SIFMA Letter at 5.

³⁷⁴

Id.

because it treats Participants and Industry Members the same from a cost allocation perspective.³⁷⁵

In response to the comment, CAT LLC states that the suggested allocation would not equitably allocate costs between and among Industry Members and Participants because “Industry Members have far greater financial resources than the Participants, and the complexity of Industry Members’ chosen business models contribute substantially to the costs of the CAT.”³⁷⁶ CAT LLC adds that the commenter did not justify why the suggested allocation would satisfy Exchange Act standards.³⁷⁷

A commenter suggests another alternative allocation where costs would be allocated to those Participants and Industry Members most directly responsible for the costs.³⁷⁸ The commenter states that, because Industry Members and their customers are directly responsible for creating the order and transactional data that is initially ingested into the CAT system, Industry Members should be responsible for the cost associated with this initial ingestion of the data into the CAT system.³⁷⁹ The commenter states that the Participants should be responsible for the costs associated with the stages after the data is initially ingested into the CAT system because the regulators directly control and benefit from these stages of the CAT system after ingestion.³⁸⁰ The commenter adds that the Participants and the Commission designed and

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Id.

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See Response Letter at 7.

377

Id.

378

See SIFMA Letter at 5–6.

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Id.

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Id.

imposed on the Industry Members a multitude of reports, fields, and data types spelled out in hundreds of pages of technical specifications and answers to Frequently Asked Questions for the sole benefit of the Participants and Commission, and as Industry Members bear the burden of producing the data in this format, the Participants should bear the costs of processing the complex data they required.³⁸¹ The commenter believes that this allocation would be consistent with the Exchange Act fee standard and the CAT NMS Plan funding principle that the allocation should “tak[e] into account the timeline for implementation of the CAT and distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon Company resources and operations.”³⁸²

In response to the comment,³⁸³ CAT LLC states that the suggested allocation method is impractical and would not result in an equitable allocation of reasonable fees.³⁸⁴ CAT LLC argues that the suggested allocation inaccurately limits Industry Members’ responsibility for CAT costs to ingestion costs when the complexity of Industry Members’ business models also results in significant data processing and storage costs.³⁸⁵ Further, CAT LLC disagrees with the commenter’s statement that Industry Members will not benefit from the CAT, explaining that the CAT is designed to benefit all market participants, with direct benefits to Industry Members.³⁸⁶

381 Id.

382 Id.

383 Id.

384 See Response Letter at 8.

385 Id.

386 Id. at 9.

F. Executed Share Model and the Cost Alignment Funding Principle

One commenter argues that the Executed Share Model is inconsistent with the cost alignment funding principle of the CAT NMS Plan.³⁸⁷ The commenter explains that the Participants are proposing to delete language in the CAT NMS Plan funding principles that requires the Participants to take into account “distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon Company resources and operations.”³⁸⁸ The commenter states that the Participants have concluded that the principle “is no longer relevant” and that it is not feasible to determine cost burden imposed by individual CAT Reporters due to the inter-related nature of CAT’s cost drivers.³⁸⁹ The commenter states that the Participants merely state that that executed share volume is “related to, but not precisely linked to” CAT cost-generation,³⁹⁰ and the commenter believes that this is inadequate to demonstrate that use of executed share volume is reasonable and equitable.³⁹¹ The commenter states that “the Proposal fails to establish a sufficient nexus between executed share volume and the technology burdens that generate CAT costs and fails to relate each reporter group’s allocation to the burden that each reporter group imposes on CAT.”³⁹² This commenter states that the Proposed Amendment “seeks to amend the core funding principles to align with an unjustified allocation methodology.”³⁹³ While the commenter is receptive to modifications to the

³⁸⁷ See FINRA Letter at 4.

³⁸⁸ Id.

³⁸⁹ Id.

³⁹⁰ Id.

³⁹¹ Id.

³⁹² Id.

³⁹³ See FINRA Letter at 5. The commenter states that the Executed Share Model instead

funding principles, it believes that changes to the core principles must be “well-reasoned and transparent and must continue to support the achievement of a fair and equitable outcome.”³⁹⁴

In response to the comment arguing that the Proposed Amendment fails to adequately link executed share volume to the technology burdens that create CAT costs,³⁹⁵ CAT LLC states that, although the Exchange Act does not require a CAT Reporter’s fees to be a proxy for its cost burden on the CAT,³⁹⁶ executed share volume is related to a CAT Reporter’s cost burden because “trading activity provides a reasonable proxy for cost burden on the CAT”³⁹⁷ as increased trading activity is correlated with increased cost burden because it impacts message traffic, data processing and storage.³⁹⁸ CAT LLC explains that it is not feasible to determine the exact cost burden of each CAT Reporter so trading activity is a reasonable proxy, and that transaction-based fees for Industry Members are commonly used by Participants since Industry Members generally effect transactions.³⁹⁹ CAT LLC adds that the commenter, FINRA, uses the TAF, a transaction-based trading activity fee, and that in approving the fee, the Commission found that transaction volume was sufficiently correlated to FINRA’s regulatory responsibilities.⁴⁰⁰ CAT LLC believes the same logic should apply to the Executed Share

places the greatest emphasis on the funding principle relating to the “ease of billing and other administrative functions,” favoring that principle over cost alignment.

³⁹⁴ Id.

³⁹⁵ Id. at 4.

³⁹⁶ See Response Letter at 3.

³⁹⁷ Id.

³⁹⁸ Id.

³⁹⁹ Id.

⁴⁰⁰ Id. at 4.

Model.⁴⁰¹ CAT LLC concludes that “executed share volume is an appropriate metric for allocating CAT costs among CAT Reporters”⁴⁰² and that the use of executed share volume would result in reasonable and equitably allocated CAT fees.⁴⁰³

G. Other Comments

The Commission also received comments on other topics related to the funding model.

One commenter states that the proposed funding model should have included an explanation of how executed share volume will be calculated and should explain which “trade” event reported by CAT Reporters will be used to determine executed share volume: MEOT, MEOF, or allocation.⁴⁰⁴ The commenter recommends that the executed share volume count only MEOT shares.⁴⁰⁵ The commenter suggests the Proposed Amendment include a set of “business rules” for calculating Executed Share Volume and that FINRA CAT be required to publish a detailed specification for calculating volume.⁴⁰⁶ The commenter states that Industry Members should have an opportunity to review both before the billing process.⁴⁰⁷

In response to the comment arguing that the Proposed Amendment lacks a description of the trades that would be used to calculate executed share volume,⁴⁰⁸ CAT LLC explains that the Proposed Amendment states that CAT fees will be assessed for trades reported to CAT by

⁴⁰¹ Id.

⁴⁰² See Response Letter at 3.

⁴⁰³ Id.

⁴⁰⁴ See MMI Letter at 3–4.

⁴⁰⁵ Id. at 3, n.2.

⁴⁰⁶ Id. at 3.

⁴⁰⁷ Id.

⁴⁰⁸ Id. at 3–4.

FINRA via the ADF, the ORF, and the TRF, and by the exchanges, and that the same transaction data in the CAT Data would be used to calculate the projected total executed equivalent share volume for the Fee Rate.⁴⁰⁹ CAT LLC adds that executed share volume would not be based on other trade-related data in the CAT, like MEOTs, and that Participant-reported trades, rather than MEOTs and other trade data in the CAT that is reported by Industry Members would be the “most efficient and effective source for calculating executed share volume.”⁴¹⁰

One commenter states that the Proposed Amendment should provide detail on how the clearing firm for the seller and/or buyer on each share traded will be determined and how calculations are proposed to be made if the buyer or seller operates with multiple clearing firms.⁴¹¹ The commenter also asks how the Participants would accurately identify the clearing firm in a transaction, providing as an example a CAT Reporter with multiple clearing firms.⁴¹²

In response to the comment asking how clearing firms would be identified in a transaction, especially when an Industry Member could have multiple clearing firms,⁴¹³ CAT LLC states that Section 6.4(d)(ii)(A)(2) of the CAT NMS Plan requires the reporting of the SRO- Assigned Market Participant Identifier of the clearing broker in an execution and that this information would be provided through the transaction data in CAT Data to identify the relevant clearing firm in a transaction.⁴¹⁴

⁴⁰⁹ See Response Letter at 18.

⁴¹⁰ Id.

⁴¹¹ See MMI Letter at 4.

⁴¹² Id. at 3, n.2.

⁴¹³ Id. at 4.

⁴¹⁴ See Response Letter at 12–13. CAT LLC also states that it will adopt policies, procedures, and practices regarding the billing and collection of fees in compliance with

Commenters also suggest protocols that would assist clearing firms and Industry Members in determining and validating CAT fees.⁴¹⁵ One commenter recommends that the Operating Committee and FINRA CAT be required to provide “detailed data to each clearing firm and to each CAT reporter so that fees may be validated,”⁴¹⁶ and suggests that the Operating Committee provide estimated fees per CAT Reporter to allow CAT Reporters to see the impact of the fees, and that these estimates should “indicate which clearing firm(s) would be charged for which portion(s) of the Reporter’s traded shares.”⁴¹⁷ The commenter also recommends that the proposed funding model “set forth parameters to avoid inefficiencies in the calculation of fees that would result in a mismatch between fees collected and fees required to cover the cost of operating the CAT . . . [and] clear procedures to avoid miscollection of fees.”⁴¹⁸ Similarly, another commenter states that, because under the Executed Share Model, clearing firms would be tasked with determining the CAT fees attributable to each client from a monthly lump sum based on transaction activity, the CAT should break-out for each clearing firm the CAT fees attributable to each of the clearing firm’s clients.⁴¹⁹ The commenter also suggests that the CAT break-out and share with each Industry Member the Industry Member’s share of monthly CAT costs.⁴²⁰

Section 11.1(d) of the CAT NMS Plan. Id. at 17.

⁴¹⁵ See MMI Letter at 4–5; SIFMA Letter at 10.

⁴¹⁶ See MMI Letter at 4–5.

⁴¹⁷ Id. at 4.

⁴¹⁸ Id. at 4–5.

⁴¹⁹ See SIFMA Letter at 10.

⁴²⁰ Id.

In response to the comments suggesting that CAT LLC provide detailed data to each clearing firm and Industry Member regarding Industry Member CAT fees and trading activity,⁴²¹ CAT LLC agrees that this data should be made available to clearing firms and their clients because “such data would allow clearing firms to determine which part of the CAT fees are attributable to their clearing clients and would facilitate any pass throughs of fees.”⁴²²

One commenter states that the Proposed Amendment fails to charge regulators for the costs of filling regulatory queries, which will result in overuse of the CAT system because regulators will not bear the costs they impose on the CAT.⁴²³ The commenter argues that this failure will make operating the CAT more expensive than it should be and will result in the inefficient allocation of query resources.⁴²⁴

Two commenters state that the Proposed Amendment lacks a cost-benefit analysis.⁴²⁵ One of the commenters argues that the Proposed Amendment fails to balance the regulatory benefits of CAT with the costs.⁴²⁶ The other commenter states that industry systems are currently set up to assess fees, such as Section 31 fees, on sellers, but not purchasers, and as a result, changing the existing industry-wide systems to charge both purchasers and sellers would “come not only at great cost to industry, but also introduce complexity due to change, without stated

⁴²¹ See MMI Letter at 4–5; SIFMA Letter at 10.

⁴²² See Response Letter at 12.

⁴²³ See Harris Letter at 6.

⁴²⁴ Id.

⁴²⁵ See Virtu Letter at 5; MMI Letter at 3.

⁴²⁶ See Virtu Letter at 4.

benefit.”⁴²⁷ This commenter believes that the Proposed Amendment should include a cost-benefit analysis of charging a “CAT fee on both the purchase and sale of securities, or alternatively be amended to a fee solely on sellers, to conform to existing frameworks and business practices.”⁴²⁸

One commenter agrees with the Proposed Amendment’s elimination of tiered pricing and fixed fees.⁴²⁹ This commenter states that these proposed changes would remove a system that is unnecessarily complex, creates “perverse incentives” in tiering and burdens competition because it increases the cost of entry for new entrants.⁴³⁰ This commenter also recommends two principles that could be used to develop a fair funding model: the Cost Recovery Principle and the Benefits Received Principle.⁴³¹

Two commenters argue that the Proposed Amendment’s statement that the Executed Share Model is consistent with existing fees is irrelevant.⁴³² One commenter states that the Participants should have explained how the existing fees are an appropriate model for CAT fees.⁴³³ Another commenter states that similarity to other transaction-based fees that have been approved by the Commission (e.g., TAF, Section 31, ORF) is not an adequate basis to show that the Executed Share Model is consistent with relevant standards; each proposed fee must be individually supported.⁴³⁴

⁴²⁷ See MMI Letter at 3.

⁴²⁸ Id.

⁴²⁹ See Harris Letter at 14.

⁴³⁰ Id.

⁴³¹ Id. at 3.

⁴³² See FINRA Letter at 4; SIFMA Letter at 4.

⁴³³ See FINRA Letter at 4.

⁴³⁴ See SIFMA Letter at 4.

In response to the comments who disagree with the use of existing fees as support for the Executed Share Model,⁴³⁵ CAT LLC explains that it cited the other transaction-based regulatory fees to demonstrate that there is precedent for the use of trading activity as a metric for calculating fees for a variety of regulatory activity,⁴³⁶ and that the Commission has found that such fees satisfy the requirements of the Exchange Act.⁴³⁷ CAT LLC states that the proposed CAT fees would operate similar to the precedent.⁴³⁸

H. Past CAT Costs

In its response, CAT LLC includes discussion and a table that breaks out the Past CAT Costs into six periods.⁴³⁹ The discussion and tables in this subsection are set forth as substantially prepared by CAT LLC.

CAT LLC states that Past CAT Costs would include costs related to the FAM periods as well as costs from prior to the first FAM period, and potentially costs after the FAM periods depending upon the effectiveness of the CAT fees pursuant to the Executed Share Model.⁴⁴⁰

⁴³⁵ See FINRA Letter at 3–4; SIFMA Letter at 4.

⁴³⁶ See Response Letter at 4.

⁴³⁷ Id. at 3–4.

⁴³⁸ Id. at 4. CAT LLC also states that the Original Funding Model relied on a transaction-based CAT fee as the Original Funding Model based fees for Participants on market share and therefore on executed transactions. Id. at 5, n.24.

⁴³⁹ Id. at 23–28. CAT LLC states that four of the six periods are the Financial Accountability Milestones (“FAM”) periods set forth in Section 11.6 of the CAT NMS Plan. Section 11.6 of the CAT NMS Plan establishes target deadlines for four implementation milestones (1) July 31, 2020 - Initial Industry Member Core Equity and Option Reporting; (2) December 31, 2020 - Full Implementation of Core Equity Reporting Requirements; (3) December 31, 2021 - Full Availability and Regulatory Utilization of Transactional Database Functionality; and (4) December 31, 2022 - Full Implementation of CAT NMS Plan Requirements. Id. at 23–24.

⁴⁴⁰ See Response Letter at 24. See also id. at 29–31 (discussing costs that CAT LLC is

Dates Cost Incurred	Period	Total CAT Costs*	Proposed 1/3 Allocation to CBBs*****	Proposed 1/3 Allocation to CBSs*****	Proposed 1/3 Allocation to Participants (and Previously Paid)*****
Prior to June 22, 2020	N/A	\$143,919,521**	\$47,973,174	\$47,973,174	\$47,973,174
June 22, 2020 – July 31, 2020	FAM Period 1	\$6,377,343	\$2,125,781	\$2,125,781	\$2,125,781
Aug. 1, 2020 – Dec. 31, 2020	FAM Period 2	\$42,976,478	\$14,325,493	\$14,325,493	\$14,325,493
Jan. 1, 2021 – Dec. 31, 2021	FAM Period 3	\$144,415,268	\$48,238,423	\$48,238,423	\$48,238,423
Jan. 1, 2022 – Dec. 31, 2022	FAM Period 4	Budgeted \$174,766,871***	TBD	TBD	TBD
Post Dec. 31, 2022	TBD****	TBD****	TBD***	TBD***	TBD***

*These costs exclude costs of \$14,749,362 related to the conclusion of the relationship with the Initial Plan Processor.

**These costs exclude \$48,874,937 of Excluded Costs.

seeking to recover during the first three periods of the FAM). The Commission notes that in May 2020, the Commission adopted amendments to the CAT NMS Plan that establish four Financial Accountability Milestones and set target deadlines by which these milestones must be achieved. These amendments also reduce the amount of any fees, costs, and expenses that the Participants may recover from Industry Members if the Participants fail to meet the target deadlines. See *supra* notes 15–18 and accompanying text. The Commission believes it is most appropriate to consider whether the Participants have met the target deadlines established for each Financial Accountability Milestone in connection with proposals related to the imposition of CAT fees on broker-dealers. For that reason, in issuing this Order, the Commission makes no determinations regarding whether the Participants have achieved the Financial Accountability Milestones set forth in Section 1.1 of the CAT NMS Plan or the potential application of fee reduction provisions set forth in Section 11.6 of the CAT NMS Plan.

***As 2022 remains in progress, these costs are budgeted costs, not actual. Past CAT Costs, however, would be based on actual costs, and the costs included would depend on the effective date of any CAT fees.

****Depending on the effective date of any CAT fees, costs from the period after December 31, 2022 may also be included in Past CAT Costs.

*****Total of proposed allocated costs may not agree to total CAT Costs due to rounding.

a. Costs Incurred Prior to June 22, 2020

Past CAT Costs include costs incurred by CAT prior to June 22, 2020 and already funded by the Participants. As noted above, the Past CAT Costs for the period prior to June 22, 2020 are \$143,919,521. Participants would remain responsible for one-third of this cost (which they have previously paid), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$47,973,174) and CBSs paying one-third (\$47,973,174). The following provides additional detail about the costs from this period.

- In accordance with Section 11.1(c) of the CAT NMS Plan, the Past CAT Costs include “fees, costs and expenses (including legal and consulting fees and expenses) incurred by the Participants on behalf of the Company prior to the Effective Date in connection with the creation and implementation of the CAT.” Specifically, Past CAT Costs include costs incurred from 2012 through November 20, 2016 related to the development of the National Market System Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail (“Selection Plan”) and the CAT NMS Plan as well as the Plan Processor selection process pursuant to the Selection Plan. The Past CAT Costs incurred during this

- period are \$13,842,881. Participants would remain responsible for one-third of this cost (which they have previously paid) (\$4,614,294), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$4,614,294) and CBSs paying one-third (\$4,614,294).
- The Past CAT Costs for this period include costs incurred after the formation of the CAT NMS Plan and prior to the selection of the Initial Plan Processor for the CAT, which covers the period from November 21, 2016 through April 5, 2017. The Past CAT Costs for this period are \$2,933,869. Participants would remain responsible for one-third of this cost (which they have previously paid) (\$977,956), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$977,956) and CBSs paying one-third (\$977,956).
 - The Past CAT Costs include a subset of the total costs incurred during the period in which Initial Plan Processor for the CAT was operating, which was April 6, 2017 through March 28, 2019. The total costs for this period are \$106,256,258. The Participants, however, have determined to exclude from the Past CAT Costs all costs incurred from November 15, 2017 through November 15, 2018 (“Excluded Costs”) due to the delay in the start of reporting to the CAT. The Excluded Costs are \$48,874,937. Accordingly, the Past CAT Costs for this period are \$57,381,321.⁴⁴¹ Participants would remain responsible for Excluded Costs as well as one-third of these Past CAT Costs (both of which they have previously paid) (\$16,291,646), and

⁴⁴¹ Section II(B)(3) below provides further discussion of costs related to the Initial Plan Processor. The Commission notes that the section cited is in the Response Letter at 28–29.

Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$16,291,646) and CBSs paying one-third (\$16,291,646).

- The Past CAT Costs include the costs incurred from the date of FINRA CAT’s selection as the Plan Processor on March 29, 2019 through June 21, 2020. The Past CAT Costs for this period are \$69,761,450. These costs are net of costs related to the conclusions of the relationship with the Initial Plan Processor of \$7,337,345.

Participants would remain responsible for costs related to the conclusion of the relationship with the Initial Plan Processor as well as one-third of these Past CAT Costs (both of which they have previously paid) (\$23,253,817), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$23,253,817) and CBSs paying one-third (\$23,253,817).

The following table breaks down the Past CAT Costs for the period prior to June 22, 2020 into the categories set forth in the audited financial statements for the Company:

Operating Expense	Total Past CAT Costs for Period Prior to June 22, 2020
Technology Costs*	\$105,044,520
Legal	\$19,674,463
Consulting	\$17,013,414
Insurance	\$880,419
Professional and administration	\$1,082,036
Public relations	\$224,669

* Capitalized developed technology costs are already included in “Technology Costs” and therefore the non-cash amortization of these capitalized developed technology costs of \$2,115,545 incurred during the period prior to June 22, 2020 have been appropriately excluded from “Operating Expense.”

b. CAT Costs incurred in Period 1

Past CAT Costs include costs incurred by CAT and already funded by Participants during FAM Period 1, which covers the period from June 22, 2020 – July 31, 2020. The Past CAT Costs for Period 1 are \$6,377,343. Participants would remain responsible for one-third of this cost (which they have previously paid) (\$2,125,781), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$2,125,781) and CBSs paying one-third (\$2,125,781). The following table breaks down the Past CAT Costs for Period 1 into the categories set forth in the audited financial statements for the Company:

Operating Expense	Total Past CAT Costs for Period 1
Technology Costs	\$5,681,670*
Legal	\$481,687
Consulting	\$137,209
Insurance	-
Professional and administration	\$69,077
Public relations	\$7,700

* Capitalized developed technology costs are already included in “Technology Costs” and therefore the non-cash amortization of these capitalized developed technology costs of \$362,121 incurred during Period 1 have been appropriately excluded from “Operating Expense.”

c. CAT Costs incurred in Period 2

Past CAT Costs include costs incurred by CAT and already funded by Participants during FAM Period 2, which covers the period from August 1, 2020 – December 31, 2020. Participants would remain responsible for one-third of this cost (which they have previously paid) (\$14,325,493), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$14,325,492.70) and CBSs paying one-third (\$14,325,492.70). The Past CAT Costs for Period 2 are \$42,976,478. The following table breaks down the Past CAT Costs for Period 2 into the categories set forth in the audited financial statements for the Company:

Operating Expense	Total Past CAT Costs for Period 2
Technology Costs*	\$38,221,127
Legal	\$2,766,644
Consulting	\$532,146
Insurance	\$976,098
Professional and administration	\$438,523
Public relations	\$41,940

* Capitalized developed technology costs are already included in “Technology Costs” and therefore the non-cash amortization of these capitalized developed technology costs of \$1,892,505 incurred during Period 2 have been appropriately excluded from “Operating Expense.”

d. CAT Costs incurred in Period 3

Past CAT Costs include costs incurred by CAT and already funded by Participants during FAM Period 3, which covers the period from January 1, 2021 – December 31, 2021. The Past CAT Costs for Period 3 are \$144,415,268. Participants would remain responsible for one-third of this cost (which they have previously paid) (\$48,238,423), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third (\$48,238,423) and CBSs paying one-third (\$48,238,423). The following table breaks down the Past CAT Costs for Period 3 into the categories set forth in the audited financial statements for the Company:

Operating Expense	Total Past CAT Costs for Period 3
Technology Costs	\$134,402,774
Legal	\$6,333,248
Consulting	\$1,408,209
Insurance	\$1,582,714
Professional and administration	\$595,923
Public relations	\$92,400

* Capitalized developed technology costs are already included in “Technology Costs” and therefore the non-cash amortization of these capitalized developed technology costs of \$5,108,044 incurred during Period 3 have been appropriately excluded from “Operating Expense.”

e. CAT Costs incurred in Period 4

Past CAT Costs would include CAT costs incurred by CAT and already funded by Participants (or to be funded by Participants) during FAM Period 4, which covers the period from January 1, 2022 – December 31, 2022 (depending on the completion of the FAM for Period 4), and incurred prior to the implementation of the CAT fees pursuant to the Executed Share Model. Participants would remain responsible for one-third of this cost (which they have previously paid), and Industry Members would be responsible for the remaining two-thirds, with CBBs paying one-third and CBSs paying one-third. Given that 2022 remains in progress, the following table provides budgeted (as opposed to actual) figures for costs for Period 4. The current budgeted CAT costs for Period 4 are \$174,766,871.

Operating Expense	Total Past CAT Costs for Period 4 Through June 2022
Technology Costs	\$163,609,591
Legal	\$7,162,084
Consulting	\$1,400,000
Insurance	\$1,820,122
Professional and administration	\$682,674
Public relations	\$92,400

Budgeted CAT costs for 2022 are \$174,766,871 and currently available on the CAT website;⁴⁴² actual CAT costs for 2022 will be available in audited financial statements for the Company after year end.

⁴⁴² See Consolidated Audit Trail, LLC 2022 Financial and Operating Budget, <https://www.catnmsplan.com/sites/default/files/2022-04/04.06.22-CAT-2022-Budget.pdf>).

V. Proceedings to Determine Whether to Approve or Disapprove the Proposed Amendment

The Commission is instituting proceedings pursuant to Rule 608(b)(2)(i) of Regulation NMS,⁴⁴³ and Rules 700 and 701 of the Commission’s Rules of Practice,⁴⁴⁴ to determine whether to disapprove the Proposed Amendment or to approve the Proposed Amendment with any changes or subject to any conditions the Commission deems necessary or appropriate. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the Proposed Amendment to inform the Commission’s analysis.

Rule 608(b)(2) of Regulation NMS provides that the Commission “shall approve a national market system plan or proposed amendment to an effective national market system plan, with such changes or subject to such conditions as the Commission may deem necessary or appropriate, if it finds that such plan or amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act.”⁴⁴⁵ Rule 608(b)(2) further provides that the Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.⁴⁴⁶ In the Notice, the Commission sought comment on the Proposed Amendment, including whether the Proposed Amendment is consistent with the Exchange

⁴⁴³ 17 CFR 242.608.

⁴⁴⁴ 17 CFR 201.700; 17 CFR 201.701.

⁴⁴⁵ 17 CFR 242.608(b)(2).

⁴⁴⁶ Id.

Act.⁴⁴⁷ In this order, pursuant to Rule 608(b)(2)(i) of Regulation NMS,⁴⁴⁸ the Commission is providing notice of the grounds for disapproval under consideration:

- Whether, consistent with Rule 608 of Regulation NMS, the Participants have demonstrated how the Proposed Amendment is necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act;⁴⁴⁹
- Whether the Participants have demonstrated how the Proposed Amendment is consistent with Section 6(b)(4)⁴⁵⁰ and Section 15A(b)(5),⁴⁵¹ of the Exchange Act, which require that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities” and that the rules of a national securities association “provide for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility or system which the association operates or controls;”

⁴⁴⁷ See Notice, *supra* note 5.

⁴⁴⁸ 17 CFR 242.608(b)(2)(i).

⁴⁴⁹ 17 CFR 242.608(b)(2).

⁴⁵⁰ 15 U.S.C. 78f(b)(4).

⁴⁵¹ 15 U.S.C. 78o-3(b)(5).

- Whether the Participants have demonstrated how the Proposed Amendment is consistent with Section 6(b)(5)⁴⁵² and Section 15A(b)(6),⁴⁵³ of the Exchange Act, which require that the rules of a national securities exchange or national securities association “promote just and equitable principles of trade... protect investors and the public interest; and [to be] not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”
- Whether the Participants have demonstrated how the Proposed Amendment is consistent with Section 6(b)(8)⁴⁵⁴ and Section 15A(b)(9)⁴⁵⁵ of the Exchange Act, which require that the rules of a national securities exchange or national securities association “do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act];”
- Whether the Participants have demonstrated how the Proposed Amendment is consistent with the funding principles of the CAT NMS Plan that are not proposed to be amended by the Proposed Amendment, which principles state that the Operating Committee shall seek, among other things, “to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company,”⁴⁵⁶ “to provide for ease of billing and other administrative

⁴⁵² 15 U.S.C. 78f(b)(5).

⁴⁵³ 15 U.S.C. 78o-3(b)(6).

⁴⁵⁴ 15 U.S.C. 78f(b)(8).

⁴⁵⁵ 15 U.S.C. 78o-3(b)(9).

⁴⁵⁶ See CAT NMS Plan, supra note 1, at Section 11.2(a).

functions,”⁴⁵⁷ “to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,”⁴⁵⁸ and “to build financial stability to support the Company as a going concern;”⁴⁵⁹

Under the Commission’s Rules of Practice, the “burden to demonstrate that a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder... is on the plan participants that filed the NMS plan filing.”⁴⁶⁰ The description of the NMS plan filing, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding.⁴⁶¹ Any failure of the plan participants that filed the NMS plan filing to provide such detail and specificity may result in the Commission not having a sufficient basis to make an affirmative finding that the NMS plan filing is consistent with the Exchange Act and the applicable rules and regulations thereunder.⁴⁶²

VI. Commission’s Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposed Amendment. In particular, the Commission invites the written views of interested persons concerning whether the Proposed Amendment is

⁴⁵⁷ Id. at Section 11.2(d).

⁴⁵⁸ Id. at Section 11.2(e).

⁴⁵⁹ Id. at Section 11.2(f).

⁴⁶⁰ 17 CFR 201.701(b)(3)(ii).

⁴⁶¹ Id.

⁴⁶² Id.

consistent with Section 11A, Section 6(b)(4), Section 6(b)(5), Section 6(b)(8), Section 15A(b)(5), Section 15A(b)(6), Section 15A(b)(9), or any other provision of the Exchange Act, or the rules and regulations thereunder, or the funding principles of the CAT NMS Plan. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 608(b)(2)(i) of Regulation NMS,⁴⁶³ any request for an opportunity to make an oral presentation.⁴⁶⁴ The Commission asks that commenters address the sufficiency and merit of the Participants' statements in support of the Proposed Amendment,⁴⁶⁵ in addition to any other comments they may wish to submit about the proposed rule changes. In particular, the Commission seeks comment on the following:

1. Commenters' views on whether the Executed Share Model is consistent with the funding principles in the CAT NMS Plan that are not proposed to be amended by the Proposed Amendment, which principles state that the Operating Committee shall seek, among other things, "to create transparent, predictable revenue streams for the Company that are aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company,"⁴⁶⁶ "to provide for ease

⁴⁶³ 17 CFR 242.608(b)(2)(i).

⁴⁶⁴ Rule 700(c)(ii) of the Commission's Rules of Practice provides that "[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views." 17 CFR 201.700(c)(ii).

⁴⁶⁵ See Notice, supra note 5.

⁴⁶⁶ See CAT NMS Plan, supra note 1, at Section 11.2(a).

of billing and other administrative functions,”⁴⁶⁷ “to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,”⁴⁶⁸ and “to build financial stability to support the Company as a going concern;”⁴⁶⁹

2. Commenters’ views on whether the Participants have demonstrated why it is consistent with the Exchange Act and Rule 608 of Regulation NMS for the Executed Share Model to allocate one-third of Prospective CAT Costs to Participants, one-third of Prospective CAT Costs to CBS and one-third of Prospective CAT Costs to CBBs;
3. Commenters’ views on potential alternative allocations of CAT costs to Industry Members and Participants, including the allocations considered, but rejected, by the Participants, and the alternative allocations suggested by commenters as discussed in this order;
4. Commenters’ views on whether a cost-based approach would be preferable to the proposed Executed Share Model. Commenters’ views on the Operating Committee’s statement that “[i]n light of the many inter-related cost drivers of the CAT (e.g., storage, message traffic, processing), determining the precise cost burden imposed by each individual CAT Reporter on the CAT is not feasible,”⁴⁷⁰ and that “trading activity provides a reasonable proxy for cost burden on the CAT,

⁴⁶⁷ Id. at Section 11.2(d).

⁴⁶⁸ Id. at Section 11.2(e).

⁴⁶⁹ Id. at Section 11.2(f).

⁴⁷⁰ See Notice, supra note 5, 87 FR at 33232.

and therefore is an appropriate metric for allocating CAT costs among CAT Reporters;”⁴⁷¹

5. Commenters’ views on how fees would be passed on to Industry Members and investors if all CAT costs were allocated to Participants; views on how this outcome would be different than under the Participants’ proposal; views on whether such an approach would benefit or harm efficiency, competition, and capital formation; and any views on whether there are other benefits or costs of adopting such an approach;
6. Commenters’ views on whether the proposed assessment of a CAT fee on FINRA would indirectly impose FINRA’s CAT fee on Industry Members, and therefore increase Industry Members’ share of CAT fees. If so, commenters’ views on whether this would result in a burden on competition for FINRA and for Industry Members, particularly those who trade OTC Equity Securities. Additionally, commenters’ views on whether FINRA should be assessed a CAT fee in the same manner as the national securities exchanges;
7. Commenters’ views on whether equities Participants and Industry Members that transact in equities would subsidize the activity of options Participants and Industry Members that transact in options under the proposal; views on how this subsidization would benefit or harm efficiency, competition, and capital formation; views on whether there are other benefits or costs of adopting such an approach; and any views (in detail) on whether there is an alternative approach that would be more beneficial to efficiency, competition, or capital formation;

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Id.

8. Commenters' views on whether the Participants have demonstrated why imposing CAT fees only on clearing brokers, instead of on all Industry Members is consistent with the Exchange Act and Rule 608 of Regulation NMS, and whether such allocation is an unreasonable burden on competition; commenters' views on the proposed imposition of the Industry Member portion of the CAT fee on both buy- and sell-side clearing brokers instead of solely on sell-side clearing brokers;
9. Commenters' views on whether the Participants should be required to change the Fee Rate when the budget or projected executed equivalent share volume changes;
10. Commenters' views on whether the Fee Rate should be permitted to be recalculated if the budgeted CAT costs or the projected total executed equivalent share volume of transactions change more than once in a year;
11. Commenters' views on whether it is necessary or appropriate in the public interest for the Proposed Amendment to permit the Fee Rate to potentially remain in effect even if the budget or projected executed equivalent share volume changes (both would be used to calculate the Fee Rate under the Executed Share Model) or if the Fee Rate should sunset after a year. For example, if the Commission temporarily suspends and institutes proceedings to determine whether to approve or to disapprove a Section 19(b) fee filing to institute a new Fee Rate, the old Fee Rate could remain in effect during the proceedings;
12. Commenters' views on whether the Proposed Amendment's statement that the Participants do not intend to file a new separate amendment to the CAT NMS

Plan for Participants each time a new Fee Rate is approved by the Operating Committee is consistent with the Exchange Act;

13. Commenters' views on whether the Proposed Amendment provides sufficient clarity and detail regarding the content and process relating to the fee filing pursuant to Section 19(b) and Rule 19b-4 thereunder with regard to Fee Rate changes applicable to Industry Members;
14. Commenters' views on the proposed Participant CAT fee, including views on its calculation; any views on whether the proposed fee raises any competitive issues; and any views on whether the proposed fee is consistent with the funding principles expressed in the CAT NMS Plan;
15. Commenters' views on the Proposed Amendment's methods of counting executed equivalent shares for NMS Stocks, Listed Options, and OTC Equity Securities, including the appropriateness of the discount to 1% for OTC Equity Security share volume;
16. Commenters' views on the Proposed Amendment's use of total executed equivalent share volume from the prior six months to determine a projected total for the year instead of using the past year's total executed equivalent share volume;
17. Commenters' views on the calculation of the Past CAT Costs Fee Rate, including any views on the relevant period to be used by the Operating Committee to calculate the Fee Rate for Past CAT Costs;

18. Commenters' views on whether it is appropriate to allocate one-third of Past CAT Costs to CBBs and one-third of Past CAT Costs to CBSs. Commenters' views on the composition and transparency of Past CAT Costs to be so allocated;
19. Commenters' views on whether the Participants have demonstrated why allowing the Participants to be responsible for one-third of Past CAT Costs and to collect two-thirds of Past CAT Costs from clearing brokers on a pro rata basis, rather than based on the executed equivalent share volume of transactions in Eligible Securities, is consistent with the Exchange Act and Rule 608 of Regulation NMS;
20. Commenters' views on whether the Proposed Amendment contains sufficient detail on how CAT fees for Past CAT Costs would be allocated to Participants on a pro rata basis;
21. Commenters' views on whether it is appropriate to use transaction activity from the past month to determine the CAT fee for Past CAT Costs (that were incurred months or years before);
22. Commenters' views on the Proposed Amendment's requirement that CAT fees related to Past CAT Costs would be collected from current Industry Members and not Industry Members that were active at the time when the Past CAT Costs were incurred;
23. Commenters' views on the transparency of the Proposed Amendment and the level of detail made available into Past CAT Costs and Prospective CAT Costs;
24. Commenters' views on the costs that would be included in the proposed definition of Budgeted CAT Costs in the Proposed Participant Fee Schedule; commenters'

views on whether the Proposed Amendment needs a discussion of how the budget will be reconciled to fees;

25. Commenters' views on the decision to use total budgeted costs for the CAT for the relevant year to calculate fees related to Prospective CAT Costs for Participants and Industry Members, rather than costs already incurred; and views on the treatment of any surpluses;
26. Commenters' views on how any inherent conflicts of interest may be addressed in the Proposed Amendment;
27. Commenters' views on whether, and if so how, the Proposed Amendment would affect efficiency, competition or capital formation;
28. Commenters' views on whether modifications to the Proposed Amendment, or conditions to its approval, would be necessary or appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, to remove impediments to, and perfect the mechanisms of, a national market system, or otherwise in furtherance of the purposes of the Exchange Act;
29. Commenters' views on the proposed changes to the funding principle in Section 11.2(b) of the CAT NMS Plan to eliminate the requirement that the Operating Committee shall seek to take into account distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon Company resources and operations;

30. Commenters' views on the proposed changes to the funding principle in Section 11.2(c) of the CAT NMS Plan, including the elimination of requirements related to a tiered fee structure in which the fees charged are based on market share for Participants and Industry Members based on message traffic, and comparability between or among CAT Reporters;
31. Commenters' views on the proposed changes to Section 11.1(d) of the CAT NMS Plan to remove references to the assignment of tiers in order to conform the Plan to the Executed Shares Model; and
32. Commenters' views on the proposed changes to Section 11.3 of the CAT NMS Plan in order to conform the Plan to the Executed Shares Model by revising the manner in which fees to recover costs will be assessed on Participants and Industry Members.

The Commission also requests that commenters provide analysis to support their views, if possible.

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to. Please include File Number 4-698 on the subject line.

Paper comments:

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number 4-698. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the Participants' principal offices. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number 4-698 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁷²

J. Matthew DeLesDernier,
Deputy Secretary.

⁴⁷² 17 CFR 200.30-3(a)(85).