

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-97193; File No. 4-698)

March 24, 2023

Joint Industry Plan; Order Approving an Amendment to the National Market System Plan  
Governing the Consolidated Audit Trail

I. Introduction

On September 8, 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”):<sup>1</sup> 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., Miami International Securities Exchange LLC, MEMX 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 “Participants” or “SROs”) filed with the Securities and Exchange Commission (“Commission”) pursuant to

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<sup>1</sup> The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Securities Exchange Act of 1934 (“Exchange Act”) and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016). The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company (“CAT LLC”) formed under Delaware state law through which the Participants conduct the activities of the CAT. 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. The latest version of the CAT NMS Plan is available at <https://catnmsplan.com/about-cat/cat-nms-plan>.

Section 11A(a)(3) of the Exchange Act,<sup>2</sup> and Rule 608 thereunder,<sup>3</sup> a proposed amendment (“Proposed Amendment”) to the CAT NMS Plan that would authorize CAT LLC to revise the Consolidated Audit Trail Reporter Agreement (“Reporter Agreement”) and the Consolidated Audit Trail Reporter Agent Agreement (“Reporter Agent Agreement” and collectively with the Reporter Agreement, the “Reporter Agreements”) by: (1) removing the arbitration provision from each agreement and replacing it with a forum selection provision (the “Forum Selection Provision”) which would require that any dispute regarding CAT reporting be filed in a United States District Court for the Southern District of New York (the “SDNY”), or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court within the First Judicial Department; and (2) revising the existing choice of law clause to provide that any dispute will be governed by federal law (in addition to New York law) (the “Choice of Law Provision”).<sup>4</sup> The proposed plan amendment was published for comment in the Federal Register on September 28, 2022.<sup>5</sup> On December 22, 2022, the Commission instituted proceedings to determine whether to approve or disapprove the Proposed Amendment.<sup>6</sup> This order approves the Proposed Amendment.

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<sup>2</sup> 15 U.S.C 78k-1(a)(3).

<sup>3</sup> 17 CFR 242.608.

<sup>4</sup> See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, Commission, dated September 8, 2022.

<sup>5</sup> See Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Securities Exchange Act Release No. 95874 (Sept. 22, 2022), 87 FR 58876 (“Notice”). The Commission received no comments on the Proposed Amendment.

<sup>6</sup> See Securities Exchange Act Release No. 96568, 87 FR 80204 (Dec. 29, 2022).

## 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 (the “CAT” or “CAT System”) that would capture customer and order event information for orders in NMS securities.<sup>7</sup> On November 15, 2016, the Commission approved the CAT NMS Plan.<sup>8</sup> On August 29, 2019, the Operating Committee for CAT LLC approved a Reporter Agreement and a Reporter Agent Agreement that would limit the total liability of CAT LLC, the Participants and the Plan Processor to a CAT Reporter<sup>9</sup> for any calendar year to the lesser of the total of fees paid by the CAT Reporter to CAT LLC for the calendar year in which the claim arose or five hundred dollars. The Reporter Agreements also included a mandatory arbitration provision. The Participants required each Industry Member<sup>10</sup> to execute a CAT Reporter Agreement prior to reporting data to CAT. On April 22, 2020, prior to the commencement of initial equities reporting for Industry Members, the Securities Industry and Financial Markets Association (“SIFMA”) filed, pursuant to Sections 19(d) and 19(f) of the Exchange Act, an application for review of actions taken by CAT LLC and the Participants (the “Administrative Proceedings”). SIFMA alleged that by requiring Industry Members to execute the Reporter Agreement as a prerequisite to submitting data to the CAT, the Participants improperly prohibited or limited SIFMA members with respect to access to the CAT System in

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<sup>7</sup> 17 CFR 242.613.

<sup>8</sup> See supra note 1.

<sup>9</sup> CAT Reporter means 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). See CAT NMS Plan at Section 1.1.

<sup>10</sup> Industry Member means a member of a national securities exchange or a member of a national securities association. See CAT NMS Plan at Section 1.1.

violation of the Exchange Act.<sup>11</sup> On May 13, 2020, the Participants and SIFMA reached a settlement and terminated the Administrative Proceedings, allowing Industry Members to report data to the CAT pursuant to Reporter Agreements that do not contain a limitation of liability provision. Since that time, Industry Members have been transmitting data to the CAT.<sup>12</sup>

On December 18, 2020, the Participants proposed to amend the CAT NMS Plan to authorize CAT LLC to revise the Reporter Agreements to insert limitation of liability provisions that would: (1) provide that CAT Reporters and CAT reporting agents accept sole responsibility for their access to and use of the CAT System, and that CAT LLC makes no representations or warranties regarding the CAT System or any other matter; (2) limit the liability of CAT LLC, the Participants, and their respective representatives to any individual CAT Reporter or CAT reporting agent to the lesser of the fees actually paid to CAT for the calendar year or five hundred dollars; (3) exclude all direct and indirect damages; and (4) provide that CAT LLC, the Participants, and their respective representatives shall not be liable for the loss or corruption of any data submitted by a CAT Reporter or CAT reporting agent to the CAT System (the

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<sup>11</sup> See Notice, supra note 5, at 58877.

<sup>12</sup> For a more detailed description of the background for the Proposed Amendment, see Notice, supra note 5, at 58876-78. See also Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Securities Exchange Act Release No. 90826 (Dec. 30, 2020), 86 FR 591 (Jan. 6, 2021).

“Limitation of Liability Amendment”).<sup>13</sup> On October 29, 2021, the Commission disapproved the Limitation of Liability Amendment.<sup>14</sup>

On May 20, 2022, the Participants proposed to amend the CAT NMS Plan to authorize CAT LLC to revise the Reporter Agreements to insert limitation of liability provisions that would: (1) replace the arbitration provisions in the agreement with a forum selection provision, which would require the parties to the Reporter Agreements to bring any action in the SDNY, or, if there is no basis for federal subject matter jurisdiction, in the New York State Supreme Court within the First Judicial Department and, if it is permitted, seek assignment to the Commercial Division; (2) revise the governing law provision to provide that the governing law for all disputes will be United States federal law and the laws of the state of New York; (3) include a provision requiring the parties to the Reporter Agreements to waive their right to a jury trial, with no exception; (4) include a provision stating that CAT LLC and the Plan Processor disclaim any, and make no, representations or warranties, regarding the CAT System or any other matter pertaining to the Reporter Agreements, including any representation or warranty relating to merchantability, quality, fitness for a particular purpose, compliance with applicable laws, non-

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<sup>13</sup> See Limitation of Liability Amendment, 86 FR at 593. The Commission received comments objecting to the proposal on the grounds that it is unfair for Industry Members to be liable for breaches because the Participants control the CAT System, insulating the Participants from liability would result in the Participants de-prioritizing security, and that it would be inappropriate to effectively prohibit Industry Members from pursuing claims against CAT LLC and the Participants even in cases where they engage in willful misconduct, gross negligence, bad faith, or criminal acts. The Commission also received two response letters from the Participants. Comments received in response to the Limitation of Liability Amendment can be found at <https://www.sec.gov/comments/4-698/4-698.htm>.

<sup>14</sup> See Securities Exchange Act Release No. 93484 (Oct. 29, 2021), 86 FR 60933 (Nov. 4, 2021) (“Limitation of Liability Disapproval Order”).

infringement, title, and sequencing, timeliness, accuracy or completeness of information.<sup>15</sup> On September 6, 2022, prior to the end of the 90-day period provided for in Exchange Act Rule 608(b)(2)(i),<sup>16</sup> the Participants withdrew that proposed amendment.<sup>17</sup>

### III. Description of the Proposal

The Participants now propose to amend the CAT NMS Plan to authorize CAT LLC to revise the Reporter Agreements by: (1) removing the arbitration provision from each agreement and replacing it with the Forum Selection Provision, which would require that any dispute regarding CAT reporting be filed in the SDNY, or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court within the First Judicial Department; and (2)

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<sup>15</sup> See Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Securities Exchange Act Release No. 95031 (Jun. 3, 2022), 87 FR 35273. Comments received in response to the proposal can be found at <https://www.sec.gov/comments/4-698/4-698-b.htm>. The Commission received comments objecting to the disclaimer of warranties provision, arguing, among other things, that the disclaimer of warranties provision functions as a limitation of liability provision, would disincentivize investment in adequate security for the CAT system, and that Participants should not be able to disclaim warranties and representations regarding the CAT System, which they operate and control. One commenter also objected to the jury waiver provision stating that every case is different, and while some cases might present complicated legal and factual issues that are best resolved by judges, other cases might present simpler and more straightforward issues that are better suited for a jury trial. See Letter from Ellen Greene, Managing Director, Equity and Options Market Structure, and Kevin M. Carroll, Managing Director and Associate General Counsel, Office of General Counsel, SIFMA, to Vanessa Countryman, Secretary, dated June 30, 2022, available at <https://www.sec.gov/comments/4-698/4698-20133896-303830.pdf>, at 3. The Commission received one comment letter on the proposal that did not relate to the substance of the proposal.

<sup>16</sup> 17 CFR 242.608(b)(2)(i).

<sup>17</sup> See Securities Exchange Act Release No. 96102 (Oct. 19, 2022), 87 FR 64294 (Oct. 24, 2022).

revising the existing choice of law clause to provide that any dispute will be governed by federal law (in addition to New York law).<sup>18</sup>

In support of the Forum Selection Provision, the Participants believe that a court is the proper forum to resolve claims concerning CAT reporting, including claims relating to potential technical issues, system failures, and data breaches.<sup>19</sup> The Participants state that litigating in court is appropriate to address claims, which likely will involve regulatory issues, including the doctrine of regulatory immunity,<sup>20</sup> and complex legal and factual issues involved in cyber litigation.<sup>21</sup> The Participants state that litigating in court would allow parties to rely on precedent that has been developed to address those issues when resolving disputes that could potentially involve parties seeking substantial damages.<sup>22</sup>

The Participants state that courts offer important procedural mechanisms that would help resolve claims related to CAT reporting fairly and efficiently.<sup>23</sup> The Participants state that adjudicating disputes in the courts would permit consolidation and joinder of claims, as federal and New York State rules of civil procedure provide mechanisms for consolidation and joinder,

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<sup>18</sup> See Notice, supra note 5, at 58876.

<sup>19</sup> Id. at 58878. The Participants note that in the aftermath of high-profile data breaches, plaintiffs have brought common law claims of breach of contract and negligence as well as claims based on various federal statutes including the Stored Communications Act, the Federal Wiretap Act, and the Computer Fraud and Abuse Act. Id.

<sup>20</sup> Id. at 58879. The Participants note that comments letters in connection with the limitation of liability amendment “demonstrated an assumption and understanding that” assessments of immunity would be decided by the courts. Id.

<sup>21</sup> See id. at 58879. The Participants state that assessing potential defenses will likely require a tribunal to resolve complex issues that implicate the Participants’ status as self-regulatory organizations and the Commission’s oversight of the CAT. Id. at 58878.

<sup>22</sup> Id. at 58879. The Participants also state that litigating disputes in court would promote the development of precedent to guide Industry Members’ and Participants’ conduct. Id.

<sup>23</sup> See id. at 58876.

as well as permit the use of class actions for certain disputes.<sup>24</sup> The Participants state that in arbitration, in contrast, the ultimate decision on consolidation is made by the arbitrator.<sup>25</sup> Further, the Participants state that the AAA Commercial Arbitration rules are silent on joinder, and parties have faced complications in joining parties to an arbitration claim when they are non-signatories, which could be significant since claims arising out of CAT reporting might be related incidents that impact Industry Members and other market participants (e.g., retail investors).<sup>26</sup> The Participants state that for those reasons, if the arbitration provisions remain in the Reporter Agreements, cases arising out of the same facts or involving the same legal issues might result in different outcomes and damage awards, and potentially create inconsistent rules.<sup>27</sup>

The Participants further state that adjudicating claims related to CAT in court provides parties with appellate rights and rules governing the discovery process and admissibility of evidence.<sup>28</sup> They state that direct appellate review is largely absent in arbitration and that the rules relating to discovery and evidence are more limited.<sup>29</sup>

As for the forum itself, the Participants state that the SDNY and the New York State Supreme Court are venues with extensive experience adjudicating matters involving federal securities laws, market structure, and cybersecurity.<sup>30</sup> The Participants state that the Second Circuit, and the SDNY, have experience with securities and financial regulation matters, data

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<sup>24</sup> Id. at 58878-79.

<sup>25</sup> Id. at 58879.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Id. at 58879-80.

<sup>29</sup> Id.

<sup>30</sup> Id. at 58880-81.

breaches and cybersecurity incidents, and have authored opinions regarding the scope of regulatory immunity.<sup>31</sup> The Participants also state that New York State courts also focus on complex cases and have addressed the scope of regulatory immunity.<sup>32</sup> They state that New York is a convenient venue for the parties since the two largest securities exchanges, several Participants, and the most prominent Industry Members by trading volume are located in New York.<sup>33</sup>

The Participants state that they are modifying the governing law provision, which currently states that disputes arising out of the Reporter Agreements will be governed by New York State law, to clarify that they will be governed by both federal law and New York State law.<sup>34</sup> The Participants state that the reason for this change is that such claims could involve issues of federal law because CAT LLC was created pursuant to federal law and is subject to a federal regulatory regime.<sup>35</sup>

The Participants propose to implement the Proposed Amendment by making the revised CAT Reporter Agreements effective upon Commission approval of the Proposed Amendment, without requiring CAT Reporters and CAT reporting agents to re-sign the agreements.<sup>36</sup> The

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<sup>31</sup> Id.

<sup>32</sup> Id.

<sup>33</sup> Id. The Participants note that the existing Reporter Agreements are governed by New York law and provide that any claim must be commenced in New York (i.e., in the current arbitration provision). They also note that all dates and times referenced in the Reporter Agreements are set to New York time. Id.

<sup>34</sup> Id. at 58881.

<sup>35</sup> Id. The Participants proposed that “[t]he Operating Committee shall have authority in its sole discretion to make non-substantive amendments to the forum selection provision and governing law provision in the Consolidated Audit Trail Reporter Agreement and the Consolidated Audit Trail Reporting Agent Agreement.” Id. at 58882.

<sup>36</sup> Id. No commenters disputed the proposal’s assertion that the amendments would be effective without re-signing.

Commission understands that the Participants will require future CAT Reporters to sign revised CAT Reporter Agreements that include the Forum Selection Provision and the Choice of Law Provision prior to reporting to the CAT.

#### IV. Discussion

##### A. The Applicable Standard of Review

Under Rule 608(b)(2) of Regulation NMS, 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.<sup>37</sup> Under Rule 700(b)(3)(ii) of 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 that are applicable to NMS plans is on the plan participants that filed the NMS plan filing."<sup>38</sup> The Commission shall disapprove a national market system plan or proposed amendment if it does not make such a finding.<sup>39</sup>

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<sup>37</sup> 17 CFR 242.608(b)(2).

<sup>38</sup> 17 CFR 201.700(b)(3)(ii). "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 a NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans." Id.

<sup>39</sup> 17 CFR 242.608(b)(2). "Approval or disapproval of a national market system plan, or an amendment to an effective national market system plan (other than an amendment initiated by the Commission), shall be by order." Id.

For the reasons described below, the Commission believes that the Proposed Amendment is consistent with Rule 608 of Regulation NMS, and 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.<sup>40</sup>

B. Forum Selection Provision

The Commission believes it is appropriate for the Participants to amend the CAT NMS Plan to require the CAT Reporter Agreements to provide that the courts, instead of arbitration, be the forum to resolve claims regarding the CAT Reporter Agreements. In the Proposed Amendments, the Participants reasonably identified several potential benefits of litigation. As the Participants note, certain potential claims arising out of CAT reporting, including technical issues, system failures, and data breaches, are likely to impact multiple parties, and requiring arbitration may result in actions involving the same common questions of law or fact or arising out of the same occurrence being brought piecemeal and lead to inconsistent outcomes.<sup>41</sup> Resolving such claims through litigation may allow for the consolidation and/or joinder of claims, and class actions depending on the nature of any claims that arise, which could lead to more efficient and fair resolution of potential disputes.<sup>42</sup> In addition, issues of regulatory immunity may arise in some disputes and resolving those disputes through litigation would also allow for resolution of those issues through the application of precedent that has been developed by the courts.<sup>43</sup> At the same time, the Commission recognizes that there are advantages to

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<sup>40</sup> 17 CFR 242.608(b)(2).

<sup>41</sup> Notice, supra note 5, at 58878-79.

<sup>42</sup> Id.

<sup>43</sup> Id. at 58879.

arbitration, which is used throughout the securities industry and in some circumstances may offer a quicker and less costly way to resolve disputes. Nonetheless, in the context of the Proposed Amendment before us for consideration, the Commission believes that there are reasonable grounds for choosing to resolve potential claims arising out of CAT reporting through litigation in court rather than arbitration, and particularly in light of the lack of any commenter objection to the Proposed Amendment, the Participants' choice to mandate that such disputes be resolved through court litigation rather than mandate that they be resolved through arbitration is appropriate.<sup>44</sup>

The Commission also believes that the Participants' proposal to amend the CAT NMS Plan to designate the SDNY and, in the absence of federal subject matter jurisdiction, New York state courts, in the Forum Selection Provision is appropriate. The Participants identify reasonable grounds for those choices. As the Participants observe, both the SDNY and New York state courts provide for robust rules and procedures relating to consolidation, joinder, class actions, discovery, and direct appellate review. As stated by the Participants "the SDNY routinely handles complicated securities matters with broad implications for the national financial markets," and the Second Circuit in particular has significant experience determining the rights and remedies of parties following data breaches. Further, both the Second Circuit and New York state courts have addressed the scope of regulatory immunity, an issue that could arise

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<sup>44</sup> The Participants proposed that "[t]he Operating Committee shall have authority in its sole discretion to make non-substantive amendments to the forum selection provision and governing law provision in the Consolidated Audit Trail Reporter Agreement and the Consolidated Audit Trail Reporting Agent Agreement." *Id.* at 58882. It is the Commission's understanding that a non-substantive amendment is one that does not affect the rights or obligations of any parties, including a CAT Reporter or the Commission. Accordingly, the Commission does not believe this provision is inconsistent with the Exchange Act.

in any disputes in light of the Participants' status as self-regulatory organizations.<sup>45</sup> The Commission also notes that no commenters objected to the Participants' choice.

For the reasons noted above, the Commission believes that the Participants' proposal to amend the CAT NMS Plan to authorize CAT LLC to modify the CAT Reporter Agreements to include the Forum Selection Provision is appropriate in the public interest, for the protection of investors and the maintenance of fair and orderly markets, and to remove impediments to, and perfect the mechanisms of, a national market system or otherwise in furtherance of the purposes of the Exchange Act.<sup>46</sup>

### C. Governing Law Provision

The Commission believes it is reasonable for the Reporter Agreements to provide that any matters between CAT LLC and either a CAT Reporter or a CAT Reporting Agent, will be governed by federal law and the laws of the State of New York, instead of just by the laws of the State of New York. The Commission agrees with the Participants' assertion that because CAT LLC was created pursuant to federal law, claims between Participants and other parties, including CAT Reporters and Industry Members, could involve issues of federal and not just state law.<sup>47</sup> The Proposed Amendment thus reasonably specifies that both sources of law would apply. For that reason, the Commission believes that this aspect of the proposal is 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.<sup>48</sup>

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<sup>45</sup> Id. at 58880-81.

<sup>46</sup> 17 CFR 242.608(b)(2).

<sup>47</sup> Notice, supra note 5, at 58881.

<sup>48</sup> 17 CFR 242.608(b)(2).

V. Impact on Efficiency, Competition, and Capital Formation

In determining whether to approve a proposed amendment, and whether such amendment is in the public interest, Rule 613 requires the Commission to consider the potential effects of the proposed amendment on efficiency, competition and capital formation.<sup>49</sup> The Commission has reviewed the arguments about such effects put forth by the Participants and independently analyzed the likely effects of the Proposed Amendment on efficiency, competition, and capital formation. The Commission received no comment letters addressing the economic impact of the Proposed Amendment. The Commission believes that the Forum Selection Provision could modestly improve efficiency and competition, and that the Proposed Amendment will otherwise have no material impact on efficiency, competition, and capital formation.

A. Efficiency

The Commission believes the Forum Selection Provision could modestly reduce potential inefficiencies in dispute resolution regarding the CAT Reporter Agreements. As discussed above,<sup>50</sup> the Forum Selection Provision requires that any dispute regarding CAT reporting be filed in the SDNY, or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court within the First Judicial Department. Court mechanisms for consolidating claims, joinder of claims, and class actions may facilitate coordination among the possibly large number of parties impacted by technical issues, system failures, and data breaches and reduce some legal costs involved in dispute resolution. The precedent generated by disputes resolved through courts may also slightly reduce aggregate legal costs by minimizing the need for the adjudicator and litigants to completely reevaluate recurring legal issues every time that they arise. However,

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<sup>49</sup> 17 CFR 242.613(a)(5).

<sup>50</sup> See Section IV.A, supra.

these potential reductions in aggregate legal costs and information technology costs may be partially offset by increases in legal costs for disputes that involve individual CAT Reporters and CAT LLC. Legal costs for these bilateral disputes may increase because resolution via arbitration can incur fewer legal costs than resolution via courts.<sup>51</sup>

The Commission believes the Governing Law would not affect efficiency because it does not produce a substantive change in the application of the federal laws of the United States and the laws of the state of New York to legal matters involving CAT LLC and CAT Reporters.

#### B. Competition

The Commission believes the Forum Selection Provision will have small positive effects on competition within markets with businesses subject to CAT Reporter Agreements. The Forum Selection Provision, via courts' mechanisms for dispute consolidation, may reduce individual firms' legal expenses during disputes with CAT LLC because dispute related legal costs may then be shared by multiple parties. If these legal expenses are shared approximately equally among involved firms, then small firms may benefit slightly more from courts' mechanisms for dispute consolidation than large firms because legal costs will decrease more as a fraction of revenue for small firms than large firms. But, the benefits of dispute consolidation for small firms may be partially reduced by greater legal costs for bilateral disputes with CAT LLC where legal costs cannot be shared by several CAT Reporters and resolution via arbitration may require lower legal costs.<sup>52</sup> The Forum Selection Provision may also make the outcomes of disputes between CAT Reporters and CAT LLC slightly more predictable because legal precedent and previous court cases may provide information regarding disputes possible

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<sup>51</sup> See Section IV.A, supra.

<sup>52</sup> See id.

outcomes. Less uncertainty about the outcomes of disputes involving CAT LLC and CAT Reporters may slightly reduce financing costs for firms by reducing uncertainty about the effect of dispute resolution outcomes on small firms' profitability. The reduction in financing costs may be greater for smaller firms where the effects of disputes' outcomes may have relatively large effects on these firms' profitability.

The Commission believes the Governing Law Provision will not materially affect competition because requiring federal law and the laws of the state of New York to govern all matters between the CAT LLC and the CAT Reporters will not have an economically significant effect on the legal costs, or legal outcomes, or other factors that might affect competition among businesses subject to CAT Reporter Agreements.

#### C. Capital Formation

The Commission believes the Forum Selection Provision and Governing Law Provision will not materially affect capital formation. The proposed amendment relates to dispute resolution between Industry Members and Participants and is thus unlikely to materially impact capital formation because the proposed amendment does not generally affect publicly traded firms' cost of capital, does not affect factors influencing investors' investments in publicly traded companies, and the previously discussed potential efficiency and competition benefits of the proposed amendment are too small in magnitude to affect the prices at which CAT Reporters offer trading services and products to investors.

#### VI. Conclusion

For the reasons set forth above, the Commission finds that the Proposed Amendment is consistent with the requirements of the Exchange Act and the rules and regulations thereunder ,

and in particular, Section 11A of the Exchange Act,<sup>53</sup> and Rule 608(b)(2),<sup>54</sup> thereunder in that the Proposed Amendment is 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.

IT IS THEREFORE ORDERED, pursuant to Section 11A of the Exchange Act,<sup>55</sup> and Rule 608(b)(2) thereunder,<sup>56</sup> that the Proposed Amendment (File No. 4-698) be, and hereby is, approved.

By the Commission.

Sherry R. Haywood,  
Assistant Secretary.

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<sup>53</sup> 15 U.S.C. 78k-1.

<sup>54</sup> 17 CFR 242.608(b)(2).

<sup>55</sup> 15 U.S.C. 78k-1.

<sup>56</sup> 17 CFR 242.608.