

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In The Matter of:

The Application of SECURITIES INDUSTRY AND
FINANCIAL MARKETS ASSOCIATION,

For Review of Action Taken by CAT LLC and Certain
Self-Regulatory Organizations

Admin. Proc. File No. 3-19766

**DECLARATION OF MICHAEL SIMON WITH RESPECT TO CONSOLIDATED
AUDIT TRAIL, LLC'S AND
PARTICIPANTS' OPPOSITION TO SIFMA'S MOTION TO STAY**

I, Michael Simon, pursuant to 28 U.S.C. § 1746, declare as follows:

Introduction and Personal Background

1. I have served as Chairman of the Consolidated Audit Trail, LLC (“CAT LLC”) Operating Committee, in a non-voting capacity, since 2017.

2. I started my legal career as a staff attorney at the U.S. Securities and Exchange Commission (the “Commission”) in 1978. By the time I left the Commission in 1986, I was an Assistant Director of Market Regulation with responsibility for clearing and oversight of over-the-counter trading and the U.S. National Market.

3. In 1987 and 1988, I served as Assistant General Counsel at National Securities Clearing Corporation, the then-largest securities clearing corporation in the U.S. Thereafter, I worked at Milbank LLP as an associate, senior associate, and counsel from 1988-1998, where I maintained a securities regulatory practice including as primary outside counsel to the New York Stock Exchange.

4. For eighteen years thereafter, from 1998 to 2016, I worked as the General Counsel, Chief Regulatory Officer and Secretary of the International Securities Exchange (“ISE”), one of

the leading options exchanges. Beginning in 2012, I represented ISE in connection with its involvement with the Consolidated Audit Trail (“CAT”), including acting as an ISE representative on the working groups that developed and created the CAT NMS Plan, which the Commission ultimately approved. When Nasdaq purchased ISE in 2016, I coordinated Nasdaq’s CAT activities, first as an employee of Nasdaq and thereafter as a consultant. While employed as a Nasdaq consultant, the CAT LLC Operating Committee elected me as its Chairman.

5. From 2017 to the present, I have been an Independent Senior Advisor to Deloitte & Touche LLP (“Deloitte”), where my work has focused on serving as Chairman of the Operating Committee. The Operating Committee is composed of representatives from the participants (“Participants”) and is responsible for managing and supervising all aspects of the business of CAT LLC.

6. As Chairman, I have helped oversee and coordinate the development of the CAT System. I interact daily with members of the Operating Committee and regularly liaise with CAT LLC’s outside counsel (including Wilmer Cutler Pickering Hale and Dorr LLP and Pillsbury Winthrop Shaw Pittman LLP) and Deloitte, which has provided, among other things, project management services to CAT LLC, the Commission staff and the CAT’s plan processor.

7. In my capacity as Chairman, I set Operating Committee agendas, moderate Operating Committee meetings, and fulfill tasks prescribed by the Operating Committee, including reviewing and signing documents on behalf of the Operating Committee, and facilitating all other committee, subcommittee or working group meetings where appropriate as determined by the Operating Committee.

8. Given my extensive involvement with the CAT project since 2012, I have knowledge of many aspects of the project, including the reporter agreement that is the subject of this proceeding.

9. I respectfully submit this declaration with respect to CAT LLC's and the Participants' May 6, 2020 Opposition to the Securities Industry and Financial Markets Association's ("SIFMA") Motion to Stay SRO Action Pending Commission Review of SIFMA's Application Pursuant to Exchange Act Sections 19(d) and 19(f) (the "Application").

The Formation of Consolidated Audit Trail, LLC

10. On May 6, 2010, in less than one hour of trading, the major market indexes dropped by over 9% (i.e., about \$1 trillion in market value) before rebounding, in what came to be called the "Flash Crash."

11. In response, on July 11, 2012, the Commission adopted Rule 613 of Regulation NMS, requiring certain self-regulatory organizations ("SROs") to develop a "Consolidated Audit Trail" that would allow regulators, including the Commission and the individual SROs, to efficiently and accurately track and analyze activity throughout the U.S. securities markets.

12. Because Rule 613 provides only a broad framework for the CAT, the Participants were required to collectively submit a plan to design, implement, and operate the CAT for the Commission's approval.

13. In order to effectuate a collective plan, on November 29, 2016, the SROs formed CAT NMS, LLC, and subsequently, on August 29, 2019, CAT LLC. As of August 29, 2019, the Participants have collectively operated and managed the CAT exclusively through CAT LLC.

CAT LLC Engaged Industry Members and SIFMA to Provide Comments on the CAT NMS Plan

14. Over the two-year period of developing the CAT NMS Plan, the SROs sought feedback from industry members (“Industry Members”) as well as SIFMA and other interested stakeholders. Among other methods of soliciting feedback, CAT LLC made numerous requests for comments from Industry Members, hosted a series of public events to address inquiries, and created a comprehensive website that addressed all aspects of the plan.¹

15. The Participants submitted to the Commission a proposed NMS plan on September 30, 2014. Before the Commission could approve that initial plan, on February 27, 2015, the SROs submitted a proposed plan that amended and replaced the initially submitted plan. The Commission approved the proposed CAT NMS Plan on November 15, 2016 as well as subsequent amendments on January 11, 2017, May 22, 2017, July 21, 2017, October 31, 2017, January 10, 2018, and August 29, 2019.

Industry Members Advised on the CAT NMS Plan Through the Development Advisory Group

16. Before the plan was submitted to the Commission for approval, to create additional opportunities for Industry Members to provide feedback on the contents of the plan, the Participants created a committee comprised of a cross-section of Industry Members (the “Development Advisory Group” or “DAG”) to formally advise the Participants regarding the CAT NMS Plan.

17. The DAG’s members included broker-dealers of varying sizes, as well as SIFMA and two other industry trade associations. The DAG effectively functioned as a forum for Industry

¹ The website is available at <http://catnmsplan.com/>.

Members and their trade associations to raise issues for discussion with the Participants regarding all aspects of the CAT NMS Plan.

18. The Participants held thirty-six meetings with the DAG before the CAT NMS Plan was submitted for Commission approval on February 27, 2015. Such meetings included discussions regarding, among other topics, the CAT NMS Plan's proposed method of funding for the CAT. The proposed CAT NMS Plan submitted for approval by the Commission took into account the extensive feedback received from Industry Members.

Industry Members Advised on the CAT Through the Advisory Committee

19. After approval of the CAT NMS Plan, the Participants continued to seek feedback from Industry Members and SIFMA regarding the implementation, operation, and administration of the CAT. One way in which the Participants obtained this feedback was by the creation of an advisory group of Industry Members and other interested constituencies (the "Advisory Committee"). The Advisory Committee was comprised of broker-dealers of varying sizes and types of business, an individual who maintains a securities account, an academic, and institutional investors.

20. Advisory Committee members were entitled to, and did, attend every meeting of CAT LLC's Operating Committee (with the exception of those that were held in executive session).

21. Advisory Committee members were also entitled to, and did, participate in meetings of a CAT subcommittee and working groups. While in attendance at Operating Committee, subcommittee, or working group meetings, Advisory Committee members could, and did, express their views on matters pending before these various groups.

The Reporter Agreement Is Shared with the Advisory Committee and Approved by the Operating Committee

22. On or around August 29, 2019, the Participants shared with the Advisory Committee a draft reporter agreement (the “Reporter Agreement”) that memorializes the methods through which Industry Members must transmit data to the CAT. The Operating Committee approved the Reporter Agreement and a CAT Reporting Agent Agreement by unanimous written consent on August 29, 2019.

The Participants Attempt to Resolve a Disagreement With SIFMA Regarding the Reporter Agreement

23. Following the approval of the Reporter Agreement by the Operating Committee, SIFMA raised concerns with the agreement’s limitation of liability provision (“Limitation of Liability Provision”), particularly in relation to a potential CAT data breach. To the best of my recollection, at no time during these discussions did SIFMA raise any concerns regarding the Reporter Agreement’s indemnification provision.

24. The Participants attempted to engage in a constructive dialogue with SIFMA in an effort to address SIFMA’s concerns regarding the Limitation of Liability Provision. For example, in February and March 2020, representatives from the Participants met with SIFMA to discuss SIFMA’s concerns regarding liability in the event of a CAT data breach.

25. The Participants also made several substantive proposals to revise the Reporter Agreement to address SIFMA’s concerns. One of those proposals involved the creation of a reserve to cover damages in the event of a data breach, which would be funded collectively by the Participants and Industry Members. Additionally, on March 27, 2020, CAT LLC provided SIFMA with two alternative “term sheets”, each of which contained a potential resolution of the parties’ disagreement regarding liability issues.

26. Throughout these discussions, the Participants stated that they were willing to consider any reasonable proposals from Industry Members. However, SIFMA did not offer any substantive proposals to address the parties' underlying disagreement on liability issues and instead stated that it would only accept an agreement without any limitation of liability provision.

Cybersecurity Measures of the CAT

27. The CAT NMS Plan contains specific requirements that CAT LLC must implement to ensure the cybersecurity of the CAT. In approving the CAT NMS Plan, the Commission approved CAT LLC's proposed cybersecurity policies, procedures, systems and controls. *See* CAT NMS Plan, Appendix D.

28. Following the approval of the CAT NMS Plan, CAT LLC designed and implemented a cybersecurity system that satisfied every requirement in the Commission-approved CAT NMS Plan.

29. Additionally, CAT LLC has designated a Chief Information Security Officer responsible for creating and enforcing policies, procedures, and control structures regarding data security.

30. The cyber policies, procedures, systems and controls implemented by the CAT's plan processor (i.e., FINRA CAT) are routinely assessed by an external auditor and subject to examination by the Commission's Office of Compliance Inspections and Examinations.

31. Prior to SIFMA's filing of this Application, the Participants offered (at the Commission's suggestion) to facilitate a meeting with security officials from the Participants and the Industry Members to discuss CAT's security.

Industry Members Withdraw Testing Agreements

32. Between September 2019 and May 5, 2020, over 1,300 Industry Members executed the CAT Reporter Agreement containing the limitation of liability provision. To enable the approximately 60 Industry Members who did not execute the Reporter Agreement to begin testing their connectivity to CAT while continuing negotiations with the Participants regarding liability issues, in December 2019, CAT LLC created a Limited Testing Acknowledgment Form. The Limited Testing Acknowledgment Form enables Industry Members to test with obfuscated data (i.e., as opposed to production data).

33. On or around March 31, 2020, one Industry Member rescinded its execution of the Limited Testing Acknowledgment Form and indicated that it intended to submit production data to the CAT without executing either the Limited Testing Acknowledgment Form or the Reporter Agreement. Shortly thereafter, nine additional Industry Members rescinded their Limited Testing Acknowledgment Forms.

34. As of May 6, 2020, four of the ten Industry Members that rescinded their Limited Testing Acknowledgment Forms re-executed the form, enabling those Industry Members to again test connectivity to the CAT System using obfuscated data.

35. In total, approximately 1,200 Industry Members are required to report equity data to the CAT on June 22, 2020.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date: May 6, 2020


Michael Simon