

**VIA EMAIL (rule-comments@sec.gov)**

November 15, 2022

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

Re: File Number 4-698 – Order Instituting Proceedings to Determine Whether to Approve or Disapprove an Amendment to the National Market System Plan Governing the Consolidated Audit Trail

Dear Ms. Countryman:

On May 13, 2022, the Consolidated Audit Trail, LLC (“CAT LLC” or “Company”), on behalf of the Participants<sup>1</sup> in the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”), filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed amendment to the CAT NMS Plan (“Proposed Amendment”).<sup>2</sup> On August 30, 2022, the SEC instituted proceedings, under Rule 608(b)(2)(i) of Regulation NMS, 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.<sup>3</sup> In response to the SEC’s order instituting proceedings (“OIP”), CAT LLC submits this letter to propose a partial amendment of the Proposed Amendment and to respond to issues discussed in the OIP. The Operating Committee has approved the proposed amendments to the Proposed Amendment as set forth in Section II of this letter in accordance with the CAT NMS Plan. CAT LLC notes that the responses set forth in Section III of the letter represent the consensus of the Participants, but that all Participants may not fully agree with each response set forth in this letter.

## **I. Executive Summary**

CAT LLC proposes to amend the CAT NMS Plan<sup>4</sup> to implement a revised funding model (“Executed Share Model”) for the consolidated audit trail (“CAT”) and to establish a fee

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<sup>1</sup> The twenty-five Participants of the CAT NMS Plan are: 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. (“FINRA”), 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.

<sup>2</sup> Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission (May 13, 2022).

<sup>3</sup> Securities Exchange Act Rel. No. 95634 (Aug. 30, 2022), 87 Fed. Reg. 54558 (Sept. 6, 2022) (“OIP”).

<sup>4</sup> The Limited Liability Company Agreement of Consolidated Audit Trail, LLC is the CAT NMS Plan. Unless otherwise defined herein, capitalized terms are defined as set forth in the CAT NMS Plan and the Proposing Release.

schedule for Participant CAT fees in accordance with the Executed Share Model. The SEC published the Proposed Amendment for comment on May 25, 2022.<sup>5</sup> After considering the comments provided in response to the Proposed Amendment, the issues discussed in the OIP and comments submitted in response to the OIP,<sup>6</sup> CAT LLC continues to believe that the Executed Share Model satisfies the applicable requirements of the Exchange Act as well as the funding principles and other requirements of the CAT NMS Plan, as proposed to be revised.

The 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. Moreover, the Executed Share Model would be consistent with past fee structures that have been approved by the Commission. It also is transparent, would be relatively easy to calculate and administer, and is designed to not have an impact on market activity because it is neutral as to the location and manner of execution. CAT LLC has gone through an extensive process of evaluating and seeking comment on various funding models since the inception of CAT. As the Commission is aware, the Exchange Act does not require CAT LLC to demonstrate that the Executed Share Model is *superior to any other potential proposal*. Instead, CAT LLC must demonstrate that the Executed Share Model is *consistent with the Exchange Act and the rules and regulations thereunder*. CAT LLC believes that the Executed Share Model satisfies the requirements of the Exchange Act and should be approved by the Commission.

CAT LLC, however, proposes to amend the Proposed Amendment to provide additional detail and clarity on the Executed Share Model in response to the OIP. Specifically, CAT LLC proposes to amend the Proposed Amendment by making changes summarized below and discussed in detail in Section II of this letter. In addition to these proposed revisions, CAT LLC responds to each of the other issues raised in the SEC's OIP in Section III of this letter.

- (1) CAT LLC proposes to make the following general changes to the description of the Executed Share Model as set forth in the Proposed Amendment:
  - Restructure the description of the Executed Share Model in the CAT NMS Plan to fully describe the process for calculating the Historical CAT Assessment and the CAT Fees related to Prospective CAT Costs, rather than describing certain aspects of the Executed Share Model in the Participant fee schedule or in the Participant fee filings related to the Industry Member fees. (Proposed Section 11.3 of the CAT NMS Plan)
  - Impose the payment obligation on the executing broker for the buyer for the transaction (“EBB”) instead of the clearing broker for the buyer for the transaction (“CBB”), and impose the payment obligation on the executing broker for the seller

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<sup>5</sup> Securities Exchange Act Rel. No. 94984 (May 25, 2022), 87 Fed. Reg. 33226 (June 1, 2022) (“Proposing Release”).

<sup>6</sup> Letter from Ellen Greene, Managing Director, Equities and Options Market Structure, SIFMA, to Vanessa Countryman, Secretary, SEC (Oct. 7, 2022) (“SIFMA Letter”).

- for the transaction (“EBS”), rather than the clearing broker for the seller for the transaction (“CBS”). (Proposed Sections 11.3(a)(iii)(A) and (b)(iii)(A) of the CAT NMS Plan)
- Provide for the use of a twelve-month lookback, rather than a six-month lookback, for the calculation of equivalent executed share volume projections. (Proposed Sections 11.3(a)(i)(D) and (b)(i)(E) of the CAT NMS Plan)
  - Amend the CAT funding principles to clarify that the CAT Fees with regard to Prospective CAT Costs and the Historical CAT Assessment are intended to be cost-based fees – that is, the fees are designed to recover the cost of the creation, implementation and operation of the CAT. (Proposed 11.2(c) of the CAT NMS Plan)
- (2) In addition to the above general changes, CAT LLC proposes to amend the description of CAT Fees related to Prospective CAT Costs as follows:
- Require the calculation of a Fee Rate for the CAT Fee twice a year, once at the beginning of the year and once during the year, and to require the Participants to file with the SEC pursuant to Section 19(b) of the Exchange Act the CAT Fees to be charged to Industry Members calculated using the Fee Rates calculated twice a year. (Proposed Section 11.3(a)(i)(A)(I) and (II) of the CAT NMS Plan)
  - Explain that CAT Fees will remain in effect until the Operating Committee approves a new Fee Rate and the CAT Fees with the new Fee Rate are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act. (Proposed Section 11.3(a)(i)(A)(III) of the CAT NMS Plan)
  - Provide additional detail regarding the categories included in the CAT budget: technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve and such other categories as determined by the Operating Committee. (Proposed Section 11.1(a)(i) of the CAT NMS Plan)
  - Describe the size of the reserve as not more than 25% of the annual budget, and state that, to the extent collected CAT Fees exceed CAT costs, including the reserve of 25% of the annual budget, such surplus shall be used to offset future fees. (Proposed Section 11.1(a)(ii) of the CAT NMS Plan)
  - Clarify that Participants will be required to pay the CAT Fees approved by the Operating Committee only if such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act. (Proposed Section 11.3(a)(ii)(B) of the CAT NMS Plan)
  - Require the fee filings pursuant to Section 19(b) of the Exchange Act for CAT Fees related to Prospective CAT Costs to provide details regarding the calculation of the

- fee, including the Fee Rate, budget, projected volume, and the reconciliation of the budget to the fees. (Proposed Section 11.3(a)(iii)(B) of the CAT NMS Plan)
- (3) Furthermore, CAT LLC proposes to describe in detail the Historical CAT Assessment in the CAT NMS Plan by making the following revisions to the CAT NMS Plan:
- Describe the Historical CAT Assessment as described in the Proposed Amendment in the CAT NMS Plan in detail, including that the Historical CAT Assessment applies to Industry Members, how it will be used to repay the Participants, the manner of calculating the Historical Fee Rate, a description of the calculation of the Historical CAT Assessment, and a description of the fee filings under Section 19(b) of the Exchange Act for the Historical CAT Assessment. (Proposed Section 11.3(b) of the CAT NMS Plan)
  - State that the length of the Historical Recovery Period used in calculating the Historical Fee Rate will not be less than 24 months or more than five years, and that the Historical CAT Assessment calculated using the Historical Fee Rate will remain in effect until all Historical CAT Costs are collected. (Proposed Section 11.3(b)(i)(D) of the CAT NMS Plan)
  - Clarify that Participants would not be obligated to pay the Historical CAT Assessment as Participants have previously paid Past CAT Costs via loans to CAT LLC, and the Historical CAT Assessment paid by Industry Members would be used by CAT LLC to repay a portion of the loans made to CAT LLC by the Participants on a pro rata basis. (Proposed Section 11.3(b)(ii) of the CAT NMS Plan)
  - State that the Participants will file fee filings pursuant to Section 19(b) of the Exchange Act to charge Industry Members the Historical CAT Assessment, and such filings will provide details regarding the calculation of the Historical CAT Assessment, including the Historical Fee Rate, Historical CAT Costs, and projected volume. (Proposed Section 11.3(b)(i)(A) and (iii)(B) of the CAT NMS Plan)

## **II. Proposed Revisions to Proposed Amendment**

CAT LLC has reviewed the SEC's OIP and the comment letter submitted in response to the OIP and it has determined to propose revisions to the Proposed Amendment. These proposed revisions are discussed in this Section II below. In addition, Exhibit A to this letter sets forth the cumulative changes proposed to be made to the CAT NMS Plan, including both those changes set forth in the Proposed Amendment as well as the additional revisions proposed in this letter. Exhibit B to this letter sets forth the proposed additional revisions to the Proposed Amendment as described in this letter.

### **A. Role of Clearing Brokers**

Under the Proposed Amendment, the CBS, the CBB and the Participant would each pay a fee equal to the number of executed equivalent shares in the transaction multiplied by one-third and a specified fee rate. CAT LLC determined to assess fees upon clearing firm Industry Members because this is the current practice for other fees, such as the options regulatory fee (“ORF”), and thus this approach would reduce administrative burdens. CAT LLC acknowledged, however, that this approach may impose an excessive financial burden on clearing firms and noted that they may pass-through the CAT fees to their clients, who may pass-through their CAT fees until the fees are imposed on the account that executed the transaction. As described in the OIP, certain commenters questioned whether the Proposed Amendment would impose an undue burden on clearing firms. In response to this proposal and the related comments, the SEC requested in the OIP “[c]ommenters’ 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.”<sup>7</sup> In its comment letter, SIFMA raised concerns regarding the cost burden that clearing firms would experience under the Proposed Amendment.<sup>8</sup>

CAT LLC recognizes that imposing the fee payment obligation on clearing brokers, rather than Industry Members more generally, potentially may impose a significant financial burden on clearing firms if the fees imposed on clearing firms are not passed through to their clients. Accordingly, CAT LLC proposes to amend the Proposed Amendment to assess the payment obligation on the EBB instead of the CBB, and to assess the payment obligation on the EBS, rather than the CBS. Charging the EBBs and EBSs would reflect the executing role the EBB and EBS have in each transaction. Like with CBBs and CBSs, EBBs and EBSs also may choose to pass the CAT fee on to their clients.

To implement this change, CAT LLC proposes to state in proposed Sections 11.3(a)(iii)(A) and (b)(iii)(A) that EBBs and EBSs would have the obligation to pay the CAT Fee and the Historical CAT Assessment. Specifically, proposed Section 11.3(a)(iii)(A) would state that the EBB and EBS would be required to pay the CAT Fee:

Each Industry Member that is the executing broker for the buyer in a transaction in Eligible Securities (“Executing Broker for the Buyer” or “EBB”) and each Industry Member that is the executing broker for the seller in a transaction in Eligible Securities (“Executing Broker for the Seller” or “EBS”) will be required to pay a CAT Fee for each such transaction in Eligible Securities in the prior month based on CAT Data. The EBB’s CAT Fee or EBS’s CAT Fee (as applicable) for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3.

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<sup>7</sup> Request for Comment No. 8, OIP at 54578.

<sup>8</sup> SIFMA Letter at 4-5. CAT LLC notes, however, that, contrary to the description set forth in the SIFMA Letter, the Historical CAT Assessment would be assessed based on current market activity, not past market activity. Accordingly, the process of passing fees through for the Historical CAT Assessment would be the same as with CAT Fees related to Prospective CAT Costs.

Similarly, proposed Section 11.3(b)(iii)(A) would state that the EBB and EBS would be required to pay the Historical CAT Assessment:

Each month in which the Historical CAT Assessment is in effect, each EBB and each EBS shall pay a fee for each transaction in Eligible Securities executed by the EBB or EBS from the prior month as set forth in CAT Data, where the Historical CAT Assessment for each transaction will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Historical Fee Rate determined pursuant to paragraph (b)(i) of this Section 11.3.

### **B. Mid-Year Fee Adjustment**

Under the Proposed Amendment, 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 actual or projected volume during the year. In response to this proposal, the SEC requested in the OIP “[c]ommenters’ views on whether the Participants should be required to change the Fee Rate when the budget or projected executed equivalent share volume changes.”<sup>9</sup>

CAT LLC recognizes the need to align CAT fees with CAT costs. Requiring the adjustment of the Fee Rate mid-year in response to changes in the budgeted or actual costs or projected or actual total executed equivalent share volume during the year would likely lead to the greater alignment of CAT fees and CAT costs, thereby potentially avoiding the collection of fees in excess of CAT costs or fees that are insufficient to cover CAT costs. Accordingly, CAT LLC proposes to require a mid-year adjustment of the Fee Rate for the CAT Fee, rather than having discretion to adjust the fee mid-year. Specifically, CAT LLC proposes to state in proposed paragraph (a)(i) of Section 11.3 that “[t]he Operating Committee will calculate the Fee Rate for the CAT Fee twice per year, once at the beginning of the year and once during the year.” In addition, CAT LLC proposes a new paragraph (a)(i)(A)(II) of Section 11.3 that would state the following:

During each year, the Operating Committee will calculate a new Fee Rate by dividing the budgeted CAT costs for the remainder of the year by the projected total executed equivalent share volume of all transactions in Eligible Securities for the remainder of the year. Once the Operating Committee has approved the new Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using the new Fee Rate. Participants and Industry Members will be required to pay CAT Fees calculated using this new Fee Rate once such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

### **C. Lookback Period**

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<sup>9</sup> Request for Comment No. 9, OIP at 54578.

As described in the Proposed Amendment, the calculation of the Fee Rate requires the determination of the projected total executed equivalent share volume of transactions in Eligible Securities for the year. In the Proposed Amendment, CAT LLC proposed to determine this projection based on the total executed equivalent share volume of transactions in Eligible Securities from the prior six months. CAT LLC reasoned that the use of the 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. In the OIP, however, the SEC asked for commenters' views on the "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."<sup>10</sup>

CAT LLC recognizes that the use of the prior twelve months, rather than the prior six months, would address the issue of potential seasonality. For example, the projection could be based on a period that typically has lighter trading volume than the other half of the year, thereby causing the projection to be too low. In addition, like the six-month look back, the twelve-month look back would be sufficiently long to avoid short term fluctuations in trading while providing data close in time to the upcoming year. Accordingly, CAT LLC proposes to amend the Proposed Amendment to use a twelve-month lookback for the calculation of the projection. With a twelve-month lookback, the Operating Committee would determine the projected total executed equivalent share volume of transactions in Eligible Securities for an upcoming year based on the total executed equivalent share volume from the prior twelve months. In addition, CAT LLC proposes to allow the Operating Committee to base its projection on the prior twelve months, but to use its discretion to analyze the likely volume for the upcoming year. As set forth in proposed Section 11.3(a)(iii)(B), Participants will be required to provide a description of the calculation of the projection in their fee filings pursuant to Section 19(b) of the Exchange Act.

To implement this change, CAT LLC proposes to reference the twelve-month look back period in proposed paragraphs (a)(i)(D) and (b)(i)(E) of Section 11.3 of the CAT NMS Plan. Proposed paragraph (a)(i)(D) of Section 11.3 would state that "[t]he Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for each relevant period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months." Similarly, proposed paragraph (b)(i)(E) of Section 11.3 of the CAT NMS Plan would state that "[t]he Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months."

#### **D. 19b-4 Fee Filing Process for Fee Rate Changes**

The SEC has requested "[c]ommenters' 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."<sup>11</sup> In its comment letter, SIFMA requests that CAT LLC provide

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<sup>10</sup> Request for Comment No. 16, OIP at 54578.

<sup>11</sup> Request for Comment No. 13, OIP at 54578.

additional detail regarding the process for collecting CAT fees from Industry Members, including any triggers and/or annual review mechanisms that would result in new fee filings in the future as a result of Fee Rate changes.<sup>12</sup>

In response, CAT LLC proposes to restructure the proposed changes to Section 11.3 of the CAT NMS Plan, make additional changes to add clarity and detail regarding the CAT fees under the Executed Share Model, and to provide additional detail regarding the fee filing process with regard to fee rate changes applicable to Industry Members, including the requirement to calculate the Fee Rate twice per year and to make fee filings pursuant to Section 19(b) twice a year with regard to the CAT Fees for Prospective CAT Costs. Proposed Section 11.3(a) in the Proposed Amendment described the fees to be charged Participants and proposed Section 11.3(b) in the Proposed Amendment described the fees to be charged Industry Members. CAT LLC proposes to revise this structure by addressing CAT Fees related to Prospective CAT Costs in proposed Section 11.3(a) and the Historical CAT Assessment in proposed Section 11.3(b). With these changes, CAT LLC intends to make the fee filing process for setting and changing the CAT fees a straightforward and easy to implement process.

## **1. CAT Fees Related to Prospective CAT Costs**

CAT LLC proposes to restructure and revise proposed Section 11.3(a) of the CAT NMS Plan to provide greater clarity and detail regarding CAT Fees related to Prospective CAT Costs calculated pursuant to the Executed Share Model. With the proposed additional revisions, proposed Section 11.3(a) of the CAT NMS Plan would describe that the CAT Fees related to Prospective CAT Costs apply to both Participants and Industry Members, the manner of calculating the Fee Rate, the description of the calculation of the Participant CAT Fee, a description of the calculation of the Industry Member CAT Fee, and a description of the fee filings under Section 19(b) of the Exchange Act for Industry Member CAT Fees. The following describes the proposed revisions to Section 11.3(a) of the CAT NMS Plan.

### **a. Introductory Statement**

In the Proposed Amendment, proposed Section 11.3(a) described the fees to be charged Participants pursuant to the Executed Share Model. CAT LLC proposes to revise proposed Section 11.3(a) to address CAT Fees related to Prospective CAT Costs for both Participants and Industry Members. Accordingly, CAT LLC proposes to revise the introductory statement in proposed Section 11.3(a), which was originally proposed to state that “[t]he Operating Committee will establish fees to be payable by Participants,” to state that “[t]he Operating Committee will establish fees (“CAT Fees”) to be payable by Participants and Industry Members with regard to CAT costs not previously paid by the Participants (“Prospective CAT Costs”) as follows.”

### **b. Calculation of the Fee Rate**

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<sup>12</sup> SIFMA Letter at 5-7.

CAT LLC proposes to move the description of the calculation of the Fee Rate for CAT Fees related to Prospective CAT Costs from proposed paragraph (b) of the Participant fee schedule to proposed Section 11.3(a) of the CAT NMS Plan. Moving the discussion of the calculation of the Fee Rate from the Participant fee schedule to proposed Section 11.3(a) would clarify in the CAT NMS Plan that the proposed calculation of the CAT Fee would apply to both Participants and Industry Members.

#### **i. Fee Rate**

Proposed paragraph (b)(1) of the Participant fee schedule as set forth in the Proposed Amendment describes the timing and manner of calculating the Fee Rate for CAT Fees related to Prospective CAT Costs. The proposed paragraph states the following:

The Operating Committee will calculate the Fee Rate at the beginning of each 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. After setting the Fee Rate at the beginning of each year, the Fee Rate may be adjusted once during the year, if necessary, due to changes in the budgeted or actual costs or projected or actual total executed equivalent share volume during the year.

CAT LLC proposes to move the description of the timing and method for calculating the Fee Rate to proposed Section 11.3(a)(i) of the CAT NMS Plan, and to provide additional detail regarding the Fee Rate in that provision. In addition, proposed Section 11.3(a)(i) will differ from the description in the Proposed Amendment as it will require the calculation of the Fee Rate twice per year, and to require the Participants to make a fee filing pursuant to Section 19(b) for Industry Member CAT Fees twice a year using the calculated Fee Rate.

Proposed Section 11.3(a)(i) of the CAT NMS Plan would state that CAT Fees related to Prospective CAT Costs will be calculated twice a year. Specifically, this proposed provision would state that “[t]he Operating Committee will calculate the Fee Rate for the CAT Fee twice per year, once at the beginning of the year and once during the year as follows.”

Proposed Section 11.3(a)(i)(A)(I) of the CAT NMS Plan would describe the annual calculation of the Fee Rate and the requirement for Participants to file a fee filing for CAT Fees to be charged Industry Members calculated using the Fee Rate. This proposed provision also would state that Participants and Industry Members would be required to pay such CAT Fees once the CAT Fees are in effect with regard to Industry Members. This proposed provision would not change how the Fee Rate would be calculated; such calculation would be the same as described in the Proposed Amendment. Specifically, this proposed provision would state:

At the beginning of each year, the Operating Committee will calculate the Fee Rate 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. Once the Operating Committee has approved such Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act CAT

Fees to be charged to Industry Members calculated using such Fee Rate. Participants and Industry Members will be required to pay CAT Fees calculated using this Fee Rate once such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

Proposed Section 11.3(a)(i)(A)(II) of the CAT NMS Plan describes the mid-year calculation of a new Fee Rate, as discussed above in Section II(B) of this letter. This proposed section would describe the mid-year calculation of the Fee Rate and the requirement for Participants to file a fee filing for CAT Fees to be charged Industry Members calculated using the Fee Rate. This proposed provision also would state that Participants and Industry Members would be required to pay such CAT Fees once the CAT Fees are in effect with regard to Industry Members. Specifically, this proposed provision would state:

During each year, the Operating Committee will calculate a new Fee Rate by dividing the budgeted CAT costs for the remainder of the year by the projected total executed equivalent share volume of all transactions in Eligible Securities for the remainder of the year. Once the Operating Committee has approved the new Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using the new Fee Rate. Participants and Industry Members will be required to pay CAT Fees calculated using this new Fee Rate once such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

This proposed provision would not change how the Fee Rate would be calculated; such calculation would be the same as described in the Proposed Amendment. This proposed provision, however, would make the mid-year Fee Rate adjustment mandatory, rather than discretionary.

CAT LLC also proposes to add Section 11.3(a)(i)(A)(III) of the CAT NMS Plan to clarify that CAT Fees related to Prospective CAT Costs do not sunset automatically; such CAT Fees would remain in place until new CAT Fees are in place with a new Fee Rate. Specifically, this proposed provision would state:

For the avoidance of doubt, CAT Fees with a Fee Rate calculated as set forth in this paragraph (a)(i) shall remain in effect until the Operating Committee approves a new Fee Rate as described in this paragraph (a)(i) and CAT Fees with the new Fee Rate are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

This provision clarifies, but does not change, the substance of the Proposed Amendment. This proposed change and the use of continuous fees more generally are discussed in more detail in Section II(H) of this letter.

## **ii. Executed Equivalent Shares**

Paragraph (b)(2) of the Participant fee schedule as set forth in the Proposed Amendment describes how executed equivalent shares would be counted. CAT LLC proposes to move this proposed paragraph (b)(2) of the Participant fee schedule as set forth in the Proposed Amendment to proposed Section 11.3(a)(i)(B) of the CAT NMS Plan. Accordingly, proposed Section 11.3(a)(i)(B) of the CAT NMS Plan would state the following:

For purposes of calculating the fees, executed equivalent shares in a transaction in Eligible Securities will be counted as follows:

- (I) each executed share for a transaction in NMS Stocks will be counted as one executed equivalent share;
- (II) each executed contract for a transaction in Listed Options will be counted based on the multiplier applicable to the specific Listed Option (i.e., 100 executed equivalent shares or such other applicable multiplier); and
- (III) each executed share for a transaction in OTC Equity Securities shall be counted as 0.01 executed equivalent share.

### **iii. Budgeted CAT Costs**

CAT LLC proposes to move proposed paragraph (b)(3) of the Participant fee schedule as set forth in the Proposed Amendment to proposed Section 11.3(a)(i)(C). Accordingly, proposed Section 11.3(a)(i)(C) of the CAT NMS Plan would state the following, which is the same as proposed paragraph (b)(3) of the Participant fee schedule in the Proposed Amendment:

The budgeted CAT costs for the year shall 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 forth 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.

CAT LLC also proposes to provide additional details regarding what is included in the annual operating budget approved by the Operating Committee pursuant to Section 11.1(a) of the CAT NMS Plan in new proposed paragraphs (a)(i) and (ii) of Section 11.1 of the CAT NMS Plan. As discussed in detail below in Section II(I), proposed Section 11.1(a)(i) would describe the categories of costs to be included in the CAT budget: “technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve, and such other cost categories as determined by the Operating Committee to be included in the budget.”

In addition, proposed Section 11.1(a)(ii) of the CAT NMS Plan would provide additional details regarding the use and size of the reserve. Specifically, proposed Section 11.1(a)(ii) of the CAT NMS Plan would state that “[f]or the reserve referenced in paragraph (a)(i) of this Section,

the budget will include an amount necessary to allow the Company to maintain a reserve of not more than 25% of the annual budget,” and, if the CAT Fees exceed CAT costs, including the reserve, then the surplus will be used to offset future fees. An analysis of budgeted CAT costs and actual CAT costs for 2020, 2021 and the first nine months of 2022 demonstrates that actual CAT costs were approximately 20% higher than budgeted amounts over this period on a cumulative average basis. Based on the magnitude of historical budget to actual variances as well as the difficulty in accurately predicting various variable CAT costs, CAT LLC believes that a 25% reserve would appear to be reasonable. In addition, this provision would clarify that each year CAT LLC would collect sufficient funds to maintain a reserve of 25% of the annual budget. For example, if CAT LLC only had a reserve of 5% of the annual budget at the end of a year, the budget for the next year would include an additional amount for the reserve of not more than 20% of the annual budget.

**iv. Projected Total Executed Equivalent Share  
Volume of Transactions in Eligible Securities**

CAT LLC proposes to move proposed paragraph (b)(4) of the Participant fee schedule as set forth in the Proposed Amendment to proposed Section 11.3(a)(i)(D) of the CAT NMS Plan. Accordingly, proposed Section 11.3(a)(i)(D) of the CAT NMS Plan would be the same as proposed paragraph (b)(4) of the Participant fee schedule in the Proposed Amendment except for the change regarding the length of the lookback period as discussed above in Section II(C) of this letter. Specifically, Section 11.3(a)(i)(D) of the CAT NMS Plan would state that “[t]he Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for each relevant period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months.”

**c. Participant CAT Fee for Prospective CAT Costs**

CAT LLC proposes to describe the Participant CAT Fees related to Prospective CAT Costs in proposed Section 11.3(a)(ii) of the CAT NMS Plan. Proposed paragraph (a)(ii) of Section 11.3 would be the same as proposed Section 11.3(a)(i) and (ii) as set forth in the Proposed Amendment, with two minor changes. Instead of referring to “a fee” generally, the paragraph would refer to the “CAT Fee.” The use of the term “CAT Fee” would clarify that this paragraph applies to the CAT Fee related to Prospective CAT Costs, not the Historical CAT Assessment. In addition, the general reference to “the applicable fee rate for the relevant period” would be replaced with the more specific reference to the Fee Rate “determined pursuant to paragraph (a)(i) of this Section 11.3.” As discussed above, proposed Section 11.3(a)(i) describes the calculation of the Fee Rate for the CAT Fees related to Prospective CAT Costs. Accordingly, proposed Section 11.3(a)(ii)(A) of the CAT NMS Plan would state the following:

Each Participant that is a national securities exchange will be required to pay the CAT Fee for each transaction in Eligible Securities executed on the exchange in the prior month based on CAT Data. Each Participant that is a national securities association will be required to pay the CAT Fee for each transaction in Eligible Securities executed otherwise than on an exchange in the prior month based on

CAT Data. The CAT Fee for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3.

CAT LLC also proposes to add paragraph (a)(ii)(B) to Section 11.3 of the CAT NMS Plan to clarify that Participants would only be required to pay CAT Fees when Industry Members are required to pay CAT Fees. The Executed Share Model is designed to cover 100% of CAT costs by allocating costs between and among Participants and Industry Members. However, the CAT Fees charged to Participants are implemented via a different process than CAT Fees charged to Industry Members. CAT Fees charged to Participants are implemented via an approval by the Operating Committee in accordance with the requirements of the CAT NMS Plan. In contrast, CAT Fees charged to Industry Members may only become effective in accordance with the requirements of Section 19(b) of the Exchange Act. Accordingly, proposed paragraph (a)(ii)(B) of Section 11.3 of the CAT NMS Plan would state that “[e]ach Participant will be required to pay the CAT Fee calculated using the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3 and approved by the Operating Committee only if such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.”

**d. Industry Member CAT Fees for Prospective CAT Costs**

**i. Industry Member CAT Fee Obligation**

CAT LLC proposes to describe the CAT Fees related to Prospective CAT Costs that are charged to Industry Members in proposed Section 11.3(a)(iii)(A) of the CAT NMS Plan. This proposed paragraph would be similar to proposed Section 11.3(b)(i) and (ii) of the CAT NMS Plan as set forth in the Proposed Amendment subject to several changes. Instead of referring to “a fee” generally, the paragraph would refer to the “CAT Fee.” The use of the term “CAT Fee” would clarify that this paragraph applies to the CAT Fee related to Prospective CAT Costs, not the Historical CAT Assessment. In addition, the general reference to “the applicable fee rate for the relevant period” would be replaced with the more specific reference to the Fee Rate “determined pursuant to paragraph (a)(i) of this Section 11.3.” As discussed above, proposed Section 11.3(a)(i) of the CAT NMS Plan describes the calculation of the Fee Rate for the CAT Fees related to Prospective CAT Costs. Furthermore, the proposed language would simplify the provision by eliminating repetitive language that was set forth in proposed Section 11.3(b)(i) and (ii) of the CAT NMS Plan as set forth in the Proposed Amendment. Finally, as discussed above, the provision would refer to EBBs and EBSs, rather than CBBs and CBSs. Accordingly, proposed Section 11.3(a)(iii)(A) of the CAT NMS Plan would state the following:

Each Industry Member that is the executing broker for the buyer in a transaction in Eligible Securities (“Executing Broker for the Buyer” or “EBB”) and each Industry Member that is the executing broker for the seller in a transaction in Eligible Securities (“Executing Broker for the Seller” or “EBS”) will be required to pay a CAT Fee for each such transaction in Eligible Securities in the prior month based

on CAT Data. The EBB's CAT Fee or EBS's CAT Fee (as applicable) for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3.

## **ii. Fee Filings under Section 19(b) of the Exchange Act**

CAT LLC proposes to provide additional detail as to the information that Participants would be required to include in their fee filings for CAT Fees in proposed paragraph (a)(iii)(B) of Section 11.3 of the CAT NMS Plan. The proposed paragraph sets forth the information about the CAT Fees related to Prospective CAT Costs that should be included in the fee filings required to be made by the Participants pursuant to Section 19(b) of the Exchange Act.<sup>13</sup> Specifically, such filings would be required to include (1) the Fee Rate; (2) the budget for the year (or remainder of the year, as applicable), including a brief description of each line item in the budget (including technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve and such other categories as determined by the Operating Committee to be included in the budget) and the reason for changes in each such line item from the prior CAT Fee filing; (3) a discussion of how the budget is reconciled to the collected fees; and (4) the projected total executed equivalent share volume of all transactions in Eligible Securities for the year (or remainder of the year, as applicable), and a description of the calculation of the projection. This detail would describe how the Fee Rate is calculated, and explain how the budget used in the calculation is reconciled to the collected fees. Such detailed information would provide Industry Members and other interested parties with a clear understanding of the calculation of the CAT Fees and their relationship to CAT costs.<sup>14</sup>

## **2. Historical CAT Assessment**

CAT LLC proposes to restructure and revise proposed Section 11.3(b) of the CAT NMS Plan as set forth in the Proposed Amendment to provide greater clarity and detail regarding the Historical CAT Assessment. With the proposed additional revisions, like with the description of the CAT Fee related to Prospective CAT Costs in proposed Section 11.3(a) of the CAT NMS Plan, proposed Section 11.3(b) of the CAT NMS Plan would describe the Historical CAT Assessment, including that the Historical CAT Assessment is charged to Industry Members, how it will be used to repay the Participants, the manner of calculating the Historical Fee Rate, a description of the calculation of the Historical CAT Assessment, and description of the fee filings under Section 19(b) of the Exchange Act for the Historical CAT Assessment. The following describes the proposed revisions to Section 11.3(b) of the CAT NMS Plan.

### **a. Introductory Statement**

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<sup>13</sup> CAT LLC expects the fee filings required to be made by the Participants pursuant to Section 19(b) of the Exchange Act with regard to CAT Fees to be filed pursuant to Section 19(b)(3)(A) of the Exchange Act. In accordance with Section 19(b)(3)(A) of the Exchange Act, fee filings made pursuant to Section 19(b)(3)(A) of the Exchange Act would be effective upon filing.

<sup>14</sup> As a practical matter, the fee filing would provide the exact fee per executed equivalent share to be paid for the CAT Fees, by multiplying the Fee Rate by one-third and describing the relevant number of decimal places for the fee.

In the Proposed Amendment, proposed Section 11.3(b) of the CAT NMS Plan describes the fees to be charged Industry Members pursuant to the Executed Share Model. CAT LLC proposes to revise proposed Section 11.3(b) of the CAT NMS Plan to address the Historical CAT Assessment to be charged to Industry Members. Accordingly, CAT LLC proposes to revise the introductory statement in proposed Section 11.3(b) of the CAT NMS Plan, which was originally proposed to state that “[t]he Operating Committee will establish fees to be payable by Industry Members,” to state that “[t]he Operating Committee will establish fees (“Historical CAT Assessment”) to be payable by Industry Members with regard to CAT costs previously paid by the Participants (“Past CAT Costs”) as follows.”<sup>15</sup>

#### **b. Calculation of Historical Fee Rate**

In the Proposing Release, CAT LLC stated that Industry Member CAT fees for Past CAT Costs would be calculated in accordance with the Executed Share Model, and that the Fee Rate for the CAT fees related to Past CAT Costs would be calculated by dividing the Past CAT Costs for the relevant period (as determined by the Operating Committee) by the projected total executed equivalent share volume of all transactions in Eligible Securities for the relevant period based on CAT Data. CAT LLC proposes to provide details regarding the calculation of the Historical CAT Assessment in proposed Section 11.3(b) of the CAT NMS Plan. The detail would be similar to the detail provided in proposed Section 11.3(a) of the CAT NMS Plan regarding CAT Fees related to Prospective CAT Costs, including a description of the calculation of the Historical Fee Rate, the counting method for executed equivalent shares, the Historical CAT Costs, the Historical Recovery Period, and the projected total executed equivalent share volume of transactions in Eligible Securities for the Historical Recovery Period.

#### **i. Historical Fee Rate**

Proposed Section 11.3(b)(i)(A) of the CAT NMS Plan would describe the calculation of the Historical Fee Rate for the Historical CAT Assessment and the requirement for Participants to file a fee filing for the Historical CAT Assessment. This proposed provision also would state that Industry Members would be required to pay the Historical CAT Assessment once such Historical CAT Assessment is in effect in accordance with Section 19(b) of the Exchange Act. Specifically, this proposed provision also would state that:

The Operating Committee will calculate the Historical Fee Rate for the Historical CAT Assessment by dividing the Historical CAT Costs by the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period. Once the Operating Committee has approved such Historical Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act the Historical CAT Assessment to be charged Industry Members calculated using such Historical Fee Rate. Industry Members

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<sup>15</sup> Note that there may be one or more Historical CAT Assessments, depending upon the timing of any approval of the amendment to the CAT NMS Plan and the completion of the Financial Accountability Milestones. For a discussion of the Financial Accountability Milestones, *see* Section 11.6 of the CAT NMS Plan

will be required to pay the Historical CAT Assessment calculated using this Historical Fee Rate once such Historical CAT Assessment is in effect in accordance with Section 19(b) of the Exchange Act.

This proposed provision would not change how the Historical Fee Rate would be calculated; such calculation would be the same as described in the Proposed Amendment.

## **ii. Executed Equivalent Shares**

As described in the Proposing Release, the Historical CAT Assessment would be calculated based on the same executed equivalent share calculation as CAT Fees related to Prospective CAT Costs. Accordingly, proposed Section 11.3(b)(i)(B) of the CAT NMS Plan would make it clear that the calculation is the same for both types of fees. Specifically, proposed Section 11.3(b)(i)(B) of the CAT NMS Plan would state that “[f]or purposes of calculating the Historical CAT Assessment, executed equivalent shares in a transaction in Eligible Securities will be counted in the same manner as set forth in paragraph (a)(i)(B) of this Section 11.3.”

## **iii. Historical CAT Costs**

The Proposing Release stated generally that the Operating Committee will determine the Past CAT Costs sought to be recovered through the Historical CAT Assessment. CAT LLC proposes to make this approach clear in the language of the CAT NMS Plan by adding proposed Section 11.3(b)(i)(C) of the CAT NMS Plan, which would state that “[t]he Operating Committee will determine the Historical CAT Costs sought to be recovered by the Historical CAT Assessment, where the Historical CAT Costs will be Past CAT Costs minus Past CAT Costs excluded from Historical CAT Costs by the Operating Committee.” As discussed below, the Historical CAT Costs, which were discussed in detail in CAT LLC’s response to comments,<sup>16</sup> also will be discussed in the fee filings regarding the Historical CAT Assessment that are required to be made under Section 19(b) of the Exchange Act.

## **iv. Historical Recovery Period**

The Proposing Release did not discuss the length of time during which the Historical CAT Assessment would be in effect. As the total amount of the Historical CAT Costs have not yet been determined because the fee model has not yet been approved and CAT LLC continues to incur costs, CAT LLC had not determined the appropriate recovery period. Based on CAT costs incurred to date, however, CAT LLC believes that the Historical Recovery Period should not be less than 24 months or more than five years. In analyzing the potential Historical Recovery Periods, CAT LLC sought to weigh the need for a reasonable Historical Fee Rate that spreads the Historical CAT Costs over an appropriate amount of time and the need to repay the loan notes to the Participants in a timely fashion. CAT LLC analyzed potential recovery periods using the Historical CAT Costs through 2022 as discussed in the CAT Response Letter<sup>17</sup> and the total executed equivalent share volume of transactions in Eligible Securities for 2021 to calculate

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<sup>16</sup> Letter to Vanessa Countryman, Secretary, SEC, from Mike Simon, Chair, Operating Committee, CAT, (Aug. 16, 2022) at 23-28 (“CAT Response Letter”).

<sup>17</sup> *Id.*

the projected total executed equivalent share volume of transactions.<sup>18</sup> Based on the variables in this analysis, CAT LLC determined that the Historical Fee Rate would range from approximately \$0.00002 – \$0.00006 per executed equivalent share for a two through five-year period. CAT LLC believes that such Historical Fee Rates would be reasonable even if Industry Members were required to pay the Historical CAT Assessment and the ongoing CAT Fee at the same time. CAT LLC notes, however, that the actual Historical CAT Assessment would be calculated using up-to-date Historical CAT Costs and executed equivalent share volume.

Proposed Section 11.3(b)(i)(D)(I) of the CAT NMS Plan would describe the Historical Recovery Period used in calculating the Historical Fee Rate. This proposed provision would state that “[t]he length of the Historical Recovery Period used in calculating the Historical Fee Rate will be established by the Operating Committee based upon the amount of the Historical CAT Costs to be recovered by the Historical CAT Assessment.” This proposed provision, however, would state that Historical Recovery Period used for calculating the Historical Fee Rate would not be less than 24 months or more than five years. As discussed below, the Historical Recovery Period is used to calculate the Historical Fee Rate. The actual recovery period may be longer or shorter than the Historical Recovery Period depending on the actual executed equivalent share volumes during the time that the Historical CAT Assessment is in effect.

Proposed Section 11.3(b)(i)(D)(II) of the CAT NMS Plan would describe the length of the time that the Historical CAT Assessment would be in effect, which may be greater than or less than the Historical Recovery Period, depending on the Historical CAT Assessment fees collected based on the actual volume. The Historical CAT Assessment would remain in effect until all Historical CAT Costs are collected. Accordingly, this provision states that “[n]otwithstanding the length of the Historical Recovery Period used in calculating the Historical Fee Rate, the Historical CAT Assessment calculated using the Historical Fee Rate will remain in effect until all Historical CAT Costs are collected.”

**v. Projected Total Executed Equivalent Share Volume of Transactions in Eligible Securities for Historical Recovery Period**

As described in the Proposing Release, the Historical Fee Rate would be calculated by using “the projected total executed equivalent share volume of all transactions in Eligible Securities for the relevant period based on CAT Data.” CAT LLC proposes to clarify the manner of calculating the projected total executed equivalent share volume for the Historical CAT Assessment by adding proposed Section 11.3(b)(i)(E) to the CAT NMS Plan. CAT LLC proposes to state in this provision that the projection will be determined based on transactions in Eligible Securities for the prior twelve months. Accordingly, proposed Section 11.3(b)(i)(E) of the CAT NMS Plan would state that “[t]he Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months.”

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<sup>18</sup> Proposing Release at 33246.

**c. Past CAT Costs and Participants**

As described in the Proposing Release, because the Participants have paid all CAT costs to date, the Participants would not pay the Historical CAT Assessment; only Industry Members would be required to pay the Historical CAT Assessment. Proposed Section 11.3(a)(iv) of the CAT NMS Plan as set forth in the Proposed Amendment clarified this point by stating that “[n]otwithstanding anything to contrary, Participants will not be required to pay a CAT fee related to CAT costs previously paid by the Participants in a manner determined by the Operating Committee (‘Past CAT Costs’).” However, the Proposing Release provided additional color regarding the Participants obligations with regard to certain Past CAT Costs. Specifically, it stated that Participants would remain responsible for the one-third of Past CAT Costs allocated to Participants under the Executed Share Model, as well as 100% of certain other past CAT Costs. The CAT fees related to included Past CAT Costs would recoup two-thirds of the included Past CAT Costs; the Participants have paid for and would not be reimbursed for the remaining one-third of the included Past CAT Costs. The CAT fees related to included Past CAT Costs paid by the Industry Members would be used to reimburse the Participants for the two-thirds of included Past CAT Costs allocated to Industry Members. The CAT fees for the included Past CAT Costs collected from Industry Members will be allocated to Participants for repayment of the outstanding loan notes of the Participants to the Company on a pro rata basis; such fees would not be allocated to Participants based on the executed equivalent share volume of transactions in Eligible Securities. CAT LLC proposes to amend proposed Section 11.3 of the CAT NMS Plan to add this detail to the CAT NMS Plan.

Specifically, CAT LLC proposes to delete proposed Section 11.3(a)(iv) of the CAT NMS Plan as set forth in the Proposed Amendment and replace it with proposed Section 11.3(b)(ii) of the CAT NMS Plan. Proposed Section 11.3(b)(ii) would clarify that the Participants would not be required to pay the Historical CAT Assessment as the Participants previously have paid Past CAT Costs. It would state that, “[b]ecause Participants previously have paid Past CAT Costs via loans to the Company, Participants would not be required to pay the Historical CAT Assessment.” In addition, proposed Section 11.3(b)(ii) of the CAT NMS Plan would clarify that the Historical CAT fees collected from Industry Members would be allocated to Participants for repayment of the outstanding loan notes of the Participants to the Company on a pro rata basis; such fees would not be allocated to Participants based on the executed equivalent share volume of transactions in Eligible Securities. Specifically, proposed Section 11.3(b)(ii) of the CAT NMS Plan would state that “[t]he Historical CAT Assessment to be paid by Industry Members and collected by the Company will be used by the Company to repay a portion of the loans from the Participants to the Company on a pro rata basis.” Furthermore, proposed Section 11.3(b)(ii) of the CAT NMS Plan would emphasize that “[t]he Historical CAT Assessment is designed to recover two-thirds of the Historical CAT Costs from Industry Members.”

**d. Historical CAT Assessment for Industry Members**

**i. Industry Member Obligation**

CAT LLC proposes to describe the Historical CAT Assessment charged to Industry Members in proposed Section 11.3(b)(iii)(A) of the CAT NMS Plan. This proposed paragraph (b)(iii)(A) of Section 11.3 of the CAT NMS Plan would be similar to proposed Section 11.3(a)(iii)(A) of the CAT NMS Plan discussed above, but would provide additional specifics regarding the Historical CAT Assessment. In particular, this paragraph would refer to the “Historical CAT Assessment,” “Historical Fee Rate” and the “Historical Recovery Period.” Specifically, this proposed paragraph would state that:

Each month in which the Historical CAT Assessment is in effect, each EBB and each EBS shall pay a fee for each transaction in Eligible Securities executed by the EBB for the buyer or EBS for the seller from the prior month as set forth in CAT Data, where the Historical CAT Assessment for each transaction will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Historical Fee Rate determined pursuant to paragraph (b)(i) of this Section 11.3.

## **ii. Fee Filings under Section 19(b) of the Exchange Act**

CAT LLC proposes to provide additional detail as to when Participants would file fee filings for the Historical CAT Assessment and what would be required to be included in such filings. Proposed Section 11.3(b)(iii)(B) would describe the requirements for filings for the Historical CAT Assessment.<sup>19</sup> The proposed paragraph would state that “[w]hen the Participants file with the SEC under Section 19(b) of the Exchange Act the Historical CAT Assessment to be charged to Industry Members that the Operating Committee approved in accordance with paragraph (b) of this Section 11.3,” the filing should set forth the following information: (1) the Historical Fee Rate; (2) a brief description of the amount and type of the Historical CAT Costs; (3) the Historical Recovery Period and the reason for its length; and (4) the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period, and a description of the calculation of the projection.<sup>20</sup>

## **E. Calculation of Past CAT Costs: Relevant Period**

The SEC requested “[c]ommenters’ 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.”<sup>21</sup> As discussed above in Section II(D) of this letter, CAT LLC proposes to add substantial detail regarding the calculation of the Historical Fee Rate to proposed Section 11.3(b) of the CAT NMS Plan. Included in those proposed changes is a provision that addresses the Historical Recovery Period used in calculating the Historical Fee

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<sup>19</sup> CAT LLC expects the fee filings required to be made by the Participants pursuant to Section 19(b) of the Exchange Act with regard to the Historical CAT Assessment to be filed pursuant to Section 19(b)(3)(A) of the Exchange Act. In accordance with Section 19(b)(3)(A) of the Exchange Act, fee filings made pursuant to Section 19(b)(3)(A) of the Exchange Act would be effective upon filing.

<sup>20</sup> As a practical matter, the fee filing would provide the exact fee per executed equivalent share to be paid for the Historical CAT Assessment, by multiplying the Historical Fee Rate by one-third and describing the relevant number of decimal places for the fee.

<sup>21</sup> Request for Comment No. 17, OIP at 54578.

Rate for the Historical CAT Assessment, and a provision that addresses the length of time that the Historical CAT Assessment would be in effect.

#### **F. Proposed Plan Changes to Describe Executed Share Model**

The SEC requested “[c]ommenters’ 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.”<sup>22</sup> As described in detail above, CAT LLC has restructured proposed Section 11.3 and added additional detail to Section 11.3 to provide a more detailed description of the implementation of the Executed Share Model in the CAT NMS Plan.

In addition, CAT LLC proposes to amend the CAT funding principles to clarify that the CAT Fee and the Historical CAT Assessment are intended to be cost-based fees – that is, the fees are designed to recover the cost of the creation, implementation and operation of the CAT. CAT LLC proposes to amend the funding principle set forth in Section 11.2(c) by making a specific reference to the costs of the CAT. With this proposed change, proposed Section 11.2(c) would state that “[i]n establishing the funding of the Company, the Operating Committee shall seek: . . . to establish a fee structure in which the fees charged to Participants and Industry Members are based upon the executed equivalent share volume of transactions in Eligible Securities, and the costs of the CAT.”

#### **G. Reconciliation of Budget to Fees**

In the OIP, the SEC requested comment on “whether the Proposed Amendment needs a discussion of how the budget will be reconciled to fees.”<sup>23</sup> If the CAT LLC collects a surplus of fees above and beyond what is required for the CAT costs, including the requisite reserve, such surpluses would be used to offset future fees and would not be distributed to the Participants as profits.<sup>24</sup> To provide transparency regarding this reconciliation process, CAT LLC proposes to require that Participants provide a discussion of how the budget is reconciled to the collected fees in their fee filings pursuant Section 19(b) of the Exchange Act. CAT LLC proposes to include this requirement in Section 11.3(a)(iii)(B) of the CAT NMS Plan.

#### **H. Continuous Fees versus Sunseting Fees**

CAT LLC does not propose to require the proposed CAT Fees to sunset automatically; instead, a CAT Fee would continue until a new CAT Fee is in place in accordance with the requirements of the CAT NMS Plan and Section 19(b) of the Exchange Act. In response to this proposal, the SEC requested “[c]ommenters’ 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

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<sup>22</sup> Request for Comment No. 32, OIP at 54579.

<sup>23</sup> Request for Comment No. 24, OIP at 54578.

<sup>24</sup> Section 11.1(c) of the CAT NMS Plan specifically states that “[a]ny surplus of the Company’s revenues over its expenses shall be treated as an operational reserve to offset future fees.”

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.”<sup>25</sup> In its comment letter, SIFMA advocates for a trigger or automatic review to ensure that the fee rate remains aligned with the CAT costs.<sup>26</sup> CAT LLC believes that the Proposed Amendment, with the revisions proposed herein, would address the concerns related to the alignment of CAT costs and CAT fees.

CAT LLC believes that it is critical that a CAT fee remain in place at all times. The financial viability of the CAT would be put at risk without a constant source of revenue. CAT LLC pays various bills, including technology bills, on a monthly basis. Accordingly, even short delays in the implementation of new CAT fees after the sunseting of a prior CAT fee may have a deleterious effect on the operation of the CAT. Indeed, adopting sunseting fees would contradict the funding principle of seeking to “build financial stability to support the Company as a going concern.”<sup>27</sup> CAT LLC proposes to add Section 11.3(a)(i)(A)(III) of the CAT NMS Plan to clarify that CAT Fees related to Prospective CAT Costs do not sunset automatically; such CAT Fees would remain in place until new CAT Fees with a new Fee Rate is in effect.

Moreover, CAT LLC does not believe that a sunseting requirement is necessary to ensure that the CAT Fees are closely coordinated with Prospective CAT costs. CAT LLC has proposed a comprehensive, multi-pronged approach to ensure that the CAT Fees are closely tied to CAT costs. First, CAT LLC will be required to calculate the Fee Rates for the CAT Fees based on budgeted CAT costs. In addition, CAT LLC will be required to calculate the Fee Rate twice a year to determine whether the Fee Rate has changed due to changes in the budgeted or actual costs or actual or projected executed equivalent share volume, and to make a fee filing twice a year to reflect this calculation. Accordingly, the Fee Rate will be required to be updated twice a year, thereby ensuring the CAT Fees are closely tied to CAT costs.

Second, the CAT NMS Plan requires that the Company operate on a “break-even” basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses would be treated as an operational reserve to offset future fees and would not be distributed to the Participants as profits. To ensure that the Participants’ operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that “[a]ny surplus of the Company’s revenues over its expenses shall be treated as an operational reserve to offset future fees.” Moreover, as discussed in detail in Section II(I) and (G) of this letter, CAT LLC proposes to amend the CAT NMS Plan to limit the reserve to no more than 25% of the annual budget and to clarify that CAT fees collected in excess of the CAT costs, including the reserve, will be used to offset future fees.<sup>28</sup>

Third, as discussed above in Section II(D) of this letter, CAT LLC proposes to amend the CAT NMS Plan to require Participants to provide significant details in their fee filings regarding Industry Member CAT Fees. Proposed paragraph (a)(iii)(B) of Section 11.3 of the CAT NMS

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<sup>25</sup> Request for Comment No. 11, OIP at 54578.

<sup>26</sup> SIFMA Letter at 5-7.

<sup>27</sup> Section 11.2(f) of the CAT NMS Plan.

<sup>28</sup> See proposed Section 11.1(a)(i) and (ii) of the CAT NMS Plan.

Plan would state that “[w]hen Participants file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using the Fee Rate that the Operating Committee approved in accordance with paragraph (a) of this Section 11.3” such filings would be required to include (1) the Fee Rate; (2) the budget for the upcoming year (or remainder of the year, as applicable), including a brief description of each line item in the budget (including technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve and/or such other categories as determined by the Operating Committee to be included in the budget) and the reason for changes in each such line item from the prior CAT Fee filing; (3) a discussion of how the budget is reconciled to the collected fees; and (4) the projected total executed equivalent share volume of all transactions in Eligible Securities for the year (or remainder of the year, as applicable), and a description of the calculation of the projection. This detail would describe how the Fee Rate is calculated and explain how the budget used in the calculation is reconciled to the collected fees. Such detailed information would provide Industry Members and other interested parties with a clear understanding of the calculation of the CAT fees and their relationship to CAT costs.

#### **I. Definition of Budgeted CAT Costs**

The Proposed Amendment would state that the budgeted CAT costs for the year shall 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 forth 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.” The SEC requested “[c]ommenters’ views on the costs that would be included in the proposed definition of Budgeted CAT Costs in the Proposed Participant Fee Schedule.”<sup>29</sup> CAT LLC believes that budgeted CAT costs appropriately include the costs set forth in the approved budget for CAT LLC. In addition, CAT LLC believes that using budgeted CAT costs, rather than CAT costs already incurred, allows the Company to collect fees prior to when bills become payable.

The budgeted CAT costs for the upcoming year would be the costs set forth in the annual operating budget for the Company required pursuant to Section 11.1(a) of the CAT NMS Plan. Section 11.1(a) states that “[o]n an annual basis the Operating Committee shall approve an operating budget for the Company. The budget shall include the projected costs of the Company, including the costs of developing and operating the CAT for the upcoming year, and the sources of all revenue to cover such costs, as well as the funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.”

The CAT costs budgeted for the year would be comprised of all fees, costs and expenses estimated to be incurred by or for the Company in connection with the development, implementation and operation of the CAT during the year. These CAT costs would include, but not be limited to, Plan Processor costs, insurance costs, third-party support costs and an operational reserve. Plan Processor costs would consist of the Plan Processor’s ongoing costs, including development costs. This amount would be based upon the fees due to the Plan Processor pursuant to the Company’s agreement with the Plan Processor. Insurance costs would

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<sup>29</sup> Request for Comment No. 24, OIP at 54578.

include cyber insurance and director liability insurance. Third-party support costs would include legal fees, consulting fees, vendor fees and audit fees. In addition, the Operating Committee aims to accumulate the necessary funds to establish an operating reserve for the Company through the CAT fees charged to CAT Reporters. As set forth in Section 11.1(a) of the CAT NMS Plan, the Operating Committee may include in the budget “funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.”<sup>30</sup> CAT LLC proposes to add proposed Section 11.1(a)(i) to provide additional clarity regarding the costs to be included in the CAT budget by listing the types of CAT costs to be included in the budget. Specifically, proposed Section 11.1(a)(i) of the CAT NMS Plan would state that “[w]ithout limiting the foregoing, the budgeted CAT costs shall include technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve, and such other categories as determined by the Operating Committee to be included in the budget.”

As required by Section 11.1(c) of the CAT NMS Plan, 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 the Proposed Amendment, CAT LLC stated that “[a]lthough the Operating Committee may determine at its discretion that a different level of reserves is appropriate in the future, the Operating Committee proposes to include in the budget for purposes of determining CAT fees an operational reserve comprised of three months of ongoing CAT costs.”<sup>31</sup> To provide additional clarity regarding the size of the reserve, CAT LLC proposes to add proposed paragraph (a)(ii) to Section 11.1 of the CAT NMS Plan to set forth the parameters for the size of the reserve. Specifically, proposed Section 11.1(a)(ii) of the CAT NMS Plan would state that “[t]he budget will include a reserve in the amount of not more than 25% of the annual budget.” In addition, CAT LLC proposes to clarify how CAT fees collected in excess of CAT costs, including the reserve, would be used. Specifically, proposed paragraph (a)(ii) of Section 11.1 of the CAT NMS Plan would state that “[t]o the extent collected CAT fees exceed CAT costs, including the reserve of 25% of the annual budget, such surplus will be used to offset future fees.”

To address potential changes related to the CAT during the year, the Operating Committee may adjust the budgeted CAT costs for the year as it reasonably deems appropriate for the prudent operation of the Company. For example, the Operating Committee may determine that an adjustment to the budget is necessary if actual costs during the year are more or less than the budget, or if unanticipated expenditures are necessary. To the extent that the Operating Committee adjusts the budgeted CAT costs during the year and determines to adjust the Fee Rate, the adjusted budgeted CAT costs would be used in calculating the new Fee Rate for the remaining months of the year.

The Operating Committee has determined to publicly provide the annual operating budget for the Company as well as any updates to the budget that occur during the year. This publicly available budget information describes in detail the budget for the Company. For example, among other things, the budget provides specific budgeted technology costs (including cloud hosting services, operating fees, Customer and Account Information System (“CAIS”)

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<sup>30</sup> Section 11.1(a) of the CAT NMS Plan.

<sup>31</sup> Proposing Release at 33228.

operating fees and change request fees) and general and administrative costs (including legal, consulting, insurance, professional and administration, and public relations). The Company provides such budget information on a dedicated webpage on the CAT NMS Plan website to make it readily accessible for CAT Reporters and others.

### **III. Response to Comments**

CAT LLC has considered each of the questions posed by the SEC in the OIP. In this Section III, CAT LLC responds to each of the questions set forth in the OIP that were not addressed in Section II of this letter.

#### **A. Consistency with Funding Principles**

The SEC has requested “[c]ommenters’ 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,’ ‘to provide for ease of billing and other administrative functions,’ ‘to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality,’ and ‘to build financial stability to support the Company as a going concern.’”<sup>32</sup> CAT LLC believes that the Executed Share Model is consistent with each of these principles.

#### **1. Transparent, Predictable Revenue Streams**

Section 11.2(a) of the CAT NMS Plan requires the Operating Committee, in establishing the funding of the Company, to seek “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.” The Executed Share Model would satisfy this funding principle.

First, by adopting a CAT-specific fee tied directly to CAT costs, CAT LLC would be fully transparent regarding the costs of the CAT and how those costs would be allocated among CAT Reporters. The CAT fees would be designed solely to cover CAT costs, and no other regulatory costs. In contrast, charging a general regulatory fee, which might otherwise be used to cover CAT costs as well as other regulatory costs, would be less transparent than the selected approach of charging a fee designated to cover CAT-related costs only. Such a general regulatory fee could cover a variety of regulatory costs without differentiating those costs related to the CAT.

Second, the Executed Share Model would provide a predictable revenue stream for CAT LLC. The Executed Share Model is designed to collect the annual CAT costs each year, thereby providing for a predictable revenue stream. In addition, to address the possibility of some variability in the collected CAT fees, an unexpected increase in costs or variations from the

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<sup>32</sup> Request for Comment No. 1, OIP at 54577.

budgeted costs or projected executed equivalent share volume of transactions in Eligible Securities, the CAT costs covered by the Executed Share Model would include an operational reserve. The operational reserve could be used in the event that the total CAT fees collected differ from the actual CAT costs. Moreover, the Executed Share Model would require the adjustment of the Fee Rate during the year, which would address funding need changes if there are changes in the projected or actual total volume of transactions in Eligible Securities or the actual or budgeted CAT costs during the year.

Third, as discussed above, the Executed Share Model provides for a revenue stream for CAT LLC that is aligned with the anticipated costs to build, operate and administer the CAT and the other costs of the Company. The total CAT fees to be collected from CAT Reporters are designed to cover the CAT costs. Any surpluses collected would be treated as an operational reserve to offset future fees and would not be distributed to the Participants as profits.

## **2. Ease of Billing**

The Executed Share Model satisfies the funding principle set forth in Section 11.2(d) of the CAT NMS Plan, which requires the Operating Committee to seek “to provide for ease of billing and other administrative functions.” The Executed Share Model satisfies this principle in several ways. The Executed Share Model is modeled after the existing Section 31-related fee programs with which the Participants and Industry Members have a longstanding familiarity. The Executed Share Model relies upon a basic calculation using a predetermined Fee Rate along with an Industry Member or Participant’s own information regarding its executed equivalent share volume, thereby making the fee determination a straightforward process.

Furthermore, the Executed Share Model provides CAT Reporters with predictable CAT fees. Because the Fee Rate is established in advance for a relevant time period, Participants, EBBs and EBSs know the CAT fee that applies to each transaction when it occurs. Accordingly, Participants, EBBs and EBSs would be able to easily estimate and validate their applicable fees based on their own trading data. In addition, to the extent any CAT fees are passed on to customers, the customers, too, can calculate the applicable CAT fee for each transaction.

## **3. Avoid Disincentives**

The Executed Share Model satisfies the funding principle set forth in Section 11.2(e) of the CAT NMS Plan, which requires the Operating Committee to seek “to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality.” The Executed Share Model would operate in a manner similar to the funding models employed by the SEC and the Participants related to Section 31 of the Exchange Act, the FINRA trading activity fee (“TAF”) and the options regulatory fee (“ORF”). These fees are long-standing and have been approved by the Commission as satisfying the requirements under the Exchange Act, including not imposing a burden on the competition that is not necessary or appropriate under the Exchange Act. In addition, the Executed Share Model avoids potentially burdensome fees for market makers or other market participants based on message traffic. Furthermore, the Executed Share Model addresses the specific trading characteristics of Listed Options and OTC Equity

Securities to avoid adverse effects of the trading of those instruments. For example, the Executed Share Model also includes the discounting of transactions involving OTC Equity Shares which, given the volume of shares typically involved in such securities transactions, otherwise may result in disproportionate fees for market participants' transactions in these securities.

The Executed Share Model also would not unfairly burden FINRA or any of the exchanges. The Executed Share Model is designed to be neutral as to the manner of execution and place of execution. The CAT fees would be the same regardless of whether the transaction is executed on an exchange or in the over-the-counter market. All Participants are self-regulatory organizations that have the same regulatory responsibilities under the Exchange Act. Their usage of CAT Data will be for the same regulatory purposes. By treating each Participant the same, the CAT fees would not become a competitive issue by and among the Participants.

The Executed Share Model also would not unfairly burden EBBs and EBSs. The Operating Committee determined to charge EBBs and EBSs because such a fee collection model is currently used and well-known in the securities markets. As a result, the CAT fees could be paid by Industry Members without requiring significant and potentially costly changes. Moreover, the EBBs and EBSs would be permitted, but not required, to pass their CAT fees through to their customers, who, in turn, could pass their CAT fees to their customers, until the fee is imposed on the ultimate participant in the transaction. With such a pass through, the EBBs and EBSs would not ultimately incur the cost of all CAT fees related to the transactions that they clear.

#### **4. Financial Stability**

The Executed Share Model satisfies the funding principle set forth in Section 11.2(f) of the CAT NMS Plan, which requires the Operating Committee to seek "to build financial stability to support the Company as a going concern." The Operating Committee believes that the Executed Share Model is structured to collect sufficient funds to pay for the cost of the CAT going forward. In addition, the Executed Share Model would collect an operational reserve for the CAT. This operational reserve is intended to address potential shortfalls in collected CAT fees versus actual CAT costs. Moreover, the Executed Share Model includes a requirement to adjust the Fee Rate during the year in order to address any changes in the projected or actual total volume of transactions in Eligible Securities or the budgeted or actual CAT costs. Furthermore, the proposal is designed to collect CAT fees continuously so as to provide uninterrupted revenue to pay CAT bills; the CAT fees related to Prospective CAT Costs are not designed to sunset.

##### **B. 1/3, 1/3, 1/3 Allocation of Prospective Costs**

In the Proposed Amendment, CAT LLC proposed to require the CBS, the CBB and the relevant Participant each to pay one-third of the fee obligation for each transaction. The SEC requested 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 CBSs and one-third of Prospective CAT Costs to CBBs.<sup>33</sup> Under the Executed Share Model, as proposed to be revised herein, CAT LLC continues to propose a one-third, one-third, one-third allocation. Specifically, the EBS, the EBB and the relevant Participant would each pay one-third of the fee obligation for each transaction. CAT LLC believes that the proposed one-third, one-third, one-third allocation satisfies the requirements of the Exchange Act.

The proposed allocation recognizes the three primary roles in each transaction: the buyer, the seller and the market regulator, and assigns an equal one-third share of the fee per transaction to each of these three roles. The Exchange Act itself recognizes the importance of these three roles in a transaction by imposing registration and other regulatory obligations on the broker-dealers and regulator involved in a transaction. This allocation is similar to the approach taken with the FINRA TAF, ORFs and Section 31 sales value fees, and also recognizes the role of the market regulator and the buyer in the transaction as well as the seller.

Furthermore, the allocation of two-thirds of the CAT costs to Industry Members and only one-third to Participants recognizes that a substantial portion of CAT costs originates from Industry Members. CAT costs are dominated by technology costs, and the predominant technology costs are data processing (*e.g.*, linker) and storage costs. The data processing and storage costs are related to message traffic and the complexity of the reporting requirements for CAT, which, in turn, are determined by market activity. Industry Members are responsible for originating trading activity that necessitates message traffic to the CAT.

One of the factors driving CAT costs is the complexity of the Industry Members' CAT reporting requirements, which are driven by the inherent complexity of Industry Members' chosen business models. For example, in light of the complexity of market activity, the CAT's reporting scenarios document for Industry Members is over 800 pages in length, addressing almost 200 scenarios, including, for example, scenarios related to representative orders, internal routing, order modification, order cancellation, ATS scenarios, OTC scenarios, foreign scenarios, child orders, proprietary orders, fractional shares, stop and conditional orders, RFQs, floor activity and more.<sup>34</sup> The processing and storage of such a large number of complex reporting scenarios requires very complex algorithms, which, in turn, lead to significant data processing and storage costs. In contrast, the Participants do not originate market activity or orders or otherwise bring this level of complexity to the markets. As a result, the technical specifications for the Participants are far less complex than for Industry Members. For example, the technical specifications for Participants have 13 reporting events for stock exchanges compared to 36 equity reporting events in the technical specifications for Industry Members, and the technical specifications for Participants have 14 reporting events for options exchanges compared to 43 reporting options events in the technical specifications for Industry Members.<sup>35</sup> Since the

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<sup>33</sup> Request for Comment No. 2, OIP at 54577.

<sup>34</sup> CAT Industry Member Reporting Scenarios, Version 4.10 (Oct. 21, 2022) (available at [https://www.catnmsplan.com/sites/default/files/2022-10/10.21.22\\_Industry\\_Member\\_Tech\\_Specs\\_Reporting\\_Scenarios\\_v4.10\\_CLEAN.pdf](https://www.catnmsplan.com/sites/default/files/2022-10/10.21.22_Industry_Member_Tech_Specs_Reporting_Scenarios_v4.10_CLEAN.pdf)).

<sup>35</sup> Compare CAT Reporting Technical Specifications for Participants, Version 4.1.0-r15 (July 29, 2022) (available at <https://www.catnmsplan.com/sites/default/files/2022-07/07.29.2022-CAT-Reporting-Technical-Specifications-for-Participants-4.1.0-r15.pdf>), with CAT Reporting Technical Specifications for Industry Members, Version 4.0.0 r17 (Aug. 24, 2022) (available at [https://www.catnmsplan.com/sites/default/files/2022-08/08.24.2022\\_CAT\\_Reporting\\_Technical\\_Specifications\\_for\\_Industry\\_Members\\_v4.0.0r17\\_CLEAN.pdf](https://www.catnmsplan.com/sites/default/files/2022-08/08.24.2022_CAT_Reporting_Technical_Specifications_for_Industry_Members_v4.0.0r17_CLEAN.pdf)).

complexity of Industry Members' chosen business models contribute substantially to the costs of the CAT, it is reasonable and equitable to require that Industry Members pay a substantial portion of those costs.

Moreover, allocating a greater percentage of the CAT costs to Participants would raise fairness issues in light of the greater financial resources of Industry Members. There are only 25 Participants and approximately 1100 Industry Members.<sup>36</sup> Moreover, based upon an analysis of available CAT Reporter revenue, Participants only represented approximately 4% of the total CAT Reporter revenue while Industry Members represented 96% of the total CAT Reporter revenue.<sup>37</sup> In addition, various individual Industry Members have revenue in excess of some or all of the Participants. Accordingly, CAT LLC determined that allocating a higher percentage of the total CAT costs to the Participants was not a fair and equitable approach.

### **C. Alternative Cost Allocations**

The SEC also requested comment 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.”<sup>38</sup> CAT LLC analyzed a variety of alternative allocations and continues to support the proposed one-third, one-third, one-third allocation as consistent with the requirements of the Exchange Act and the CAT NMS Plan.

In its comment letter on the Proposed Amendment, one commenter suggested that 50% of the CAT costs should be paid by Participants and 50% of the CAT costs should be paid by Industry Members, with Industry Members funding of FINRA taken into account in such a model.<sup>39</sup> The commenter did not offer a reasoned basis for why a 50-50 allocation would satisfy the standards set forth in the Exchange Act. CAT LLC has previously considered and rejected a 50-50 allocation because, among other things, although the 50-50 allocation would provide a mathematically equal split between the two groups, it would not provide an equitable allocation between and among Industry Members and Participants. As discussed above, such an allocation raises fairness issues as 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.

### **D. Alternative Approach based on Individualized CAT Reporter Cost to CAT**

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<sup>36</sup> An average of 1,124 unique CAT Reporters sent transaction data to the CAT from July 1, 2022 to August 8, 2022.

<sup>37</sup> See Securities Exchange Act Rel. No. 91555 (Apr. 14, 2021), 86 Fed. Reg. 21050, 20155 (Apr. 21, 2021) (“2021 CAT Funding Proposal”). Industry Member revenue was calculated based on the total revenue reported in the Industry Member's FOCUS reports. Participant revenue was calculated based on revenue information provided in Form 1 amendments and/or publicly reported figures. Participants are not required to file uniform FOCUS-type reports regarding revenue like Industry Members. Accordingly, the revenue calculation for Participants is not as straightforward as for Industry Members.

<sup>38</sup> Request for Comment No. 3, OIP at 54577.

<sup>39</sup> Letter from Ellen Greene, Managing Director, Equities & Options Market Structure, SIFMA, to Vanessa Countryman, Secretary, SEC (June 22, 2022) at 5.

The SEC has requested “[c]ommenters’ views on whether a cost-based approach would be preferable to the proposed Executed Share Model,” and “[c]ommenters’ 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,’ and 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.’”<sup>40</sup> In response, CAT LLC emphasizes that the Exchange Act requires CAT fees to be fair, reasonable and equitably allocated, and CAT LLC believes that the use of executed share volume satisfies these requirements. The Exchange Act does not require each CAT Reporter’s fees to be a proxy for that CAT Reporter’s cost burden on the CAT, let alone an exact proxy.

### **1. Difficulty in Determining Individual CAT Reporter Costs due to Inter-related Cost Drivers**

CAT LLC has analyzed the cost drivers for the CAT, and has concluded that determining the precise cost burden imposed by each individual CAT Reporter on the CAT is not feasible. The computation of a specific CAT Reporter’s burden on the CAT is complicated by the many inter-related factors that contribute to CAT costs, including message traffic, data processing, storage, the complexity of reporting requirements, reporting timelines, infrastructure, connectivity and more. The use of executed equivalent share volume as the metric for the funding model is an improvement over the message traffic model. CAT LLC analyzed the cost drivers of CAT and determined that, although message traffic is one factor in CAT costs, it is not the primary factor. CAT costs are dominated by technology costs, and the predominant technology costs are data processing (e.g., linker) and storage costs. Compute costs represent more than half of all technology costs. While such costs are related in part to message traffic, they are driven by the stringent performance timelines, data complexity and operational requirements in the CAT NMS Plan. The Plan requires that order events be processed, corrected, and made available to regulatory users within established timeframes, including a four-hour window for initial linkage processing. For this reason, among other issues with the message traffic model and other considerations, CAT LLC determined to shift its focus to the new metric of executed equivalent share volume from the message traffic and market share metrics set forth in the CAT NMS Plan as approved.

### **2. Trading Activity as Reasonable Proxy for Cost Burden**

CAT LLC determined 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. CAT LLC analyzed reasonable metrics for determining CAT fees, and determined that, although executed equivalent share volume is not an exact proxy for the cost burden (nor need it be), trading activity provides a reasonable proxy for cost burden on the CAT. Increased trading activity impacts message traffic, data processing, storage and other factors, and thus necessarily correlates with increased cost burden on the CAT. Moreover, Industry Member activity in the market generally is engaged in for the purpose of effecting transactions, and, as a

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<sup>40</sup> Request for Comment No. 4, OIP at 54577.

result, it is common for Participants to use transaction-based fees. Therefore, executed share volume is an appropriate metric for allocating CAT costs among CAT Reporters.

This conclusion is consistent with the SEC’s prior recognition of the use of transaction volume in setting regulatory fees. For example, in approving FINRA’s TAF, the SEC recognized that transaction volume was closely enough connected to FINRA’s broad regulatory responsibilities to satisfy the statutory standard in the Exchange Act.<sup>41</sup> FINRA proposed a transaction-based TAF to fund its member regulatory activities in a variety of areas such as “sales practices, routine examinations, financial and operational reviews, new member applications, enforcement \* \* \* . . . wherever such member activity occurs.”<sup>42</sup> The SEC noted that “[a]ssessing fees in relation to transactions correlates to heightened NASD responsibilities regarding firms that engage in the trading,” but the fees were not an exact proxy for the costs of such regulatory responsibilities.<sup>43</sup> The SEC noted this lack of a precise correlation:

In most cases, the NASD has direct responsibility to oversee the firm’s dealing with the public in effecting the transactions; the NASD may also have responsibility to oversee the impact of the trading on the firm’s financial condition. In most cases, where responsibility for certain member activities has been allocated to other SROs, the NASD retains responsibility for other member functions.<sup>44</sup>

Nevertheless, the SEC concluded that “while trading activity is not wholly correlated to the full range of NASD responsibility for members in all instances, the Commission believes that they are closely enough connected to satisfy the statutory standard.”<sup>45</sup> CAT LLC believes that this same logic is applicable to the proposed Executed Share Model.

#### **E. Fee Pass-Throughs**

The SEC requested comment 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.”<sup>46</sup> Under the Executed Share Model, Industry Members would be allocated two-thirds of the CAT costs and Participants would be allocated one-third of the CAT costs. Industry Members may determine to pass their CAT fees on to their clients at their discretion. Participants also may determine to pass their CAT fees on to their members, or to pay the CAT fees charged to the Participant through other means. If Participants were to determine to pass CAT fees on to their members, they may choose to adopt a CAT-specific fee that directly passes the CAT fee through to their members, in whole or in part, or they may choose to increase other fees charged to members (*e.g.*, transaction fees). Participants

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<sup>41</sup> Securities Exchange Act Rel. No. 47946 (May 30, 2003), 68 Fed. Reg. 34021, 34023 (June 6, 2003) (“TAF Release”).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 30424.

<sup>46</sup> Request for Comment No. 5, OIP at 54578.

would need to file any such fee proposals with the SEC in accordance with Section 19(b) of the Exchange Act.

If all CAT costs were allocated to Participants, Participants would have the same options for covering the costs of the CAT fees. They may choose to adopt a CAT-specific fee that directly passes through the CAT fee through to their members, in whole or in part, or they may choose to increase other fees charged to members (*e.g.*, transaction fees). Participants would need to file any such fee proposals with the SEC in accordance with Section 19(b) of the Exchange Act.

#### **F. FINRA Fee**

Under the Executed Share Model, for each transaction in Eligible Securities based on CAT Data, the EBS, the EBB and the applicable Participant for the transaction each would pay a fee calculated by multiplying the number of executed equivalent shares in the transaction and the applicable Fee Rate and dividing the product by three. The applicable Participant for the transaction would be the national securities exchange on which the transaction was executed, or FINRA for each transaction executed otherwise than on an exchange. The SEC has requested comment on the CAT fees to be charged FINRA. Specifically, the SEC has requested (1) “[c]ommenters’ 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”; (2) “[i]f 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;” and (3) “commenters’ views on whether FINRA should be assessed a CAT fee in the same manner as the national securities exchanges.”<sup>47</sup> The SIFMA Letter argues that imposing a CAT fee on FINRA would indirectly impose the fee on Industry Members, resulting in a burden on FINRA and the Industry Members, and that FINRA should not be assessed a CAT fee in the same manner as the national securities exchanges.<sup>48</sup> SIFMA suggests charging FINRA a nominal regulatory user fee instead of the proposed fee. CAT LLC believes that the proposed CAT fees for FINRA are consistent with the Exchange Act and the CAT NMS Plan.

The Executed Share Model is designed to be neutral as to the manner of execution and place of execution. The CAT fees would be the same regardless of whether the transaction is executed on an exchange or in the over-the-counter market. All Participants are self-regulatory organizations that have the same regulatory obligations under the Exchange Act, regardless of whether they operate as a for-profit or not-for-profit entity. Their usage of CAT Data, either directly or indirectly through regulatory services agreements, would be for the same regulatory purposes in accordance with those obligations. By treating each Participant the same, the CAT fees would not become a competitive issue by and among the Participants.

In addition, the size of FINRA’s fee is calculated based on the activity in the over-the-counter market, which is substantial. For example, the executed equivalent share volume for over-the-counter trades in Eligible Securities in 2021 was 1,361,484,729,008 out of a total

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<sup>47</sup> Request for Comment No. 6, OIP at 54578.  
<sup>48</sup> SIFMA Letter at 3-4.

volume of 3,963,697,612,395 executed equivalent shares for trades in Eligible Securities.<sup>49</sup> Accordingly, approximately 34% of the executed equivalent share volume in Eligible Securities took place in the over-the-counter market.

Moreover, FINRA and the exchanges should not be evaluated differently based upon the potential for any particular Participant to pass its CAT fees onto its members through regulatory, trading or other fees. Each Participant will need to determine for itself how it will obtain the funds to pay for its CAT fees. Because each Participant, not just FINRA, is using CAT Data to satisfy the same self-regulatory obligations, each Participant may determine to charge their members fees to fund their share of the CAT fees, and the Exchange Act specifically permits self-regulatory organizations to do so, provided the fee filing requirements of the Exchange Act are satisfied. Indeed, in approving the CAT NMS Plan, the SEC stated “the Exchange Act specifically permits the Participants to charge members fees to fund their self-regulatory obligations.”<sup>50</sup> Any review of how the Participants obtain their funds to pay CAT fees is beyond the scope of the CAT fee filing.

Furthermore, SIFMA fails to recognize the basic fact that Industry Members themselves face the same issue that they raise with regard to FINRA. Industry Members may determine to pass their CAT fees through to their customers, just as they may do with Section 31-related fees and other fees. Accordingly, the two-thirds allocation of CAT costs to Industry Members may be entirely passed through to investors, thereby alleviating Industry Members of any burden of funding the CAT.

### **G. Equities Subsidization of Options**

A commenter on the Proposed Amendment stated that, if options market participants do not pay all of the costs they impose on CAT LLC, entities in the equity markets would subsidize options market trading and options market entities would have little incentive to control their costs. In response to this comment, the SEC requested “[c]ommenters’ 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.”<sup>51</sup> CAT LLC believes that the Executed Share Model provides for a fair, reasonable and equitable treatment of the equities and options markets.

As a preliminary matter, unlike other previously proposed fee models, the Executed Share Model does not allocate costs between the equities and options markets; instead, the fee attributable to a transaction in an equity or option security depends on equivalent executed share volume. The use of equivalent executed share volume is designed to normalize options and

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<sup>49</sup> These figures for executed equivalent share volume for 2021 are set forth in the illustrative example in the Proposing Release. *See* Proposing Release at 33246.

<sup>50</sup> Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 Fed. Reg. 84696, 84794 (Nov. 23, 2016) (“CAT NMS Plan Approval Order”).

<sup>51</sup> Request for Comment No. 7, OIP at 54578.

equities in the calculation of fees, and to recognize and address the different trading characteristics of different types of securities. Recognizing that Listed Options trade in contracts rather than shares, the Executed Share Model would count executed equivalent share volume differently for Listed Options. Specifically, each executed contract for a transaction in Listed Options would be counted based on the multiplier applicable to the specific Listed Option contract in the relevant transaction (*e.g.*, 100 executed equivalent shares or such other applicable equivalency).

## **H. Sell-Side and Buy-Side**

CAT LLC proposes to charge both the buy-side and sell-side of a transaction in Eligible Securities a CAT fee.<sup>52</sup> The SEC has requested “[c]ommenters’ 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.”<sup>53</sup> The proposal to charge both the buy-side and the sell-side of a transaction is consistent with other types of fees charged to both the buyer and the seller that are common in the industry. As such, CAT LLC believes that the proposal would comply with the requirements of the Exchange Act.

For example, the ORF, a fee common to the options exchanges, is one example of a regulatory fee charged to both the buy-side and sell-side of the transaction. For example, the MIAX fee schedule lists the options regulatory fee as applying “per executed contract side.”<sup>54</sup> Similarly, under its pricing schedule, Nasdaq PHLX charges an options regulatory fee “per contract side.”<sup>55</sup> As set forth in its fee schedule, CBOE EDGX also charges an options regulatory fee to each side of the contract.<sup>56</sup> In addition, the industry is familiar with transaction-based fees charged to both the buyer and the seller by the exchanges and FINRA.<sup>57</sup>

## **I. Fee Rate Changes More than Once per Year**

In the Proposed Amendment, CAT LLC proposes to adjust the Fee Rate no more than twice per year: annually and a discretionary adjustment during the year. In the OIP, the SEC requested “[c]ommenters’ 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.”<sup>58</sup> As discussed above, CAT LLC proposes in this letter to require the calculation of the Fee Rate, and the adjustment of the CAT Fee, twice a year. CAT LLC believes that the proposal to adjust the Fee Rate twice a year, once at the beginning of the year and once during the year, appropriately balances the need to coordinate the Fee Rate with changes in the costs and projections with the cost and effort to the industry related to more frequent fee changes.

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<sup>52</sup> As noted above, CAT LLC proposes to amend the prior proposal to impose CAT fees on EBBs and EBSs instead of CBBs and CBSs.

<sup>53</sup> Request for Comment No. 9, OIP at 54578.

<sup>54</sup> MIAX Options Exchange, Fee Schedule, as of September 8, 2022.

<sup>55</sup> Nasdaq PHLX Rules, Options 7, Section 6(D).

<sup>56</sup> Cboe EDGX Fee Schedule, effective September 1, 2022.

<sup>57</sup> *See, e.g.*, NYSE Price List 2022 for fees charged to both sides.

<sup>58</sup> Request for Comment No. 10, OIP at 54578.

CAT LLC believes its proposal is in keeping with views expressed by the industry in other contexts regarding the appropriate frequency of regulatory rate changes. For example, in the ORF context, the industry requested that rate changes be limited to twice per year. SIFMA stated in a comment letter on one of the ORF fee proposals that “[r]ates should only be changed two times per year to reduce operational complexity and reduce risk.”<sup>59</sup> The exchanges with ORF fees noted that the possibility for fee rate changes only twice per year would also “better enable [their members] to properly account for ORF charges among their customers.”<sup>60</sup> In light of these views on the frequency of the rate changes, exchanges with an options regulatory fee have limited the fee rate changes to twice a year.<sup>61</sup>

## **J. Plan Amendment Process for Fee Rate Changes**

Under the Proposed Amendment, once any Fee Rate has been established by a majority vote of the Operating Committee in accordance with the Executed Share Model set forth in the CAT NMS Plan,<sup>62</sup> each Participant would be required to pay the applicable CAT fee calculated in accordance with the proposed fee schedule in the CAT NMS Plan. The Operating Committee does not plan to submit an amendment to the CAT NMS Plan each time that the Fee Rate is established or adjusted because of the length of time and burden required to amend the CAT NMS Plan for each adjustment to the Fee Rate. In the OIP, the SEC requested comment on the intention not 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.<sup>63</sup> CAT LLC continues to believe that it is unnecessary to file a new separate amendment for the Participant CAT Fees each time a new Fee Rate is approved because the CAT NMS Plan would set forth in detail the manner in which the CAT fees are established and the inputs for calculating the specific CAT fees would be published on the CAT website and included in the Participant fee filings under Section 19(b) of the Exchange Act for Industry Member CAT fees. Therefore, the amendments to the Plan for a fee rate change would be redundant and impractical in terms of timing.

CAT LLC proposes to amend the CAT NMS Plan to describe in detail how CAT fees would be calculated, including the formula for the calculation and the methods for determining the inputs for the calculation (*i.e.*, the budget, projected executed equivalent share volume, executed equivalent shares per transaction). As such, the Participants would be required to calculate the Fee Rate and the related CAT fees using the proposed formula; this process would be mandatory. As discussed, CAT LLC has proposed herein to amend the Proposed Amendment to make the discretionary mid-year Fee Rate change mandatory. Moreover, the budgetary and projection inputs to the calculation would be public, including in public fee filings pursuant to

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<sup>59</sup> See, e.g., Letter from Ellen Greene, Managing Director, SIFMA to Vanessa Countryman, Secretary, SEC, re: SIFMA Comment Letter on the Options Regulatory Fee Filings by SR-EMERALD-2019-01 (Apr. 10, 2019) at 5, available at <https://www.sifma.org/wp-content/uploads/2019/04/MIAX-Emerald-ORF.pdf>.

<sup>60</sup> See, e.g., Securities Exchange Act Rel. 93667 (Oct. 15, 2021).

<sup>61</sup> See, e.g., Cboe BZX Fee Schedule (“The Exchange may only increase or decrease the ORF semi-annually”); MIAX Fee Schedule (The Exchange may only increase or decrease the ORF semi-annually); and BOX Fee Schedule (“The Exchange may only increase or decrease the ORF semi-annually”).

<sup>62</sup> Note that CAT LLC proposes to amend the Proposed Amendment to clarify that Participants would be required to pay the CAT Fee once the CAT Fee is in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

<sup>63</sup> Request for Comment No. 12, OIP at 54578.

Section 19(b) of the Exchange. Accordingly, CAT LLC does not believe that a Plan amendment would be necessary each time a new Fee Rate is calculated in accordance with the Plan.

The CAT NMS Plan would require each Participant to pay the proposed CAT Fees determined in accordance with the Executed Share Model. Proposed Section 11.3(a)(ii)(A) sets forth the requirement for Participants to pay the CAT fees. It states that “[e]ach Participant that is a national securities exchange will be required to pay the CAT Fee for each transaction in Eligible Securities executed on the exchange in the prior month based on CAT Data,” and that “[e]ach Participant that is a national securities association will be required to pay the CAT Fee for each transaction in Eligible Securities executed otherwise than on exchange in the prior month based on CAT Data.” It further states that “[t]he CAT Fee for each transaction will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3.” In addition, proposed paragraph (a) of the Participant fee schedule would state that “[e]ach Participant shall pay the CAT Fee set forth in Section 11.3(a) of the CAT NMS Plan in the manner prescribed by Consolidated Audit Trail, LLC on a monthly basis based on the Participant’s transactions in the prior month.”

The Participants would be required to follow the requirements set forth in the CAT NMS Plan for establishing and calculating CAT Fees and requiring the payment of the CAT Fees as both a regulatory and contractual matter. Rule 613(h)(1) of Regulation NMS under the Exchange Act states that “[e]ach national securities exchange and national securities association shall comply with the provisions of the national market system plan approved by the Commission,” that is, the CAT NMS Plan. Rule 613(h)(2) of Regulation NMS further states that “[a]ny failure by a national securities exchange or national securities association to comply with the provisions of the national market system plan approved by the Commission shall be considered a violation of this section.” Similarly, Rule 608(c) of Regulation NMS under the Exchange Act states that “[e]ach self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant.” Section 3.11 of the CAT NMS Plan reiterates this requirement, stating that “[e]ach Participant shall comply with . . . the provisions of SEC Rule 613 and of this Agreement, as applicable, to the Participant.” In addition, each Participant is a signatory to the CAT NMS Plan as a member of the limited liability company. Accordingly, a failure to comply with the requirements of the CAT NMS Plan related to the CAT fees would be a violation of the regulatory obligation to comply with the CAT NMS Plan and a breach of contractual requirements on the CAT NMS Plan.

#### **K. Participant CAT Fees**

The SEC has requested “[c]ommenters’ 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.”<sup>64</sup> The proposed Participant CAT fee and its calculation are discussed in Section II(D) of this letter, the competitive issues related to the Participant CAT fees

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<sup>64</sup> Request for Comment No. 14, OIP at 54578.

are discussed in Section III(B) and (F) of this letter, and the CAT fees' consistency with the funding principles in the CAT NMS Plan are discussed in Section III(A) of this letter.

**L. Executed Equivalent Shares for NMS Stocks, Listed Options and OTC Equity Securities**

The Executed Share Model uses the concept of executed equivalent shares as the transactions subject to a CAT fee involve NMS Stocks, Listed Options and OTC Equity Securities, each of which have different trading characteristics. Under the Executed Share Model, each executed share for a transaction in NMS Stocks would be counted as one executed equivalent share, each executed contract for a transaction in Listed Options would be counted using the contract multiplier applicable to the specific Listed Option in the relevant transaction, and each executed share for a transaction in OTC Equity Securities would be counted as 0.01 executed equivalent shares. In response to this proposal, the SEC requested “[c]ommenters’ 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.”<sup>65</sup>

CAT LLC continues to believe that the proposed counting methods are appropriate. The counting method for Listed Options appropriately recognizes that Listed Options trade in contracts rather than shares, and that each executed contract for a transaction in Listed Options will be counted using the contract multiplier applicable to the specific Listed Option in the relevant transaction. Typically, a Listed Option contract represents 100 shares; however, it may also represent another designated number of shares.

Similarly, in recognition of the different trading characteristics of OTC Equity Securities as compared to NMS Stocks, the Executed Share Model would discount the share volume of OTC Equity Securities when calculating the CAT fees. Many OTC Equity Securities are priced at less than one dollar – and a significant number are priced at less than one penny – per share and low-priced shares tend to trade in larger quantities. Accordingly, a disproportionately large number of shares are involved in transactions involving OTC Equity Securities versus NMS Stocks. Because the Executed Share Model would calculate CAT fees based on executed share volume, CAT Reporters trading OTC Equity Securities would likely be subject to higher fees than their market activity may warrant. To address this potential concern, the Executed Share Model would count each executed share for a transaction in OTC Equity Securities as 0.01 executed equivalent shares. The discount to 1% was selected based on a reasoned analysis of a variety of different metrics for comparing the markets for OTC Equity Securities and NMS Stocks, rather than a simple calculation. For example, using 2021 data, the Operating Committee calculated the following metrics: (1) the ratio of total notional dollar value traded for OTC Equity Securities to OTC Equity Securities and NMS Stocks was 0.051%; (2) the ratio of total trades in OTC Equity Securities to total trades in OTC Equity Securities and NMS Stocks was 0.90%; and (3) the ratio of average share price per trade of OTC Equities to average share price per trade for OTC Equity Securities and NMS Stocks was 0.065%. In recognition of the fact that

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<sup>65</sup> Request for Comment No. 15, OIP at 54578.

these calculations involve averages and for ease of application, CAT LLC determined to round these metrics to 1%.

#### **M. 1/3, 1/3 Allocation of Past CAT Costs**

Under the Executed Share Model, as proposed to be revised herein, the EBS and the EBB would each pay one-third of the fee obligation for each transaction related to Past CAT Costs. Because the Participants have already paid for Past CAT Costs, the Participants would not be required to pay a CAT fee related to Past CAT Costs. The two-thirds of the Past CAT Costs collected from Industry Members would be allocated to repay the Participants pro rata based on the outstanding loan amounts to the Company. The SEC requested “[c]ommenters’ 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.”<sup>66</sup> As noted above, CAT LLC proposes to amend the prior proposal to impose CAT fees on EBBs and EBSs instead of CBBs and CBSs. CAT LLC believes that this proposed approach satisfies the requirements of the Exchange Act for the reasons discussed in more detail above in Section III(B) regarding the 1/3, 1/3 1/3, allocation and Section III(O) regarding the pro rata allocation among Participants.

#### **N. Composition and Transparency of Past CAT Costs**

In the OIP, the SEC also requested comment on the composition and transparency of Past CAT Costs.<sup>67</sup> The Historical Fee Rate for the Historical CAT Assessment would be calculated based on actual past costs incurred by the CAT (except for certain costs that CAT LLC has determined to exclude from the calculation), rather than budgeted costs. CAT LLC described these actual costs, including excluded costs, in detail in its response to comments regarding the Executed Share Model.<sup>68</sup> Moreover, the actual costs for prior to 2022 are set forth in detail in the audited financial statements for the Company and its predecessor CAT NMS, LLC, which are available on the CAT website.<sup>69</sup>

#### **O. Allocation of Past CAT Costs to Participants: Pro Rata versus Use of Executed Share Model**

The Participants have been responsible for all costs related to the CAT to date, and Industry Members have not paid any of the costs to date. Accordingly, under the Executed Share Model, the Participants would not be required to pay a CAT fee related to Past CAT Costs in addition to prior payments. The two-thirds of the Historical CAT Costs collected from Industry Members would be allocated pro rata, based on the outstanding amounts due under the notes to the Participants for repayment of outstanding loan notes to the Company. The one-third of Historical CAT Costs that are not allocated to Industry Members would not be allocated to the Participants pursuant to the Executed Share Model. Instead, CAT fees for such Historical CAT Costs that are collected from Industry Members would be allocated to the Participants pro rata

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<sup>66</sup> Request for Comment No. 18, OIP at 54578.

<sup>67</sup> *Id.*

<sup>68</sup> CAT Response Letter at 23-28.

<sup>69</sup> The audited financial statements for CAT NMS, LLC and Consolidated Audit Trail, LLC are available at <https://www.catnmsplan.com/audited-financial-statements>.

based on the outstanding amounts due under the notes. In response to this proposal, the SEC requested “[c]ommenter’s 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.”<sup>70</sup> CAT LLC entered into the loans with the Participants pursuant to its authority under the CAT NMS Plan as approved by the SEC to pay for CAT costs, and, as such, the loans and their repayment terms are consistent with the Exchange Act and Rule 608 of Regulation NMS. The terms of the loans do not need to satisfy the requirements of the funding model set forth in Article XI of the CAT NMS Plan.

Section 3.9 of the CAT NMS Plan states that “[i]f the Company requires additional funds to carry out its purposes, to conduct its business, to meet its obligations, or to make any expenditure authorized by this Agreement, the Company may borrow funds from such one or more of the Participants, or from such third party lender(s), and on such terms and conditions, as may be approved by a Supermajority Vote of the Operating Committee.” As the Company – CAT LLC – did not have a source of revenue to fund its activities without a funding model approved by the SEC, CAT LLC determined to borrow funds from the Participants on terms approved by a Supermajority Vote of the Operating Committee. After this vote, CAT LLC entered into loan agreements with the Participants to cover CAT costs. The terms of the loan agreements dictate that repayment of the notes will be pro rata, based on the outstanding amounts loaned to CAT LLC. Accordingly, CAT LLC is obligated by contract, approved in accordance with the terms of the CAT NMS Plan, to repay the notes pro rata, not by another method.

Moreover, Section 3.8 of the CAT NMS Plan states that “[e]xcept as may be determined by the unanimous vote of all the Participants or as may be required by applicable law, no Participant shall be obligated to contribute capital or make loans to the Company.” The Participants voluntarily have agreed to provide loans to CAT LLC under the agreed upon terms to fund the CAT until a funding model is approved. Without a unanimous vote of the Participants, however, CAT LLC cannot require the Participants to make a new loan to CAT LLC. Accordingly, without the agreement of the Participants, the loans must be repaid in accordance with their terms.

#### **P. Sufficient Detail regarding Pro Rata Allocation of Past CAT Costs to Participants**

Further with regard to the pro rata allocation of Past CAT Costs, the SEC requested “[c]ommenters’ 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.”<sup>71</sup> The manner in which the loans are repaid are governed by the loan agreements between CAT LLC and the Participants, as approved by CAT LLC. The following provides additional detail as to the allocation of Past CAT Costs to Participants in accordance with the loans to CAT LLC.

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<sup>70</sup> Request for Comment No. 19, OIP at 54578.

<sup>71</sup> Request for Comment No. 20, OIP at 54578.

Pending SEC approval of CAT fees to fund the CAT, the Participants voluntarily determined to fund the development and operation of the CAT through quarterly loans to CAT LLC. The Participants determined to use the market share, tier-based funding model applicable to Execution Venues described in the proposed amendment to the CAT NMS Plan submitted to the SEC on December 11, 2017 (without including alternative trading systems as Equity Execution Venues) to allocate loan amounts among Participants (“Tiered Market Share Proposal”).<sup>72</sup> As described in that proposal, each Equity Execution Venue is placed in one of four tiers of fixed fees based on market share, and each Options Execution Venue is placed in one of two tiers of fixed fees based on market share. Equity Execution Venue market share is determined by calculating each Equity Execution Venue’s proportion of the total volume of NMS Stock and OTC Equity shares reported by all Equity Execution Venues during the relevant time period. For purposes of calculating market share, the OTC Equity Securities market share of Execution Venue ATSS trading OTC Equity Securities as well as the market share of the FINRA OTC reporting facility are discounted. Similarly, market share for Options Execution Venues is determined by calculating each Options Execution Venue’s proportion of the total volume of Listed Options contracts reported by all Options Execution Venues during the relevant time period. The tiers are refreshed on a quarterly basis in accordance with the Tiered Market Share Proposal.

Each of the Participants voluntarily have loaned CAT LLC funds in amounts in accordance with the Tiered Market Share Proposal to cover Past CAT Costs. Accordingly, under the Proposed Amendment, the Participants propose to be reimbursed for two-thirds of the Historical CAT Costs pro rata based on the outstanding amounts loaned to CAT LLC pursuant to the Tiered Market Share Proposal, as this is what is required under the loan contract between CAT LLC and the Participants. Correspondingly, for the remaining one-third of the Historical CAT Costs, the Participants propose to remain responsible for the amounts loaned to CAT LLC pursuant to the Tiered Market Share Proposal.

**Q. Past CAT Costs: Collected from Current versus Past Industry Members and Use of Prior Month’s Transactions**

The SEC has requested “[c]ommenters’ 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,”<sup>73</sup> and “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).”<sup>74</sup> CAT LLC continues to believe that the Historical CAT Assessment is appropriately assessed to current Industry Members based on current market activity.

The Operating Committee believes that it is appropriate to collect the Historical CAT Assessment from current Industry Members based on current market activity because current market participants are the beneficiaries of the regulatory value provided by the CAT to the

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<sup>72</sup> See Securities Exchange Act Rel. No. 82451 (Jan. 5, 2018), 83 Fed. Reg. 1399 (Jan. 11, 2018).

<sup>73</sup> Request for Comment No. 22, OIP at 54578.

<sup>74</sup> Request for Comment No. 21, OIP at 54578.

securities markets. The SEC has emphasized that the CAT provides a benefit to all market participants,<sup>75</sup> and, therefore, current Industry Members are benefitting from the efforts to create and operate the CAT.

In addition, the approach recognizes the many practical difficulties of imposing fees retroactively on Industry Members' market activity from the past, sometimes years in the past as the relevant recovery period extends to 2012. For example, one of the practical difficulties may include the fact that some Industry Members that would be subject to such a retroactive fee may no longer be in business or no longer registered as a broker-dealer that is subject to the jurisdiction of the Participants or SEC. Indeed, this is likely to be a substantial issue. For example, in the SEC's approval order of the CAT NMS Plan, the SEC used an estimate of 1800 broker-dealers subject to CAT reporting for its cost estimates.<sup>76</sup> However, the number of current Industry Members has greatly diminished from these early estimates to approximately 1100.<sup>77</sup> Therefore, at least approximately 40% of the broker-dealers that would have been subject to CAT reporting in 2012 are no longer CAT Reporters.

Another practical issue involves the difficulty of accurately determining the transactions in Eligible Securities of the Industry Member for the past decade that would be subject to CAT fees. Because the recovery period for Past CAT Costs spans a period in which the CAT was not in existence yet, as well as periods in which CAT reporting was being phased in, the CAT may not have any record of relevant transactions from earlier periods, and it may not have a complete record of the relevant transactions for later periods.

Moreover, imposing retroactive fees for past market activity could raise fairness issues. For example, because the fee would be retroactive, market participants could not have taken into consideration the CAT fee when they decided to enter into the transactions in the past. In addition, given the passage of time, past CAT Reporters may not be in a position to pay a fee related to earlier market activity.

## **R. Cost Transparency**

The SEC has request "[c]ommenters' views on the transparency of the Proposed Amendment and the level of detail made available into Past CAT Costs and Prospective CAT Costs."<sup>78</sup> 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.

CAT LLC provides substantial financial information regarding the operation of the CAT as required by the CAT NMS Plan. For example, CAT LLC currently makes detailed financial information about the CAT publicly available. Section 9.2(a) of the CAT NMS Plan requires CAT LLC to maintain a system of accounting established and administered in accordance with

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<sup>75</sup> See generally Securities Exchange Act Rel. No. 67457 (Jul. 18, 2012), 77 Fed. Reg. 45722 (Aug. 1, 2012) ("Rule 613 Adopting Release").

<sup>76</sup> CAT NMS Plan Approval Order at 84862.

<sup>77</sup> An average of 1,124 unique CAT Reporters sent transaction data to the CAT from July 1, 2022 to August 8, 2022.

<sup>78</sup> Request for Comment No. 23, OIP at 54578.

GAAP and requires “all financial statements or information that may be supplied to the Participants shall be prepared in accordance with GAAP (except that unaudited statements shall be subject to year-end adjustments and need not include footnotes).” Section 9.2(a) of the CAT NMS Plan also requires the Company to prepare and provide to each Participant “as soon as practicable after the end of each Fiscal Year, a balance sheet, income statement, statement of cash flows and statement of changes in equity for, or as of the end of, such year, audited by an independent public accounting firm.” The CAT NMS Plan requires that this audited balance sheet, income statement, statement of cash flows and statement of changes in equity be made publicly available. Among other things, these financial statements provide operating expenses, including technology, legal, consulting, insurance, professional and administration and public relations costs. CAT LLC also maintains a dedicated web page on the CAT NMS Plan website that consolidates its annual financial statements in a public and readily accessible place.<sup>79</sup> The Company’s annual financial statements from inception in 2017 through 2021 are available on the CAT website.

In addition to providing financial information required under the CAT NMS Plan and otherwise, CAT LLC also has voluntarily chosen to provide more financial transparency to the public regarding its costs. For example, CAT LLC publicly provides its annual operating budget as well as periodically provides updates to the budget that occur during the year. CAT LLC includes such budget information on a dedicated web page on the CAT NMS Plan website to make it readily accessible to the public, like the CAT financial statements. CAT LLC also has held webinars providing additional detail about CAT costs and about potential alternative funding models for the CAT, and commenters submitted questions and comments on the webinars.<sup>80</sup>

## **S. Budgeted Versus Incurred Costs**

Under the Executed Share Model, the budgeted CAT costs set forth in the annual operating budget would be used to determine the Fee Rate. The budgeted CAT 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. The SEC has requested “[c]ommenters’ 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.”<sup>81</sup>

CAT LLC believes that using budgeted CAT costs, rather than CAT costs already incurred, is critical to “build[ing] financial stability to support the Company as a going concern.”<sup>82</sup> Using budgeted CAT costs to determine the Fee Rate would allow the CAT LLC to

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<sup>79</sup> See CAT Audited Financial Statements, <https://www.catnmsplan.com/audited-financialstatements>.

<sup>80</sup> See, e.g., CAT LLC Webinar, CAT Costs (Sept. 21, 2021), <https://www.catnmsplan.com/events/catcostsseptember-21-2021>; CAT LLC Webinar, CAT Funding (Sept. 22, 2021), <https://www.catnmsplan.com/events/catfundingseptember-22-2021>; and CAT LLC Webinar, CAT Funding (Apr. 6, 2022), <https://www.catnmsplan.com/events/cat-funding>.

<sup>81</sup> Request for Comment No. 25, OIP at 54578. The discussion in Section II(H) above addresses the SEC’s question regarding surpluses.

<sup>82</sup> Section 11.2(f) of the CAT NMS Plan.

collect fees before bills become payable. If, however, CAT fees are only collected after bills become payable, then the Participants would be required to continue to fund 100% of CAT costs in order to pay the bills as they come due. Making the Participants responsible for all of the CAT costs upfront, rather than one-third of the CAT costs, would change the proposed model in a significant manner.

Requiring the calculation of the fee rate based on incurred CAT costs, rather than budgeted CAT costs would only be necessary if budgeted and incurred CAT costs were likely to diverge. However, the Executed Share Model has been designed to address this concern. As proposed, CAT LLC would be required to calculate the Fee Rate each year based upon the budget for the upcoming year, and to adjust the fee rate mid-year to reflect changes in the budgeted or actual CAT costs or the projected or actual executed share volume. Accordingly, CAT LLC would be required to adjust CAT fees twice a year to ensure that they are closely aligned with CAT costs. Moreover, when establishing the annual budget or its mid-year adjustment, CAT LLC would adjust the budget to reflect any surplus or deficit in CAT fees collected during the prior period.

In addition, the CAT NMS Plan requires that the Company operate on a “break-even” basis, with fees imposed to cover costs and an appropriate reserve. Any surpluses would be treated as an operational reserve to offset future fees and would not be distributed to the Participants as profits. To ensure that the Participants’ operation of the CAT will not contribute to the funding of their other operations, Section 11.1(c) of the CAT NMS Plan specifically states that “[a]ny surplus of the Company’s revenues over its expenses shall be treated as an operational reserve to offset future fees.” In addition, CAT LLC proposes to limit the size of the reserve to not more than 25% of the annual budget. To the extent that collected CAT fees exceed CAT costs, including the reserve of 25% of the annual budget, such surplus shall be used to offset future fees.<sup>83</sup> Furthermore, CAT LLC is set up as a business league to mitigate concerns that CAT LLC’s earnings could be used to benefit individual Participants.<sup>84</sup>

## **T. Conflicts of Interest**

The SEC also requested comment “on how any inherent conflicts of interest may be addressed in the Proposed Amendment.”<sup>85</sup> CAT LLC believes that the current process for developing the CAT funding model, including allocating CAT fees between and among Participants and Industry Members, appropriately addresses potential conflicts of interest related to CAT fees. The CAT NMS Plan, as approved by the SEC, adopts various measures to protect against potential conflicts issues raised by the Participants’ fee-setting authority, including, but not limited to, the fee filing requirements under the Exchange Act and operating the CAT on a

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<sup>83</sup> See Proposed 11.1(a)(ii) of the CAT NMS Plan.

<sup>84</sup> To qualify as a business league under Section 501(c)(6) of the Internal Revenue Code, an organization must “not [be] organized for profit and no part of the net earnings of [the organization can] inure[ ] to the benefit of any private shareholder or individual.” As the SEC stated when approving the CAT NMS Plan, “the Commission believes that the Company’s application for Section 501(c)(6) business league status addresses issues raised by commenters about the Plan’s proposed allocation of profit and loss by mitigating concerns that the Company’s earnings could be used to benefit individual Participants.” CAT NMS Plan Approval Order at 84793.

<sup>85</sup> Request for Comment No. 26, OIP at 54578.

break-even basis. CAT LLC believes that these and other measures address potential conflicts of interest related to CAT fees.

#### **U. Effect on Efficiency, Competition or Capital Formation**

In the OIP, the SEC requested comment “on whether, and if so how, the Proposed Amendment would affect efficiency, competition or capital formation.”<sup>86</sup> CAT LLC believes that the Proposed Amendment would have a positive impact on efficiency, competition and capital formation.

The Executed Share Model is designed to provide a predictable revenue stream sufficient to cover CAT costs each year. In doing so, the Executed Share Model would be designed to maintain the CAT as a going concern financially. By providing for the financial viability of the CAT, the Executed Share Model would allow the CAT to provide its intended benefits. For example, the CAT is intended to provide significant improvements in efficiency related to how regulatory data is collected and used. In addition, the CAT could result in improvements in market efficiency by deterring violative activity. Similarly, the CAT is intended improve capital formation by improving investor confidence in the market due to enhancements in surveillance.

In addition, the Executed Share Model would not impose an inappropriate burden on competition. The Executed Share Model would operate in a manner similar to the funding models employed by the SEC and the Participants related to Section 31 of the Exchange Act, the FINRA TAF and the ORF. These fees are long-standing and have been approved by the Commission as satisfying the requirements under the Exchange Act, including not imposing a burden on the competition that is not necessary or appropriate under the Exchange Act. In addition, the Executed Share Model avoids potentially burdensome fees for market makers or other market participants based on message traffic. Furthermore, the Executed Share Model addresses the specific trading characteristics of Listed Options and OTC Equity Securities to avoid adverse effects of the trading of those instruments. For example, the Executed Share Model includes the discounting of transactions involving OTC Equity Shares which, given the volume of shares typically involved in such securities transactions, otherwise may result in disproportionate fees to market participants transaction these securities.

The Executed Share Model also would not unfairly burden FINRA or any of the exchanges. The Executed Share Model is designed to be neutral as to the manner of execution and place of execution. The CAT fees would be the same regardless of whether the transaction is executed on an exchange or in the over-the-counter market. All Participants are self-regulatory organizations that have the same regulatory responsibilities under the Exchange Act. Their usage of CAT Data will be for the same regulatory purposes. By treating each Participant the same, the CAT fees would not become a competitive issue by and among the Participants.

As discussed above, CAT LLC recognizes that imposing the fee payment obligation on clearing brokers, rather than Industry Members more generally, may impose a significant financial burden on clearing firms, particularly if the fees imposed on clearing firms are not

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<sup>86</sup> Request for Comment No. 27, OIP at 54578.

passed through to their clients. Accordingly, CAT LLC proposes to amend the Proposed Amendment to impose the payment obligation on the EBB and EBS, rather than the CBB and CBS. Charging the EBBs and EBSs would reflect the executing role the EBB and EBS have in each transaction. CAT LLC does not believe that this proposal would unfairly burden EBBs and EBSs. Such a fee model is currently used and well-known in the securities markets. For example, SRO members regularly pay transaction-based fees. As a result, the CAT fees could be paid by Industry Members without requiring significant and potentially costly changes. Moreover, the EBBs and EBSs could determine, but would not be required, to pass their CAT fees through to their customers, who, in turn, could pass their CAT fees to their customers, until the fee is imposed on the ultimate participant in the transaction. With such a pass through, the EBBs and EBSs would not ultimately incur the cost of all CAT fees related to their transactions.

#### **V. Any Changes Necessary for Compliance with Exchange Act**

The SEC requested “[c]ommenters’ 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.”<sup>87</sup> CAT LLC continues to believe that the Proposed Amendment satisfies the requirements of the Exchange Act for the reasons set forth therein. Upon further analysis, however, CAT LLC has proposed certain additional amendments to the Proposed Amendment, as discussed in detail in Section II of this letter. CAT LLC believes that these proposed changes to the Proposed Amendment also satisfy the requirements of the Exchange Act.

#### **W. Proposed Plan Language Changes to Remove Requirements for the Operating Committee to Take into Account Distinctions in Securities Trading Operations**

Section 11.2(b) of the CAT NMS Plan states that “[i]n establishing the funding of the Company, the Operating Committee shall seek . . . (b) to establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act, taking 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.” CAT LLC proposes to delete the requirement to take into account “distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon Company resources and operations.” In response to this proposal, the SEC requested “[c]ommenters’ 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.”<sup>88</sup> This requirement related to the use of message traffic and market share in the calculation of CAT fees, as message traffic and market share were metrics related to

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<sup>87</sup> Request for Comment No. 28, OIP at 54578.

<sup>88</sup> Request for Comment No. 29, OIP at 54578-79.

the impact of a CAT Reporter on the Company's resources and operations. With the proposed move to the use of the executed equivalent shares metric instead of message traffic and market share, the requirement is no longer relevant.

#### **X. Proposed Plan Changes to Remove Tiered Fee Structure Using Market Share/Message Traffic**

Section 11.2(c) of the CAT NMS Plan states that:

In establishing the funding of the Company, the Operating Committee shall seek: . . . (c) to establish a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii) Industry Members' non-ATS activities are based upon message traffic; and (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) be 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).

CAT LLC proposes to amend paragraph (c) of Section 11.2 to read as follows: "to establish a fee structure in which the fees charged to Participants and Industry Members are based upon the executed equivalent share volume of transactions in Eligible Securities." In response to these proposed revisions, the SEC requested "[c]ommenters' 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."<sup>89</sup>

The Original Funding Model set forth in the CAT NMS Plan requires Participants and Execution Venue ATSS to pay CAT fees based on market share and Industry Members (other than Execution Venue ATSS) to pay CAT fees based on message traffic. The CAT NMS Plan also describes how the market share-based fee would be calculated for Participants and other Execution Venue ATSS and how the message traffic-based fee would be calculated for Industry Members (other than Execution Venue ATSS). CAT LLC proposes to amend Section 11.2(c) of the CAT NMS Plan to establish a CAT fee based on the number of executed equivalent shares in a transaction in Eligible Securities, rather than based on market share and message traffic. Accordingly, the Operating Committee proposes to amend Section 11.2(c) of the CAT NMS Plan to reflect the proposed use of executed equivalent shares in transactions in Eligible Securities in calculating CAT Fees.

In addition, CAT LLC proposes to eliminate the use of tiered fees for the Executed Share Model. Instead, under the Executed Share Model, the CAT fee would be based solely on the relevant Participant or Industry Member's transactions in Eligible Securities. The Operating

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<sup>89</sup> Request for Comment No. 30, OIP at 54579.

Committee therefore proposes to amend Section 11.2(c) of the CAT NMS Plan to eliminate tiered fees and related concepts.

By removing the concept of fee tiering for both Industry Members and Participants, the Executed Share Model addresses various comments regarding the use of tiering. Utilizing a tiered fee structure, by its nature, would create certain inequities among the CAT fees paid by CAT Reporters. For example, two CAT Reporters with comparable executed equivalent share volume may pay notably different fees if one falls in a higher tier and the other falls within a lower tier. Correspondingly, a tiered fee structure generally reduces fees for CAT Reporters with higher executed share volume in one tier, while increasing fees for Industry Members with lower executed share volume in the same tier, as compared to a non-tiered fee. Furthermore, CAT Reporters in lower tiers potentially pay more than they would without the use of tiers. While tiering appropriately exists in various other self-regulatory fee programs, in response to feedback on the 2018 and 2021 Fee Proposals, the Operating Committee is proposing to eliminate the tiering concept, rendering past comments about a tiered model moot.

By charging each relevant CAT Reporter a CAT fee directly based on its own executed equivalent share volume, rather than charging a tiered fee, the Executed Share Model would result in a CAT fee being tied more directly to the CAT Reporter's executed share volume. In contrast, with a tiered fee, CAT Reporters with different levels of executed equivalent share volume that are placed in the same tier would all pay the same CAT fee, thereby limiting the correlation between a CAT Reporter's activity and its CAT fee.

The proposed non-tiering approach is simpler and more objective to administer than the tiering approach. With a tiering approach, the number of tiers for the CAT Reporters, the boundaries for each tier and the fees assigned to each tier must be established. In the absence of clear groupings of CAT Reporters, selecting the number of, boundaries for, and the fees associated with, each tier would be subject to some level of subjectivity. Furthermore, the establishment of tiers would need to be continually reassessed based on changes in the executed equivalent share volume of transactions in Eligible Securities, thereby requiring regular subjective assessments. Accordingly, the removal of tiering from the funding model eliminates a variety of subjective analyses and judgments from the model and simplifies the determination of CAT fees.

#### **Y. Proposed Plan Language Changes to Remove Assignment of Tier Language**

Section 11.1(d) of the CAT NMS Plan states that:

Consistent with this Article XI, the Operating Committee shall adopt policies, procedures, and practices regarding the budget and budgeting process, assignment of tiers, resolution of disputes, billing and collection of fees, and other related matters.” For the avoidance of doubt, as part of its regular review of fees for the CAT, the Operating Committee shall have the right to change the tier assigned to any particular Person in accordance with fee schedules previously filed with the Commission that are reasonable, equitable and not unfairly discriminatory and

subject to public notice and comment, pursuant to this Article XI. Any such changes will be effective upon reasonable notice to such Person.

CAT LLC proposes to delete the reference to “assignment of tiers” from the first sentence of Section 11.1(d) and to delete the last two sentences of Section 11.1(d), which discuss changes to a Person’s assigned tiers. In response, the SEC requested “[c]ommenters’ 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.”<sup>90</sup> As noted above, unlike the Original Funding Model, the Executed Share Model would not utilize tiered fees. Accordingly, the references to tiers in Section 11.1(d) would not be applicable to the Executed Share Model.

#### **Z. Proposed Plan Language Changes to Describe the Executed Share Model**

The SEC requested “[c]ommenters’ 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.”<sup>91</sup> As discussed in detail in Section II(D) of this letter, CAT LLC proposes to restructure the proposed changes to Section 11.3 of the CAT NMS Plan, make additional changes to add clarity and detail regarding the CAT fees under the Executed Share Model, and to provide additional detail regarding the fee filing process with regard to fee rate changes applicable to Industry Members. With these proposed changes, a detailed description of the Executed Share Model would be incorporated in the CAT NMS Plan.

#### **AA. Plan Governance**

In its comment letter, SIFMA recommends that, because of the “continuing inability of the Participants to achieve consensus regarding a CAT funding model”, the Commission consider issuing an order soliciting comment on whether the CAT Operating Committee should be reorganized to provide for a governance structure consistent with the CT Plan to facilitate a fairer structure for the views of the SROs and industry to be heard.<sup>92</sup> Although CAT LLC continues to believe that the voting structure of the Operating Committee is outside the scope of the Executed Share Model, CAT LLC notes that the Proposed Amendment was approved in accordance with the requirements of the CAT NMS Plan as approved by the Commission.

CAT LLC disagrees with SIFMA’s characterization of Participant support for the Executed Share Model. The CAT NMS Plan requires at least two-thirds of the Participants to approve the an amendment to the CAT NMS Plan.<sup>93</sup> The Executed Share Model has satisfied this requirement. As such, the Participants have exceeded a mere consensus in proposing the Executed Share Model.

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<sup>90</sup> Request for Comment No. 31, OIP at 54579.

<sup>91</sup> Request for Comment No. 32, OIP at 54579.

<sup>92</sup> SIFMA Letter at 2.

<sup>93</sup> Section 12.3 of the CAT NMS Plan.

In addition, CAT LLC continues to disagree with the comments recommending Industry Member representation on the Operating Committee.<sup>94</sup> The current governance structure provides Industry Members with the ability to provide meaningful input on CAT matters through the Advisory Committee and it does not compromise the key regulatory and oversight responsibilities related to the CAT, including the SEC and SRO oversight of Industry Members. Moreover, Industry Members have ample opportunity for comment on proposed Plan amendments and fee filings, thereby obviating the need for a presence on the Operating Committee.<sup>95</sup>

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Respectfully submitted,



Mike Simon  
CAT NMS Plan Operating Committee Chair

cc: The Hon. Gary Gensler, Chair  
The Hon. Hester M. Peirce, Commissioner  
The Hon. Caroline A. Crenshaw, Commissioner  
The Hon. Mark T. Uyeda, Commissioner  
The Hon. Jaime Lizárraga, Commissioner  
Mr. Hugh Beck, Senior Advisor for Regulatory Reporting  
Mr. Haoxiang Zhu, Director, Division of Trading and Markets  
Mr. David S. Shillman, Associate Director, Division of Trading and Markets  
Mr. David Hsu, Assistant Director, Division of Trading and Markets  
Mr. Mark Donohue, Senior Policy Advisor, Division of Trading and Markets  
Ms. Erika Berg, Special Counsel, Division of Trading and Markets  
CAT NMS Plan Participants

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<sup>94</sup> See also *Nasdaq Stock Market LLC, et al v. SEC*, No. 21-1167 (D.C. Cir. 2022) (holding that Section 11A of the Exchange Act does not permit non-SROs to participate in NMS plan governance).

<sup>95</sup> CAT NMS Plan Approval Order at 84730.

**EXHIBIT A:**

**Cumulative Proposed Revisions to CAT NMS Plan**

Additions **underlined**; deletions **[bracketed]**

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**ARTICLE I**

**DEFINITIONS**

\* \* \* \* \*

**[“Execution Venue” means 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).]**

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**ARTICLE XI**

**FUNDING OF THE COMPANY**

**Section 11.1. Funding Authority.**

(a) On an annual basis the Operating Committee shall approve an operating budget for the Company. The budget shall include the projected costs of the Company, including the costs of developing and operating the CAT for the upcoming year, and the sources of all revenues to cover such costs, as well as the funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.

**(i) Without limiting the foregoing, the budgeted CAT costs shall include technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve and such other cost categories as determined by the Operating Committee to be included in the budget.**

**(ii) For the reserve referenced in paragraph (a)(i) of this Section, the budget will include an amount necessary to allow the Company to maintain a reserve of not more than 25% of the annual budget. To the extent collected CAT fees exceed CAT costs, including the reserve of 25% of the annual budget, such surplus shall be used to offset future fees.**

(b) Subject to Section 11.2, the Operating Committee shall have discretion to establish funding for the Company, including: (i) establishing fees that the Participants shall pay;

and (ii) establishing fees for Industry Members that shall be implemented by Participants. The Participants shall file with the SEC under Section 19(b) of the Exchange Act any such fees on Industry Members that the Operating Committee approves, and such fees shall be labeled as “Consolidated Audit Trail Funding Fees.”

(c) To fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. In determining fees on Participants and Industry Members the Operating Committee shall take into account 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, and such fees, costs and expenses shall be fairly and reasonably shared among the Participants and Industry Members. Any surplus of the Company’s revenues over its expenses shall be treated as an operational reserve to offset future fees.

(d) Consistent with this Article XI, the Operating Committee shall adopt policies, procedures, and practices regarding the budget and budgeting process, **[assignment of tiers,]** resolution of disputes, billing and collection of fees, and other related matters. **[For the avoidance of doubt, as part of its regular review of fees for the CAT, the Operating Committee shall have the right to change the tier assigned to any particular Person in accordance with fee schedules previously filed with the Commission that are reasonable, equitable and not unfairly discriminatory and subject to public notice and comment, pursuant to this Article XI. Any such changes will be effective upon reasonable notice to such Person.]**

**Section 11.2. Funding Principles.** In establishing the funding of the Company, the Operating Committee shall seek:

(a) 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;

(b) to establish an allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act, taking 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];**

(c) to establish a **[tiered]** fee structure in which the fees charged to **[: (i) Participants and [CAT Reporters that are Execution Venues, including ATs, are based upon the level of market share; (ii) Industry Members]’ non-ATS activities] are based upon the executed equivalent share volume of transactions in Eligible Securities, and the costs of the CAT [message traffic; and (iii) 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)].**

- (d) to provide for ease of billing and other administrative functions;
- (e) to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and
- (f) to build financial stability to support the Company as a going concern.

### **Section 11.3. Recovery.**

(a) The Operating Committee will establish [fixed] fees ("**CAT Fees**") to be payable by [Execution Venues] **Participants and Industry Members with regard to CAT costs not previously paid by the Participants ("Prospective CAT Costs") as follows [provided in this Section 11.3(a)]:**

(i) **Fee Rate. The Operating Committee will calculate the Fee Rate for the CAT Fee twice per year, once at the beginning of the year and once during the year.**

#### **(A) General.**

(I) **At the beginning of each year, the Operating Committee will calculate the Fee Rate 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. Once the Operating Committee has approved such Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using such Fee Rate. Participants and Industry Members will be required to pay CAT Fees calculated using this Fee Rate once such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.**

(II) **During each year, the Operating Committee will calculate a new Fee Rate by dividing the budgeted CAT costs for the remainder of the year by the projected total executed equivalent share volume of all transactions in Eligible Securities for the remainder of the year. Once the Operating Committee has approved the new Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using the new Fee Rate. Participants and**

**Industry Members will be required to pay CAT Fees calculated using this new Fee Rate once such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.**

**(III) For the avoidance of doubt, CAT Fees with a Fee Rate calculated as set forth in this paragraph (a)(i) shall remain in effect until the Operating Committee approves a new Fee Rate as described in paragraph (a)(i) and CAT Fees with the new Fee Rate are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.**

**(B) Executed Equivalent Shares. For purposes of calculating CAT Fees, executed equivalent shares in a transaction in Eligible Securities will be counted as follows:**

**(I) each executed share for a transaction in NMS Stocks will be counted as one executed equivalent share;**

**(II) each executed contract for a transaction in Listed Options will be counted based on the multiplier applicable to the specific Listed Option (i.e., 100 executed equivalent shares or such other applicable multiplier); and**

**(III) each executed share for a transaction in OTC Equity Securities shall be counted as 0.01 executed equivalent share.**

**(C) Budgeted CAT Costs. The budgeted CAT costs for the year shall 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 forth 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.**

**(D) Projected Total Executed Equivalent Share Volume of Transactions in Eligible Securities. The Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for each relevant period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months.**

**(ii) Participant CAT Fees.**

**(A) CAT Fee Obligation. Each Participant that is a national securities exchange will be required to pay the CAT Fee for each transaction in Eligible Securities executed on the exchange in the prior month based on CAT Data. Each Participant that is a national securities association will be required to pay the CAT Fee for each transaction in Eligible Securities executed otherwise than on an exchange in the prior month based on CAT Data. The CAT Fee for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3.**

**(B) Effectiveness. Each Participant will be required to pay the CAT Fee calculated using the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3 and approved by the Operating Committee only if such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.**

**(iii) Industry Member CAT Fees.**

**(A) CAT Fee Obligation. Each Industry Member that is the executing broker for the buyer in a transaction in Eligible Securities (“Executing Broker for the Buyer” or “EBB”) and each Industry Member that is the executing broker for the seller in a transaction in Eligible Securities (“Executing Broker for the Seller” or “EBS”) will be required to pay a CAT Fee for each such transaction in Eligible Securities in the prior month based on CAT Data. The EBB’s CAT Fee or EBS’s CAT Fee (as applicable) for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3.**

**(B) Content of Fee Filings. When Participants file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using the Fee Rate that the Operating Committee approved in accordance with paragraph (a) of this Section 11.3, such filings shall set forth (A) the Fee Rate; (B) the budget for the upcoming year (or remainder of the year, as applicable), including a brief description of each line item in the budget, including technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve and/or such other categories as determined by the Operating Committee to be included in the budget, and the reason for changes in each such line item from the prior CAT Fee filing; (C) a discussion of how the budget is reconciled to the collected fees; and (D) the**

**projected total executed equivalent share volume of all transactions in Eligible Securities for the year (or remainder of the year, as applicable), and a description of the calculation of the projection.**

**(i) Each Execution Venue that: (A) executes transactions; or (B) in the case of a national securities association, has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange, in NMS Stocks or OTC Equity Securities will pay a fixed fee depending on the market share of that Execution Venue in NMS Stocks and OTC Equity Securities, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's NMS Stocks and OTC Equity Securities market share. For these purposes, market share for Execution Venues that execute transactions will be calculated by share volume, and market share for a national securities association that has trades reported by its members to its trade reporting facility or facilities for reporting transactions effected otherwise than on an exchange in NMS Stocks or OTC Equity Securities will be calculated based on share volume of trades reported, provided, however, that the share volume reported to such national securities association by an Execution Venue shall not be included in the calculation of such national security association's market share.]**

**(ii) Each Execution Venue that executes transactions in Listed Options will pay a fixed fee depending on the Listed Options market share of that Execution Venue, with the Operating Committee establishing at least two and no more than five tiers of fixed fees, based on an Execution Venue's Listed Options market share. For these purposes, market share will be calculated by contract volume.]**

**(b) Past CAT Costs. The Operating Committee will establish [fixed] fees ("Historical CAT Assessment") to be payable by Industry Members with regard to CAT costs previously paid by the Participants ("Past CAT Costs") as follows: [, based on the message traffic generated by such Industry Member, with the Operating Committee establishing at least five and no more than nine tiers of fixed fees, based on message traffic. For the avoidance of doubt, the fixed fees payable by Industry Members pursuant to this paragraph shall, in addition to any other applicable message traffic, include message traffic generated by: (i) an ATS that does not execute orders that is sponsored by such Industry Member; and (ii) routing orders to and from any ATS sponsored by such Industry Member.]**

**(i) Calculation of Historical Fee Rate.**

**(A) General. The Operating Committee will calculate the Historical Fee Rate for the Historical CAT Assessment by dividing the Historical CAT Costs by the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period. Once the Operating Committee has approved such Historical Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act the Historical**

**CAT Assessment to be charged Industry Members calculated using such Historical Fee Rate. Industry Members will be required to pay the Historical CAT Assessment calculated using this Historical Fee Rate once such Historical CAT Assessment is in effect in accordance with Section 19(b) of the Exchange Act.**

**(B) Executed Equivalent Shares. For purposes of calculating the Historical CAT Assessment, executed equivalent shares in a transaction in Eligible Securities will be counted in the same manner as set forth in paragraph (a)(i)(B) of this Section 11.3.**

**(C) Historical CAT Costs. The Operating Committee will determine the Historical CAT Costs sought to be recovered by the Historical CAT Assessment, where the Historical CAT Costs will be Past CAT Costs minus Past CAT Costs excluded from Historical CAT Costs by the Operating Committee.**

**(D) Historical Recovery Period.**

**(I) The length of the Historical Recovery Period used in calculating the Historical Fee Rate will be established by the Operating Committee based upon the amount of the Historical CAT Costs to be recovered by the Historical CAT Assessment; provided, however, no Historical Recovery Period used in calculating the Historical Fee Rate shall be less than 24 months or more than five years.**

**(II) Notwithstanding the length of the Historical Recovery Period used in calculating the Historical Fee Rate, the Historical CAT Assessment calculated using the Historical Fee Rate will remain in effect until all Historical CAT Costs are collected.**

**(E) Projected Total Executed Equivalent Share Volume of Transactions in Eligible Securities for Historical Recovery Period. The Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months.**

**(ii) Past CAT Costs and Participants. Because Participants previously have paid Past CAT Costs via loans to the Company, Participants would not be required to pay the Historical CAT Assessment. The Historical CAT Assessment to be paid by Industry Members and collected by the Company will be used by the Company to**

**repay a portion of the loans from the Participants to the Company on a pro rata basis. The Historical CAT Assessment is designed to recover two-thirds of the Historical CAT Costs.**

(iii) **Historical CAT Assessment for Industry Members.**

**(A) Each month in which the Historical CAT Assessment is in effect, each EBB and each EBS shall pay a fee for each transaction in Eligible Securities executed by the EBB or EBS from the prior month as set forth in CAT Data, where the Historical CAT Assessment for each transaction will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Historical Fee Rate determined pursuant to paragraph (b)(i) of this Section 11.3.**

**(B) Historical CAT Fee Filing. When the Participants file with the SEC pursuant to Section 19(b) of the Exchange Act the Historical CAT Assessment calculated using the Historical Fee Rate that the Operating Committee approved in accordance with this Section 11.3, such filing shall set forth (A) the Historical Fee Rate; (B) a brief description of amount and type of the Historical CAT Costs; (C) the Historical Recovery Period and the reasons for its length; and (D) the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period, and a description of the calculation of the projection.**

(c) The Operating Committee may establish any other fees ancillary to the operation of the CAT that it reasonably determines appropriate, including fees: (i) for the late or inaccurate reporting of information to the CAT; (ii) for correcting submitted information; and (iii) based on access and use of the CAT for regulatory and oversight purposes (and not including any reporting obligations).

(d) The Company shall make publicly available a schedule of effective fees and charges adopted pursuant to this Agreement as in effect from time to time. The Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semiannual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.

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**APPENDIX B**

**Fee Schedule**

**Consolidated Audit Trail Funding Fees for Participants**

**(a) CAT Fee. Each Participant shall pay the CAT Fee set forth in Section 11.3(a) of the CAT NMS Plan to Consolidated Audit Trail, LLC in the manner prescribed by Consolidated Audit Trail, LLC on a monthly basis based on the Participant's transactions in Eligible Securities in the prior month.**

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**EXHIBIT B:**

**Proposed Additional Revisions to Proposed Changes in Proposed Amendment**

Additions underlined; deletions [bracketed]

\* \* \* \* \*

**ARTICLE XI**

**FUNDING OF THE COMPANY**

**Section 11.1. Funding Authority.**

(a) On an annual basis the Operating Committee shall approve an operating budget for the Company. The budget shall include the projected costs of the Company, including the costs of developing and operating the CAT for the upcoming year, and the sources of all revenues to cover such costs, as well as the funding of any reserve that the Operating Committee reasonably deems appropriate for prudent operation of the Company.

**(i) Without limiting the foregoing, the budgeted CAT costs shall include technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve and such other cost categories as determined by the Operating Committee to be included in the budget.**

**(ii) For the reserve referenced in paragraph (a)(i) of this Section, the budget will include an amount necessary to allow the Company to maintain a reserve of not more than 25% of the annual budget. To the extent collected CAT fees exceed CAT costs, including the reserve of 25% of the annual budget, such surplus shall be used to offset future fees.**

(b) Subject to Section 11.2, the Operating Committee shall have discretion to establish funding for the Company, including: (i) establishing fees that the Participants shall pay; and (ii) establishing fees for Industry Members that shall be implemented by Participants. The Participants shall file with the SEC under Section 19(b) of the Exchange Act any such fees on Industry Members that the Operating Committee approves, and such fees shall be labeled as “Consolidated Audit Trail Funding Fees.”

(c) To fund the development and implementation of the CAT, the Company shall time the imposition and collection of all fees on Participants and Industry Members in a manner reasonably related to the timing when the Company expects to incur such development and implementation costs. In determining fees on Participants and Industry Members the Operating Committee shall take into account 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, and such fees,

costs and expenses shall be fairly and reasonably shared among the Participants and Industry Members. Any surplus of the Company's revenues over its expenses shall be treated as an operational reserve to offset future fees.

(d) Consistent with this Article XI, the Operating Committee shall adopt policies, procedures, and practices regarding the budget and budgeting process, resolution of disputes, billing and collection of fees, and other related matters.

**Section 11.2. Funding Principles.** In establishing the funding of the Company, the Operating Committee shall seek:

(a) 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;

(b) to establish an allocation of the Company's related costs among Participants and Industry Members that is consistent with the Exchange Act, taking into account the timeline for implementation of the CAT;

(c) to establish a fee structure in which the fees charged to Participants and Industry Members are based upon the executed equivalent share volume of transactions in Eligible Securities, **and the costs of the CAT.**

(d) to provide for ease of billing and other administrative functions;

(e) to avoid any disincentives such as placing an inappropriate burden on competition and a reduction in market quality; and

(f) to build financial stability to support the Company as a going concern.

**Section 11.3. Recovery.**

(a) **Prospective CAT Costs.** The Operating Committee will establish fees ("**CAT Fees**") to be payable by Participants **and Industry Members with regard to CAT costs not previously paid by the Participants ("Prospective CAT Costs")** as follows:

(i) **Fee Rate. The Operating Committee will calculate the Fee Rate for the CAT Fee twice per year, once at the beginning of the year and once during the year as follows:**

**(A) General.**

**(I) At the beginning of each year, the Operating Committee will calculate the Fee Rate 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. Once the Operating Committee has**

approved such Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using such Fee Rate. Participants and Industry Members will be required to pay CAT Fees calculated using this Fee Rate once such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

(II) During each year, the Operating Committee will calculate a new Fee Rate by dividing the budgeted CAT costs for the remainder of the year by the projected total executed equivalent share volume of all transactions in Eligible Securities for the remainder of the year. Once the Operating Committee has approved the new Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using the new Fee Rate. Participants and Industry Members will be required to pay CAT Fees calculated using this new Fee Rate once such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

(III) For the avoidance of doubt, CAT Fees with a Fee Rate calculated as set forth in this paragraph (a)(i) shall remain in effect until the Operating Committee approves a new Fee Rate as described in paragraph (a)(i) and CAT Fees with the new Fee Rate are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.

(B) Executed Equivalent Shares. For purposes of calculating CAT Fees, executed equivalent shares in a transaction in Eligible Securities will be counted as follows:

(I) each executed share for a transaction in NMS Stocks will be counted as one executed equivalent share;

(II) each executed contract for a transaction in Listed Options will be counted based on the multiplier applicable to the specific Listed Option (i.e., 100 executed equivalent shares or such other applicable multiplier); and

**(III) each executed share for a transaction in OTC Equity Securities shall be counted as 0.01 executed equivalent share.**

**(C) Budgeted CAT Costs. The budgeted CAT costs for the year shall 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 forth 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.**

**(D) Projected Total Executed Equivalent Share Volume of Transactions in Eligible Securities. The Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for each relevant period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months.**

**(ii) Participant CAT Fees.**

**(A) CAT Fee Obligation.** Each Participant that is a national securities exchange will be required to pay [a fee] **the CAT Fee** for each transaction in Eligible Securities executed on the exchange in the prior month based on CAT Data. Each Participant that is a national securities association will be required to pay [a fee] **the CAT Fee** for each transaction in Eligible Securities executed otherwise than on an exchange in the prior month based on CAT Data. [(ii)] The [fee] **CAT Fee** for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the [applicable fee rate for the relevant period (“] Fee Rate [”)] **determined pursuant to paragraph (a)(i) of this Section 11.3.**

**(B) Effectiveness.** Each Participant will be required to pay **the CAT Fee calculated using the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3 and approved by the Operating Committee only if such CAT Fees are in effect with regard to Industry Members in accordance with Section 19(b) of the Exchange Act.**

**[(iii) Participants will be required to pay a CAT fee with regard to CAT costs not previously paid by the Participants (“Prospective CAT Costs”). The Fee Rate for the CAT fee related to Prospective CAT Costs will be calculated by dividing the budgeted CAT costs for the relevant period (as determined by the Operating Committee) by the projected total executed equivalent share volume of all transactions in Eligible Securities for the relevant period based on CAT Data.]**

**[(iv) Notwithstanding anything to the contrary, Participants will not be required to pay a CAT fee related to CAT costs previously paid by the Participants in a manner determined by the Operating Committee (“Past CAT Costs”).]**

**(iii) Industry Member CAT Fees.**

**(A) CAT Fee Obligation. Each Industry Member that is the executing broker for the buyer in a transaction in Eligible Securities (“Executing Broker for the Buyer” or “EBB”) and each Industry Member that is the executing broker for the seller in a transaction in Eligible Securities (“Executing Broker for the Seller” or “EBS”) will be required to pay a CAT Fee for each such transaction in Eligible Securities in the prior month based on CAT Data. The EBB’s CAT Fee or EBS’s CAT Fee (as applicable) for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate determined pursuant to paragraph (a)(i) of this Section 11.3.**

**(B) Content of Fee Filings. When the Participants file with the SEC pursuant to Section 19(b) of the Exchange Act CAT Fees to be charged to Industry Members calculated using the Fee Rate that the Operating Committee approved in accordance with paragraph (a) of this Section 11.3, such filings shall set forth (A) the Fee Rate; (B) the budget for the upcoming year (or remainder of the year, as applicable), including a brief description of each line item in the budget, including technology, legal, consulting, insurance, professional and administration, and public relations costs, a reserve and/or such other categories as determined by the Operating Committee to be included in the budget, and the reason for changes in each such line item from the prior CAT Fee filing; (C) a discussion of how the budget is reconciled to the collected fees; and (D) the projected total executed equivalent share volume of all transactions in Eligible Securities for the year (or remainder of the year, as applicable), and a description of the calculation of the projection.**

**(b) Past CAT Costs.** The Operating Committee will establish fees (“Historical CAT Assessment”) to be payable by Industry Members **with regard to CAT costs previously paid by the Participants (“Past CAT Costs”)** as follows:

**(i) Calculation of Historical Fee Rate.**

**(A) General. The Operating Committee will calculate the Historical Fee Rate for the Historical CAT Assessment by dividing the Historical CAT Costs by the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period. Once the Operating Committee has approved such**

**Fee Rate, the Participants shall be required to file with the SEC pursuant to Section 19(b) of the Exchange Act the Historical CAT Assessment to be charged to Industry Members calculated using such Historical Fee Rate. Industry Members will be required to pay Historical CAT Assessment calculated using this Historical Fee Rate once such Historical CAT Assessment is in effect in accordance with Section 19(b) of the Exchange Act.**

**(B) Executed Equivalent Shares. For purposes of calculating the Historical CAT Assessment, executed equivalent shares in a transaction in Eligible Securities will be counted in the same manner as set forth in paragraph (a)(i)(B) of this Section 11.3.**

**(C) Historical CAT Costs. The Operating Committee will determine the Historical CAT Costs sought to be recovered by the Historical CAT Assessment, where the Historical CAT Costs will be Past CAT Costs minus Past CAT Costs excluded from Historical CAT Costs by the Operating Committee.**

**(D) Historical Recovery Period.**

**(I) The length of the Historical Recovery Period used in calculating the Historical Fee Rate will be established by the Operating Committee based upon the amount of the Historical CAT Costs to be recovered by the Historical CAT Assessment; provided, however, no Historical Recovery Period used in calculating the Historical Fee Rate shall be less than 24 months or more than five years.**

**(II) Notwithstanding the length of the Historical Recovery Period used in calculating the Historical Fee Rate, the Historical CAT Assessment calculated using the Historical Fee Rate will remain in effect until all Historical CAT Costs are collected.**

**(E) Projected Total Executed Equivalent Share Volume of Transactions in Eligible Securities for Historical Recovery Period. The Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior twelve months.**

**(ii) Past CAT Costs and Participants. Because Participants previously have paid Past CAT Costs via loans to the Company, Participants would not be required to pay the Historical CAT Assessment. The Historical CAT Assessment to be paid by Industry Members and collected by the Company will be used by the Company to repay a portion of the loans from the Participants to the Company on a pro rata basis. The Historical CAT Assessment is designed to recover two-thirds of the Historical CAT Costs.**

**(iii) Historical CAT Assessment for Industry Members.**

**(A) Each month in which the Historical CAT Assessment is in effect, each EBB and each EBs shall pay a fee for each transaction in Eligible Securities executed by the EBB or EBS from the prior month as set forth in CAT Data, where the Historical CAT Assessment for each transaction will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Historical Fee Rate determined pursuant to paragraph (b)(i) of this Section 11.3.**

**(B) Historical CAT Fee Filing. When the Participants file with the SEC pursuant to Section 19(b) of the Exchange Act the Historical CAT Assessment calculated using the Historical Fee Rate that the Operating Committee approved in accordance with paragraph (b) of this Section 11.3, such filing shall set forth (A) the Historical Fee Rate; (B) a brief description of the amount and type of the Historical CAT Costs; (C) the Historical Recovery Period and the reasons for its length; and (D) the projected total executed equivalent share volume of all transactions in Eligible Securities for the Historical Recovery Period, and a description of the calculation of the projection.**

**[(i) Each Industry Member that is the clearing firm for the buyer in a transaction in Eligible Securities (“Clearing Broker for the Buyer” or “CBB”) will be required to pay a fee for each such transaction in Eligible Securities based on CAT Data. The CBB’s fee for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate.]**

**[(ii) Each Industry Member that is the clearing firm for the seller in a transaction in Eligible Securities (“Clearing Broker for the Seller” or “CBS”) will be required to pay a fee for each transaction in Eligible Securities based on CAT Data. The CBS’s fee for each transaction in Eligible Securities will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate.]**

**[(iii) CBBs and CBSs will be required to pay CAT fees related to Past CAT Costs. The Fee Rate for the CAT fees related to Past CAT Costs will be calculated by dividing the Past CAT Costs for the relevant period (as determined by the**

**Operating Committee) by the projected total executed equivalent share volume of all transactions in Eligible Securities for the relevant period based on CAT Data.]**

**[(iv) CBBs and CBSs will be required to pay CAT fees related to Prospective CAT Costs. The Fee Rate for the CAT fees related to Prospective CAT Costs will be the same as set forth in paragraph (a)(iv) above.]**

(c) The Operating Committee may establish any other fees ancillary to the operation of the CAT that it reasonably determines appropriate, including fees: (i) for the late or inaccurate reporting of information to the CAT; (ii) for correcting submitted information; and (iii) based on access and use of the CAT for regulatory and oversight purposes (and not including any reporting obligations).

(d) The Company shall make publicly available a schedule of effective fees and charges adopted pursuant to this Agreement as in effect from time to time. The Operating Committee shall review such fee schedule on at least an annual basis and shall make any changes to such fee schedule that it deems appropriate. The Operating Committee is authorized to review such fee schedule on a more regular basis, but shall not make any changes on more than a semiannual basis unless, pursuant to a Supermajority Vote, the Operating Committee concludes that such change is necessary for the adequate funding of the Company.

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## APPENDIX B

### Fee Schedule

#### Consolidated Audit Trail Funding Fees for Participants

(a) **CAT Fee.**

**[(1) Each Participant that is a national securities exchange shall pay a fee for each transaction in Eligible Securities executed on the exchange based on CAT Data, where the fee for each transaction will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate.**

**(2) Each Participant that is a national securities association shall pay a fee for each transaction in Eligible Securities executed otherwise than on exchange based on CAT Data, where the fee for each transaction will be calculated by multiplying the number of executed equivalent shares in the transaction by one-third and by the Fee Rate.**

(b) **Fee Rate**

**(1) The Operating Committee will calculate the Fee Rate at the beginning of each 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. After setting the Fee Rate at the beginning of each year, the Fee Rate may be adjusted once during the**

year, if necessary, due to changes in the budgeted or actual costs or projected or actual total executed equivalent share volume during the year.

(2) For purposes of calculating the fees, executed equivalent shares in a transaction in Eligible Securities will be counted as follows:

(i) each executed share for a transaction in NMS Stocks will be counted as one executed equivalent share;

(ii) each executed contract for a transaction in Listed Options will be counted based on the multiplier applicable to the specific Listed Option (i.e., 100 executed equivalent shares or such other applicable multiplier); and

(iii) each executed share for a transaction in OTC Equity Securities shall be counted as 0.01 executed equivalent share.

(3) **Budgeted CAT Costs.** The budgeted CAT costs for the year shall 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 forth 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.

(4) **Projected Total Executed Equivalent Share Volume of Transactions in Eligible Securities.** The Operating Committee shall determine the projected total executed equivalent share volume of all transactions in Eligible Securities for each relevant period based on the executed equivalent share volume of all transactions in Eligible Securities for the prior six months.]

[(c) **Fee Payments/Collection.**] Each Participant shall pay the CAT **Fee** [fee] set forth **in Section 11.3(a) of the CAT NMS Plan [paragraph (a)]** to Consolidated Audit Trail, LLC in the manner prescribed by Consolidated Audit Trail, LLC on a monthly basis based on the Participant's transactions **in Eligible Securities** in the prior month.

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