

May 22, 2023

VIA EMAIL (tradingandmarkets@sec.gov)

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

Re: Request for Exemption to Allow for Extension of Time for Provisions of the National Market System Plan Governing the Consolidated Audit Trail Related to FAM 4 and for Phase 2e of the Phased Reporting Exemption

Dear Ms. Countryman:

Consolidated Audit Trail, LLC (“CAT LLC”), on behalf of the Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”)² respectfully requests that the Securities and Exchange Commission (“Commission” or “SEC”) use its exemptive authority under Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”)³ and/or Rule 608(e) of Regulation NMS under the Exchange Act⁴ to extend until August 31, 2024 the target deadline in Section 11.6(a)(i)(D) of December 30, 2022 for Full Implementation of CAT NMS Plan Requirements. The Participants believe that the requested exemption to extend the date until August 31, 2024 is “necessary or appropriate in the public interest, and consistent with the protection of investors,”⁵ and is “consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.”⁶

¹ 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.

² The Limited Liability Company Agreement of Consolidated Audit Trail, LLC is the CAT NMS Plan. Unless otherwise noted, capitalized terms are used as defined in Rule 613, in the CAT NMS Plan, or in this letter.

³ See 15 U.S.C. § 78mm(a)(1), which provides, in relevant part, that the “Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”

⁴ 17 C.F.R. § 242.608(e), which provides that “[t]he Commission may exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.”

⁵ 15 U.S.C. § 78mm(a)(1).

⁶ 17 C.F.R. § 242.608(e).

As an initial matter and as described further below, the Participants have made substantial progress towards Full Implementation of CAT NMS Plan Requirements. The CAT NMS Plan requires the creation of a transactional database and a separate customer database, referred to as the Customer Account and Information System (“CAIS”). The transactional database has been implemented and is fully operational. Although there are outstanding defects to be addressed pertaining to CAIS (which is a sub-system of the overall CAT), CAIS has been implemented and is currently operational, and Industry Members have been reporting required data to CAIS on a daily basis since November 2022. As described in further detail below, the vast majority of transaction data is benefiting from the reported CAIS data and regulators are generally able to track trading activity of at least one customer across accounts and broker-dealers. This is not to minimize the importance of addressing any defects within CAIS, which the Participants are committed to working with the Plan Processor to do, but to provide critical context for this request in light of overall CAT operations, and the excessive and hugely disproportionate penalties that would be imposed on the Participants and the unintentional economic incentives that would be created in the absence of exemptive relief.

This request for exemptive relief to extend the Period 4⁷ deadline from December 30, 2022 until August 31, 2024, and related request to extend the Phase 2e Industry Member Data reporting deadline to a date no later than August 31, 2024 (as further detailed below), amends and replaces the requests previously submitted to the Commission on November 22, 2022⁸ and June 30, 2022.⁹

A. Period 4 of the Financial Accountability Milestones

On May 15, 2020, the Commission adopted amendments to the CAT NMS Plan to establish financial accountability provisions to achieve full CAT implementation.¹⁰ Specifically, Section 11.6 of the CAT NMS Plan requires the Participants to meet four Financial Accountability Milestones by certain dates in order to collect the full amount of any fees established by the Operating Committee, or implemented by the Participants, to recover Post-Amendment Expenses from Industry Members (“Post-Amendment Industry Member Fees”). If the Participants meet the target deadline specified for a given Financial Accountability Milestone, Section 11.6 of the CAT NMS Plan would entitle them to collect the full amount of any related Post-Amendment Industry Member Fees. However, if the Participants do not meet the date specified for a given Financial Accountability Milestone, Section 11.6 of the CAT NMS

⁷ See Section 11.6(a)(i)(D) of the CAT NMS Plan (defining “Period 4” as running “from the date immediately following the achievement of Full Availability and Regulatory Utilization of Transactional Database Functionality to the date of Full Implementation of CAT NMS Plan Requirements,” and setting a target deadline of December 30, 2022).

⁸ See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated Nov. 22, 2022.

⁹ See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated June 30, 2022.

¹⁰ See Securities Exchange Act Release No. 88890 (May 15, 2020), 85 Fed. Reg. 31322 (May 22, 2020) (“Financial Accountability Milestones Release”), <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-10963.pdf>.

Plan would reduce the amount of related Post-Amendment Industry Member Fees that the Participants may recover.¹¹

This exemptive request is related to the fourth and final Financial Accountability Milestone (“FAM 4”): Full Implementation of CAT NMS Plan Requirements. “Full Implementation of CAT NMS Plan Requirements” is defined to mean:

the point at which the Participants have satisfied all of their obligations to build and implement the CAT, such that all CAT system functionality required by Rule 613 and the CAT NMS Plan has been developed, successfully tested, and fully implemented at the initial Error Rates specified by Section 6.5(d)(i) or less, including functionality that efficiently permits the Participants and the Commission to access all CAT Data required to be stored in the Central Repository pursuant to Section 6.5(a), including Customer Account Information, Customer-ID, Customer Identifying Information, and Allocation Reports, and to analyze the full lifecycle of an order across the national market system, from order origination through order execution or order cancellation, including any related allocation information provided in an Allocation Report. This Financial Accountability Milestone shall be considered complete as of the date identified in a Quarterly Progress Report meeting the requirements of Section 6.6(c).¹²

FAM 4 would include, among other things, the full implementation of CAIS.

Section 11.6(a)(i)(D) of the CAT NMS Plan sets forth the target deadline of December 30, 2022. It states that:

[t]he Participants will be entitled to collect the full amount of: . . . (D) Any Post-Amendment Industry Member Fees established or implemented to recover the Post-Amendment Expenses incurred from the date immediately following the achievement of Full Availability and Regulatory Utilization of Transactional Database Functionality to the date of Full Implementation of CAT NMS Plan Requirements (“Period 4”), so long as such date is no later than December 30, 2022.

Section 11.6(a)(iii) of the CAT NMS Plan sets forth the penalty for missing the target deadline of December 30, 2022. It states that:

The amount of Post-Amendment Industry Member Fees that the Participants are entitled to collect for Periods 2, 3, and 4 will be reduced according to the following schedule if the Participants miss the deadline set forth for that Period:

¹¹ The Commission has stated that “[t]o the extent that the Participants are availing themselves of exemptive relief from a CAT NMS Plan requirement, such requirement shall not be included in the requirements for a Financial Accountability Milestone, provided that the conditions of the exemption are satisfied.” See Securities Exchange Act Release No. 89051 (June 11, 2020), 85 Fed. Reg. 36631, 36633 (June 17, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-06-17/pdf/2020-12998.pdf>.

¹² Section 1.1 of the CAT NMS Plan.

(A) By 25% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by less than 90 days;

(B) By 50% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by 90 days or more, but less than 180 days;

(C) By 75% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by 180 days or more, but less than 270 days; and

(D) By 100% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by 270 days or more.

B. CAT LLC Has Made Substantial Progress Toward Satisfaction of FAM 4, the CAT Is Fully Operational Except for Certain CAIS Functionality, and the Overall CAIS Data Currently Available Is Significant and Is Providing Regulatory Value

CAT LLC has made substantial progress toward satisfaction of Full Implementation of CAT NMS Plan Requirements. As indicated in prior Quarterly Progress Reports, the first three Financial Accountability Milestones have been completed on time. With respect to FAM 4, save for some aspects of the CAIS sub-system discussed below, the CAT has been built and implemented, such that all CAT system functionality required by Rule 613 and the CAT NMS Plan has been developed, successfully tested, and fully implemented at or less than the initial Error Rates specified in the Plan, and the system includes functionality that efficiently permits the Participants and the Commission to access all CAT Data required to be stored in the Central Repository and to analyze the full lifecycle of an order across the national market system.

Although there are outstanding defects to be addressed, CAIS has been implemented and is currently operational, the CAIS Regulator Portal is available, and the overall CAIS data that is currently available is significant and in its current state provides regulatory utility and efficiencies that augment the CAT transactional database. Industry Members have been required to report, and are reporting, required data to CAIS in production on a daily basis since November 7, 2022, consistent with interim reporting obligations. CAIS currently accepts and validates CAIS data submitted by Industry Members. Subject to certain issues described below, the CAIS production environment has been receiving customer and account data, and such data is accessible to regulators for surveillance and oversight.

CAIS has been available in production since April 25, 2022, and, under the Phased Reporting Exemption,¹³ Industry Members were required to report “Phase 2e Industry Member Data”¹⁴ by July 11, 2022. However, as Industry Members began reporting in the CAIS production environment, the Plan Processor observed certain processing delays. CAT LLC

¹³ See Securities Exchange Act Rel. No. 88702 (Apr. 20, 2020), 85 Fed. Reg. 23075 (Apr. 24, 2020) (“Phased Reporting Exemption”).

¹⁴ Phase 2e Industry Member Data includes “Customer Account Information and Customer Identifying Information, other than LTIDs, date account opened/Account Effective Date and Firm Designated ID type flag previously reported to the CAT.” See Phased Reporting Exemption at 23080.

raised these delays with the SEC staff and on June 30, 2022 proposed an extension of the Phase 2e Industry Member Data reporting deadline to December 12, 2022, with certain interim reporting obligations before that time.¹⁵ These original CAIS processing delays generally related to concurrent file processing and error feedback and have since been addressed via new system releases/updates. As the Plan Processor gained more experience with CAIS and its customer and account data, additional processing issues were subsequently identified to CAT LLC; these defects were the subject of the subsequent exemptive request submitted November 22, 2022.¹⁶ Specifically, the Plan Processor identified certain data load defects introduced in October 2022 that resulted in not all received CAIS data being loaded into the primary data stores. These data load defects impact both accepted data and rejected data. As a result, while all data received has been preserved, certain accepted CAIS data is not consistently loaded into the necessary data stores to make it available for query in the CAIS Regulator Portal and is unavailable for enrichment of transaction data. Further, error feedback not loaded is not available to Industry Members on the Industry Member CAT Reporter Portal.¹⁷

The Plan Processor will implement a series of releases through 2023 to achieve data load completeness throughout all stages of CAIS processing. The Plan Processor is developing a system update to address these data load defects and ultimately plans to reload historical CAIS data (both accepted and rejected data) from October 2022 to present to all relevant data stores so that it will be fully available to both regulators and Industry Members. As a result of this, Industry Members are not currently required to submit error repairs within the repair deadline.

Despite these data load defects, based on CAT LLC's current understanding to date from the Plan Processor, the production data accepted and stored by the CAIS system is of high quality and can be relied on by regulators. Based on a comprehensive analysis of CAIS data, the Plan Processor has found no instances where an FDID has been associated with an incorrect CCID, and unique CCIDs are being correctly assigned to customers based on the unique transformed identifiers submitted by Industry Members. FDIDs reported with transaction data are largely available in CAIS. The Plan Processor has been enriching transaction data with CCIDs since July 11, 2022. From November 7, 2022¹⁸ through May 3, 2023, the Plan Processor has observed that approximately 94% of transaction records eligible for CCID enrichment¹⁹ were enriched with at least one CCID. The percentage of CCID-eligible transaction records where at least one CCID was available in CAIS for the record has improved over time, with the most recent period observed (April 2023) reflecting that over 97% of CCID-eligible transaction records were enriched with at least one CCID.

¹⁵ See *supra* note 9.

¹⁶ See *supra* note 8.

¹⁷ Initial file level error feedback is provided to Industry Members; it is the presentation of such feedback through the CAT Reporter Portal that is impacted.

¹⁸ As noted above, Industry Members were required to report all Active Accounts and daily changes to CAIS on a daily basis starting November 7, 2022 (Interim Reporting Obligation 3 in CAT Alert 2022-01).

¹⁹ Transaction records eligible for CCID enrichment include Industry Member order events, exchange order events (excluding option quote events), and TRF trade reports.

To summarize, based on CAT LLC's current understanding to date from the Plan Processor, the impact of the remaining defects on current CAIS functionality is as follows:

- First, in certain situations, accepted CAIS data is not currently being loaded each day into the necessary data stores to make it available for query in the CAIS Regulator Portal and to make FDID/CCID associations available to the transaction data. As a result, although data has been accepted and processed by CAIS, a subset of accepted data is not currently available for query in the CAIS Regulator Portal and could result in a regulator not being able to see all FDID or CCID information, or not seeing the most recent version of an FDID or CCID. In addition, a subset of FDID/CCID associations are not enriched on transaction data. Absence of complete FDID/CCID associations could result in one or more CCIDs not being associated to a particular transaction record. For example, if only one of two customers associated with a particular FDID has been loaded, CAIS will reflect only one customer associated with the FDID. As noted above, the Plan Processor is developing a system update to address the remaining data load defects, and ultimately plans to reload historical CAIS data from October 2022 to present into the data pipeline, which is anticipated to resolve this issue. Until these defects are addressed, however, this could result in incomplete search results, which would not be readily identifiable to regulatory users. Despite these current limitations, submitted CAIS data is of high quality and substantially available to regulators as described above.
- Second, error feedback that was not loaded is not currently available to Industry Members, which impacts the error feedback, error correction and processing timeline set forth in Appendix D, Section 6.2 of the CAT NMS Plan.²⁰ Because error feedback is not fully available to Industry Members on the CAT Reporter Portal, the requirement that Industry Members submit error repairs to CAIS within the repair deadline has been temporarily paused. Relatedly, there is an associated impact on the ability of Industry Members to address error rates.
- Third, although the CAIS Regulator Portal is available, certain defects may impact search response times, filtering, and download functionalities, and address history search is currently disabled in production. Additionally, Industry Member Portal feedback is currently missing certain errors and is not reflective of all repair submissions.
- Fourth, until the outstanding CAIS defects are addressed, the Plan Processor is currently unable to produce and publish monthly report cards with respect to customer and account information.

²⁰ Specifically, Section 6.2 of Appendix D of the CAT NMS Plan provides, with respect to customer and account information, that the Central Repository must validate the data and generate error reports no later than 5:00 p.m. Eastern Time on T+1, and that corrected data must be resubmitted no later than 5:00 p.m. Eastern Time on T+3, that the Central Repository must process the resubmitted data no later than 5:00 p.m. Eastern Time on T+4, and that corrected data must be available to regulators no later than 8:00 a.m. Eastern Time on T+5.

- Fifth, other defects exist that impact FDID versioning, storage of historical records and certain edge case CCID assignment scenarios; however, all these defects combined impacted less than 1% of data.

To reiterate, there is no indication of any data loss, CAIS is currently operational, and the overall CAIS data currently available is significant and provides regulatory utility and efficiencies that augment the CAT transactional database, despite these outstanding defects.

Accordingly, CAT LLC has determined that a reasonable extension of the FAM 4 target deadline—as contemplated by the SEC when it adopted the Financial Accountability Milestones—would provide CAT LLC and the Plan Processor necessary additional time to properly analyze and responsibly address any remaining defects related to CAIS without incurring an excessive and disproportionate financial penalty in the interim. During any such extension period while these outstanding CAIS defects are addressed, the CAT system (including CAIS) will continue to be operational.

C. The Commission Has Indicated That It Would Consider Exemptive Relief from the Financial Accountability Milestones in the Event of Reasonable Delays

The SEC previously has indicated that it would consider the use of its exemptive authority with regard to the Financial Accountability Milestones if the CAT were to experience reasonable delays in its implementation. When the SEC proposed the Financial Accountability Milestones, the Participants and Industry Members raised concerns about the possibility of reasonable delays in the implementation of the CAT that should not give rise to financial penalties. For example, the Financial Information Forum stated that the “completion of current and upcoming CAT implementation milestones are all contingent on several challenging and aggressive deliverables, many of which will impact the development, testing, and roll-out of complex technology,” and that “factors outside of the Participants’ and/or Plan Processor’s control may require the regulators to revisit the reasonableness and viability of implementation milestones to preserve the ultimate delivery of a useable CAT in a reasonable timeframe.”²¹ Accordingly, FIF recommended that the Commission “allow, after the holistic assessment of all factors impacting the Participants’ ability to meet a particular milestone date, flexibility to extend milestone dates without holding Participants directly accountable (financially or otherwise),” reasoning that this approach would “allow the Commission and Participants to focus on the goal of successfully delivering a functional CAT, rather than focusing on a [sic] milestone target dates, which may raise the risk of lower-quality deliverables.”²² Another commenter “recommend[ed] that the SEC allow for some flexibility or reasonable delays in target deadlines, particularly in matters that may impact data quality.”²³ This commenter noted that “financial

²¹ Financial Accountability Milestones Release at 31335. See Letter from Christopher Bok, Director, Financial Information Forum, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“FIF Letter”), at 4, <https://www.sec.gov/comments/s7-13-19/s71319-6355358-196251.pdf>.

²² FIF Letter at 4.

²³ Financial Accountability Milestones Release at 31335, n.165. See Letter from Thomas Tesauro, President, Fidelity Capital Markets, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“Fidelity Letter”), at 5, <https://www.sec.gov/comments/s7-13-19/s71319-6357608-196387.pdf>.

penalties will create a degree of friction in the development process that is not conducive to the overall success of the CAT and that may prioritize rushing to complete a target deadline over a long-term view of the CAT.”²⁴ The Securities Industry and Financial Markets Association likewise “‘recommended that the Commission take reasonable delays into account in imposing the proposed financial penalties,’ perhaps by ‘suspending the proposed financial penalties based on the cause, foreseeability and attempts to mitigate the impact of the delay.’”²⁵ Similarly, the Participants stated that “the Commission and all market participants would benefit from a more flexible approach in which the Commission would assess the appropriateness of the recovery of Post-Amendment Industry Member Fees in the context of particular facts and circumstances in the event of a delay in meeting such a Milestone.”²⁶

Although the SEC determined to include definitive dates in the Financial Accountability Milestones, it noted that “it is sensitive to the concerns expressed by commenters.”²⁷ In response to these concerns, the Commission expressly indicated that its “authority to grant exemptive relief from any requirement associated with a particular Financial Accountability Milestone . . . should alleviate the Participants’ concerns regarding the potential impact of unforeseeable or reasonable delays.”²⁸ The proposed delay related to address certain defects impacting an otherwise currently operational CAIS (which is a sub-system of the overall CAT system that is itself operational) is the type of reasonable delay in the implementation of CAT that was contemplated by this discussion.

D. The Proposed Relief Is Necessary and Appropriate

The advantages of a reasonable delay in the application of the fee collection limitations related to Period 4 outweigh the disadvantages.

By way of context, the Commission’s order that the Participants build a centralized regulatory surveillance database to collect and store customer information for every account at every broker-dealer is an unprecedented construct for the securities industry.²⁹ Accordingly, building CAIS has presented a series of unique implementation challenges—including from a technology perspective—for creating a unified reporting regime that accommodates the diverse systems and reporting structures employed by Industry Members. To our knowledge, no other

²⁴ Fidelity Letter at 5.

²⁵ Financial Accountability Milestones Release at 31335. See Letter from Theodore R. Lazo, Managing Director & Associate General Counsel, and Ellen Greene, Managing Director, Financial Services Operations, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“SIFMA Letter”), at 2, <https://www.sec.gov/comments/s7-13-19/s71319-6366765-195937.pdf>.

²⁶ Financial Accountability Milestones Release at 31335 n.168. See Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“Participant Letter”), at 10, <https://www.sec.gov/comments/s7-13-19/s71319-6357609-196389.pdf>.

²⁷ Financial Accountability Milestones Release at 31335.

²⁸ *Id.*

²⁹ Similarly, when the CAT NMS Plan adopted, the Commission estimated an average of 58 billion events per day; in 2022, CAT processed approximately 442 billion events per day. See Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 Fed. Reg. 54696, 85023 n.3944 (Nov. 15, 2016).

comparable system or database of this scale and particular data content and complexity exists anywhere in the world.

Overall, the rationale underlying the Financial Accountability Milestones is no longer present, given the substantial progress that has been made towards Full Implementation of CAT NMS Plan Requirements. The requested relief would allow additional time for CAT LLC and the Plan Processor to address remaining CAIS defects while continuing to offer existing functionality to regulators. To mitigate the effect of the delay, existing CAT system functionality (including CAIS functionality) will remain operational, CAT Reporters will continue to report required data to CAIS, and progress will continue to be made toward Full CAIS reporting compliance. As described above, CAIS is currently operational, the CAIS Regulator Portal is available, and the overall CAIS data currently available is significant and provides regulatory value that augments the CAT transactional database, subject to the error corrections, regulatory access, and database management issues noted. The Plan Processor will implement a series of releases throughout 2023 to address these outstanding issues. This process is intended to be entirely seamless to Industry Members. It is currently anticipated that these issues will be fully addressed by May 2024. CAT LLC is requesting an exemption until August 31, 2024 to provide additional flexibility with respect to the timeline in the event that additional, unforeseen issues arise, and to ensure an orderly completion of any remaining components associated with FAM 4.

Furthermore, it should be noted that CAT LLC has satisfied other requirements of FAM 4, including providing CAT system functionality required by Rule 613 and the CAT NMS Plan at or less than the initial Error Rates specified by Section 6.5(d)(i) related to Reportable Events.

Despite the substantial progress toward completion of the CAT overall and the existing regulatory value in its current state, without such additional time as requested herein, the application of the Financial Accountability Milestones would lead to substantial, excessive financial penalties disproportionate to the costs associated with the above-referenced CAIS defects. As noted above, the FAM 4 penalty applies to *all* costs incurred by CAT LLC from January 1, 2022 until all of the FAM 4 requirements have been satisfied. CAT costs in 2022 totaled approximately \$179 million, the 2023 CAT budget is approximately \$233 million, and the 2024 CAT budget is likely to be comparable or higher. These escalating costs are driven primarily by factors outside of CAT LLC's control—including data volumes that are far beyond what was contemplated when the CAT was adopted, processing costs, storage costs, and the complexity of reporting requirements—and are unrelated and disproportionate to the specific CAIS defects described above. Accordingly, based on current cost trends, absent exemptive relief, the FAM 4 penalty could potentially be applied to an excess of *\$500 million* in CAT costs if the outstanding defects are resolved on June 30, 2024.³⁰ A penalty of this magnitude would be

³⁰ This estimate assumes \$200 million in CAT costs in 2023 and 2024, which is likely a significant underestimate given current volume projections. The Participants' proposed funding model would allocate two-thirds of CAT costs to Industry Members; in this example, two-thirds of \$500 million is \$333.33 million. *See* Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Securities Exchange Act Release No. 97151 (Mar 15, 2023), 88 Fed. Reg. 17086 (Mar. 21, 2023).

excessive and does not align with anyone's expectations of fairness when the FAMs were adopted.

The Commission made the correct decision when it adopted Rule 613 that both the Participants and Industry Members should share in the costs of the CAT.³¹ Here, Industry Members have not been harmed by the limited delay and would be unjustly enriched by FAM 4 absent exemptive relief.

Moreover, any such penalty would be hugely disproportionate in comparison to what is left to implement. As noted above, the first three Financial Accountability Milestones were completed on time, and the transactional database is operational. The Commission and the Participants are currently making use of CAT data, including the Commission's use of CAT data in formulating its recent equity market structure proposals.³² Subject to the outstanding issues to be addressed, the CAT is also currently accepting and processing CAIS data, and regulators also are using CAIS (and other CAT data) for enforcement and market oversight. When the Commission proposed the Financial Accountability Milestones in 2019, the Commission expressed concerns regarding the Participants' progress towards implementing the CAT and argued that implementing Financial Accountability Milestones were important in the effort to deliver a functional CAT.³³ Since then, the Participants have worked diligently with the Plan Processor and with Industry Members and have made substantial progress towards Full Implementation of CAT NMS Plan Requirements. By that measure, the Commission's efforts have been successful and the Commission has achieved its objective in establishing the Financial Accountability Milestones.

Similarly, any such penalty would be grossly out of proportion to the costs associated with the noted CAIS defects that are being addressed—which represent a relatively small portion of overall CAT costs—and would overlook the fact that other CAT costs are attributed to well-functioning features and ongoing operations of CAT.

E. Request for Exemptive Relief Related to FAM 4

For the reasons discussed above, CAT LLC requests that the Commission provide conditional exemptive relief from the provisions in Section 11.6(a)(i)(D) and (iii) limiting the collection of the full amount of any Post-Amendment Industry Member Fees established or implemented to recover the Post-Amendment Expenses incurred from the date immediately following the achievement of Full Availability and Regulatory Utilization of Transactional Database Functionality to the date of Full Implementation of CAT NMS Plan Requirements.

³¹ See generally Securities Exchange Act Release No. 67457 (Jul. 18, 2012), 77 Fed. 45722, 45795 (Aug. 1, 2012). To date, the Participants have paid the full cost of the creation, implementation and maintenance of the CAT since 2012, pending Commission approval of a fee model.

³² See Disclosure of Order Information, Securities Exchange Act Release No. 96493 (Dec. 14, 2022); Regulation NMS: Minimum Pricing Increments, Access Fees, and Transparency of Better Priced Orders, Securities Exchange Act Release No. 96494 (Dec. 14, 2022); Order Competition Rule, Securities Exchange Act Release No. 96495 (Dec. 14, 2022); Regulation Best Execution, Securities Exchange Act Release No. 96496 (Dec. 14, 2022).

³³ See Securities Exchange Act Release No. 86901 (Sept. 9, 2019), 84 Fed. Reg. 48458, 48461 (Sept. 13, 2019).

Specifically, CAT LLC requests exemptive relief to extend the FAM 4 date of December 30, 2022 set forth in Section 11.6(a)(i)(D) to August 31, 2024, subject to the following conditions:

- The CAT system (including CAIS functionality) will remain operational while the outstanding CAIS defects described in this letter are addressed.
- The Participants and the Plan Processor must meet with the Commission staff on a regular basis to provide a detailed status update regarding their current efforts toward addressing the CAIS defects described in this letter, and promptly respond to related requests for additional information or data.
- The Participants will only be permitted to collect Post-Amendment Industry Member Fees for Period 4 after August 31, 2024, or such earlier date that FAM 4 has been satisfied.³⁴ For the avoidance of doubt, this exemptive request would not affect CAT LLC's ability to seek recovery of costs incurred prior to the effective date of the Financial Accountability Milestones and during Period 1, Period 2, and Period 3.³⁵

F. Request for Exemptive Relief Related to Phased Reporting Exemption

In connection with this request, CAT LLC further requests that the Commission extend the deadline set forth in the Phased Reporting Exemption³⁶ requiring each Participant to require, via its respective Compliance Rule, its Large Industry Members and Small Industry Members to commence full reporting to the Central Repository Phase 2e Industry Member Data from July 11, 2022 to a date no later than August 31, 2024, as determined by CAT LLC in consultation with the Plan Processor.³⁷ The compliance date (and any applicable interim compliance date(s)) will be announced with sufficient time for Industry Members to address outstanding errors.³⁸

³⁴ The Participants note that they have separately requested exemptive relief in other contexts that the Commission may view as relevant to satisfaction of Full Implementation of CAT NMS Plan Requirements. *See, e.g.,* Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated October 27, 2022 (requesting exemptive relief from certain provisions of the CAT NMS Plan related to creating a unique CAT Customer-ID ("CCID") in certain limited scenarios). To the extent the Commission determines not to grant these exemptions, the Participants do not waive any arguments that they may assert concerning or related to their satisfaction of Full Implementation of CAT NMS Plan Requirements.

³⁵ To date, the Participants have paid 100% of CAT costs via no-interest loans to CAT LLC. Subject to Commission approval of a funding model, a portion of these loans will be repaid by CAT LLC. *See* Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Securities Exchange Act Release No. 97151 (Mar 15, 2023), 88 Fed. Reg. 17086 (Mar. 21, 2023).

³⁶ *See* Phased Reporting Exemption, *supra* note 13.

³⁷ *See* Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated June 30, 2022 (previously requesting an extension to December 12, 2022). Industry Members currently are reporting CAIS data to CAT and will continue to do so. The requested exemption would allow Industry Members additional time to repair rejects and report inconsistencies related to CAIS submissions.

³⁸ The CAIS reporting implementation schedule is described in CAT Alert 2022-01, which sets forth six key dates: (1) production certification deadline, (2) Interim Reporting Obligation 1, (3) Interim Reporting Obligation 2, (4) Interim Reporting Obligation 3, (5) Interim Reporting Obligation 4, and (6) Full CAIS Compliance Go-Live.

Ms. Vanessa Countryman

May 22, 2023

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Thank you for your attention to this matter. Please contact me if you have any questions or comments.

Respectfully submitted,

/s/ Brandon Becker

Brandon Becker
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 Saltiel, Deputy 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

The first four milestones have been achieved. The remaining milestones require Industry Members to repair all outstanding rejects and material inconsistencies (*i.e.*, Interim Reporting Obligation 4), with all error repair and material inconsistency resolution deadlines enforced as of Full CAIS Compliance Go-Live.