July 13, 2023

VIA ELECTRONIC DELIVERY

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

RE: Joint Industry Plan; Order Instituting Proceedings to Determine Whether to Approve or Disapprove an Amendment to the National Market System Plan Governing the Consolidated Audit Trail, Release No. 34-97750, File No. 4-698 (June 16, 2023)

Dear Ms. Countryman:

Virtu Financial, Inc.[1] ("Virtu") appreciates the opportunity to submit this comment letter in response to the above-referenced Securities and Exchange Commission ("SEC" or "Commission") order instituting proceedings to determine whether to approve or disapprove an amendment (the "Proposed Amendment") filed by the Operating Committee for Consolidated Audit Trail, LLC ("CAT LLC") on behalf of the self-regulatory organizations ("Plan Participants" or "SROs") that would establish a funding model for the National Market System Plan Governing the Consolidated Audit Trail. The Proposed amendment would establish the fees for Plan Participants and "Industry Members," including broker-dealers such as Virtu.

Next week marks the eleventh anniversary of the Commission's adoption of the Consolidated Audit Trail. For eleven long years, the Plan Participants have mismanaged the design, build, and operation of the CAT and at every turn have attempted to unfairly foist the lion's share of the cost on Industry Members for a project over which they had absolutely no decision-making authority.

The Plan Participants' most recent proposed funding model, known as the Executed Share Model, is no different. Like prior proposals, the Executed Share Model would have the Industry

[1] Virtu is a leading financial firm that leverages cutting-edge technology to deliver liquidity to the global markets and innovative, transparent trading solutions to its clients. Virtu operates as a market maker across numerous exchanges in the U.S. and is a member of all U.S. registered stock exchanges. Virtu's market structure expertise, broad diversification, and execution technology enables it to provide competitive bids and offers in over 25,000 securities, at over 235 venues, in 36 countries worldwide. As such, Virtu broadly supports innovation and enhancements to transparency and fairness which enhance liquidity to the benefit of all marketplace participants. Virtu hereby incorporates by reference its comment letters on prior iterations of the CAT funding proposals. *See* Letter from Thomas M. Merritt, Deputy General Counsel, to Vanessa Countryman (May 12, 2021), available at https://www.sec.gov/comments/4-698/4698-8790127-237768.pdf; Letter from Thomas M. Merritt, Deputy General Counsel, to Vanessa Countryman (June 22, 2022), available at https://www.sec.gov/comments/4-698/4698-20132715-303206.pdf.

Members foot the bill for over 80% of operating costs for the CAT, including hundreds of millions of dollars in historical costs incurred by the Plan Participants for a mismanaged project. Like prior proposals, the Executed Share Model does not include any mechanism to control future spending or prevent spiraling budget increases year after year. And like prior proposals, several of the key components of the Executed Share Model are arbitrary and lack adequate supporting data or rationale to substantiate their appropriateness.

The self-regulatory model in the securities industry is based on funding by broker-dealers and other market participants. Our firm, our customers, and the industry at large benefit from the self-regulatory framework established under the federal securities laws, and we are fully committed to contributing our share of the funding of that framework where the fees that we are charged are fair, reasonable, and equitable. With respect to the funding of the CAT, it is important to bear in mind that Industry Members like Virtu already provide the Plan Participants with a very substantial level of funding through membership fees, registration and licensing fees, dedicated regulatory fees, and options regulatory fees. In addition, the Plan Participants receive significant amounts of revenue from the sale of consolidated market data obtained from Industry Members and extract exorbitant rents from Industry Members for access to the markets and for proprietary data feeds that many firms must purchase in order to remain competitive. Many of the fees charged by the Plan Participants are for services that facilitate their regulatory obligation to surveil the market – an obligation that is core to the purpose of developing the CAT NMS Plan in the first place.

Over the past 11 years, the CAT has morphed into one of the most expensive government-mandated initiatives that the financial services industry has ever seen. As SIFMA has demonstrated in its comment letters, the Commission's decision to force the industry to spend hundreds of millions of dollars – which ultimately will be borne by investors – to build a surveillance tool that is unlikely to benefit anyone other than the Commission's enforcement program raises serious constitutional issues. As a threshold matter, the CAT instead should be a program managed by the SEC and funded by appropriations from Congress. It is neither fair, nor reasonable, nor equitable to impose responsibility for funding and operating a project of this magnitude on industry members that do not stand to benefit from it and with no oversight to determine how the CAT budget is managed. It is also anti-competitive in that it forces Industry Members like Virtu to foot the bill for CAT fees that Virtu could otherwise use to fund and grow its business, promote capital formation, and create new jobs. At its core, the CAT funding proposal is yet another flank of an all-out assault by Chair Gensler on industry members like Virtu because of his apparent preference for reduced market center competition and a desire to concentrate market activity on exchanges. This bias is political in nature and reflects his fundamental cynical view of the value of financial services firms and his wrongly held views about "excessive intermediation" that is not grounded in any facts or data but simply his own political views.

As with prior funding proposals, we believe that the Executed Share Model fails to meet the required standards under the Exchange Act, is arbitrary and capricious, and therefore should be disapproved.

FINRA – A Plan Participant Strongly Opposes the Proposed Amendment

For conclusive proof that the Plan Participants have failed to establish that the Executed Share Model meets the standards governing SRO fees under the Exchange Act, one need look no further than the comment letters submitted by FINRA – ***one of the Plan Participants*** – strongly urging Commission disapproval. As FINRA has observed, the Executed Share Model:

> "[F]ails to adequately address concerns that have been previously raised both by FINRA and industry members regarding, among other things, the inequitable allocation to FINRA of a disproportionate share of the total CAT costs to be borne by the self-regulatory organization ('SRO') participants to the CAT NMS Plan ('Participants' or 'Plan Participants'), the reasonableness and fairness of such an approach, and the impact it would have on FINRA and FINRA members. Any funding model adopted by the Participants must be consistent with the CAT Plan and the Securities Exchange Act of 1934 ('Exchange Act')."[2]

Opposition to the proposal by one of the largest Plan Participants is a clear red flag that the Commission should disapprove the Proposed Amendment – and we agree with the principles articulated in FINRA's comment letters of April 11, 2023[3] and May 25, 2023[4] opposing the Executed Share Model.

As Industry Members Have Repeatedly And Consistently Observed, The Proposed Amendment Fails To Meet The Requirements Of The Exchange Act

We also agree with and firmly support the arguments that SIFMA has advanced in opposition to the various iterations of proposed funding models, including the Executed Share Model. In particular, we share the concerns SIFMA expressed in its letters of May 2, 2023[5] and June 5, 2023[6] including, but not limited to:

- The Plan Participants have failed to meet their obligation under the Exchange Act of demonstrating that the proposal (1) provides "for the equitable allocation of reasonable dues, fees, and other charges," (2) is "not designed to permit unfair discrimination between customers, issuers, brokers or dealers," and (3) does not "impose any burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act;

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[2] FINRA Letter to Vanessa Countryman (Apr. 11, 2023), available at https://www.sec.gov/comments/4-698/4698-20164063-334005.pdf.
[3] *Id*.
[4] FINRA Letter to Vanessa Countryman (May 25, 2023), available at https://www.sec.gov/comments/4-698/4698-194699-386902.pdf.
[5] SIFMA Letter to Vanessa Countryman (May 2, 2023), available at https://www.sec.gov/comments/4-698/4698-182799-335422.pdf.
[6] SIFMA Letter to Vanessa Countryman (June 5, 2023), available at https://www.sec.gov/comments/4-698/4698-199319-399182.pdf.

- The Executed Share Model's definition of "executing broker" would lead to an inequitable allocation of fees to such brokers;

- The Executed Share Model's proposed allocation of more than 80% of the cost for operating the CAT to Industry Members is unfair, unreasonable, and arbitrary when the industry has no means of participating in the governance, oversight, or design of CAT and obtains no tangible benefits from its operation;

- The Proposed Amendment fails to explain why allocating approximately $350 million in historical costs to a small group of executing broker firms based on current market volumes is consistent with the Exchange Act, where the allocation is made based on current market share and bears no relation to how the firms may have contributed to historical costs, and with little ability for these firms to establish cost-sharing arrangements for historical-costs;

- The $240 million estimate for the current annual operating costs of the CAT is staggering, representing more than 10% of the SEC's 2023 budget request. What's more, last year's CAT budget increased by more than 30%, suggesting that Industry Members could be exposed to ever-increasing fees with no mechanism to control or limit the budget;

- There is no independent cost review mechanism to ensure that CAT fees are fair and reasonable and that spending controls are implemented;

- There is a significant risk that executing brokers will face challenges in establishing cost-sharing arrangements with other firms that more appropriately should be responsible for such costs;

- The Commission separately has yet to address data security concerns associated with the CAT;

- The Commission has proposed four sweeping rule changes that would dramatically reshape the marketplace and could impact the operational complexity and cost structure of the CAT, not to mention dozens of other rule proposals that could impact liquidity and competition in the marketplace and collectively impose significant costs on industry members.

The Proposed Amendment Would – Unfairly and Unjustifiably – Impose Costs on "Executing Brokers" That May Be Impossible To Receive From Other Responsible Market Participants Involved In The Chain Of A Transaction

Under the Executed Share Model, responsibility for CAT fees would be allocated to a subset of Industry Members. Specifically, "executing brokers", which are typically the last broker in the chain of a larger group of brokers that handle an order, would be responsible for paying the CAT fee. Saddling executing brokers with the responsibility to pay CAT fees would lead to an inequitable allocation of fees to such brokers because they would be forced to either (i) absorb the

fee that other brokers responsible for originating a transaction rightly should be contributing to, or (ii) go to the great expense and burden of trying to establish cost-sharing arrangements designed to recover an equitable percentage of the fee from other brokers in the chain of a transaction. As SIFMA explained in its May 2, 2023 letter,

> "Any analysis of a funding model that charges only a subset of brokers-dealers needs to evaluate whether there is an expectation that such firms would pass on costs to others, or whether they would absorb them, and to what extent this has any negative impacts on competition. In other words, like clearing brokers under the prior proposal, the Participants would place executing brokers in the position of having to collect the Industry Member portion of CAT Fees on behalf of the Participants, causing the executing brokers to incur expenses that other Industry Members would not incur."[7]

As a leading wholesaler, Virtu would be unfairly burdened with shouldering the responsibility of paying the CAT fees because we serve as the executing broker in the vast majority of our transactions. The prospect of designing processes and systems for tracking all of the market participants in the chain of a trade who properly should have financial responsibility and then implementing a process for cost recovery would be an enormous and extraordinarily costly, time-and-human-resource consuming initiative, if it is even possible at all.

We question how the Commission could ever conclude that the Executed Share Model represents a fair and equitable allocation of fees when brokers like Virtu would be on the hook to pay CAT fees for transactions that did not originate with them and where brokers do not have systems and processes in place to track and pass through fees to the client firms that sent the orders that resulted in executions. We think it is highly likely that executing brokers would generally end up absorbing the fees themselves, which is an egregiously unfair and inequitable result that would also have an anti-competitive impact. Large firms like ours might be able to afford the technological and administrative investment to develop a cost-recovery process, but what about smaller firms? Many might choose to exit the business altogether rather than be faced with the prospect of footing the bill for the rest of the industry. And let us not forget that any incremental fees that executing brokers would have to pay on behalf of other brokers who rightly should be contributing are likely to ultimately be passed along to retail investors to foot the bill.

In sum, the Executed Share Model's proposal to force executing brokers to pay for (and either absorb or engage in an exorbitantly expensive process to recover costs from other brokers):

- **does not** "provide for the equitable allocation of reasonable dues, fees, and other charges,"
- **is** "designed to permit unfair discrimination between customers, issuers, brokers or dealers," and

[7] SIFMA Letter to Vanessa Countryman (May 2, 2023), available at https://www.sec.gov/comments/4-698/4698-182799-335422.pdf.

- **does** "impose a burden on competition not necessary or appropriate in furtherance of the purposes" of the Exchange Act,"

and therefore, should be **disapproved**.

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Virtu appreciates the opportunity to submit this response to the above-referenced SEC order. While we appreciate that the CAT project and its funding are complex issues involving many different parties and moving parts, any allocation of funding responsibility must be fair, reasonable, and equitable. What the Plan Participants have offered meets none of these criteria. As noted earlier, Virtu is a beneficiary of the self-regulatory model and is prepared to pay its appropriate share where the fees charged are fair, reasonable, and equitable. Unfortunately, the Proposed Amendment fails to satisfy that standard, violates the Exchange Act, is plainly unreasonable, and therefore should be rejected.

On the eve of the eleventh anniversary of the SEC's adoption of the CAT NMS Plan, we also would welcome and encourage a meeting with the Plan Participants to participate in a meaningful dialogue with the industry to seek a viable path forward for funding the CAT. Over the past decade, it has become painfully evident that trading barbs in the comment files of the 19b-4 rulemaking framework is not a constructive method to achieve the objectives that the Commission envisioned when it first adopted the CAT. The only way to address these issues fully, fairly, and responsibly is for the interested parties to meet and devise an equitable solution – we are more than willing to participate in such an effort.

Respectfully submitted,

Douglas A. Cifu
Chief Executive Officer

cc: The Honorable Gary Gensler, Chair
The Honorable Hester M. Peirce, Commissioner
The Honorable Caroline A. Crenshaw, Commissioner
The Honorable Mark T. Uyeda, Commissioner
The Honorable Jaime E. Lizarraga, Commissioner
Dr. Haoxiang Zhu, Director, Division of Trading and Markets