



June 22, 2022

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; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail (Release No. 34-94984; File No. 4-698) (May 25, 2022)

Dear Ms. Countryman:

Virtu Financial, Inc.¹ (“Virtu”) appreciates the opportunity to submit this comment letter in response to the above-referenced notice of filing of proposed amendments to the National Market System Plan Governing the Consolidated Audit Trail (the “Executed Share Model”) submitted by the Operating Committee for Consolidated Audit Trail, LLC (“CAT LLC”) on behalf of the self-regulatory organizations (“Plan Participants” or “SROs”) that are parties to the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”).² In this filing, the Plan Participants propose to amend their fee schedules to establish the fees for Plan Participants and “Industry Members,” including broker-dealers such as Virtu, to fund the CAT.

Just thirteen months ago, Virtu submitted a letter³ responding to the last iteration of the Plan Participants’ attempt to unfairly foist the costs of an extraordinarily expensive and mismanaged project to build the CAT (the “2021 Proposal”). In that letter, we pointed out that the Plan Participants – which, with the exception of FINRA, are all for-profit entities – were once more seeking to advance their own commercial interests at the expense of the Industry Members and the investors by proposing a fee structure that disproportionately shifts the costs for the CAT onto the Industry Members and the investors they serve.

While the Plan Participants’ latest missive purports to address the defects contained in last year’s proposal, the unfortunate reality is that little has changed:

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 over 50 countries worldwide. As such, Virtu broadly supports innovation and enhancements to transparency and fairness which enhance liquidity to the benefit of all marketplace participants.

² Joint Industry Plan; *Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail*, SEC Rel. No. 34-94984; File No. 4-698 (May 25, 2022) (the “Executed Share Model”), available at <https://www.sec.gov/rules/sro/nms/2022/34-94984.pdf>.

³ Letter from Thomas M. Merritt, Deputy General Counsel, to Vanessa Countryman (May 12, 2021), available at https://virtu-www.s3.amazonaws.com/uploads/documents/Virtu_CATFeesCommentLetter_05122021.pdf.



- **Once again, the Plan Participants have failed to substantiate the need for an additional fee for the CAT.**
- **Once again, the Plan Participants have proposed a fee allocation that is arbitrary and unsupported, including saddling the Industry Members and investors with two thirds of the costs for the ongoing operation of the CAT, and two thirds of hundreds of millions of dollars of historical costs incurred due to project mismanagement to date.**
- **And once again, the Plan Participants have declined to provide a clear description of what those costs are including any disclosures of the revenue and profits generated by Plan Participants in relation to the operation of the CAT.**

For the reasons described below, the Executed Share Model fails to meet the requirements under the Exchange Act that the proposed funding of the CAT (i) provides “for the equitable allocation of reasonable dues, fees, and other charges,” (ii) is “not designed to permit unfair discrimination between customers, issuers, brokers or dealers,” and (iii) does not “impose any burden on competition not necessary or appropriate in furtherance of the purposes” of the Exchange Act.⁴

I. Plan Participants Have Failed to Substantiate Need for an Additional Fee for CAT

Similar to the 2021 Proposal, the Plan Participants have yet again failed to substantiate why the Industry Members and investors should be responsible for any supplemental fee whatsoever to fund the CAT. As we pointed out in our response to the 2021 Proposal, neither the Exchange Act nor SEC Rule 613, which governs the implementation of the CAT, requires the CAT NMS Plan to impose fees on Industry Members or investors. The Plan Participants, who were solely responsible for developing the CAT and for making decisions about expenditures for its implementation, have unilaterally decided to impose fees for the CAT on Industry Members and investors, and have advanced a proposed approach that is woefully deficient in providing justification for why the industry and investors should burden 75% of the bill.

Our securities markets are premised on a self-regulatory model that is funded by broker-dealers and other market participants. Virtu is firmly committed to financially supporting that self-regulatory model, which greatly benefits the investing public. However, in considering the best approach to the fair and equitable funding of the CAT, it is critical to not lose sight of the fact that Industry Members like Virtu already provide the Plan Participants a very substantial level of regulatory funding through a wide variety of channels, including:

- Membership fees;
- Registration and licensing fees;
- Dedicated regulatory fees;
- Options regulatory fees; and

⁴ See Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Exchange Act for the relevant provisions governing exchanges and Sections 15A(b)(5), 15A(b)(6) and 15A(b)(9) of the Exchange Act for the relevant provisions governing FINRA.

- Substantial fees for proprietary market data and market access that many firms must purchase in order to remain competitive.

The Executed Share Model makes it clear that the Plan Participants do not believe that any portion of the staggering sums of fees that they currently collect from the industry should be allocated to the funding of the CAT. **This is all the more puzzling to us given that many of the fees that are 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.** Because it fails to substantiate the need for an additive CAT fee, the Executed Share Model should be rejected.

II. Proposed Fee Allocation Approach is Arbitrary and Unsupported

Once again, the Plan Participants have concocted an approach that would saddle Industry Members and investors with the majority of costs for the operation of the CAT, including (i) more than \$100 million per year in operational costs, and (ii) two-thirds of the *hundreds* of millions of dollars in historical costs incurred through 2021.

First, the Proposed Funding Model would allocate one third of operating costs to Plan Participants and two thirds to Industry Members and investors as a group, based on a model where fees would be calculated by multiplying the number of executed equivalent shares in a transaction by the applicable fee rate and dividing the product by three (with the Plan Participants paying one third and Industry Members paying two thirds). Second, the Executed Share Model calls for Industry Members to foot the bill for two thirds of the \$337,688,610 in historical costs incurred in building out the CAT over the past decade.

As with the 2021 Proposal, the Plan Participants have again failed to adequately substantiate the proposed allocation of two thirds of the costs to Industry Members and one third to Plan Participants. **In our view, the proposed split is nothing more than an unscientific number the Plan Participants have invented that fails to consider the regulatory and commercial costs and benefits involved in allocating fees for the CAT.** We suspect that the more likely justification for the proposed split is that it appears marginally better for Industry Participants than the 75/25 percent split in the 2021 Proposal.

With respect to operational costs going forward, the Executed Share Model projects that the cost to the Industry Members for a single year would be a staggering \$110 million. Although individual firm obligations are anonymized in the filing, estimated costs for certain firms approach nearly \$12 million a year. Putting aside the breathtaking size of these fees, the Executed Share Model readily admits that these estimates are hypothetical and could be even higher.

“Note Exhibit B only provides an illustrative example of how the Executed Share Model would operate; the calculation of actual fees will differ from this example in various ways.”⁵

While the Executed Share Model succeeds in demonstrating the arithmetic used to determine what each firm would be obligated to pay, it fails in explaining the justification for why those numbers are appropriate. First, none of the arguments relied on by the Plan Participants provide a reasonable basis for

⁵ Executed Share Model at p. 79.

determining whether and why a two thirds/one third split is appropriate. Second, as described in greater detail below, the Executed Share Model is devoid of detail about the makeup of the actual costs that will be incurred in operating the CAT, rendering it impossible to determine whether the allocation to the Industry Members and investors is fair and equitable. **Third, and most importantly, the Executed Share Model fails to acknowledge the fact that costs imposed on the Industry Participants may ultimately be passed on to the investing public.** These are very substantial costs that will make it more expensive for investors to access our capital markets – a fact that the Plan Participants conveniently dodge in their filing.

The Executed Share Model also is deficient in justifying why the Industry Participants and investors should be on the hook for two thirds of the historical costs incurred by the Plan Participants – a breathtaking sum of \$225,125,740. For a host of reasons, the notion of sticking the Industry Members and investors with two thirds of the bill for a years-long, mismanaged project over which they had absolutely no decision-making authority is nothing short of preposterous. Since this project began nearly a decade ago, the CAT Operating Committee, which is fully comprised of representatives of the Plan Participants, has been solely responsible for every aspect of designing the CAT, hiring contractors to build it, supervising its implementation, and approving each and every cost along the way. By all accounts, however, this has been a mismanaged project with cost overruns and problematic spending decisions.

Even putting aside these defects, the metrics and arguments advanced in the Executed Share Model are meaningless in the absence of an economically sound cost-benefit analysis that comprehensively balances the regulatory benefits that eventually will flow from the CAT and allocates the costs accordingly. We see no evidence that the Plan Participants have engaged in such an exercise, and respectfully submit that the Commission should put this proposal on the shelf until one is forthcoming. By law, the Commission is required to undertake a thorough cost-benefit analysis anytime it exercises its authority in a rulemaking capacity. Here, where the Commission has ordered through rulemaking, the design and implementation of what is turning out to be one of the most expensive databases ever built, the Plan Participants who have complete control over the management of the project should be held to the same standard. This is not a blank check project.

For all of these reasons, the Commission should reject the Executed Share Model's effort to force the Industry Members to pick up the historical costs for a mismanaged project over which they had no control or decision-making authority.

III. The Plan Participants Have Declined to Provide Sufficient Detail About Anticipated CAT Costs Including Any Disclosures of the Revenue and Profits Generated by Plan Participants in Relation to the Operation of the CAT

As with the 2021 Proposal, the Executed Share Model lacks adequate information about the anticipated annual fees and costs to run the CAT for Industry Members and investors (i) to project with any degree of confidence what they will be obligated to pay each year or (ii) to assess the reasonableness of the projected costs.



The only information included in the Executed Share Model about anticipated costs is the CAT's projected budget for 2022, dated as of April 6, 2022:⁶

Consolidated Audit Trail, LLC
2022 Financial and Operating Budget

Cash Basis Budget ⁽²⁾					
Cash Inflows	Actual		Estimated		Total ⁽¹⁾
	Quarter 1	Quarter 2	Quarter 3	Quarter 4	
Promissory Notes	\$ 37,079,323	\$ 52,401,677	\$ 44,223,307	\$ 44,888,004	\$ 178,592,310
Total Inflows	\$ 37,079,323	\$ 52,401,677	\$ 44,223,307	\$ 44,888,004	\$ 178,592,310
Operating Costs and Expenditures					
<i>Technology Costs:</i>	Actual		Estimated ⁽³⁾		Total
Cloud hosting services	\$ 30,360,705	\$ 29,552,401	\$ 29,434,789	\$ 30,811,554	\$ 120,159,449
Operating fees	6,252,995	6,553,084	6,586,781	6,561,978	25,954,838
CAIS operating fees	4,116,439	2,722,914	3,693,444	3,548,634	14,081,431
Change request fees	172,363	1,775,400	884,600	1,639,100	4,471,463
Total Technology Costs	\$ 40,902,501	\$ 40,603,799	\$ 40,599,615	\$ 42,561,267	\$ 164,667,182
<i>General and Administrative:</i>					
Legal	1,451,340	\$ 1,608,766	\$ 1,461,266	\$ 1,461,266	\$ 5,982,637
Consulting	409,495	330,168	330,168	330,168	1,400,000
Insurance	-	-	1,820,122	-	1,820,122
Professional and administration	207,780	234,618	119,873	119,873	682,145
Public relations	23,100	23,100	23,100	23,100	92,400
Total General and Administrative	\$ 2,091,715	\$ 2,196,652	\$ 3,754,529	\$ 1,934,407	\$ 9,977,304
Total Operating Costs	\$ 42,994,216	\$ 42,800,451	\$ 44,354,144	\$ 44,495,674	\$ 174,644,485
<i>Capitalized Developed Technology Costs</i>	\$ 1,542,153	\$ 650,001	\$ -	\$ -	\$ 2,192,154
Total Expenditures	\$ 44,536,369	\$ 43,450,452	\$ 44,354,144	\$ 44,495,674	\$ 176,836,639

(1) Amounts do not reconcile to audited financial statements as the above costs are on a cash basis, while the audited financial statements are on an accrual GAAP basis of accounting. Additionally, a portion of the above PINRA CAT costs have been capitalized.

(2) This cash basis budget reflects expenditures when paid; versus accrual GAAP basis amounts which would reflect expenditures when incurred.

(3) The estimated expenditures for this cash basis budget are based on currently-anticipated costs. Actual results may differ from these budgeted amounts.

Regrettably, this high level, cursory description of the categories of costs that will be incurred by the CAT is wholly inadequate to allow for an assessment of what the CAT Operating Committee is spending Market Participants' and investors' money on, whether those costs are reasonable and necessary for the operation of the CAT, how much revenue and profit the Operating Committee members are generating from the CAT, and whether the project is being managed responsibly. Furthermore, our understanding is that the budget for 2022 is not a fixed amount and could in fact result in significantly higher costs to the Industry Members and investors than projected. Without reasonable transparency into the costs and drivers of the costs, how will Market Participants and investors know how much expense to expect in 2023 or beyond?

The Executed Share Model also is deficient in that it fails to provide a detailed breakdown of the \$337 million of historical costs incurred to build the CAT, two thirds of which the Industry Participants would be obligated to pay under the scheme advanced by the Executed Share Model. The filing contends that the historical costs 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."⁷ However, like the budget

⁶ Executed Share Model at n. 17 (linking to CAT website, <https://www.catnmsplan.com/cat-financial-and-operating-budget>).

⁷ Executed Share Model at p. 18.



summary described above, the CAT’s historical financial statements⁸ only include top-line, categorical expense information – not a detailed breakdown of costs and expenditures that would allow a third-party to make an objective determination about the reasonableness and appropriateness of costs incurred. Importantly, all of the current and historical expense figures lack any disclosure of how much revenue and profit is generated by Plan Participants from services they provide to the CAT. In short, the proposal lacks customary related-party transaction disclosures.

CAT NMS, LLC
STATEMENTS OF ACTIVITIES
YEAR ENDED DECEMBER 31, 2018 AND
PERIOD FROM NOVEMBER 21, 2016 (INCEPTION) THROUGH DECEMBER 31, 2017

Text	Year Ended December 31, <u>2018</u>	November 21, 2016 (Inception) through December 31, <u>2017</u>
Revenues	\$ -	\$ -
Operating Expenses		
Advertising and promotion	99,271	41,631
Consulting	4,346,089	3,487,921
Legal	6,299,399	5,025,624
Professional and administration	360,324	-
Total Operating Expenses	<u>11,105,083</u>	<u>8,555,176</u>
Change in Net Deficit from Operating Activities	<u>(11,105,083)</u>	<u>(8,555,176)</u>
Capital Activities:		
Contributions from SROs (members)	<u>2,867,268</u>	7,088,494
Change in net deficit from capital activities	<u>2,867,268</u>	<u>7,088,494</u>
Change in net deficit without restrictions	(8,237,815)	(1,466,682)
Net deficit without restrictions, beginning of year	<u>(1,466,682)</u>	-
Net deficit without restrictions, end of year	<u>\$ (9,704,497)</u>	<u>\$ (1,466,682)</u>

⁸ CAT NMS LLC Financial Statements for the year ended December 31, 2018 and period from November 21, 2016 (inception) through December 31, 2017), available at <https://www.catnmsplan.com/sites/default/files/2021-08/CAT-NMS-LLC-2018-and-2017-Audited-Financial-Statements.pdf>.

Unsurprisingly, when we asked FINRA for more detailed information about historical and future operational costs, we were directed to the same high-level budget projections and historical financials referenced in the filing and excerpted above. With these materials as the only proffered justification for the costs of the CAT to be borne by Industry Members and investors, we submit that the Executed Share Model lacks sufficient detail to allow the Commission to articulate a satisfactory explanation for its approval as required by the D.C. Circuit's opinion in *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442, 443 (D.C. Cir. 2017).

We also take issue with the manner in which the Plan Participants are approaching the costs that the Industry Members and investors are projected to bear. It gives us no confidence to reliably judge what our annual funding obligations actually will be and feels like we are being asked to hand over a blank check with the amount to be filled in later.

* * *

Virtu appreciates the opportunity to submit this response to the Executed Share Model. While we appreciate that the CAT project and its funding are complex issues involving many different parties and moving parts, at the end of the day any allocation of funding responsibility must be fair, reasonable, equitable and include adequate related-party disclosures. What the Plan Participants have offered meets none of these criteria and is woefully deficient in data and information to even enable the Industry Members and investors to project what their costs will be.

We respectfully submit that rather than continuing to ride the Plan Participants' merry-go-round of proposals, the Plan Participants and Industry members should meet and have a sincere conversation to find a viable path forward on a plan to fund the CAT. The industry has repeatedly and respectfully asked to engage with the Plan Participants on this topic in a constructive way, but those entreaties have essentially been rebuffed. Any assistance that the Commission can offer in encouraging the Plan Participants to join the Industry Members at the table to work together to achieve a fair, reasonable, and equitable resolution would be greatly welcomed.

Respectfully submitted,



Thomas M. Merritt
Deputy General Counsel

cc: Gary Gensler, Chairman
Hester M. Peirce, Commissioner
Allison H. Lee, Commissioner
Caroline A. Crenshaw, Commissioner
Dr. Haoxiang Zhu, Director, Division of Trading and Markets

