May 12, 2021

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. 34-91555; File No. 4-698) (Apr. 14, 2021)

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 ("Proposed Funding 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.

Among other items, the Proposed Funding Model would allocate 25% of operating costs to Plan Participants and 75% to Industry Members as a group. The Industry Member cost allocation would be based on message traffic and the Plan Participant cost allocation would be based on market share. The Proposed Funding Model would eliminate the "tiering" included in earlier proposals, and therefore all ATSs would be included as Industry Members. The Proposed Funding Model also includes certain market maker discounts and a minimum and maximum CAT fee for Industry Members. The cost allocations of the Proposed Funding Model would also include nearly $200 million of historical costs incurred to date, as well as ongoing costs to operate the CAT.

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

[2] SEC Rel. No. 34-91555; File No. 4-698 (Apr. 14, 2021), *available at* https://www.sec.gov/rules/sro/nms/2021/34-91555.pdf.

In the never-ending saga of the regulation of equity market structure, the Plan Participants – which, with the exception of FINRA, are all for-profit entities – are once more seeking to advance their own commercial interests at the expense of the Industry Members and the investors they serve. Yet again, the Plan Participants have submitted a proposed fee structure for the CAT that disproportionately shifts the costs for an extraordinarily expensive project (that they themselves have mismanaged) onto the Industry Members. If approved, the Proposed Funding Model will unfairly impose yet further unjustifiable costs on market participants. Virtu respectfully submits that the Proposed Funding 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.[3]

Importantly, at least one of the Plan Participants agrees that the Proposed Funding Plan is flawed and should be rejected. In a comment letter[4] filed just two days ago, the New York Stock Exchange registered its objections to the structure of the proposal and called on the Plan Participants to go back to the drawing board to come up with a fairer and more equitable model. While we have not had the opportunity to fully digest the arguments in the NYSE's letter, we believe it is telling that the largest Plan Participant is opposed to the filing – yet another red flag that the Commission should reject the proposal.

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

As a threshold matter, the Plan Participants have failed to substantiate why the Industry Members should be responsible for any supplemental fee whatsoever to fund the CAT. 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. 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 have advanced a proposal that is woefully deficient in providing justification for why the industry should foot three quarters of the bill.

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 benefits greatly 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. However, with respect to the fair and equitable funding

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3 *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.

4 *See* NYSE Letter to Vanessa Countryman (May 10, 2021) available at https://www.sec.gov/comments/4-698/4698-8779961-237701.pdf.

of the CAT, it is important to bear in mind that Industry Members like Virtu already provide the Plan Participants a very substantial level of regulatory 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, 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 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.

We believe that the Proposed Funding Model fails to adequately explain how regulatory fees are currently allocated and why an additive funding requirement for Industry Members is warranted. Based on their most recent proposal, it is clear that the Plan Participants have unilaterally decided that not a single dollar of the staggering sums of fees that they currently collect from the industry should be allocated to the funding of the CAT. In our view, the Plan Participants have failed to substantiate the need for an additive CAT fee and therefore the Proposed Funding Model should be rejected.

II. Proposed Fee Allocation Approach is Arbitrary and Unsupported

Even if for the sake of argument one were to stipulate that an additive fee for Industry Members is warranted, we respectfully submit that several of the key components of the Proposed Funding Model are arbitrary and lack adequate supporting data or rationale to substantiate why they are appropriate.

75% / 25% Split

First and foremost, the Plan Participants have once again failed to adequately substantiate the proposed allocation of 75% of the costs to Industry Members and 25% to Plan Participants. In our view, the proposed split is nothing more than an unscientific number the Plan Participants have pulled out of a hat that fails to take into account the regulatory and commercial costs and benefits involved in allocating fees for the CAT.

In support of the proposed split, the Plan Participants place heavy emphasis on the notion that Industry Members will pay less than what was included in prior proposals because ATSs are now included in the Industry Member bucket, expanding the universe of Industry Members who must share the costs. They also cite for justification of the split that there are fewer Plan Participants than Industry Members and that the aggregate revenues of the Industry Members exceed that of the Plan Participants. Finally, they reason that the split is reasonable and equitable because Industry Members with the most message traffic and the Plan Participants with the most market share would pay comparable CAT fees (in the range of $5 million to $6 million annually).

In our view, none of the arguments relied on by the Plan Participants provide a reasonable basis for determining whether and why a 75%/25% split is appropriate. While the Plan

Participants' emphasis on metrics such as aggregate revenues may be relevant to which market participants have the *ability* to pay, that is not the question. The relevant consideration is what each market participant *should* pay based on the costs and benefits. Other metrics relied on by the Plan Participants ignore the economic realities of how the self-regulatory model is funded. For example, FINRA, which under the Proposed Funding Model would have the highest funding obligation among the Plan Participants, is 100% funded by Industry Members, meaning that the industry, de facto, would be on the hook for well in excess of 75% of costs. Similarly, the Proposed Funding Plan fails to include any analysis of whether FINRA's trading activity fee will be used to offset the costs of CAT once OATS is retired.

Moreover, the original Proposed Funding Plan filed by the Plan Participants on April 14, 2021 lacked fundamental information about the anticipated annual fees and costs to run the CAT, rendering it impossible for Industry Members to project with any degree of confidence what they will be obligated to pay each year. Specifically, it omitted an annual operating budget that would allow Industry Members to estimate their 75% portion of the funding allocation, and even more concerning, it failed to even include data on message traffic numbers. In response to comments about these glaring omissions, the Plan Participants made a supplemental filing (the "Supplemental Submission")[5] with message traffic data and a budget for 2021 on May 5, 2021 – just one week before comments on the original proposal are due. Our understanding is that the budget for 2021 is not a fixed amount, and could in fact result in significantly higher costs to the Industry Members than projected. And what about the anticipated budget for 2022 and beyond? Even with the additional information contained in the Supplemental Submission, we respectfully submit that the Proposed Funding Plan 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 haphazard manner in which the Plan Participants are approaching the costs that the Industry Members 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 blank check with the amount to be filled in later.

Even putting aside these defects, the metrics and arguments advanced in the Proposed Funding Plan 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.

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5 See Letter from CAT NMS Plan Operating Committee to Vanessa Countryman (May 5, 2021), available at https://www.sec.gov/comments/4-698/4698-8760381-237447.pdf.

Message Traffic vs. Market Share

Under the Proposed Funding Plan, Industry Members would be allocated their portion of the 75% funding bucket based on message traffic. Their fees would be calculated on a quarterly basis, subject to certain discounts for market makers, and a subject to a minimum and maximum fee formula. The Plan Participants, however, would be allocated their portion of the 25% funding bucket based on their market share in NMS equities and listed options.

We have two principal concerns with this approach. First, we are concerned that because the Plan Participants will not be charged based on message traffic, they will have no incentives to put in place mechanisms to limit such traffic to keep costs down. Second, and more worrisome, we are very concerned that basing the Industry Member allocation on message traffic volumes could have a substantial, and as yet unknown, impact on market activity. Certain market participants will be incentivized to reduce message traffic to minimize CAT costs, which could severely impact liquidity and have other unintended consequences on market activity. The Plan Participants do not appear to have conducted any empirical research to endeavor to gauge whether and what impact this funding model could have on the markets, and we respectfully submit that the proposal should be rejected unless and until a comprehensive study of this issue is forthcoming.

Historical Costs

Under the Proposed Funding Plan, not only would the Industry Members be on the hook for 75% of going-forward operating costs for the CAT, but also for 75% of the staggering amount of expenses that have been incurred to date by the Plan Participants. Specifically, the Proposed Funding Plan contemplates that the Industry Members would be responsible for $144,955,006 of the $193,273,342 historical costs incurred by the Plan Participants.[6]

For a host of reasons, the notion of obligating Industry Members with three quarters 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 an egregiously mismanaged project with cost overruns and irresponsible spending decisions.

First, on their own and with no input from the industry, the Plan Participants selected a technology firm, Thesys Technologies LLC, to build the CAT. Industry Members had no control over the selection or management of Thesys, which ultimately was unable to meet its obligations. The Thesys episode resulted in the Plan Participants squandering approximately $90 million in costs. We cannot imagine any circumstance where it would be fair and reasonable for the Industry

[6] *Supra* n. 2 at 56.

Members to be obligated to pay 75% of the bill for a $90 million train wreck over which they had no control. Second, the Plan Participants incurred substantial costs to clean up the mess they made by transferring the management of the project to FINRA. As would be expected, there were massive expenses involved in transitioning a project of this size and complexity from one provider to another, including legal, training, technology, operational, and compliance expenses. Again, the industry had no decision-making authority over how expenses were managed for the transition to FINRA, and it is unfair and unreasonable for the Industry Members to be expected to cover those costs. Plus, as noted above, FINRA is already 100% funded by industry, so it is unclear why the Industry Members should be on hook for 75% of the costs for that transition to FINRA. Finally, further demonstrating the irrationality and unfairness of the proposal, new Industry Members would be obligated to cover historical costs, but new Plan Participants would not. There is no sound basis for treating new Industry Members differently from new Plan Participants. As with so many others, this aspect of the Proposed Funding Plan is unfair and anti-competitive, and represents yet another example of the Plan Participants attempting to protect their own commercial interests.

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

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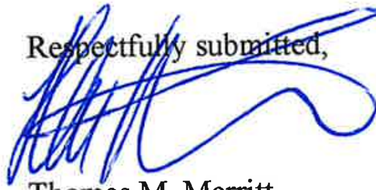
Virtu appreciates the opportunity to submit this response to the Proposed Funding Order. While we appreciate that the CAT project and its funding are complex issues involving many different parties and moving parts, at the end of the day any allocation of funding responsibility must be fair, reasonable, and equitable. 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 to project what their costs will be. As noted earlier, Virtu is a beneficiary of the self-regulatory model and is prepared to pay its fair share where the fees charged are fair, reasonable, and equitable. Unfortunately, the Proposed Funding Order fails to provide a basis to make that determination and therefore should be rejected.

Respectfully submitted,



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