

August 28, 2024

VIA ELECTRONIC DELIVERY

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

Re: Opposition to Consolidated Audit Trail (“CAT”) Fee Proposals By Self-Regulatory Organizations (“SROs”) And Request For Temporary Suspension

Dear Ms. Countryman:

Virtu Financial Inc. (“Virtu”)¹ respectfully submits this letter to the U.S. Securities and Exchange Commission (the “Commission”) in opposition to recently submitted rule filings, which concern efforts by the SROs to establish fees for Industry Members related to certain costs of the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”). The first set of filings, made pursuant to an August 1, 2024 “CAT Fee Alert – 2024-1” published by FINRA CAT LLC,² were submitted by nearly all of the SROs with the Commission on or after August 15, 2024,³ and would “implement CAT Fee 2024-1 as the first CAT Fee related to Prospective CAT Costs.”⁴ The second set of filings, made pursuant to an August 8, 2024 “CAT Fee Alert – 2024-2” published by FINRA CAT LLC, would establish a Historical CAT Assessment known as the “Historical CAT Assessment 1” and is to “replace[] the prior Historical CAT Assessment 1 that was previously . . . filed with the Commission”⁵ and subsequently temporarily suspended by the Commission.⁶ Since August 22, 2024, the majority of SROs have

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.

² CAT Fee Alert 2024-1 (Aug. 1, 2024), https://catnmsplan.com/sites/default/files/2024-08/08.01.24-CAT-Fee-Alert_2024-1.pdf.

³ Attached is an Appendix listing the SRO rule filings concerning CAT Fee 2024-1.

⁴ NYSE Acra, Inc., Proposal to amend the NYSE Arca Equities Fees and Charges and the NYSE Arca Options Fees and Charges to establish fees for Industry Members related to reasonably budgeted CAT costs of the National Market System Plan Governing the Consolidated Audit Trail for the period from July 16, 2024 through December 31, 2024, at 7, (Aug. 16, 2024), <https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/rule-filings/filings/2024/SR-NYSEArca-2024-69.pdf>.

⁵ CAT Fee Alert – 2024-2 (Aug. 8, 2024), https://catnmsplan.com/sites/default/files/2024-08/08.08.24-CAT-Fee-Alert_2024-2.pdf.

⁶ On January 17, 2024, the Commission temporarily suspended the initial proposed historical fee proposal and instituted proceedings “to determine whether to approve or disapprove” the proposed rule change. See 89 Fed. Reg. 10887 (Feb. 13, 2024). The withdrawal and re-filing of fee requests reflects a type of gamesmanship by the SROs that the Commission should not facilitate.

filed rules to implement the Historical CAT Assessment 1.⁷ For the reasons set forth below, the proposed CAT Fee 2024-1 and the Historical CAT Assessment 1 (together, the “CAT Fee Filings”) should be disapproved because they do not meet the requirements governing SRO fees set forth in the Securities Exchange Act of 1934 (“Exchange Act”), which requires such fees to be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition.

Virtu urges the Commission to temporarily suspend all of the rule filings listed in the attached Appendix relating to CAT Fee 2024-1 and Historical CAT Assessment 1 under Section 19(b)(3)(C) of the Exchange Act, and issue an order instituting proceedings (“OIP”) to determine whether to approve or disapprove the proposed fees under the Exchange Act. A temporary suspension is appropriate for reasons similar to those leading to the Commission’s temporary suspension of the previous CAT fee application submitted by the SROs.⁸ A temporary suspension should be issued for two additional reasons. First, the Commission should temporarily suspend the CAT Fee Filings at least until the Eleventh Circuit rules on the serious issues presented in litigation pending before that court concerning the CAT funding model and its appropriateness under the Exchange Act and other applicable law. The CAT Fee Filings should not be approved until this legal challenge is resolved. Failure by the Commission to temporarily suspend the fee filings will have the unfair and improper effect of circumventing the authority of the Eleventh Circuit. In particular, if the Eleventh Circuit ultimately sets aside the Commission’s order approving the CAT funding model, the effect of that ruling would be frustrated because, as CAT LLC itself has acknowledged, fees paid to the SROs would likely be unrecoverable by Industry Members.⁹ Second, even if the CAT funding model were upheld by the Court, a temporary suspension is required because under the CAT funding model, the Commission committed to a process in which the reasonableness of CAT fees and their satisfaction of other Exchange Act requirements would be evaluated as part of an orderly notice and comment period and not by immediately effective filings that circumvent the notice and comment process.

The CAT Fee Filings follow the Commission’s approval in September 2023 of the SRO revised funding model for the CAT (“CAT Funding Model”),¹⁰ which created the framework for the SROs as the CAT NMS Plan Participants (“Participants”) to establish and collect fees from Industry Members to cover both historical and prospective CAT costs incurred by the Participants. The fees imposed under both of the fee filings would be payable to Consolidated Audit Trail, LLC. Under CAT Fee 2024-1, monthly payments would start in October 2024 based on trading activity in September 2024. They would include costs incurred by the Participants during the period from September 2024 through December 2024. Monthly payments under the Historical CAT Assessment 1 would be required starting in December 2024, and would be calculated based

⁷ The attached Appendix also lists the SRO rule filings concerning Historical CAT Assessment 1.

⁸ See 89 Fed. Reg. 10887 (Feb. 13, 2024) (“temporarily suspending” and “instituting proceedings to determine whether to approve or disapprove the proposed rule change” concerning the SROs’ January 2, 2024 proposed “Historical CAT Assessment 1”).

⁹ See Letter from B. Becker to V. Countryman 45 (June 13, 2024), <https://tinyurl.com/28dc58p2>.

¹⁰ See Release No. 34-98290 (September 6, 2023), 88 Fed. Reg. 62628 (September 12, 2023). Capitalized terms not otherwise defined in this letter have the same meanings as they do in the CAT NMS Plan and/or the CAT Funding Model.

on October 2024 transactions. The Historic CAT Assessment 1 would be in effect until \$212,039,879.34 is collected.

As a threshold matter, Virtu continues to believe the CAT Funding Model is not consistent with the Exchange Act and the CAT Fee Filings are further evidence of a failure to comply with the applicable law. In the CAT Funding Model, the Commission approved and committed to a process in which the reasonableness of CAT fees and their satisfaction of the other Exchange Act fee requirements would be evaluated through rule filings submitted by the SROs under Section 19(b) of the Exchange Act.¹¹ The process set in place by the current CAT Fee Filings, however, purports to permit the SROs to file CAT fees for immediate effectiveness under Section 19(b)(3)(A) of the Exchange Act without any requirement that the Commission affirmatively determine that the fees meet the applicable Exchange Act requirements.¹² That process violates the Exchange Act and is inconsistent with the terms of the CAT Funding Model approved by the Commission. Unless the Commission temporarily suspends the newly proposed CAT fees and institutes proceedings, there will be no Commission finding that the fees are reasonable, equitably allocated and otherwise meet Exchange Act fee requirements.

The CAT Fee Filings further demonstrate the fundamental flaws with the CAT Funding Model. In the filings, the Participants are seeking to pass along to Industry Members virtually all costs incurred by them through the proposed CAT fees regardless of the reasonableness of passing along such costs. Absent the Commission's intervention, Industry Members would be faced with the unfair and nearly impossible task of building new systems and processes to pay such fees without any Commission evaluation of the reasonableness of the fee collection process or the fees themselves. As described below, the Commission should disapprove the CAT Fee Filings because they do not meet the Exchange Act fee requirements as well as the requirement in Section 11.1 of the CAT NMS Plan that CAT costs be fairly and reasonably shared among the Participants and Industry Members.

In addition, the Commission should temporarily suspend the CAT Fee Filings because they will otherwise circumvent unresolved issues that are presently the subject of pending litigation. As the Commission is aware, the lawfulness of the CAT Funding Model is the subject of pending litigation in the Eleventh Circuit in which certain affected persons are challenging the

¹¹ In this regard, for example, the Commission noted in its CAT Funding Model approval order that “[o]nce the proposed Section 19(b) fee filings are filed by the Participants, the Commission will review them for consistency with the Exchange Act and the CAT NMS Plan.” See CAT Funding Model at 62663. The Commission also noted that “[e]ven if the Participants decide to pass-through the costs of CAT to Industry Members, however, in our view, the rule filing process under Section 19(b) and Rule 19b-4 will still incentivize the Participants to control costs. Any effort to pass-through costs will be subject to that process and, if the Participants fail to control costs, their ability to demonstrate that a proposed fee is reasonable and consistent with the Exchange Act may be compromised.” See CAT Funding Model at 62636.

¹² This is the completely opposite approach to the one the Commission took in amending Rule 608 of Regulation NMS, in which the Commission eliminated the ability of NMS plan participants to file fee changes for fees charged under the plans for immediate effectiveness. See Release No. 34-89618 (August 19, 2020), 85 Fed. Reg. 65470 (October 15, 2020). Now, such fee filings must be published for comment and approved by the Commission before they can become effective.

Commission’s approval of the CAT Funding Model .¹³ The amicus brief filed by the Securities Industry and Financial Markets Association (“SIFMA”) and Virtu in support of setting aside the Commission’s approval of the funding model demonstrates that the Commission’s imposition of uncontrolled CAT costs on broker-dealers and investors through the approval of the CAT Funding Model is unlawful.¹⁴ Based on the Eleventh Circuit’s pending review of the CAT Funding Model under which the CAT Fee Filings have been made, Virtu urges the Commission to temporarily suspend the process for consideration of the proposed CAT Fee 2024-1 and the Historical CAT Assessment 1 until the Court rules on the lawfulness of the funding model. The Commission is empowered under Section 19(b)(3)(C) of the Exchange Act to “temporarily suspend” a proposed SRO fee if it appears “that such action is necessary or appropriate in the public interest for the protection of investors, or otherwise in furtherance of the purpose” of Section 19(a). In order to show due respect for the Eleventh Circuit, the judicial process and provide the Court with the opportunity to rule on the issues presented, the Commission should exercise its authority to temporarily suspend the CAT Fee– 2024-1 and Historical CAT Assessment 1. Temporary suspensions also would avoid the expensive and lengthy litigation that inevitably would result if the Eleventh Circuit sets aside the CAT Funding Model *after* Industry Members have already made payments to the SROs.

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¹³ Am. Sec. Ass’n v. SEC, No. 23-13396 (11th Cir.) (filed Oct. 17, 2023).

¹⁴ Dkt. 61, Am. Sec. Ass’n v. SEC, No. 23-13396 (11th Ci

For the reasons set forth above and those set forth in Virtu's March 5, 2024 and earlier comment letters on CAT funding and fee filings,¹⁵ Virtu urges the Commission to temporarily suspend the CAT Fee 2024-1 and the Historical CAT Assessment 1, initiate proceedings and disapprove the filings, as the Participants have not met their burden of demonstrating that the proposed fees are consistent with the Exchange Act fee requirements. In addition, a temporary suspension is appropriate in order to give due respect to the Eleventh Circuit and an opportunity for the Court to rule on the lawfulness of the CAT funding model under which the current CAT Fee Filings have been made. If you have any questions or need any additional information, please feel free to contact me.

Respectfully submitted,



Thomas M. Merritt
Deputy General Counsel

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 Lizarraga, Commissioner
Mr. Haoxiang Zhu, Director, Division of Trading and Markets
Mr. David Saltiel, Deputy Director, Division of Trading and Markets
Mr. David Shillman, Associate Director, Division of Trading and Markets

¹⁵ See, e.g., Virtu Comment Letter (Mar. 5, 2024), <https://www.sec.gov/comments/sr-finra-2024-002/srfinra2024002-441719-1121682.pdf>; Virtu Comment Letter (July 13, 2023), <https://www.sec.gov/comments/4-698/4698-222219-467223.pdf>; Virtu Comment Letter (June 22, 2022), <https://www.sec.gov/comments/4-698/4698-20132715-303206.pdf>; Virtu Comment Letter (May 12, 2021), <https://www.sec.gov/comments/4-698/4698-8790127-237768.pdf>.

Appendix

SRO	Rule Filings Concerning the CAT Fee 2024-1	Rule Filings Concerning the Historical CAT Assessment 1
BOX Exchange LLC	SR-BOX-2024-20 Aug. 16, 2024	N/A (as of Aug. 27, 2024)
Cboe BYX Exchange, Inc.	SR-CboeBYX-2024-029 Aug. 15, 2024	SR-CboeBYX-2024-031 August 22, 2024
Cboe BZX Exchange, Inc.	SR-CboeBZX-2024-076 Aug. 15, 2024	SR-CboeBZX-2024-078 Aug. 22, 2024
Cboe C2 Exchange, Inc.	SR-C2-2024-013 Aug. 15, 2024	SR-C2-2024-014 Aug. 22, 2024
Cboe EDGA Exchange, Inc.	SR-CboeEDGA-2024-033 Aug. 15, 2024	SR-CboeEDGA-2024-035 Aug. 22, 2024
Cboe EDGX Exchange, Inc.	SR-CboeEDGX-2024-052 Aug. 15, 2024	SR-CboeEDGX-2024-054 Aug. 22, 2024
Cboe Exchange, Inc.	SR-CBOE-2024-037 Aug. 15, 2024	SR-CBOE-2024-038 Aug. 22, 2024
The Financial Industry Regulatory Authority, Inc.	SR-FINRA-2024-011 Aug. 26, 2024 SR-FINRA-2024-012 Aug. 26, 2024	N/A (as of Aug. 27, 2024)
Investors Exchange LLC	SR-IEX-2024-14 Aug. 15, 2024	N/A (as of Aug. 27, 2024)
Long-Term Stock Exchange, Inc.	N/A (as of Aug. 27, 2024)	N/A (as of Aug. 27, 2024)
MEMX LLC	SR-MEMX-2024-33 Aug. 16, 2024	N/A (as of Aug. 27, 2024)
Miami International Securities Exchange, LLC	SR-MIAX-2024-33 Aug. 19, 2024	SR-MIAX-2024-34 Aug. 23, 2024
MIAX Emerald, LLC	SR-EMERALD-2024-23 Aug. 19, 2024	SR-EMERALD-2024-24 Aug. 23, 2024
MIAX PEARL, LLC	SR-PEARL-2024-35 Aug. 19, 2024 SR-PEARL-2024-34 Aug. 19, 2024 SR-MIAX-2024-33 Aug. 19, 2024	SR-PEARL-2024-37 Aug. 23, 2024 SR-PEARL-2024-36 Aug. 23, 2024
MIAX Sapphire, LLC	SR-SAPPHIRE-2024-24 Aug. 19, 2024	SR-SAPPHIRE-2024-27 Aug. 23, 2024
Nasdaq BX, Inc.	SR-BX-2024-030 Aug. 15, 2024	SR-BX-2024-032 Aug. 23, 2024

Nasdaq GEMX, LLC	<u>SR-GEMX-2024-29</u> Aug. 15, 2024	<u>SR-GEMX-2024-30</u> Aug. 23, 2024
Nasdaq ISE, LLC	<u>SR-ISE-2024-41</u> Aug. 15, 2024	<u>SR-ISE-2024-42</u> Aug. 23, 2024
Nasdaq MRX, LLC	<u>SR-MRX-2024-32</u> Aug. 15, 2024	<u>SR-MRX-2024-33</u> Aug. 23, 2024
Nasdaq PHLX LLC	<u>SR-Phlx-2024-42</u> Aug. 15, 2024	<u>SR-Phlx-2024-43</u> Aug. 23, 2024
The Nasdaq Stock Market LLC	<u>SR-NASDAQ-2024-047</u> Aug. 15, 2024	<u>SR-NASDAQ-2024-049</u> Aug. 23, 2024
New York Stock Exchange LLC	<u>SR-NYSE-2024-46</u> Aug. 16, 2024	N/A (as of Aug. 27, 2024)
NYSE American LLC	<u>SR-NYSEAMER-2024-50</u> Aug. 16, 2024	N/A (as of Aug. 27, 2024)
NYSE Arca, Inc.	<u>SR-NYSEARCA-2024-69</u> Aug. 16, 2024	N/A (as of Aug. 27, 2024)
NYSE National, Inc.	<u>SR-NYSENAT-2024-23</u> Aug. 16, 2024	N/A (as of Aug. 27, 2024)
NYSE Chicago	<u>SR-NYSECHX-2024-26</u> Aug. 16, 2024	N/A (as of Aug. 27, 2024)