

August 28, 2024

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

**RE: Time-Sensitive Request Regarding Self-Regulatory Organizations' Rule 19b-4 Filings Relating to the Consolidated Audit Trail**

Dear Secretary Countryman:

Citadel Securities LLC requests that the U.S. Securities and Exchange Commission (Commission or SEC) immediately suspend the effectiveness of the SROs' new Rule 19b-4 filings related to the Consolidated Audit Trail (CAT). Last week, the 25 self-regulatory organizations (SROs) comprising CAT LLC began withdrawing and resubmitting Rule 19b-4 filings seeking to bill broker-dealers for certain historical costs purportedly incurred in developing the CAT.<sup>1</sup> The SROs also recently began submitting new Rule 19b-4 filings seeking to impose fees for the costs of operating the CAT prospectively for the year 2024.<sup>2</sup> Both sets of filings aim to start assessing those amounts imminently. This gambit appears to be a brazen attempt by the SROs to evade formal SEC review and approval of their filings. It also reflects an effort to extract hundreds of millions of dollars from broker-dealers such as Citadel Securities—even though a fully briefed challenge to the funding of the CAT before the Eleventh Circuit may render *all* of those filings unlawful.

The Commission should not allow the SROs' improper attempt to end-run meaningful review of their imposition of CAT costs and undermine the Eleventh Circuit's ability to address the CAT Funding Order, 88 Fed. Reg. 62628 (2023), and the Commission's Exemptive Order, 89 Fed. Reg. 45715 (2024), in the ordinary course. In its adoption and defense of the Funding Order, the Commission told both the public and the courts that it would carefully scrutinize the SROs' Rule 19b-4 filings—including any attempt to pass through the SROs' portions of CAT costs to broker-dealers—to ensure compliance with the law. *See* 88 Fed. Reg. at 62663, 62636-37; SEC Br.

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<sup>1</sup> *See* File Nos. SR-BOX-2024-21, SR-CboeBYX-31, SR-CboeBZX-78, SR-C2-2024-14, SR-Cboe-EDGA-2024-35, SR-Cboe-EDGX-2024-54, SR-CBOE-2024-38, SR-MIAX-2024-34, SR-EMERALD-2024-24, SR-PEARL-2024-36, SR-PEARL-2024-37, SR-SAPPHIRE-2024-27, SR-BX-2024-32, SR-GEMX-2024-30, SR-ISE-2024-42, SR-MRX-2024-33, SR-PHLX-2024-43, SR-NASDAQ-2024-49. Identical filings from the remaining SROs are expected imminently. *See* FINRA CAT, LLC, *CAT Fee Alert-2024-2* (Aug. 8, 2024), <https://perma.cc/J2XY-WW5A> (announcing replacement historical CAT assessment for all SROs).

<sup>2</sup> *See* File Nos. SR-BOX-2024-20, SR-CboeBYX-29, SR-CboeBZX-76, SR-C2-2024-13, SR-Cboe-EDGA-2024-33, SR-Cboe-EDGX-2024-52, SR-CBOE-2024-37, SR-FINRA-2024-11, SR-FINRA-2024-12, SR-IEX-2024-14, SR-MEMX-2024-33, SR-MIAX-2024-33, SR-EMERALD-2024-23, SR-PEARL-2024-34, SR-PEARL-2024-35, SR-SAPPHIRE-2024-24, SR-BX-2024-30, SR-GEMX-2024-29, SR-ISE-2024-41, SR-MRX-2024-32, SR-PHLX-2024-42, SR-NASDAQ-2024-47, SR-NYSE-2024-46, SR-NYSEAMER-2024-50, SR-NYSEARCA-2024-69, SR-NYSECHX-2024-26 and SR-NYSEAT-2024-23. An identical filing from the Long-Term Stock Exchange is expected imminently. *See* FINRA CAT, LLC, *CAT Fee Alert-2024-1* (Aug. 1, 2024), <https://perma.cc/5AXZ-Y2Y3> (announcing prospective CAT assessment for all SROs).

25-26, No. 23-13396 (11th Cir. Apr. 15, 2024) (SEC Br.). The Commission initially suspended the original 19b-4 filings submitted by the SROs, inviting comments on a number of issues that the Commission claimed it was reviewing. SEC Br. 26-27, 32. The SEC should not break its prior commitments by allowing the SROs to suddenly implement nearly overnight hundreds of millions of dollars in fees that depend on the lawfulness of orders still under judicial review.

In the event the Commission does not suspend the filings, Citadel Securities will be left with no choice but to seek appropriate judicial relief. While the Commission technically has 60 days to consider whether to suspend the SROs' new 19b-4 filings, 15 U.S.C. § 78s(b)(3)(C), Citadel Securities and others risk irreparable harm if they wait that long for a decision. As discussed below, under the SROs' newly filed 19b-4s, the SROs intend to begin billing broker-dealers for hundreds of millions of dollars in CAT costs for trading activity starting on September 1, 2024, with bills due as early as November 2024. Once fees come due, Citadel Securities and others will be forced to pay hundreds of millions of dollars in likely unrecoverable costs before the Eleventh Circuit has had the opportunity to address the challenged orders. When considering the now-withdrawn 19b-4s, the Commission suspended those filings and instituted proceedings within 15 days after the SROs published them. 89 Fed. Reg. 10544 (2024). We thus request that the Commission take a similar approach here and suspend the new sets of filings for both historical and prospective CAT costs by no later than **September 12, 2024**. If it does not, and taking into account the start date for the accrual of these new fees, Citadel Securities will have no choice but to assume that the Commission does not intend to suspend the filings and will be forced to proceed accordingly.

#### *Background on Pending Judicial Review & Timing of Rule 19b-4 Filings*

As the Commission is aware, last year Citadel Securities and the American Securities Association (ASA) petitioned the Eleventh Circuit for review of the Commission's Funding Order, which establishes the CAT's funding scheme. *ASA v. SEC*, No. 23-13396 (11th Cir.). That petition contends the Funding Order is unlawful because the CAT itself exceeds the SEC's statutory authority and because the Order independently violates the Exchange Act and Administrative Procedure Act. That case, in which CAT LLC and many of its constituent SROs have intervened, is at an advanced stage. The merits have been fully briefed since May 2024 and the Court will soon schedule oral argument.

In July 2024, Citadel Securities petitioned the Eleventh Circuit for review of the Commission's Exemptive Order, which exempts the SROs from deadlines to report certain CAT data, thereby purporting to clear away an obstacle to the SROs' ability to bill historical CAT costs to broker-dealers through the Rule 19b-4 process. *Citadel Securities v. SEC*, No. 24-12300 (11th Cir.); *see* 89 Fed. Reg. 45715. To facilitate orderly review of both petitions, the Eleventh Circuit granted Citadel Securities' motion to hold in abeyance its challenge to the Exemptive Order pending resolution of its separate challenge to the Funding Order—a motion the SEC did not oppose, with which CAT LLC agrees, and to which no SRO has objected. Order, No. 24-12300 (11th Cir. Aug. 1, 2024); CAT LLC Motion for Leave to Intervene at 11, No. 24-12300 (11th Cir. Aug. 15, 2024); *see* Cboe Exchanges Motion for Leave to Intervene at 2, No. 24-12300 (11th Cir. Aug. 15, 2024); Nasdaq Exchanges Motion for Leave to Intervene at 13, No. 24-12300 (11th Cir. Aug. 16, 2024).

While the Funding Order petition was pending, all 25 SROs comprising CAT LLC submitted Rule 19b-4 filings on January 2, 2024 that seek to pass through hundreds of millions of dollars in historical CAT costs to broker-dealers. *See* Letter from Citadel Securities to V. Countryman 1 n.1 (Mar. 5, 2024), <https://tinyurl.com/av6a8bbd> (March 2024 Citadel Letter). Fifteen days later, the Commission appropriately suspended those 19b-4 filings and instituted notice-and-comment proceedings to consider whether the filings complied with the Exchange Act. 89 Fed. Reg. at 10544. During the comment period, Citadel Securities, along with other broker-dealers and trade associations, filed comment letters explaining that the Commission should not approve the SROs' 19b-4 filings in light of the pending Funding Order challenge and highlighting many additional flaws in those submissions. That process has been headed toward its natural conclusion—an order from the Commission responding to those comments and approving or rejecting the 19b-4 filings. *See* 15 U.S.C. § 78s(b)(2)(B), (b)(3)(C); 17 C.F.R. § 240.19b-4(g).

On August 22, 2024, however, the SROs suddenly began withdrawing their earlier Rule 19b-4 filings relating to historical CAT-related costs and refiled virtually identical ones. *See, e.g.*, SR-CboeBZX-2024-78 (Aug. 22, 2024), <https://perma.cc/Y77X-2P2H>. They also began submitting still another set of Rule 19b-4 filings aimed at billing broker-dealers for certain prospective CAT costs for the year 2024. *See, e.g.*, SR-CboeBZX-2024-76 (Aug. 15, 2024), <https://perma.cc/F6RM-267V>. And one SRO has gone a step further by submitting a filing aimed at passing through the portion of CAT costs purportedly allocated to it under the CAT Funding Order to its broker-dealer members. *See* SR-FINRA-2024-12 (Aug. 26, 2024), <https://perma.cc/D6HZ-F8KT>.

While the reasons for this abrupt shift (and its timing) are unclear, it is difficult to see these actions as anything other than an improper attempt to undermine the Eleventh Circuit's pending review of the Funding Order and Exemptive Order and to avoid any meaningful review by the Commission of the SROs' original, previously suspended 19b-4 filings. Like the original filings, both sets of recent filings purport to be immediately effective. So if the Commission takes no action on them, they will purportedly remain effective, and the SROs will attempt to bill broker-dealers for hundreds of millions of dollars in CAT costs for trading activity starting on September 1, 2024, with bills due as early as November 2024. *See* FINRA CAT, LLC, *CAT Fee Alert–2024-1* (Aug. 1, 2024), <https://perma.cc/5AXZ-Y2Y3>. CAT LLC itself has taken the position that any amounts paid by Citadel Securities and others to the SROs will likely be unrecoverable in the event the Funding Order is overturned. *See* Letter from B. Becker to V. Countryman 45 (June 13, 2024), <https://tinyurl.com/28dc58p2> (CAT LLC Letter). And all of that will occur while the Eleventh Circuit is considering whether the CAT itself is an *ultra vires* program and whether the Funding Order and the Exemptive Order—legal predicates to the SROs' 19b-4 filings, including to FINRA's attempt to pass through its portion of costs to broker-dealers—are otherwise unlawful.

### *Conclusion*

The Commission should immediately suspend the effectiveness of the SROs' new Rule 19b-4 filings. A failure to do so will strongly suggest that both the SROs and the Commission are seeking to evade meaningful review by the Eleventh Circuit of the two pending petitions for review—one of which is fully briefed and should soon be set for oral argument, and the other a case that the Commission and CAT LLC have agreed (without objection from any individual SRO)

should be held in abeyance to permit orderly resolution of the first. Indeed, the SROs have admitted they are in a mad dash to offload their costs on Citadel Securities and the rest of the industry now in case “the Funding Model Litigation [is] successful.” CAT LLC Letter at 45. The Commission should reject that improper effort. At the very least, it should not play a part in it.

Nor should the Commission abdicate its responsibility to scrutinize and clearly determine whether the SROs have in fact complied with the financial accountability milestones necessary for recovering historical CAT costs. Indeed, there is no logical reason why it would be necessary and appropriate for the Commission to suspend and ask specific questions about the first set of 19b-4 filings for historical costs but not the second, which are essentially identical.<sup>3</sup> And many of the defects in the filings for historical CAT costs are also present in the filings for prospective CAT costs: the requirements of the CAT NMS Plan *still* have not been fully met, and the SROs again have not provided adequate information to assess the reasonableness of what is a facially unreasonable annual operating budget of more than \$200 million. *See* March 2024 Citadel Letter at 4-7, 8-13. The Commission thus should suspend the SROs’ new sets of filings, allowing Citadel Securities and the rest of the industry to submit comments on them before fees begin to accrue, and then formally determine whether the filings are lawful under the Exchange Act.

Please feel free to call the undersigned with any questions regarding our concerns.

Respectfully,

/s/ Stephen John Berger

Managing Director

Global Head of Government & Regulatory Policy

cc: Megan Barbero, SEC, General Counsel  
Michael A. Conley, SEC, Solicitor  
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<sup>3</sup> In its order instituting proceedings on the first batch of 19b-4 filings, the Commission posed various questions to the SROs regarding *inter alia*, the amount of the fees in question, whether the charges were consistent with the Exchange Act standard, whether the costs accrued were reasonable, whether the SROs reasonably excluded certain wasteful expenditures, and whether the length of the recovery period had been reasonably established. *See* 89 Fed. Reg. at 10581-82. Those questions remain, and there has been no order of the Commission finding that they have been satisfactorily answered.