

October 17, 2025

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

Re: 2025 CAT Funding Proposal (File No. 4-698)

Funding the consolidated audit trail (“CAT”) has been a historic debacle. Broker-dealers and their customers have been compelled to pay hundreds of millions of dollars for the system’s development and operation—on top of billions in implementation costs—pursuant to a funding order that the Eleventh Circuit recently determined was unlawful for multiple reasons.¹ Despite that proven illegality, these vast sums of money are now gone forever, money that otherwise could have been deployed to benefit investors, issuers, and U.S. financial markets.

Current Securities and Exchange Commission (the “Commission”) leadership has rightly indicated that a new course must be charted. Chairman Atkins has called for a “comprehensive review” that covers not only the funding of the CAT, but also governance, scope, data security, and budget.² Meanwhile, Commissioners Peirce and Uyeda have described the CAT as a “system that one would expect to find in a dystopian surveillance state, not the shining beacon for liberty and the free world.”³

Ignoring this backdrop, the CAT Operating Committee has once again come hat in hand to request that this Commission simply reinstate the unlawful 2023 funding order with the addition of one “new paragraph” (the “2025 Funding Proposal”).⁴ This audacious attempt to circumvent the Eleventh Circuit’s ruling and the Commission’s pending comprehensive review must be swiftly rejected. Not only does the latest funding proposal fail fully to address the serious deficiencies identified by the Eleventh Circuit as detailed below, but it defies basic common sense. The SROs who have been independently operating the CAT for over a decade—replete with implementation delays, uncontrolled budgets, and a refusal to collaboratively engage with the industry—cannot be trusted to rapidly chart a new course if the rest of the industry must continue bailing them out for their mess. Broker-dealers and their customers have suffered enough, and new fees must not be assessed until the Commission completes its comprehensive review.

¹ *Am. Sec. Ass’n, v. SEC*, 147 F.4th 1264 (11th Cir. 2025) (“Eleventh Circuit Decision”).

² <https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925> and https://www.sec.gov/newsroom/speeches-statements/atkins-093025-consolidated-audit-trail-new-day-cat?utm_medium=email&utm_source=govdelivery.

³ <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-focus-report-121624>.

⁴ 90 FR 44910 (Sept. 17) at 44911, available at: <https://www.govinfo.gov/content/pkg/FR-2025-09-17/pdf/2025-17929.pdf>.

I. The CAT Funding Proposal Exceeds the Commission's Authority

The 2025 Funding Proposal exceeds the Commission's authority in multiple respects.

First, the CAT itself is unlawful and, thus, any attempt to compel broker-dealers to fund it is unlawful as well. In approving the unlawful 2023 funding order, and during the subsequent litigation, the Commission was unable to identify any statutory authority explicitly granting the Commission the power to create the CAT. Instead, the Commission attempted to shoehorn its surveillance system into §78k-1(a)(1)'s generic objectives of "preserving and strengthening the securities markets, assuring fair competition, protecting investors, and maintaining fair and orderly markets," and §78k-1(a)(2)'s aim of "facilitat[ing] the establishment of a national market system."⁵ But the CAT "cannot rest merely on the 'policy objectives of the Act,'"⁶ especially when such majestic generalities could in theory justify virtually any Commission action, making the more limited grants of authority in §78k-1 and the rest of the Exchange Act meaningless.

Attempts to rely on the mousehole of SRO joint action under §78k-1(a)(3)(B) fail as well. Long seen as an antitrust-immunity provision for the SROs, §78k-1(a)(3)(B) does not give the Commission *carte blanche* to hijack the SROs for carrying out whatever regulatory measures it deems fit. If this provision really allowed the Commission to do *indirectly* what it could not do *directly*, then it would render much of the Exchange Act superfluous. To conclude otherwise would transform §78k-1 into a roving police power for the Commission, leaving the agency free to do whatever it wants so long as it does so by proxy.

Finally, §78q of the Exchange Act addresses internal broker-dealer recordkeeping requirements, not the creation and funding of a market-wide audit trail.

There is no precedent for the CAT, not only in terms of its size and scope, but also in its purported statutory basis, which meaningfully departs from prior SRO-led audit trails.⁷ Ultimately, the multi-billion dollar all-encompassing CAT system is greatly consequential both politically and economically,⁸ and, thus, requires "clear congressional authorization" under the major questions doctrine.⁹ The Commission has conceded that no such express authorization exists.¹⁰

Second, and relatedly, it is unlawful for the Commission to outsource the funding of the CAT so as to effectively immunize the surveillance program from congressional appropriations or

⁵ 88 FR 62628 (Sept. 12, 2023) at 62673, available at: <https://www.sec.gov/files/rules/sro/nms/2023/34-98290.pdf> ("2023 Funding Order").

⁶ *Georgia v. President*, 46 F.4th 1283, 1298 (11th Cir. 2022).

⁷ We note prior SRO-led audit trails did not rely on Section 11A of the Exchange Act for statutory authority and instead pointed to §78f(b)(1) and §78o-3(b)(2), neither of which are sufficient here.

⁸ We note that nearly half the States and over 20 Members of Congress have questioned the CAT's legality. See *Amicus Brief of Arkansas et al.* at 10–24, *Am. Sec. Ass'n v. SEC*, 23-13396 (11th Cir. 2024); *Amicus Brief of Senator Tom Cotton et al.* at 8–28, *Am. Sec. Ass'n v. SEC*, 23-13396 (11th Cir. 2024).

⁹ *Biden v. Nebraska*, 600 U.S. 477, 506 (2023).

¹⁰ 2023 Funding Order at 62673.

oversight. As both Commissioners Peirce and Uyeda have noted, the CAT is “essentially funded by the public but operates outside the direct oversight or authorization of Congress.”¹¹ While Congress has explicitly permitted the Commission to recoup *appropriated* expenditures through industry fees, the Commission has refused to include the CAT in its appropriated budget, despite the fact that it is a Commission project—undertaken pursuant to Commission rulemaking and relied upon by Commission personnel to perform their statutorily-mandated market surveillance responsibilities.¹² This end-run turns the Appropriations Clause on its head by permitting an executive branch agency to fund its own regulatory initiatives through outsourcing taxing authority to the SROs, thus eviscerating Congress’s power over “the purse.” This theory would allow the Commission to remove most, if not all, of its operations—including its most controversial initiatives—from the congressional appropriations process through the simple expedient of conscripting the SROs into service. That cannot be correct. At a minimum, such a scheme would have to be expressly authorized by Congress, but again, there is no such authorization here.

We note that the Commission taking the formal step of approving the 2025 Funding Proposal would represent a new application of the *ultra vires* CAT regime. With the vacatur of the 2023 funding order, only Commission Rule 613 and the 2016 CAT NMS Plan remain in effect.¹³ Neither allocate *any* costs associated with the development and operation of the CAT to broker-dealers and their customers.¹⁴ Therefore, the 2025 Funding Proposal would be the only operative Commission action that purports to compel broker-dealers and their customers to pay hundreds of millions for the development and operation of CAT. Before taking this significant step, the Commission has a “duty to examine key assumptions”—including ones “regarding [its] statutory authority”—“as part of its affirmative burden of promulgating and explaining a non-arbitrary, non-capricious rule.”¹⁵ Commissioner Peirce recognized this duty by specifically asking “Does the Commission have the authority to fund its primary market surveillance tool with money that does not run through the Congressional appropriation process?” when considering the unlawful 2023 funding order.¹⁶ The Commission never provided a rational response and cannot ignore these fundamental questions here.

¹¹ <https://www.sec.gov/newsroom/speeches-statements/peirce-uyeda-statement-focus-report-121624>.

¹² See 77 FR 45722 (Aug. 1, 2012), available at: <https://www.govinfo.gov/content/pkg/FR-2012-08-01/pdf/2012-17918.pdf> (“Rule 613”).

¹³ In Rule 613, the Commission explicitly deferred “its economic analysis of the actual creation, implementation, and maintenance of a consolidated audit trail itself until such time as it may approve the NMS plan submitted to the Commission for its consideration.” Rule 613 at 45802. In its economic analysis of the 2016 CAT NMS Plan, the Commission made clear that the CAT funding model “has not yet been finalized” and “the Funding Model will be filed with the Commission and subject to public comment.” 81 FR 84696 (Nov. 23, 2016) at 84804, 84881, available at: <https://www.govinfo.gov/content/pkg/FR-2016-11-23/pdf/2016-27919.pdf> (“2016 CAT NMS Plan”).

¹⁴ See Rule 613 at 45802 and 2016 CAT NMS Plan at 84804 and 84864.

¹⁵ *Am. Fuel & Petrochemical Mfrs. v. EPA*, 937 F.3d 559, 589 (D.C. Cir. 2019) (cleaned up). Further, an agency’s approval of another entity’s proposal to allocate “the percentage” that “each contributor must provide to” a regulatory “fund” is enough to “restart[] the sixty-day clock” for challenging not only the agency’s “prior regulations,” but even “the entire statutory delegation scheme.” *Consumers’ Rsch. v. FCC*, 88 F.4th 917, 921–22 (11th Cir. 2023).

¹⁶ <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-cat-funding-090623>.

II. The CAT Funding Proposal Does Not Remedy The Commission’s Prior Deficient Economic Analysis

The Eleventh Circuit determined that it was arbitrary and capricious for the Commission to refuse to update its 2016 economic analysis before approving a material amendment to the CAT NMS Plan.¹⁷ As noted by the Eleventh Circuit, “[a]gencies must consider material changes in circumstances, and they must act reasonably when they discover new evidence or encounter new facts.”¹⁸ Thus, the Commission cannot approve the 2025 Funding Proposal before conducting a new and accurate economic analysis.

Below, we set forth key aspects of the 2016 economic analysis that must be updated to reflect “real-world numbers,”¹⁹ all of which directly relate to the fundamental question of whether the 2025 Funding Proposal is consistent with the Exchange Act. We note that it is the Commission’s responsibility—independent of the SROs—to weigh the costs and benefits of the 2025 Funding Proposal and determine its impact on efficiency, competition, and capital formation.²⁰ In connection with fulfilling this statutory obligation, the Commission should require the SROs to provide necessary data.

A. The CAT Operational Budget

In order to evaluate the 2025 Funding Proposal’s economic implications, it is necessary to accurately document the aggregate amount of costs that are proposed to be allocated to broker-dealers and their customers relating to the ongoing operation of the CAT. In 2016, the Commission estimated that it would cost \$37.5 million to \$65 million to build CAT and that annual operating costs would range from \$36.5 million to \$55 million.²¹ These estimates proved to be grossly inaccurate and must be updated with current figures and reasonable future projections.

First, the Commission must comprehensively document the current state of play, including (i) the current CAT budget, (ii) key metrics related to the system’s overall costs, such as the number of executed transactions per day (subdivided by equities and options), the number of quotation messages per day (subdivided by equities and options), and the number of CAT records created per day, (iii) the number of broker-dealers who are responsible for shouldering the costs in the first instance (i.e. invoiced by CAT LLC), and (iv) the number of unique market participants who may ultimately bear a portion of the costs (i.e. have transaction records stored in the CAT system). In addition, the Commission should detail the usage-related costs (e.g. due to data requests made by the Commission or the SROs) that are now being incurred.

Second, the Commission must explain why its 2016 estimates were so inaccurate, and identify the key drivers that led to the dramatic increase in overall costs. The Commission must determine

¹⁷ Eleventh Circuit Decision at 1277–78.

¹⁸ See Eleventh Circuit Decision at 1277; *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011).

¹⁹ Eleventh Circuit Decision at 1269.

²⁰ See Rule 613(a)(5).

²¹ 2016 CAT NMS Plan at 84801.

whether (and to what extent) the observed cost increases were due to (i) changes in market volume, (ii) changes in required system scope and functionality, or (iii) technological design choices made by CAT LLC and the Commission. In order to perform this assessment, the Commission must detail the most important cost drivers and the key system design choices that contributed to these cost drivers. In addition, the Commission should detail the key design alternatives that were considered in relation to these cost drivers before the current CAT system was finalized.

Third, the Commission must update its estimates of the future trajectory of the CAT budget based on the identified cost drivers to determine the future costs that broker-dealers and their customers will bear under the 2025 Funding Proposal. In addition to projecting an average annual rate of increase, the Commission must also consider costs associated with (i) the building of additional system functionality if existing no-action relief expires without being extended or codified,²² (ii) implementation of approved (but not yet implemented) Commission rules, such as the Tick Sizes and Access Fees rule (which is expected to significantly increase equities message traffic),²³ and (iii) implementation of approved (but not yet implemented) SRO rules, such as the launch of newly approved equities and options exchanges (e.g. 24X Exchange, the Texas Stock Exchange, the Green Impact Exchange, and IEX Options) and the launch of overnight on-exchange trading (both of which will significantly increase equities and options message traffic). Further, the Commission must identify whether there are expected future costs associated with AWS contract renegotiations or planned system design changes.

B. Broker-Dealer Reporting Costs

In order to evaluate the 2025 Funding Proposal's economic implications, it also is necessary to accurately document the CAT-related costs that the industry is already bearing. In 2016, the Commission estimated that broker-dealers would incur one-time system implementation costs of \$2.2 billion and annual reporting costs of \$1.5 billion.²⁴ These estimates alone led the Commission to conclude that broker-dealers would incur approximately 90% of total CAT-related costs, even if they were not allocated *any* additional costs for the development and operation of the system.²⁵ Of course, these estimates proved to be grossly inaccurate and must be updated with actual figures now that the CAT is operational.

First, the Commission must determine the annual CAT reporting costs being incurred by broker-dealers and SROs by refreshing the industry surveys used in the 2016 economic analysis. This involves conducting a new "Reporters Study" and "Participants Study."²⁶

²² See, e.g., Release No. 34-103528 (July 23, 2025), available at: <https://www.sec.gov/files/rules/other/2025/34-103528.pdf> and Release No. 34-98848 (Nov. 2, 2023), available at: <https://www.sec.gov/files/rules/exorders/2023/34-98848.pdf>.

²³ 89 FR 81620 (Oct. 8, 2024), available at: <https://www.govinfo.gov/content/pkg/FR-2024-10-08/pdf/2024-21867.pdf>.

²⁴ 2016 CAT NMS Plan at 84859.

²⁵ 2016 CAT NMS Plan at 84864.

²⁶ See the "Reporters Study" and "Participants Study" detailed in the 2016 CAT NMS Plan.

Second, the Commission must determine the reporting and compliance costs associated with the Electronic Blue Sheet system, which the Commission in its 2016 economic analysis incorrectly assumed would be replaced by the CAT and “dramatically reduce the hundreds of thousands of requests that regulators must make each year.”²⁷ These savings have not materialized to offset broker-dealer CAT reporting costs and, therefore, must be added back in (both past and future).

C. The Industry’s Allocation of CAT Operational Costs

In order to evaluate the 2025 Funding Proposal’s economic implications, it is necessary to consider the impact of allocating to broker-dealers and their customers at least two-thirds of the total CAT operating budget in perpetuity. In 2016, the Commission’s economic analysis did not allocate *any* costs to operate CAT to broker-dealers since a funding model was not being finalized at the time, meaning that no such analysis was even attempted.²⁸ Several relevant considerations are set forth below.

First, the 2025 Funding Proposal picks winners and losers in terms of how it proposes to allocate costs *among* broker-dealers and their customers. The Commission must consider the economic implications of these choices, including:

- **Undue Impact on Equities (versus Options).** Even though one member of the CAT Operating Committee has stated that equities trading volume creates “a relatively low burden on CAT, from a cost-generation perspective, compared to other cost drivers, such as options activity,”²⁹ equities market participants will contribute far more under the 2025 Funding Proposal than options market participants due to the proposed allocation methodology. The Commission must evaluate (i) the proposed split between equities and options using CAT data and the invoices sent by CAT LLC over the past year under the vacated 2023 funding order (as the proposed allocation is the same) and (ii) the estimated CAT system costs associated with equities versus options trading activity in order to determine whether equities market participants are inappropriately subsidizing CAT costs arising from options activity and the associated economic implications.
- **Undue Impact on Retail Investors.** Although other regulatory fees are allocated based on executed *notional value*, the 2025 Funding Proposal allocates CAT costs based on executed *shares*. This means that a 1000-share transaction in a \$2 stock would result in 100 times the fees compared to a 10 share transaction in a \$200 stock, despite being equivalent in notional value. Retail investors would be particularly impacted, given the amount of retail trading in low-priced NMS stocks. For example, data shows that approximately 33% of total retail NMS stock trading activity is in sub-dollar NMS stocks.

²⁷ 2016 CAT NMS Plan at 84829.

²⁸ See Table 5 at 2016 CAT NMS Plan at 84864.

²⁹ Letter from FINRA (Apr. 11, 2023) at FN 23, available at: <https://www.sec.gov/comments/4-698/4698-20164063-334005.pdf>.

CAT LLC recognized the unfairness of allocating fees in this manner for certain low-priced stocks (i.e. OTC equities) by amending the allocation formula. However, no similar adjustment for low-priced NMS stocks was included. This creates nonsensical outcomes—for example, buying 1,000 shares of an NMS stock priced at \$0.50 results in 50 times more fees than buying 2,000 shares of an OTC stock priced at \$5, even though the purchase was for half the number of shares and 1/20th of the notional value.

Therefore, the Commission must assess the economic implications for retail investors in particular, including gathering data on (i) the percentage of total retail NMS stock trading activity in low-priced symbols and (ii) the percentage of CAT system costs allocated to retail investor trading activity by looking at CAT data and the invoices sent by CAT LLC over the past year under the vacated 2023 funding order (as the proposed allocation is the same). This will help determine whether retail investors are inappropriately subsidizing CAT costs arising from other trading activity, leading to negative impacts on efficiency, competition, and capital formation.

- **Undue Impact on Market Makers.** CAT LLC has previously acknowledged that it is important that a CAT funding model not “disproportionately affect market makers, thereby leading to a reduction in liquidity and market quality.”³⁰ However, the 2025 Funding Proposal would do exactly that by allocating a disproportionate percentage of total CAT system costs to a small handful of market makers. And since market makers would be allocated CAT system costs for their proprietary trading activity, those costs could be passed-on to other market participants through higher trading spreads.

The Commission must assess the economic implications for market makers and overall market liquidity by determining (i) the percentage of total CAT costs that the ten largest market makers would be allocated based their proprietary trading activity (using CAT data and the invoices sent by CAT LLC over the past year under the vacated 2023 funding order) and (ii) the potential impact on spreads, particularly in less liquid stocks with wider quoted spreads.

Second, separate from how the CAT’s costs will ultimately come to rest between broker-dealers and their customers, the Commission must consider the economic implications of allocating at least two-thirds of CAT system costs in perpetuity to those entities (currently over 100 million dollars per year). In addition, the Commission should assess the economic implications of broker-dealers and their customers being compelled to pay hundreds of millions of dollars under the unlawful 2023 funding order. All of these amounts could otherwise be deployed to benefit investors, issuers, and U.S. financial markets.

All of the economic analyses outlined above are critically important in determining whether the 2025 Funding Proposal is consistent with the Exchange Act and are required by the Eleventh Circuit’s Opinion. In fact, many are consistent with questions the Commission has itself asked (but never fully analyzed) when considering prior funding proposals.³¹ Further, they are eminently

³⁰ Release No. 34-91555 (Apr. 14, 2021) at 28, available at: <https://www.sec.gov/rules/sro/nms/2021/34-91555.pdf>.

³¹ See <https://www.sec.gov/files/rules/sro/nms/2022/34-95634.pdf> at 84-91.

feasible using existing CAT data. The Commission cannot attempt to evade its statutory requirement to conduct rigorous economic analysis by simply noting that the per-share cost will be small, given that trillions of shares are traded each year. Instead, it is the aggregate amounts (and how those amounts fall among broker-dealers and their customers) that matter, on top of all of the other CAT-related costs that broker-dealers and their customers are already bearing. As Chairman Atkins recently confirmed, “[u]ltimately, these costs make participating in our equities and options markets more expensive.”³²

As part of its economic analysis, the Commission should also consider whether reasonable alternatives would mitigate some of the concerns detailed above. For example, enhancements could include (i) minimum and maximum fee levels, (ii) appropriate calibrations to fees for market makers, and (iii) a different percentage split between the SROs and the industry.

After completing the required economic analysis, it will be clear that allocating at least two-thirds of CAT system costs to broker-dealers and their customers in the manner contemplated by the 2025 Funding Proposal is not fair and equitable under the Exchange Act.³³ The reasoning provided by Commissioners Peirce and Uyeda in dissenting from the nearly identical 2023 funding order is instructive, with Commissioner Peirce noting that “[t]he allocation required under this plan, with industry members bearing directly two-thirds of the costs of CAT, will reduce the incentives of plan participants and the Commission to subject the budget and resulting fees to rigorous scrutiny”³⁴ and Commissioner Uyeda pointing out that “the key issue here is whether this proposal sufficiently aligns incentives regarding decision-making that may impact these costs.”³⁵ The Commission’s comprehensive review of the CAT must address these core issues; until then, broker-dealers and their customers must not be forced to pay new, unrecoverable fees for a broken regime.

³² https://www.sec.gov/newsroom/speeches-statements/atkins-093025-consolidated-audit-trail-new-day-cat?utm_medium=email&utm_source=govdelivery.

³³ CAT LLC makes two additional flawed arguments to support allocating at least two-thirds of the costs to broker-dealers and their customers. First, CAT LLC argues that there are many more broker-dealers than SROs and broker-dealers have “greater financial resources.” 2025 Funding Proposal at 46. This argument, apart from its redistributive undertones, ignores that an exorbitant percentage of total CAT system costs will be allocated to a *small handful* of market makers. Second, CAT LLC argues that broker-dealers have adopted business models that bring “complexity to the markets.” *Id.* at 45. This argument conveniently ignores the complexity introduced by SROs, including via trading venue fragmentation, complex order types, and fee models. Neither argument addresses the actual costs of operating the CAT, and why the system was designed and implemented such that the number of CAT records has increased by five times original estimates even though overall market trading volume has not. Nor does it account for the fact that these complexities are the product of a process overseen exclusively by CAT LLC and its constituent SROs, which maintain authority over the design, implementation, and operation of the CAT. Broker-dealers and their customers, by contrast, have no say and, thus, no ability to exert control over the CAT costs they are being asked to bear.

³⁴ <https://www.sec.gov/newsroom/speeches-statements/peirce-statement-cat-funding-090623>.

³⁵ <https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-cat-funding-090623>.

III. The CAT Funding Proposal Does Not Sufficiently Prohibit SRO Pass-Throughs

The Eleventh Circuit determined that it was arbitrary and capricious for the Commission to allow the SROs “to pass along *all* of their CAT costs to their members, should they choose to do so.”³⁶ In response to the Eleventh Circuit’s decision, CAT LLC “proposes to add a new paragraph (e) to Section 11.3 providing that each Participant agrees not to establish a *new fee* for passing through its CAT fees.”³⁷ CAT LLC’s careful wording represents an audacious attempt to circumvent the Eleventh Circuit’s ruling.

In particular, the 2025 Funding Proposal does not modify a separate provision in the CAT NMS Plan stating that the SROs “may charge their members to cover the CAT NMS Plan costs either explicitly *or subsume those costs in other fees or assessments*.”³⁸ By merely prohibiting the imposition of a “new fee” for SRO pass-throughs, and explicitly refusing to amend or delete the sentence above,³⁹ CAT LLC is clearly attempting to preserve the ability for SROs to pass through some or all of their CAT costs to their members in other ways in direct contravention of the Eleventh Circuit’s decision—for example, simply by including them in already-existing fees.

As further evidence of CAT LLC’s attempt to “hide the ball,” the 2025 Funding Proposal provides no explanation as to how FINRA, as a not-for-profit organization, will fund its allocation of CAT costs, which amount to more than 10% of the entire CAT budget. To the extent that FINRA will attempt to pass through these costs to its members by adding them into existing fees, that must be clearly disclosed and explained *now*, as the Eleventh Circuit concluded that these types of fundamental allocation questions cannot be left to later fee filings.⁴⁰ Instead, the Commission must either require the SROs to clearly prohibit all attempts to pass through their CAT fees (in whatever form, whether through new fees or existing fees), or specifically acknowledge that SRO pass-throughs may continue to occur and to take that into account when considering whether the 2025 Funding Proposal is consistent with the Exchange Act and the Eleventh Circuit’s decision. Continuing to allow SRO pass-throughs would directly conflict with the Eleventh Circuit’s decision and fundamentally alters the allocation formula that the SEC is now considering. If broker-dealers and their customers are actually being allocated, for example, at least 80% of the entire CAT budget (rather than 67%) due to bearing FINRA’s portion (with the potential of bearing 100% of the entire CAT budget if other SROs follow suit), that must be factored into all of the economic analyses detailed above and into the ultimate determination as to whether the 2025 Funding Proposal is consistent with the Exchange Act.

Finally, the 2025 Funding Proposal does not compensate broker-dealers and their customers for the unlawful SRO pass-through fees that were collected under the vacated 2023 funding order. Despite repeatedly representing to the Eleventh Circuit that any “overpayments”

³⁶ Eleventh Circuit Decision at 1269.

³⁷ 2025 Funding Proposal at 7 (emphasis added).

³⁸ CAT NMS Plan at Appendix C-80 (emphasis added).

³⁹ 2025 Funding Proposal at FN 20.

⁴⁰ Eleventh Circuit Decision at 1276 (holding “[t]he Commission’s *post hoc* review of fee filings is insufficient” given that they are considered immediately effective upon filing).

by broker-dealers and their customers could be fairly addressed in future proceedings,⁴¹ there is no mention of the tens of millions in extra fees that broker-dealers and their customers were unlawfully compelled to pay to FINRA under the 2023 funding order as an explicit SRO pass-through. There is no question that this SRO pass-through was unlawful—in fact, it was withdrawn by FINRA immediately after the Eleventh Circuit’s decision—and broker-dealers and their customers have not been made whole. At the very least, these unlawful payments must be accounted for in any future funding model, and yet the 2025 Funding Proposal makes no attempt to do so.

IV. The CAT Funding Proposal Unlawfully Circumvents SEC Rule 608

As with CAT LLC’s flawed prior proposal, the 2025 Funding Proposal does not include *any* detail regarding the actual CAT costs that will be allocated to broker-dealers and their customers under the proposed allocation formula. Instead, CAT LLC asks the Commission to punt, explaining that these details will be provided in later filings made by each SRO pursuant to Commission Rule 19b-4.⁴² This approach is unlawful for several reasons.

First, fee filings relating to an NMS Plan are governed by Commission Rule 608 and cannot be filed as immediately effective under Rule 19b-4. Specifically, in 2020, the Commission amended Rule 608 to explicitly require that fee filings relating to NMS plans must be approved by the Commission prior to becoming effective.⁴³ In doing so, the Commission specifically referenced the CAT NMS Plan multiple times throughout the release.⁴⁴ The conclusion that these proposed CAT fees are governed by Rule 608 is further supported by how they are administered. In stark contrast to a typical fee set by an individual SRO for its members, CAT fees are administered at the NMS Plan level by FINRA CAT, LLC. Individual SROs have no role in (a) determining the specific fee amounts payable by each broker-dealer, (b) sending invoices to broker-dealers, (c) receiving payment, or (d) handling fee disputes. The Commission thus already has correctly determined that fee filings under the CAT NMS Plan would be covered by Rule 608; taking a different position now would represent an arbitrary and unlawful reversal.⁴⁵ The 2025 Funding Proposal ignores this and proposes to rely on an unlawful process for setting and collecting fees to fund the CAT.

⁴¹ See *Motion for Stay and Injunctive Relief* at 4, 11, *Am. Sec. Ass’n v. SEC*, 23-13396 (11th Cir. 2024) (explaining why unlawfully demanded CAT fees are unrecoverable); CAT LLC Opp. to Motion for Stay and Injunctive Relief at 17, *Am. Sec. Ass’n v. SEC*, 23-13396 (11th Cir. 2024) (contending overpayments “could be adjusted in any CAT postmortem proceedings”); CAT LLC Petition for Panel Rehearing at 11, *Am. Sec. Ass’n v. SEC*, 23-13396 (11th Cir. 2025) (arguing that “any ‘overpayments’” made by broker-dealers “can be addressed through a revised funding model”)

⁴² 2025 Funding Proposal at 20.

⁴³ See 85 Fed. Reg. 65470 (Oct. 15, 2020), available at: <https://www.govinfo.gov/content/pkg/FR-2020-10-15/pdf/2020-18572.pdf>.

⁴⁴ See, e.g., *id.* at 65471, 65481-83, 65490.

⁴⁵ We note the suggestion in the 2023 Funding Order that the fee filing process under Rule 608 only covers “fees imposed on vendors and subscribers of market data under Market Data Plans,” 2023 Funding Order at 62674, is without legal basis and ignores the fact that the CAT NMS Plan was referenced throughout the Commission’s 2020 release. See 85 Fed. Reg. at 65471, 65481-83, 65490.

Second, even if subsequent fee filings are permitted under Rule 19b-4, the Commission must assess *now* whether the actual costs that may be allocated are fair and reasonable as part of determining whether the 2025 Funding Proposal complies with the Exchange Act. The Eleventh Circuit has clearly stated that the Commission’s “*post hoc* review of fee filings is insufficient,” since they are considered immediately effective without Commission approval and appear immune from judicial challenge.⁴⁶ Further, we have already witnessed how the SROs are able to abuse and game the 19b-4 process: in response to the Commission suspending their first set of CAT fee filings in 2024, the SROs simply withdrew them and refiled virtually identical ones, daring the Commission to suspend them again, which the Commission did not. Similarly, after the Eleventh Circuit ruled that the prior funding order was unlawful, the SROs made a failed attempt to delay issuance of the court’s mandate to continue collecting millions in fees pursuant to 19b-4 filings they had accepted were unlawful.

The 2025 Funding Proposal cannot be fair and equitable if it allows the SROs to recoup clearly unreasonable costs from broker-dealers and their customers pursuant to filings that are deemed immediately effective and immune from judicial review. A cursory review of the fee filings submitted under the unlawful 2023 funding order illustrates just how ludicrous many of these costs are—such as requiring broker-dealers and their customers to pay for (i) the multi-year litigation between the CAT Operating Committee and the Commission, (ii) costs related to designing and attempting to implement numerous funding models that were not consistent with the Exchange Act (including the unlawful 2023 funding order), (iii) costs relating to the Customer & Account Information System (CAIS)—which never should have been built—including for a vendor that was terminated for implementation delays and cost overruns, and (iv) costs for public relations firms “monitoring comments made by market participants about CAT.”⁴⁷ Before approving the 2025 Funding Proposal, the Commission must explain how compelling broker-dealers and their customers to pay for these costs is consistent with the Exchange Act. In addition, CAT LLC has repeatedly refused to provide sufficient detail regarding the technical design of the CAT system or the costs incurred to design and maintain it. The historical CAT costs and the current CAT budget are known *right now*, and the Commission must determine whether those costs are reasonable to recoup from broker-dealers and their customers as part of assessing whether the 2025 Funding Proposal is consistent with the Exchange Act.

V. The Commission Must Independently Confirm The Financial Accountability Milestones Have Been Satisfied

The SROs are not permitted to recoup CAT costs from broker-dealers and their customers until a series of Financial Accountability Milestones (“FAMs”) are met.⁴⁸ While the SROs provide various dates by which they assert that specific FAMs were met, the Commission must independently validate these assertions and document its analysis. And to the extent the Commission permits the SROs to make subsequent fee filings under Rule 19b-4—meaning they are deemed immediately effective without Commission approval and immune from judicial

⁴⁶ Eleventh Circuit Decision at 1276.

⁴⁷ See, e.g., 89 FR 10850, 10859 (Feb. 13, 2024).

⁴⁸ 85 FR 31322 (May 22, 2020) at 31348, available at: <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-10963.pdf>.

review—the 2025 Funding Proposal provides the only opportunity for the Commission to scrutinize and clearly document SRO compliance with the FAMs, as required by the CAT NMS Plan. Several issues in particular warrant scrutiny.

First, the SROs are not permitted to recoup ongoing CAT costs until the date on which they delivered “Full Implementation of CAT NMS Plan Requirements.”⁴⁹ The SROs assert this was achieved in July 2024.⁵⁰ However, the SROs are, still to this date, relying on various exemptive orders issued by the Commission that provide relief from specific CAT NMS Plan requirements.⁵¹ Therefore, it is clear that, according to the Commission, the SROs have not fully implemented *all* of the CAT NMS Plan requirements and the only question is whether the granted exemptive relief also serves as a backdoor way to comply with the FAMs.

In certain more recent exemptive orders, the Commission has asserted that “to the extent that the [SROs] are availing themselves of exemptive relief from a CAT NMS Plan requirement, such requirement shall not be included in the requirements for a FAM, provided that the conditions of the exemption are satisfied.”⁵² However, the exemptive orders do not contain the statutorily-required analysis to support such an assertion. In particular, the Commission would have to conclude that it is in the public interest to permit the SROs to allocate hundreds of millions of CAT costs to broker-dealers and their customers even though they have failed to comply with specific CAT NMS Plan requirements and the express terms of the FAMs.⁵³ The interests of broker-dealers and their customers must be considered before the Commission can take action that results in specific CAT NMS Plan requirements being excluded from the FAMs or that otherwise impacts how the FAMs are interpreted.⁵⁴ Such an analysis would have to be completed before the Commission can conclude that all of the FAMs have been met and should be conducted before any approval of the 2025 Funding Proposal.

Second, even if the Commission’s exemptive orders also provide an exemption from the FAMs, they cannot retroactively do so for purposes of allowing the SROs to recoup historical costs. Under the CAT NMS Plan, in order for the SROs to recoup any historical costs, all of the requirements associated with “Period 1” must have been completed by July 31, 2020.⁵⁵ However, according to the Commission, one such “Period 1” requirement is the reporting of responses to electronic requests for quotes (“RFQs”) that are not immediately actionable.⁵⁶ This requirement was never completed, and, instead, the Commission eventually granted exemptive relief in May 2024. This belated exemptive relief, granted years after the deadline established in the CAT NMS Plan, cannot retroactively bring the SROs into compliance with the July 31, 2020 deadline and

⁴⁹ *Id.*

⁵⁰ 2025 Funding Proposal at FN 47.

⁵¹ *See, e.g., supra* note 22.

⁵² *See* 89 FR 45715 (May 23, 2024) at 45716, FN 11, available at: <https://www.govinfo.gov/content/pkg/FR-2024-05-23/pdf/2024-11360.pdf>.

⁵³ *See Cboe Futures Exch., LLC v. SEC*, 77 F.4th 971, 980 (D.C. Cir. 2023).

⁵⁴ We note that notice-and-comment was not provided before issuing the relevant exemptive orders.

⁵⁵ *Supra* note 48.

⁵⁶ *Supra* note 52.

retroactively authorize them to impose hundreds of millions in costs on broker-dealers. And even if it somehow could, the grant of exemptive relief does not contain any explanation justifying such a dramatic change in position. Since the SROs failed to meet the relevant deadlines, no historical fees can be collected.

VI. The Path Forward

We wholeheartedly agree with Chairman Atkins' call for a "comprehensive review" that covers all aspects of the CAT.⁵⁷ If the CAT is to remain, any strategic solution must put the regime on more solid legal footing as well as address the core governance issues that led to its ballooning scope and budget.

First, the Commission must include the CAT in its appropriated budget. In addition to being required by law,⁵⁸ this action will address several core problems with the current CAT structure. For the first time, there will be meaningful checks and balances as part of the governance process—the Commission will be incentivized to carefully oversee the size of the CAT budget and carefully weigh the costs and benefits of required functionality, while Congress will have a clear role in order to protect against waste and regulatory overreach. In addition, the funding controversy would be put to bed—the CAT would be treated the same as any other Commission project and funded through Section 31 fees (paid by the industry, not taxpayers writ large).

Second, while recent cost-saving efforts are a good initial step, the annual CAT budget is still estimated to be nearly \$200 million.⁵⁹ This is far too high, and all options must be on the table to rightsize the system and design it more efficiently. We look forward to providing more detailed recommendations as the Commission conducts its comprehensive review, but suggestions include:

- Engage a third-party technology firm to perform an independent review of the technological design of CAT to identify opportunities to optimize and reduce costs;⁶⁰
- Relax the most costly and compute-intensive deadlines, such as moving the initial FINRA CAT processing deadline to T+2 and moving the deadline to resolve errors to T+5;
- Reduce, simplify, and streamline the data fields required to be reported, rely on TRF or exchange-reported data when possible, and eliminate unnecessary records;

⁵⁷ <https://www.sec.gov/newsroom/speeches-statements/atkins-prepared-remarks-sec-speaks-051925> and https://www.sec.gov/newsroom/speeches-statements/atkins-093025-consolidated-audit-trail-new-day-cat?utm_medium=email&utm_source=govdelivery.

⁵⁸ See *supra* Part I.

⁵⁹ <https://www.sec.gov/newsroom/press-releases/2025-127-sec-issues-order-reduce-operating-costs-consolidated-audit-trail>.

⁶⁰ See also Letter from Citadel Securities (Mar. 5, 2024) at 9-21, available at: <https://www.sec.gov/comments/sr-finra-2024-002/srfinra2024002-442099-1120722.pdf> (detailing numerous CAT design-related questions that should be analyzed).

- Optimize the linkage process, including by eliminating the production of all interim linkage data by FINRA CAT; and
- Retire the Electronic Blue Sheets system.

These actions must be taken prior to assessing new fees on broker-dealers and their customers. Doing so does not foreclose the SROs from recouping appropriate CAT fees that went uncollected in the interim; rather, it recognizes—as the Eleventh Circuit did—that the balance of equities clearly favors broker-dealers and their customers who have already paid hundreds of millions of dollars pursuant to an unlawful funding order and would have no recourse to the extent new fees are unlawfully collected given the SROs’ immunity.

The Commission should be allocating its limited resources to implement Chairman Atkins’ call for a comprehensive review and to chart a new path forward, rather than becoming embroiled in yet another controversy over the funding of a broken system. We urge the Commission and the SROs to move as quickly as possible to rectify the errors of the past decade.

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We thank the Commission for considering our comments.

Please feel free to call the undersigned with any questions regarding these comments.

Respectfully,

/s/ Stephen John Berger

Managing Director

Global Head of Government & Regulatory Policy