

September 19, 2024

Via Electronic Mail

Hon. Gary Gensler, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Petition to Revise the Structure, Governance, and Funding for the
Consolidated Audit Trail

Dear Chair Gensler:

Healthy Markets Association¹ writes to petition the Commission to immediately revise the Consolidated Audit Trail (CAT) structure, governance and funding so that this essential tool may better protect the stability and integrity of the US capital markets.

While we oppose the CAT's current structure, governance, and funding, we also fear that the elimination of the CAT would leave the capital markets exposed to significant abuse, and regulators without any effective tools to protect them.

The CAT is now the primary surveillance tool used by regulators to identify abuses and inform policy decisions. Further, thousands of market participants spent untold numbers of hours and dollars transitioning away from reporting to FINRA's now-retired Order Audit Trail System to reporting to the CAT. There is no longer any other comprehensive regulatory reporting system. The CAT can't simply be turned off without incurring significant costs, uncertainty, and catastrophic risks to our markets.

At the same time, the current deeply flawed CAT structure, governance, and funding should not be permitted to persist. We believe that courts, Congress, or both, may determine that the CAT Plan was established outside of the SEC's legal authority and some of the details, including the funding, were approved in an arbitrary manner. Unquestionably, the Commission's choice to implement CAT through an NMS Plan, rather than by the Commission directly, is deeply flawed, leading to delays and significant costs for the exchanges, FINRA, and other market participants.

¹ The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

Rather than continuing to roll the dice with the fate of the greatest capital markets in the history of the world, we urge the Commission to use all deliberate speed to:

- move the current CAT reporting regime directly under Commission authority and operations as a Commission-controlled regulatory tool;²
- end the CAT NMS Plan³ and rescind the related CAT Funding Order;
- establish a funding mechanism to reimburse verified CAT-related expenses incurred by the exchanges and FINRA to date;
- limit access to the CAT to just the Commission and such other governmental regulators as the Commission may deem necessary, such as the Commodity Futures Trading Commission;
- clarify that entities reporting data to the CAT have no liability for the safekeeping of the data once it is submitted to the CAT; and
- ensure that any access to any personally identifiable information is appropriately protected.

These changes would:

- remove significant uncertainty regarding the Commission's authority;
- ensure that the funding for this essential governmental tool would be subject to Congressional appropriations, like other agency tools and staff; and
- materially reduce conflicts of interest for the CAT going forward.

Controlling the CAT is the Commission's job. We understand that the Commission may not desire to operate a large database with valuable information, especially if it is concerned that the agency or tool may be under-resourced by Congress. It may not have much choice. Again, while the Exchange Act empowers the agency to oversee the markets, it's not clear that the agency has statutory authority to impose upon private market participants an obligation to create and operate a tool for the agency to perform the agency's statutory responsibilities. Congress tasked the Commission with this job.

The CAT should be the Commission's expense. When the Commission established the CAT NMS Plan, in addition to passing off the responsibility for building and operating it, the agency also quite literally passed the buck. And we understand why the Commission may not wish to absorb the potential costs and other liabilities of operating

² As it does with other Commission tools, the agency could contract with a third party, including FINRA CAT, LLC, to continue to develop, maintain, and operate the CAT.

³ *Hearing on Implementation and Cybersecurity Protocols on the Consolidated Audit Trail Before the House Financial Services Committee, Subcommittee on Capital Markets, Securities and Investment*, 115th Cong. (2017) (testimony of Tyler Gellasch, Executive Director, Healthy Markets Association) (arguing that "for-profit exchanges should not be empowered by the government to set the terms and the costs of the regulatory apparatus that oversees the markets – including their competitors."). That still holds true. Aside from being legally dubious, the not-statutorily created NMS Plans are generally conflicted and difficult to manage, and should be abandoned.

the CAT. However, the CAT performs an essential governmental function, and it should be paid for like other governmental tools. The Commission's appropriated budget is offset by Section 31 fees, and that would be appropriate here. Those fees are clearly within the Commission's statutory authority to impose and collect. A funding model developed by the self-regulatory organizations to shift two-thirds of the costs of an SEC-mandated regulatory tool to brokers, however, is much more legally suspect.

Exchanges shouldn't have access to CAT data. We have long been concerned with for-profit exchanges' access to CAT data. These entities are competitors and are also often competitors with their own customers. While CAT data access is purportedly limited to "regulatory" functions, these lines may be difficult to draw and enforce. Given the business incentives exchanges may have to use (or misuse) CAT data in ways that benefit their revenues, we urge you to eliminate such access for the exchanges.

Market participants shouldn't be liable for SEC handling of CAT data. Once data is provided to the CAT, entities providing that data should not have liability for whatever the government does with it. Reporting entities simply can't be responsible for the government's safeguarding (or not) data reported to the CAT.⁴ The Commission should assume the responsibility of safeguarding the data.

Personally identifiable information should be protected. Lastly, while the Commission and FINRA have long had access to personally identifiable information (PII) of traders through OATS and "blue sheets," and a key component of the CAT's value is to link that information together, we recognize that this data must be safeguarded to avoid misuse. The Commission should take steps to ensure any PII in the CAT is appropriately protected, including potentially revising some elements of the architecture.

Conclusion. The CAT's flawed structure, governance, and funding model have rendered it too costly, too risky, and too susceptible to legal challenge. We urge you to fix these shortcomings without delay, so that regulators may continue to have the essential tools needed to protect the stability and integrity of our markets.

Sincerely,



Tyler Gellasch
President & CEO

⁴ Once data is reported to the government and outside of reporting entities' control, those entities cannot be reasonably responsible for what the government does with it. CAT data should be treated no differently than data provided to the Commission in other contexts. This issue has been a significant concern given the quasi-governmental status of the entire CAT NMS Plan, its plan participants, and the functions.