

# FIA PTG

## PRINCIPAL TRADERS GROUP

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March 9, 2024

Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

Re: 1<sup>st</sup> CAT Fee Filings (File Nos. SR-BOX-2024-03, SR-CboeBYX-002, SR-CboeBZX-004, SR-C2-2024-002, SR-Cboe-EDGA-2024-002, SR-CboeEDGX-2024-005, SR-CBOE-2024-003, SR-FINRA-2024-002, SR-FINRA-2024-003, SR-IEX-2024-01, SR-LTSE-2024-02, SR-MEMX-2024-01, SR-MIAX-2024-02, SR-EMERALD-2024-01, SR-PEARL-2024-02, SR-PEARL-2024-01, SR-BX-2024-002, SR-GEMX-2024-02, SR-ISE-2024-02, SR-MRX-2024-01, SR-PHLX-2024-01, SR-NYSEAMER-2024-02, SR-NYSEARCA-2024-02, SR-NYSECHX-2024-02, SR-NYSE-2024-03, SR-NYSESTAT-2024-01, and SR-NASDAQ-2024-001).

Dear Ms. Countryman:

The FIA Principal Traders Group (“FIA PTG”)<sup>1</sup> appreciates the opportunity to submit this letter to the Securities and Exchange Commission (“SEC” or the “Commission”) in response to the above captioned self-regulatory organizations’ (“SRO”) proposed rule changes to Establish Fees for Industry Members Related to Certain Historical Costs of the National Market System Plan Governing the Consolidated Audit Trail (the “CAT Fee Filings”) incurred by the SROs prior to January 1, 2022. Over the past seven years, FIA PTG has filed five comment letters<sup>2</sup> on the various Consolidated Audit Trail (“CAT”) funding proposals filed by Consolidated Audit Trail, LLC (“CAT LLC”) on behalf of the SROs (“Participants”).

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<sup>1</sup> FIA PTG is an association of firms, many of whom are broker-dealers, who trade their own capital on exchanges in futures, options and equities markets worldwide. FIA PTG members engage in manual, automated and hybrid methods of trading, and they are active in a wide variety of asset classes, including equities, fixed income, foreign exchange and commodities. FIA PTG member firms serve as a critical source of liquidity, allowing those who use the markets, including individual investors, to manage their risks and invest effectively. The presence of competitive professional traders contributing to price discovery and the provision of liquidity is a hallmark of well-functioning markets. FIA PTG advocates for open access to markets, transparency and data-driven policy.

<sup>2</sup> See Letter from Joanna Mallers, Secretary, FIA PTG, to Brett J. Fields, Secretary, SEC, dated June 22, 2017 (“FIA PTG CAT Funding Letter #1”); Letter from Joanna Mallers, Secretary, FIA PTG, to Brett J. Fields, Secretary, SEC, dated Jul 28, 2017 (“FIA PTG CAT Funding Letter #2”); Letter from Joanna Mallers, Secretary, FIA PTG, to Brett J. Fields, Secretary, SEC, dated January 12, 2018 (“FIA PTG CAT Funding Letter #3”); Letter from Joanna Mallers, Secretary, FIA PTG to Vanessa Countryman, Secretary, SEC, dated May 12, 2021 (“FIA PTG CAT Funding Letter #4”). Letter from Joanna Mallers, Secretary, FIA PTG to Vanessa Countryman, Secretary, SEC dated July 14, 2023 (“FIA PTG CAT Funding Letter #5”).

Before we discuss specific concerns with the CAT Fee Filings, we reiterate our prior comments that the CAT Funding Model<sup>3</sup> is not consistent with the Exchange Act. In this regard, it is premature to consider the CAT Fee Filings until the pending litigation in the U.S. Court of Appeals for the Eleventh Circuit is resolved. The Petitioners have raised significant and fundamental concerns regarding the legality of CAT and the CAT Funding Model. The Participants' efforts to rush through the Proposals before the litigation is just another example of the flawed process that has plagued the CAT from its inception. The Commission should therefore disapprove the filings and allow the Participants to refile after resolution of the Eleventh Circuit matter.

Separate from the legality of the CAT and the CAT Funding Model, the CAT Fee Filings are unreasonable and violate both the Exchange Act and the CAT NMS Plan in their own right. We note that market participants have only had a matter of weeks to evaluate hundreds of millions of dollars of costs that the SROs propose to pass on to them. Even so, it is clear that the CAT Fee Filings lack significant detail, and that the SROs seek to pass through several categories of unreasonable and inappropriate costs.

### **The CAT Fee Filings Propose Passing Through Unreasonable Fees on to Industry Members.**

The Exchange Act and the CAT NMS Plan require that any fees imposed on Industry Members be reasonable.<sup>4</sup> The CAT Fee Filings seek to impose several unreasonable and inappropriate costs on Industry Members. Examples of this in the CAT Fee Filings include, but are not limited to:

- The Participants' Costs Related to Thesys Technologies LLC. While the Funding Model appropriately excluded certain costs related to the engagement of Thesys Technologies, LLC ("Thesys") as the initial plan processor, the Participants now seek to pass through to Industry Members certain costs related to Thesys. Specifically, even though they had a contract with Thesys from January 17, 2017, through January 30, 2019, the Participants are only seeking to exclude costs incurred from November 15, 2017, through November 15, 2018. Participants fail to justify why it is appropriate to only exclude costs within this period. Moreover, the actual costs incurred arising from the failed Thesys engagement, including problematic design choices, technical specifications and other impactful system infrastructure decisions are likely significantly greater. The costs of these decisions far outlasted the terminated contract; however, no related cost concessions have been made. Further economic analysis beyond simply the operating costs incurred from November 15, 2017, through November 15, 2018, and the costs related to the conclusion of the relationship must be conducted and additional exclusions provided.

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<sup>3</sup> Release No. 34-98290 (September 6, 2023), 88 FR 62628 (September 12, 2023).

<sup>4</sup> 15 U.S.C. §§ 78o-3(b)(5), 78f(b)(4); see section 11.3(b)(iii)(B)(II) of the CAT NMS Plan.

- The Participants' Costs Related to Kingland Systems. Similar to the Thesys-related costs above, the Participants seek to pass through the costs related to the failed engagement of Kingland Systems ("Kingland") to build the CAT Customer and Account Information System ("CAIS") database. The CAIS system has been riddled with delays. Indeed, it was required to be completed by December 31, 2022, in accordance with the Commission's FAM 4 milestone and yet is still incomplete. We also understand that the Participants have terminated Kingland's contract. Like the Participants' failed Thesys engagement, it is completely inappropriate for the Participants to pass along any Kingland-related costs to Industry Members. Participants are solely responsible for the decision to hire Kingland as a vendor, and for Kingland's failure to complete the task for which it was hired.
- Amazon Web Services ("AWS") Costs. The Participants have not demonstrated that the significant AWS costs incurred by the Participants are reasonable. The bulk of the historical costs for the CAT relate to AWS compute and storage costs. However, the CAT Fee Filings provide virtually no information for the Commission to determine the reasonableness of these costs. For example, the Participants failed to provide information regarding the process by which AWS was selected or alternative vendors considered. The Participants failed to provide information that would enable the Commission to determine whether the costs of the AWS services were reasonable, and whether the Participants' own design choices are responsible for the significant AWS compute and storage costs.
- The Participants' Legal Costs Related to CAT Liability. The Participants seek to pass through to Industry Members legal bills from the law firms Pillsbury Shaw Pittman LLP ("Pillsbury") and Covington & Burling LLP ("Covington") related to their unsuccessful attempt to limit their own liability in connection with owning and operating the CAT by seeking to pass through their liability to Industry Members.
- Other Legal Costs. The Participants seek to pass through costs related to the multi-year litigation between the CAT Operating Committee and the Commission. These costs were unrelated to the implementation of CAT, and instead arose from disagreements between the CAT Operating Committee and the Commission over what the CAT NMS Plan required. Additionally, the Participants seek to pass through the legal costs related to their multiple attempts to adopt prior funding models that were inconsistent with the Exchange Act and subsequently withdrawn.
- Public Relations Costs. The Participants seek to pass through costs for "professional communications services" including "media relations consulting, strategy and execution." It is completely inappropriate for the Participants to pass through media relation services hired to represent them, not Industry Members. The way the Participants position themselves before the media, Congress, and the public should not be the responsibility of Industry Members, who are likely to have different views from the Participants on such matters.

The examples above are indicative of a broader failure throughout the release to provide basic information regarding the source and driver of costs, as well as information necessary for the Commission to determine that the costs are reasonable. As set forth in Section 200.700(b)(3)(iii) of the Commission's Rules of Practice, the burden "to demonstrate that an NMS plan filing is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to NMS plans is on the plan participants that filed the NMS plan filing." The lack of analysis by the Participants in the CAT Fee Filings overall does not provide the Commission with sufficient data to allow it to articulate a satisfactory explanation for its approval of the proposed CAT fees.

**Assessing Overlapping Historical Recovery Periods is Unreasonable.**

The CAT Fee Filings are limited to Historical Recovery Period I – costs incurred prior to January 1, 2022. Clearly there will be additional recovery periods established to cover time periods after January 1, 2022, and there is nothing to preclude the SROs from assessing the fees in connection with these recovery periods simultaneously. FIA PTG urges the Commission to constrain collection to one Historical Period at a time.

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For the reasons detailed above, as well as the additional issues that may have been discovered if commentors had been provided sufficient time and detail to analyze the hundreds of millions of dollars of costs, FIA PTG urges the Commission to disapprove the CAT Fee Filings. If you have any questions, please do not hesitate to contact Joanna Mallers at [jmallers@fia.org](mailto:jmallers@fia.org).

Respectfully,

FIA Principal Traders Group



Joanna Mallers  
Secretary

cc: Gary Gensler, Chair  
Hester M. Peirce, Commissioner  
Caroline A. Crenshaw, Commissioner  
Mark T. Uyeda, Commissioner  
Jaime Lizárraga, Commissioner