

MEMO# 35599

January 26, 2024

Your Input Requested by Wednesday, January 31: Invitation to Join SIFMA Amicus Brief in Litigation Against CAT Funding Model

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TO: Equity Markets Advisory Committee

ETF (Exchange-Traded Funds) Committee RE: Your Input Requested by Wednesday, January 31: Invitation to Join SIFMA Amicus Brief in Litigation Against CAT Funding Model

ICI has been invited by SIFMA to join an amicus brief with several other groups^[1] in support of the American Securities Association's and Citadel Securities's petition against the SEC seeking to vacate the SEC's September 2023 approval of the CAT revised funding model.^[2] As we previously explained,^[3] the revised CAT funding model—the Executed Share Model—would allocate approximately two-thirds of the CAT operating costs, including the legacy costs already incurred, to executing brokers (one-third to a buyer's executing broker and one-third to a seller's executing broker) based on the number of executed shares in a transaction and a fee rate based in part on budgeted CAT costs. The CAT operating committee—which currently consists only of the plan's participants, i.e., the exchanges and FINRA—is responsible for setting the operating budget that informs that fee rate.

We request your feedback by COB next Wednesday, January 31 on whether ICI should or should not join SIFMA and the other groups on the amicus brief. The brief, a draft of which has been shared with ICI, argues that the SEC acted in an "arbitrary and capricious" manner by (1) imposing "massive and escalating" financial costs on broker-dealers and investors without the opportunity to control or participate in establishing the CAT's budget; and (2) failing to adequately address other alternative approaches proposed by commenters (e.g., a one-half split between broker-dealers and the exchanges/FINRA), including cost-control measures. The brief also says that the two-thirds cost allocation to broker-dealers, with even more costs to be allocated from FINRA's pass-through of its share, is neither equitable nor reasonable.

The brief further emphasizes that the SEC's approval order expressly acknowledges that broker-dealers may, and some likely will, pass through their share of CAT costs to their customers.^[4] It characterizes such a pass-through to customers as contrary to the goal of

"protect[ing] investors and support[ing] fair, efficient capital markets."

If you have any additional questions on the brief or would like to discuss further, please do not hesitate to contact me at nhan.nguyen@ici.org.

Nhan Nguyen
Assistant General Counsel, Securities Regulation

Notes

[1] In addition to SIFMA, these groups so far include the Alternative Investment Management Industry, the Committee on Capital Markets Regulation, and Virtu Financial.

[2] Joint Industry Plan; Order Approving an Amendment to the National Market System Plan Governing the Consolidated Audit Trail; Notice (Sept. 6, 2023), 88 Fed. Reg. 62628 (Sept. 12, 2023) ("SEC CAT Funding Model Approval Order").

[3] SEC Adopts Amended Funding Model for the Consolidated Audit Trail, ICI Memorandum No. 35428 (Sept. 7, 2023), available at <https://www.ici.org/memo35428>.

[4] SEC CAT Funding Model Approval Order at 62637. The SEC stated that the inability to determine how much of the CAT costs will be passed on to investors does not affect whether the funding model should be approved. *Id.* The SEC also noted, however, that any broker-dealer pass-through of CAT fees to customers would be subject to SEC and FINRA oversight to ensure that they are fair and reasonable. *Id.* at n.198. Further, the SEC stated its belief that these additional costs that may be imposed on customers are likely to be small relative to other current transaction costs (e.g., Section 31 fees, which are ultimately passed down from broker-dealers (as passed down to them from exchanges) to their customers).