

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98023)

July 28, 2023

Order Granting a Temporary Conditional Exemption Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934 and Rule 608(e) of Regulation NMS Under the Exchange Act, Relating to the Reporting of Certain Activities on the Floor of National Securities Exchanges and Certain Activities by Industry Members Off Exchange Floors, as Required by Section 6.4(d) of the National Market System Plan Governing the Consolidated Audit Trail

I. Introduction

By letter dated March 31, 2023, BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, NASDAQ BX, LLC, Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc., (collectively, the “Participants” or “SROs”) requested that the Securities and Exchange Commission (“Commission”) grant temporary conditional exemptive relief to the Participants from the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”),¹ pursuant to its authority under Section 36(a)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)² and Rule 608(e) of Regulation NMS under the Exchange Act, from certain reporting requirements in Section 6.4(d)

¹ The CAT NMS Plan was approved by the Commission, as modified, on November 15, 2016. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (“CAT NMS Plan Approval Order”).

² 15 U.S.C. 78mm(a)(1).

of the CAT NMS Plan relating to certain activities on the floors of national securities exchanges and certain activities by Industry Members off exchange floors (“upstairs activity”).³

Section 36(a)(1) of the Exchange Act grants the Commission the authority, with certain limitations, to “conditionally or unconditionally exempt any person, security, or transaction . . . from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”⁴ Under Rule 608(e) of Regulation NMS, the Commission may “exempt from [Rule 608], either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanism of, a national market system.”⁵

For the reasons set forth below, the Commission believes that it is consistent with the purposes of the Exchange Act to grant temporary conditional exemptive relief relating to the reporting of: (1) Floor broker verbal announcements of firm orders on an exchange that are otherwise reported as systematized orders; (2) market maker verbal announcements of firm quotes on an exchange trading floor; (3) telephone discussions between an Industry Member and a client that may involve firm bid and offer communications; and (4) unstructured electronic and

³ See letter from the Participants to Vanessa Countryman, Secretary, Commission, dated March 31, 2023 (the “March 31, 2023 Exemption Request”). Unless otherwise noted, capitalized terms are used as defined in the CAT NMS Plan. “Upstairs” is a term used to describe the off-exchange market. For example, trading that occurs within a broker-dealer firm or between two broker-dealers in the over-the-counter market would be described as occurring “upstairs.”

⁴ 15 U.S.C. 78mm(a)(1).

⁵ 17 CFR 242.608(e).

verbal communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages), subject to certain conditions, and expiring on July 31, 2026.

II. Background and Request for Relief

On November 12, 2020, pursuant to Section 36(a)(1) of the Exchange Act,⁶ and Rule 608(e) of the Exchange Act,⁷ the Commission granted the Participants an exemption, until July 31, 2023, from the requirement in Section 6.4(d) of the CAT NMS Plan that requires each Participant, through its Compliance Rule, to require its Industry Members to record and electronically report to the Central Repository: (1) Floor broker verbal announcements of firm orders on an exchange that are otherwise reported as systematized orders; (2) market maker verbal announcements of firm quotes on an exchange trading floor; (3) telephone discussions between an Industry Member and a client that may involve firm bid and offer communications; and (4) unstructured electronic and verbal communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages), subject to certain conditions.⁸

In the March 31, 2023 Exemption Request, the Participants request that the Commission extend the temporary exemptive relief granted in the 2020 Order for an additional three years, to July 31, 2026. In support of their request, the Participants reiterate their belief that the verbal floor activity and unstructured verbal and electronic upstairs activity at issue were not previously

⁶ 15 U.S.C. 78mm(a)(1).

⁷ 17 CFR 242.608(e).

⁸ Securities Exchange Act Release No. 90405, 85 FR 73544 (November 18, 2020) (the “2020 Order”).

contemplated by Rule 613 or the CAT NMS Plan.⁹ The Participants state that the Commission disagreed with the Participants' view in the 2020 Order, but did not cite to any discussion in the CAT NMS Plan or the CAT NMS Plan Adopting Release regarding the activity at issue, nor did the Commission address the Participants' assertion that there was no cost-benefit analysis related to the capture and reporting of this activity in the CAT NMS Plan Adopting Release.¹⁰

The Participants also state that potential technological or business breakthroughs contemplated by the 2020 Order have not materialized, with neither natural language processing nor voice recognition technology currently sophisticated enough to reliably, accurately and consistently capture, parse and analyze and report interactions in the current trading environments and workflows.¹¹ Accordingly, the Participants state that they, CAT Advisory Committee members, and Industry Member groups, including the Financial Information Forum (FIF), have considered this issue and continue to believe that capturing and interpreting this activity in an automated manner without human intervention is not possible with current technology, nor would it be cost-effective to manually capture this activity.¹²

The Participants also state that manually capturing and reporting verbal activity would be costly, inconsistent, prone to error, and disruptive.¹³ The Participants state that manually capturing these events is impracticable and not cost-effective because it would require listening to every verbal interaction either live or from tape and/or sifting through electronic communications, and that the determination of whether unstructured electronic and verbal

⁹ March 31, 2023 Exemptive Request, at 4.

¹⁰ See id. at 4.

¹¹ See id. at 5.

¹² See id.

¹³ See id. at 5-6.

activity involves a firm bid or offer is a manual, subjective process that could be highly prone to error resulting in overreporting and/or underreporting to the CAT.¹⁴ This would lead to inconsistent or less accurate data across CAT Reporters, because Industry Members will capture the same activity differently, resulting in misleading or incomplete views of transactions and limit regulators' ability to determine compliance with any reporting requirement.¹⁵

In addition, the Participants do not believe that the reporting of the verbal and manual quotes and orders at issue in the 2020 Order would provide meaningful value from a regulatory or surveillance perspective.¹⁶ The Participants state that orders on exchange floors are systematized and reportable to CAT, and manual orders in "upstairs activity" whether or not trades occur on an exchange floor or off-floor are also reportable to CAT.¹⁷ The Participants also represent that the CAT Advisory Committee believes that bilateral negotiations in upstairs activity, such as between asset brokers and broker-dealers, or between two broker-dealers, are currently captured when the broker either creates an order, as in from an asset manager, or accepts an order, as in from another broker-dealer, and when the trade execution occurs.¹⁸ The Participants also state that verbal floor and unstructured verbal and electronic upstairs activities do not lend themselves to the types of market manipulation considered in the adoption of Rule 613, and that the costs of compliance would outweigh any incremental value for regulatory or surveillance purposes.¹⁹

¹⁴ See id.

¹⁵ See id. at 6.

¹⁶ See id. at 5-6.

¹⁷ See id. at 6-7.

¹⁸ See id. at 7.

¹⁹ See id.

III. Discussion of Participants' Exemption Request

The Commission has carefully considered the Participants' exemption request. The Commission believes that extending temporary exemptive relief is, pursuant to Section 36(a)(1) of the Exchange Act, appropriate in the public interest and consistent with the protection of investors, and that pursuant to Rule 608(e), this exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and the perfection of a national market system.

The Participants dispute the Commission's position that verbal and manual quotes and orders are required to be reported to the CAT.²⁰ Because the Commission believes that the Participants' request for an extension of the temporary exemption from these reporting requirements is reasonable, we do not address their arguments here.

The Commission believes that extending the temporary exemptive relief should allow Participants and Industry Members time to collaborate, develop, and implement a reporting framework, guidelines, FAQs, and scenarios necessary for effective and efficient reporting of floor-based verbal quotes and order and upstairs activity.

Based on the foregoing, pursuant to Section 36(a)(1) of the Exchange Act, it is appropriate in the public interest and consistent with the protection of investors, and pursuant to Rule 608(e), it is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and the perfection of a national market system to extend conditional temporary relief for the reporting of: (1) Floor broker verbal announcements of firm orders on an exchange that are otherwise reported as systematized orders; (2) market maker verbal announcements of firm quotes on an exchange trading floor; (3)

²⁰ See 2020 Order, supra note 8, at 73547; CAT NMS Plan at Section 1.1.

telephone discussions between an Industry Member and a client that may involve firm bid and offer communications; and (4) unstructured electronic and verbal communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages). Extending the temporary exemptive relief until July 31, 2026, would provide Participants the time to develop and implement any necessary reporting guidance, specifications, and any technical changes to the CAT and is approximately four years after the date by which the Participants previously estimated that the CAT would be fully implemented, July 11, 2022.²¹ It would also provide CAT Reporters the time to fully consider and implement how to report such events and create the necessary technological and process changes required to capture these required quotes and orders while minimizing potential business disruptions and impacts to existing workflows. However, the Commission believes it is appropriate to provide exemptive relief subject to certain conditions discussed below.

IV. Conclusion

The Commission believes it is appropriate to extend the temporary exemptive relief that exempts each Participant from the requirement in Section 6.4(d) of the CAT NMS Plan for each Participant, through its Compliance Rule, to require its Industry Members to record and electronically report to the Central Repository the following communications, until July 31, 2026: (1) Floor broker verbal announcements of firm orders on an exchange that are otherwise reported as systematized orders; (2) market maker verbal announcements of firm quotes on an exchange trading floor; (3) telephone discussions between an Industry Member and a client that may involve firm bid and offer communications; and (4) unstructured electronic and verbal

²¹ See Securities Exchange Act Release No. 88890 (May 15, 2020), 85 FR 31322, 31334 (May 22, 2020).

communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages).

As a condition to this relief, the Participants must provide the Commission a written status update on the reporting of these quotes and orders by July 31, 2025, including, for both verbal activity on exchange floors and upstairs activity separately, an analysis of the feasibility of traders contemporaneously recording firm bid and offer information for verbal and manual quotes and orders, and an implementation plan for the reporting of these quotes and orders. Furthermore, this implementation plan for the reporting of these quotes and orders must: (1) identify verbal and manual workflows to facilitate the reporting of these quotes and orders; (2) provide or reference published guidelines for Industry Members for determining when verbal or manual communications become firm and are required to be reported; and (3) provide or reference published technical specifications to allow for the reporting of verbal and manual quotes and orders by Industry Members. The purpose of these conditions is to help ensure that the Participants establish a framework necessary to permit the reporting of verbal and manual quotes and orders by Industry Members before the expiration of the temporary conditional exemptive relief.

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act,²² and Rule 608(e) of the Exchange Act²³ that the Participants are granted an exemption, until July 31, 2026, from the requirement in Section 6.4(d) of the CAT NMS Plan that requires each Participant, through its Compliance Rule, to require its Industry Members to record and electronically report to the Central Repository: (1) Floor broker verbal announcements of firm

²² 15 U.S.C. 78mm(a)(1).

²³ 17 CFR 242.608(e).

orders on an exchange that are otherwise reported as systematized orders; (2) market maker verbal announcements of firm quotes on an exchange trading floor; (3) telephone discussions between an Industry Member and a client that may involve firm bid and offer communications; and (4) unstructured electronic and verbal communications that are not currently captured by Industry Member order management or execution systems (e.g., Bloomberg chats, text messages), subject to the conditions described above.

By the Commission.

Sherry R. Haywood,

Assistant Secretary.