

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88703)

April 20, 2020

Order Granting Limited Exemptive Relief, Pursuant to Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”) and Rule 608(e) of Regulation NMS Under the Exchange Act, Related to Certain Introducing Brokers, From the Requirements of the National Market System Plan Governing the Consolidated Audit Trail

By letter dated February 3, 2020, 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. (“FINRA”); Investors Exchange LLC; Long-Term Stock Exchange, Inc.; Miami International Securities Exchange, LLC; MIAX Emerald, LLC; MIAX Pearl, LLC; Nasdaq BX, Inc.; 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” to the National Market System (“NMS”) Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”))¹ requested that the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to its authority under Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”)² and Rule 608(e) of Regulation NMS under the Exchange Act,³ grant exemptive relief from certain provisions of the CAT NMS Plan related to broker-dealers that do not qualify as Small Industry Members solely because such broker-dealers satisfy Rule 0-10(i)(2) under the Exchange Act⁴ in

¹ The Commission approved the CAT NMS Plan, 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).

³ 17 CFR 242.608(e).

⁴ 17 CFR 240.0-10(i)(2).

that they introduce transactions on a fully disclosed basis to clearing firms that are not small businesses or small organizations (for purposes of this order, such broker-dealers are referred to as “Introducing Brokers” or “Introducing Industry Members”).⁵ Specifically, the Participants request that the Commission provide exemptive relief from requiring Introducing Industry Members to comply with the requirements of the CAT NMS Plan that apply to Industry Members other than Small Industry Members (“Large Industry Members”), provided that the Participants require such Introducing Industry Members to comply with the requirements of the CAT NMS Plan that apply to Small Industry Members.⁶ The Participants state that the CAT NMS Plan permits Small Industry Members to begin reporting to the CAT later than Large Industry Members.⁷

Under the CAT NMS Plan, a Small Industry Member is an Industry Member that qualifies as a small broker-dealer as defined in Rule 613 under the Exchange Act.⁸ Rule 613 incorporates the definition of small broker-dealer in Rule 0-10(c) under the Exchange Act.⁹ Exchange Act Rule 0-10(c) defines a small broker or dealer to mean a broker or dealer that:

⁵ See letter from Mike Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, U.S. Securities and Exchange Commission, dated February 3, 2020 (“Exemption Request”). Unless otherwise noted, capitalized terms are used as defined in Rule 613 of Regulation NMS, in the CAT NMS Plan, or in this letter. “Industry Member” means “a member of a national securities exchange or a member of a national securities association.” “Small Industry Member” means “an Industry Member that qualifies as a small broker-dealer as defined in SEC Rule 613.” See CAT NMS Plan at Section 1.1.

⁶ See Exemption Request.

⁷ See id. at 2.

⁸ 17 CFR 242.613. See CAT NMS Plan at Section 1.1.

⁹ 17 CFR 240.0-10(c).

(1) Had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a-5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and

(2) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section.

Under Exchange Act Rule 0-10(i),¹⁰ a broker or dealer is affiliated with another person for purposes of Exchange Act Rule 0-10(c) if:

(1) Such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person; or

(2) Such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries such accounts on a fully disclosed basis.

¹⁰ 17 CFR 240.0-10(i).

In the CAT NMS Plan Approval Order, the Commission stated that the CAT NMS Plan provides a capital level-based definition of Small Industry Members for purposes of the CAT NMS Plan implementation schedule.¹¹ The Commission further stated that the definition is derived from Exchange Act Rule 0-10, which defines small entities under the Exchange Act for purposes of the Regulatory Flexibility Act, and reflects an “existing regulatory standard that is an indication of small entities for which regulators should be sensitive when imposing regulatory burdens.”¹² The Commission stated that the definition of Small Industry Member is a reasonable means to identify market participants for which it would be appropriate to provide, and that would benefit from, an additional year to prepare for CAT reporting due to their relatively limited resources.¹³

Under Exchange Act Rule 0-10(i)(2), an Introducing Broker would not be a small broker-dealer as defined in Exchange Act Rule 0-10(c) if the Introducing Broker introduced transactions in securities on a fully disclosed basis to a clearing firm that was not a small broker-dealer, regardless of the Introducing Broker’s capital level.¹⁴ The Participants believe that excluding Introducing Brokers from the definition of a small broker-dealer based on the introducing relationship described in Exchange Act Rule 0-10(i)(2) is not consistent with the intention to provide small broker-dealers with additional time to comply with the CAT NMS Plan.¹⁵ The

¹¹ See CAT NMS Plan Approval Order, 81 FR at 84771.

¹² See id. (citing Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45804 (August 1, 2012) (“Rule 613 Adopting Release”).

¹³ See CAT NMS Plan Approval Order, 81 FR at 84771.

¹⁴ Only broker-dealers that perform their own trading and either self-clear or clear on an omnibus basis, rather than on a fully disclosed basis, would be a small broker-dealer under Exchange Act Rule 0-10(i)(2). See Exemption Request at 3.

¹⁵ See id.

Participants state that Introducing Brokers, as defined herein, are excluded from the definition of a small broker-dealer solely because of their introducing relationship with a clearing firm, and that Introducing Brokers otherwise satisfy the capital threshold in Exchange Act Rule 0-10(c)(1) for small broker-dealers.¹⁶ Accordingly, the Participants request exemptive relief for Introducing Industry Members from the requirements in the CAT NMS Plan applicable to Large Industry Members.¹⁷

The Participants state that the CAT NMS Plan permits Small Industry Members to commence reporting to the CAT later than Large Industry Members.¹⁸ As a condition to the exemption, the Participants would require Introducing Industry Members to comply with the provisions of the CAT NMS Plan applicable to Small Industry Members.¹⁹ As a result, Introducing Industry Members would report information pursuant to the CAT NMS Plan when Small Industry Members begin reporting.²⁰ The Participants state that the requested exemptive relief would affect only the timing for when data would be reported, but not the type or amount of data that would be reported.²¹

In a separate order, the Commission granted the Participants' request for exemptive relief from certain requirements in the CAT NMS Plan related to Industry Member reporting of

¹⁶ See id.

¹⁷ See id. at 4.

¹⁸ See id. at 2.

¹⁹ See id. Each Participant would be required to require through its Compliance Rule that an Introducing Industry Member comply with the requirements of the CAT NMS Plan applicable to Small Industry Members. "Compliance Rule" means, "with respect to a Participant, the rule(s) promulgated by such Participant as contemplated by Section 3.11." See CAT NMS Plan at Section 1.1.

²⁰ See id.

²¹ See id.

Industry Member Data to the Central Repository to allow for the implementation of phased reporting for Industry Members to the CAT.²² The reporting schedule in the Phased Reporting Order addresses Large Industry Members, Small Industry Members that are required to record and report information to FINRA’s Order Audit Trail System pursuant to applicable self-regulatory organization (“SRO”) rules (“Small Industry OATS Reporters”), and Small Industry Members that are not required to record and report information to FINRA’s OATS pursuant to applicable SRO rules (“Small Industry Non-OATS Reporters”). Under the relief requested herein, the Participants would be exempt from requiring Introducing Brokers to comply with the requirements of the Plan applicable to Large Industry Members and the Participants would require Introducing Brokers to comply with the requirements of the Plan applicable to Small Industry Members. The implementation schedule that an Introducing Broker would follow would depend upon whether the Introducing Broker was an OATS Reporter or a Non-OATS Reporter. Specifically, by providing this relief, Introducing Brokers who are OATS Reporters would follow the schedule established for Small Industry OATS Reporters and Introducing Brokers who are Non-OATS Reporters would follow the schedule for Small Industry Non-OATS Reporters, as described in more detail in the Phased Reporting Order.²³

Section 36 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

²² See Securities Exchange Act Release No. 88702 (April 20, 2020) (Order Granting Conditional Exemptive Relief, Pursuant to Rule 608(e) of the Securities Exchange Act of 1934, from Sections 6.4, 6.7(a)(v) and 6.7(a)(vi) of the National Market System Plan Governing the Consolidated Audit Trail) (“Phased Reporting Order”).

²³ See id.

consistent with the protection of investors.”²⁴ Rule 608(e) of Regulation NMS under the Exchange Act provides that the Commission may exempt from the provisions of an NMS plan, either unconditionally or on specified terms and conditions, any self-regulatory organization or its members, 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 mechanisms of, a national market system.

The Commission believes that, pursuant to Exchange Act Section 36, this exemption is 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 the mechanisms of, a national market system. This relief will provide Introducing Industry Members that meet the capital standard in Exchange Act Rule 0-10(c)(1) with additional time to prepare effectively for certain CAT reporting phases depending on whether they are OATS Reporters, as described in more detail in the Phased Reporting Order. The Commission believes that the introducing relationship described in Exchange Act Rule 0-10(i)(2) should not prevent an Introducing Broker that meets the capital standard in Exchange Act Rule 0-10(c)(1) from being considered a Small Industry Member. The Commission understands that despite their clearing relationships, these Introducing Industry Members have the same resource limitations as other small broker-dealers that are similarly capitalized. Additionally, although an Introducing Broker may rely on its clearing firm to meet its regulatory obligations, an Introducing Broker is not obligated to choose its clearing firm as its CAT reporting agent. As the Commission stated in adopting Rule 613, providing small broker-dealers

²⁴ 15 U.S.C. 78mm(a)(1).

with a longer implementation time would assist small broker-dealers in identifying the most cost-effective and the most efficient manner to comply with Rule 613.²⁵ The Commission believes that this rationale applies equally to all broker-dealers that meet the capital threshold required to be considered a Small Industry Member, including Introducing Brokers. This relief affects only the time when certain Introducing Industry Members begin CAT reporting, but not the type or amount of information that they will be required to report. Accordingly, the Commission believes that the Participants should be exempt from requiring Introducing Industry Members that meet the capital standard in Exchange Act Rule 0-10(c)(1) to comply with the requirements of the CAT NMS Plan applicable to Large Industry Members, provided that such Introducing Industry Members comply with the requirements of the CAT NMS Plan applicable to Small Industry OATS Reporters and Small Industry Non-OATS Reporters, as applicable.

²⁵ See Rule 613 Adopting Release, 77 FR at 45804.

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act,²⁶ and Rule 608(e) of the Exchange Act,²⁷ that the Participants are exempt from requiring Introducing Industry Members to comply with the requirements of the CAT NMS Plan that apply to Large Industry Members, provided that each Participant, through its Compliance Rule, requires such Introducing Industry Members to comply with the requirements of the CAT NMS Plan applicable to Small Industry Members.

By the Commission.

Vanessa A. Countryman
Secretary

²⁶ 15 U.S.C. 78mm(a)(1).

²⁷ 17 CFR 242.608(e).