

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97530)

May 19, 2023

Order Granting Temporary Conditional 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, from Certain Requirements of the National Market System Plan Governing the Consolidated Audit Trail

I. Introduction and Background

In July 2012, the Securities and Exchange Commission (the “Commission” or the “SEC”) adopted Rule 613 of Regulation NMS, which required national securities exchanges and national securities associations (the “Participants”)¹ to jointly develop and submit to the Commission a national market system plan to create, implement, and maintain a consolidated audit trail (the “CAT”).² The goal of Rule 613 was to create a modernized audit trail system that would provide regulators with timely access to a comprehensive set of trading data, thus enabling regulators to more efficiently and effectively analyze and reconstruct market events, monitor market behavior, conduct market analysis to support regulatory decisions, and perform surveillance, investigation, and enforcement activities. On November 15, 2016, the Commission approved the national market system plan required by Rule 613 (the “CAT NMS Plan”).³

¹ The Participants include BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX 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, 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.

² See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (Aug. 1, 2012) (“Rule 613 Adopting Release”).

³ Securities Exchange Act Release No. 78318 (Nov. 15, 2016), 81 FR 84696, (Nov. 23, 2016) (“CAT NMS Plan Approval Order”). The CAT NMS Plan is Exhibit A to the

To provide the Participants with more time to meet certain requirements of the CAT NMS Plan and thereby allow the Participants to prioritize and focus resources on meeting other implementation goals, the Commission issued two exemptive orders on December 16, 2020 (collectively, the “2020 Orders”). In the first order, in response to a request from the Participants, the Commission granted temporary conditional relief from certain performance requirements related to the online targeted query tool.⁴ The second order granted temporary conditional relief from the following requirements: (1) requirements for lifecycle linkages timeframes; (2) requirements for re-processing of corrected data received after T+5; (3) linkage requirements for Securities Information Processor data; (4) reporting requirements for port-level settings; (5) requirements for lifecycle linkages between customer orders and “representative” orders; and (6) requirements for Participant reporting of rejected orders.⁵ Although the Participants did not request the relief granted in the second order, the Commission believed that

CAT NMS Plan Approval Order. See CAT NMS Plan Approval Order, at 84943-85034. The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (the “Company”). Each Participant is a member of the Company and jointly owns the Company on an equal basis. The Participants submitted to the Commission a proposed amendment to the CAT NMS Plan on Aug. 29, 2019, which they designated as effective on filing. Under the amendment, the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC serves as the CAT NMS Plan, replacing in its entirety the CAT NMS Plan. See Securities Exchange Act Release No. 87149 (Sept. 27, 2019), 84 FR 52905 (Oct. 3, 2019).

⁴ See Securities Exchange Act Release No. 90689 (Dec.16, 2020), 85 FR 83667 (Dec. 22, 2020); see also Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated Dec. 1, 2020, available at <https://catnmsplan.com/sites/default/files/2020-12/12.01.20-CAT-Exemption-Request-OTQT.pdf> (“Participant Letter”).

⁵ See Securities Exchange Act Release No. 90688 (Dec. 16, 2020), 85 FR 83634 (Dec. 22, 2020).

granting such relief was necessary in order to “provide Participants the time to develop the necessary technological, system or procedural changes to meet the CAT NMS Plan requirements” addressed in that order.⁶

On February 14, 2021, a subset of the Participants filed motions requesting that the Commission stay the 2020 Orders, based on their concern that portions of the 2020 Orders “interpret and apply the Plan in ways that will produce unintended adverse consequences, present implementation challenges, or both.”⁷ Corresponding petitions for judicial review were also filed with the D.C. Circuit by a smaller subset of the Participants.⁸ In their motions to stay and supporting materials, the Participants urged the Commission to consider their “arguments and supporting evidence and to reevaluate whether the [2020] Order[s] [were] appropriate in light of that information.”⁹ Alternatively, the Participants requested that the Commission stay portions of the 2020 Orders pending resolution of the petitions for judicial review.¹⁰ On January 12, 2022, the Participants further requested that the Commission supplement the record to include certain additional materials.¹¹ The Commission granted this request.

After careful review of the arguments and evidence proffered by the Participants, the

⁶ Id. at 83634.

⁷ See Motion for Partial Stay of Order 34-90689, at 2 (“First Motion”); Motion for Partial Stay of Order 34-90688, at 2 (“Second Motion”). Financial Industry Regulatory Authority, Inc. and Long-Term Stock Exchange, Inc. did not join these motions.

⁸ See Petition for Review, USCA Case No. 21-1065; Petition for Review, USCA Case No. 21-1066. Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, and MIAX PEARL, LLC did not join these petitions.

⁹ First Motion, supra note 7, at 2; Second Motion, supra note 7, at 2.

¹⁰ First Motion, supra note 7, at 2; Second Motion, supra note 7, at 2.

¹¹ See Letter from K. King, Counsel for Consolidated Audit Trail, LLC, Covington & Burling LLP, to Vanessa Countryman, Secretary, Commission (Jan. 12, 2022).

Commission issued a new exemptive relief order on July 8, 2022.¹² The 2022 Order clarified certain aspects of the 2020 Orders, modified other aspects of the 2020 Orders in light of subsequent developments and/or additional information provided by the Participants, and provided the Participants with additional time either to come into compliance with the relevant provisions of the CAT NMS Plan or to develop alternative solutions that achieve the regulatory goals of Rule 613 and the CAT NMS Plan in a more cost-effective manner. Specifically, the 2022 Order granted temporary exemptive relief from the same requirements addressed in the 2020 Orders until July 31, 2024, and set forth new conditions with which the Participants were required to comply in order to qualify for that exemptive relief.¹³ In granting this temporary conditional exemptive relief, the Commission emphasized its willingness to consider alternative regulatory solutions in the form of a proposed CAT NMS Plan amendment or a request for permanent exemptive relief.¹⁴

On the same day that it issued the 2022 Order, the Commission denied the Participants' pending motions to stay the 2020 Orders as moot.¹⁵ With respect to the pending petitions for judicial review of the 2020 Orders, the Commission and the Participants submitted a joint stipulation of voluntary dismissal to the D.C. Circuit on August 5, 2022,¹⁶ and the court

¹² See Securities Exchange Act Release No. 95234 (July 8, 2022), 87 FR 42247 (July 14, 2022) (the "2022 Order"). The Commission stated that the 2022 Order superseded the 2020 Orders. As of July 8, 2022, the terms of the 2022 Order governed, and the terms of the 2020 Orders were no longer in force. Id. at 42248.

¹³ See 2022 Order, supra note 12.

¹⁴ See, e.g., id. at 42248.

¹⁵ See Securities Exchange Act Release No. 95231 (July 8, 2022), 87 FR 42242 (July 14, 2022).

¹⁶ See Stipulation of Voluntary Dismissal, USCA Case Nos. 21-1065, 21-1066.

dismissed those petitions for judicial review.¹⁷ On September 6, 2022, in order to reserve their rights, a subset of the Participants filed a new petition for judicial review of the 2022 Order with the D.C. Circuit.¹⁸ On October 3, 2022, the D.C. Circuit granted the parties' joint motion to hold the case in abeyance while the parties pursue settlement discussions.¹⁹ On March 29, 2023, the D.C. Circuit granted the parties' joint motion to govern future proceedings and lifted the abeyance.²⁰

In the months following the issuance of the 2022 Order, the Participants and Commission staff have continued to engage in discussions with the goal of resolving or narrowing their differences with respect to the issues addressed in that order. On April 12, 2023, the Participants requested that the Commission extend the relief granted in the 2022 Order from July 31, 2024 to January 31, 2025, in order to facilitate further settlement discussions between the Participants and Commission staff.²¹ The Participants stated their belief that a six-month extension of the compliance deadline set forth in the 2022 Order would “provide the parties with adequate time to conclude their settlement negotiations and allow the Commission time to consider any resulting [CAT NMS] Plan amendments or exemptive relief.”²² The Participants further stated that, if the

¹⁷ See Order Granting Dismissal (Aug. 5, 2022), USCA Case Nos. 21-1065, 21-1066.

¹⁸ See Petition for Review, USCA Case No. 22-1234. Financial Industry Regulatory Authority, Inc. and Investors' Exchange LLC did not join this petition.

¹⁹ See Order Granting Joint Motion to Hold Appeal in Abeyance, USCA Case No. 22-1234.

²⁰ See Order Returning Case to Court's Active Docket and Setting Briefing Schedule, USCA Case No. 22-1234.

²¹ See Letter from Brandon Becker, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission (Apr. 12, 2023), available at <https://catnmsplan.com/sites/default/files/2023-04/04.12.23-July-8-Order-Extension-Request.pdf> (“Participant Letter”), at 2.

²² See *id.* at 2.

Commission granted the requested extension of exemptive relief, they would agree to “promptly seek an abeyance of the litigation for an appropriate length of time in light of the duration of the extension, the status of settlement negotiations, and related considerations.”²³

For the reasons set forth below, this order (the “Order”) grants the Participants’ request for an extension of the temporary exemptive relief that was provided by the 2022 Order, subject to the same conditions set forth for that relief in the 2022 Order.²⁴

II. Discussion and Exemptive Relief

Section 36 of the Exchange Act grants the Commission the authority 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

²³ See id.

²⁴ In May 2020, the Commission adopted amendments to the CAT NMS Plan that establish four Financial Accountability Milestones and set target deadlines by which these milestones must be achieved. These amendments also reduce the amount of any fees, costs, and expenses that the Participants may recover from Industry Members if the Participants fail to meet the target deadlines. See Securities Exchange Act Release No. 88890 (May 15, 2020), 85 FR 31322 (May 22, 2020). The Commission believes it is most appropriate to consider whether the Participants have met the target deadlines established for each Financial Accountability Milestone in connection with proposals related to the imposition of CAT fees on broker-dealers. For that reason, in issuing this Order, the Commission makes no determinations regarding the Participants’ compliance or non-compliance with the conditions set forth in the prior orders or the potential impact of such compliance or non-compliance on the Participants’ ability to meet the Financial Accountability Milestones set forth in Section 1.1 of the CAT NMS Plan or the potential application of fee reduction provisions set forth in Section 11.6 of the CAT NMS Plan. Rather, the Commission will consider the Participants’ compliance with the CAT NMS Plan requirements, and/or compliance with the conditions set forth in the prior orders and the impact of that compliance, in the context of such fee proposals. Moreover, the Commission makes no determinations regarding the Participants’ compliance or non-compliance with other provisions or requirements of the CAT NMS Plan that are not discussed in the prior orders or in this Order.

investors.”²⁵ Rule 608(e) of Regulation NMS similarly grants the Commission the authority to “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 mechanisms of, a national market system.”²⁶

The Commission has determined that an extension of the exemptive relief provided in the 2022 Order, subject to the same conditions set forth in that order, is appropriate in the public interest and consistent with the protection of investors under Section 36 of the Exchange Act, as well as consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets, and the perfection of the mechanisms of a national market system under Rule 608(e).

The Commission approved the CAT NMS Plan to help to protect investors and maintain fair and orderly markets by providing a sophisticated audit trail that improves regulators’ ability to investigate potential misconduct, to reconstruct and to analyze market events, and to support regulatory decisions with detailed and accurate data, among other benefits. To realize this full spectrum of regulatory benefits, however, the CAT must be implemented in a manner that achieves the regulatory goals of Rule 613 and the CAT NMS Plan. To the extent that Participants seek to implement alternative solutions that deviate from the CAT NMS Plan requirements, they must first obtain Commission approval of either an amendment to the CAT NMS Plan or permanent exemptive relief.

²⁵ 15 U.S.C. 78mm(a)(1).

²⁶ 17 CFR 242.608(e).

The Commission’s intention in issuing the 2022 Order, the substance of which is incorporated by reference herein, was to provide the Participants with additional time either to come into compliance with the requirements of the CAT NMS Plan or to develop and obtain Commission approval of alternative solutions that achieve the regulatory goals of Rule 613 and the CAT NMS Plan in a more cost-effective manner,²⁷ subject to certain conditions generally intended to preserve existing functionality as a baseline and/or give the Commission information about the performance of the CAT and the impact of any changes or improvements made by the Participants. Some conditions attached to the relief provided in the 2022 Order were also designed to ensure that the parties remained on track to resolve these issues in a timely fashion.²⁸

As noted above, the Participants and Commission staff have continued to engage in discussions with the goal of reaching agreement on long-term solutions to the issues addressed in the 2022 Order that achieve the regulatory goals of Rule 613 and the CAT NMS Plan in a more cost-effective manner. The Commission agrees with the Participants that “significant progress is being made” in these ongoing settlement discussions²⁹ and believes that a six-month extension will provide additional time for the discussions to conclude and for the Commission to consider any resulting proposed CAT NMS Plan amendments or requests for exemptive relief. The Commission also believes that such an extension will increase the likelihood of timely agreement

²⁷ See 2022 Order, supra note 12, at 42248.

²⁸ For example, the Commission required the Participants and the Plan Processor to meet with Commission staff on at least a monthly basis to provide a detailed status update regarding each requirement at issue in the litigation and to promptly respond to related requests for additional information or data, in order to “ensure that the Participants remain on track either to come into compliance with the requirements of the CAT NMS Plan or obtain the Commission’s approval of an alternative solution by July 31, 2024.” See 2022 Order, supra note 12, at 42250-57.

²⁹ See Participant Letter, at 2.

on and implementation of such long-term solutions, thus furthering the public interest, the protection of investors, the maintenance of fair and orderly markets, and the perfection of the mechanisms of a national market system.

III. Conclusion

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act³⁰ and Rule 608(e) under the Exchange Act,³¹ that the exemptive relief granted in the 2022 Order be extended to January 31, 2025, subject to the same conditions set forth in that order.

By the Commission.

Sherry R. Haywood,

Assistant Secretary.

³⁰ 15 U.S.C. 78mm(a)(1).

³¹ 17 CFR 242.608(e).