

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90688)

December 16, 2020

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, Relating to Certain Requirements of the National Market System Plan Governing the Consolidated Audit Trail

I. Introduction

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, 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., NYSE National, Inc., and Long Term Stock Exchange, Inc. (collectively, the “Participants” or “SROs”) are responsible for implementing the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”).¹ When fully implemented, the consolidated audit trail (“CAT”) is designed to capture customer and order event information for Eligible Securities² across all markets, from the time of order inception through routing, cancellation, modification, or execution in a single, consolidated data source.

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 Unless otherwise noted, capitalized terms are used as defined in the CAT NMS Plan.

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 consistent with the protection of investors.”³ 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.”⁴

For the reasons set forth below, this Order grants the Participants temporary conditional exemptive relief from certain requirements of the CAT NMS Plan, until the dates specified below. The Commission is granting temporary conditional exemptive relief from certain CAT NMS Plan requirements in order to allow Participants more time to meet such requirements and to allow Participants to prioritize and focus resources on implementation of other outstanding CAT NMS Plan requirements.

II. Discussion and Exemptive Relief

Participants and Industry Members have devoted and continue to expend substantial resources and efforts in the ongoing development of the CAT. The Commission believes that

³ 15 U.S.C. 78mm(a)(1).

⁴ 17 CFR 242.608(e).

granting the temporary exemptive relief until July 31, 2023,⁵ except where otherwise noted below, would provide Participants the time to develop the necessary technological, system or procedural changes to meet the CAT NMS Plan requirements discussed below. The Commission believes that granting temporary conditional exemptive relief from specific CAT NMS Plan requirements as discussed below is, pursuant to Section 36 of the Exchange Act, appropriate in the public interest and consistent with the protection of investors, and that pursuant to Rule 608(e), this exemptive relief 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.

In addition to the conditions specific to the exemptive relief described below, the Commission is granting the exemptive relief described herein conditioned on the Participants providing information in Quarterly Progress Reports⁶ regarding the progress towards meeting these CAT NMS Plan requirements. Section 6.6(c)(ii)(B) of the CAT NMS Plan requires that for each “milestone” still in progress at the end of a given calendar quarter, the Participants must submit, among other things, a description of “any other factual indicators that demonstrate the current level of completion with respect to the milestone.” As a condition of the exemptive relief granted in this Order, the Participants are required to include a description of specific factual indicators that demonstrate the current level of completion with respect to the “Full

⁵ This date is approximately one year after the date by which the Participants previously estimated that the CAT would be fully implemented, July 11, 2022. See Securities Exchange Act Release No. 88890 (May 15, 2020), 85 FR 31322, 31334 (May 22, 2020).

⁶ See CAT NMS Plan at Section 6.6(c)(ii) (requiring Participants to file quarterly progress reports with the Commission tracking progress towards implementing the CAT NMS Plan requirements). See also Securities Exchange Act Release No. 88890 (May 15, 2020), 85 FR 31322 (May 22, 2020).

Implementation of CAT NMS Plan Requirements” milestone⁷ within the Quarterly Progress Reports required by the CAT NMS Plan. These factual indicators, as they apply to each CAT NMS Plan requirement, are discussed in greater detail below.

A. Timeframes for Lifecycle Linkages

The CAT NMS Plan requires specific timeframes for the identification, communication and correction of errors from the time an order event is received by the processor, including, by Noon Eastern Time T+1 (transaction date + one day), “[i]nitial data validation, lifecycle linkages and communication of errors to CAT Reporters.”⁸ This means that by 12pm EST the day after a transaction, the Plan Processor must have completed initial data validation, made lifecycle linkages (i.e., completed processing and linkage of the initial transaction data) and communicated errors to CAT Reporters. However, the Commission understands that the Plan Processor is currently unable to establish lifecycle linkages by the noon EST T+1 deadline as required by the CAT NMS Plan, but the Plan Processor does have the ability to provide an interim CAT Order ID and lifecycle linkages by 9pm EST T+1. To allow the Participants more time to make the technological changes necessary to meet the requirements of Section 6.1 of Appendix D, the Commission believes it is appropriate to grant temporary exemptive relief, until

⁷ See CAT NMS Plan at Section 1.1 (defining “Full Implementation of CAT NMS Plan Requirements” milestone). The Commission believes that these factual indicators relate to the Full Implementation of CAT NMS Plan Requirements milestone because this milestone “means the point at which Participants have satisfied all of their obligations to build and implement the CAT, such that all CAT system functionality required by Rule 613 and the CAT NMS plan has been developed, successfully tested and fully implemented[.]” Id.

⁸ See CAT NMS Plan at Section 6.1 of Appendix D. Section 6.1 of Appendix continues to provide the following timelines: (1) “8:00 a.m. Eastern Time T+3 (transaction date + three days) – Resubmission of corrected data; and” (2) “8:00 a.m. Eastern Time T+5 (transaction date + five days) – Corrected data available to Participant regulatory staff and the SEC.”

July 31, 2023, from the requirement that the Participants make lifecycle linkages of transaction data available by noon EST T+1. This relief is conditioned on the Participants providing an interim CAT Order ID and lifecycle linkages by 9pm EST T+1. Furthermore, as a condition of this relief, and for purposes of the Quarterly Progress Reports, factual indicators that demonstrate the current level of completion with respect to this CAT NMS Plan requirement must include a description of any improvements to the time by which the Plan Processor is capable of providing an interim CAT Order ID and lifecycle linkages. The Commission believes that this condition would allow the Commission to monitor the progress made towards meeting this CAT NMS Plan requirement prior to the expiration of the exemptive relief.

B. Re-Processing of Corrections Received after T+5

Section 3 of Appendix D of the CAT NMS Plan requires that all CAT Data reported to the Central Repository must be processed and assembled to create the complete lifecycle of each Reportable Event.⁹ Furthermore, Section 6.2 of Appendix D of the CAT NMS Plan states that if corrections are received after T+5 (transaction date + 5 days), Participants' regulatory staff and the SEC must be notified and informed as to how re-processing will be completed. The Commission understands that the Participants believe that re-processing data for corrections made after T+5 could negatively impact current development timelines and thus impede regulatory use of CAT Data, and that Section 3 of Appendix D does not require the re-processing of all data corrections made after T+5, but that the Participants do plan to establish procedures to identify when and how such data will be re-processed. However, under the CAT NMS Plan,

⁹ See, e.g., CAT NMS Plan, supra note 1, at Section 3 of Appendix D. Pursuant to Section 6.1 of Appendix D, the Plan Processor is required to make available corrected data to Participant regulatory staff and the SEC at 8:00 a.m. EST five days after a transaction date.

corrections received after T+5 are required to be re-processed, with the Participants' regulatory staff and SEC notified and informed as to how re-processing will be completed; it does not provide that re-processing is optional. To provide the Participants time to develop the changes necessary to handle the re-processing of all corrections received after T+5, the Commission believes it is appropriate to grant temporary exemptive relief, until July 31, 2021, from the requirement in Section 3 and Section 6.2 of Appendix D of the CAT NMS Plan that the Participants process and assemble the complete lifecycle for corrected Reportable Events received by the Plan Processor after T+5. As a condition of this relief, and for purposes of the Quarterly Progress Reports, factual indicators that demonstrate the current level of completion with respect to this CAT NMS Plan requirement must include a description of progress made with respect to the re-processing of all corrections received after T+5 prior to the expiration of the exemptive relief on July 31, 2021. The Commission believes that this condition would allow the Commission to monitor the progress made towards meeting this CAT NMS Plan requirement prior to the expiration of the exemptive relief.

C. Linkage of Participant Data and Industry Member Data with SIP Data

Section 6.5(b)(i) of the CAT NMS Plan requires, among other things, that the CAT Data and data from the Securities Information Processor (the "SIP") that is collected by the Central Repository ("SIP Data") when available to the Participant regulatory staff and the SEC "shall be linked," such that the Participant and Industry Member Data ("Transaction Data") collected by CAT and the SIP Data collected by CAT are part of the lifecycle of a single Order.¹⁰ However, the Commission understands that the CAT Plan Processor is unable to "link" Participant Data

¹⁰ Section 3 of Appendix D of the CAT NMS Plan requires that "[a]ll CAT Data reported to the Central Repository must be processed and assembled to create the complete lifecycle of each Reportable Event," and "CAT Data" explicitly includes "SIP Data."

and Industry Member Data with SIP Data as required by Section 6.5(b)(i) of the CAT NMS Plan. Rather, the Commission understands that the CAT Plan Processor is only able to provide a regulatory user a side-by-side view of – instead of a linkage between – both the transactional data in CAT and SIP Data through an online targeted query tool or a user-defined direct query.

In order to provide Participants more time to develop the changes necessary to meet the requirements of Section 6.5(b)(i), the Commission believes it is appropriate to, until July 31, 2023, grant a temporary exemption to the Participants from the requirement in Section 6.5(b)(i) of the CAT NMS Plan that requires the information collected by the Central Repository pursuant to paragraphs (c)(7) and (e)(7) of SEC Rule 613 to be provided to regulators in a linked manner, insofar as this provision applies to linking Participant Data and Industry Member Data with SIP Data as required by Section 6.5(b)(i). As a condition of this relief, and for purposes of the Quarterly Progress Reports, factual indicators that demonstrate the current level of completion with respect to this CAT NMS Plan requirement must include the release of updated specifications and/or scenarios documents relating to the linkage of Participant Data and Industry Member Data with SIP Data, such that SIP Data is incorporated in the lifecycle of an order. The Commission believes that this condition would allow the Commission to monitor the progress made towards meeting this CAT NMS Plan requirement prior to the expiration of the exemptive relief.

D. Reporting of Port-Level Settings Applicable to Orders

Port-level settings are special handling instructions associated with a port connection to another Industry Member or Participant and are used by Industry Members and Participants to instruct how to handle an Order (e.g., certain routing instructions) that are sent through that port connection. The CAT NMS Plan requires Industry Members to report the “Material Terms of an

Order,” including “any special handling instructions”¹¹ to the Central Repository for certain events in an Order’s lifecycle.¹² The Commission believes that the CAT NMS Plan’s requirement to report “Material Terms of an Order” including “any special handling instructions” requires the reporting of port-level settings because port-level settings provide instructions on how orders should be handled.¹³ Put another way, port-level settings are special handling instructions, and therefore these settings must be reported, consistent with the two-sided reporting obligations of CAT, by both the sender and receiver. For example, an instruction that prevents an order from trading with another order from the same broker-dealer (self-trade match prevention) is reportable as a special handling instruction even if the exchange does not need to apply the instruction because there is not another order from the same broker-dealer that would trade with the incoming order.

The Commission understands, however, that Participants and/or Industry Members would have to make technological changes to ensure the accurate and reliable reporting of port-level settings, and therefore, the Commission believes it is appropriate to, until July 31, 2023, exempt the Participants from requiring that both the CAT Reporter sending an Order and the CAT Reporter receiving an Order report port-level settings as part of the Material Terms of an Order. In order to monitor the Participants’ progress on compliance with the CAT NMS Plan’s reporting requirements, this exemptive relief is conditioned on the Participants engaging both the

¹¹ See CAT NMS Plan at Section 1.1.

¹² See CAT NMS Plan at Sections 1.1 and 6.4(d)(i), (ii), (iii), and (iv).

¹³ CAT NMS FAQ (D34) regarding the requirement to report material terms of an order that are communicated via default or implicit handling instructions states that generally, the party who “applies” the default or implicit handling instruction to the order is required to report any material terms in that instruction to CAT. See CAT NMS FAQ D34, available at: <https://www.catnmsplan.com/faq>.

Commission and Industry Members on a plan to address the reporting of port-level settings on an exchange-by-exchange basis. Furthermore, as a condition of this relief, and for purposes of the Quarterly Progress Reports, factual indicators must include the release of updated specifications and/or scenarios documents relating to the reporting of port-level settings by both the sender and receiver of an Order as a special handling instruction to demonstrate the current level of completion with respect to the CAT NMS Plan requirement that special handling instructions, including port-level settings, be reported as Material Terms of an Order. The Commission believes that these conditions would allow the Commission to monitor the progress made towards meeting this CAT NMS Plan requirement prior to the expiration of the exemptive relief.

E. Lifecycle Linkage Between Customer Orders and “Representative” Orders

The CAT NMS Plan requires that the Plan Processor must be able to link all related order events from all CAT Reporters involved in the lifecycle of an order, and this requirement applies to, among other things, “representative” orders. Specifically, the CAT NMS Plan states that the Central Repository must be able to create the lifecycle between customer orders to “representative” orders created in firm accounts for the purpose of facilitating a customer order (e.g., linking a customer order handled on a riskless principal basis to the street-side proprietary order).¹⁴ The Commission understands that the Participants do not currently have the ability to create lifecycles in certain representative order scenarios, particularly because of the difficulty of linking representative orders for Industry Members with separate order management systems and

¹⁴ See CAT NMS Plan at Section 3, Appendix D. A representative order is an order originated in a firm owned or controlled account, including principal, agency average price and omnibus accounts, by an Industry Member for the purpose of working one or more customer or client orders. See Securities Exchange Act Release No. 88702 (April 20, 2020), 85 FR 23075, 23076 n.26 (April 24, 2020) (“Phased Industry Member Reporting Order”).

execution management systems that do not currently have a systematic or direct link between them.¹⁵ While the Commission has granted exemptive relief relating to the timing of CAT NMS Plan reporting requirements for Industry Members,¹⁶ including the phased reporting of representative orders, the exemptive relief that was granted relates solely to the timing and phasing of reporting and not the substantive requirements of the CAT NMS Plan.¹⁷

In order to allow time for Participants and Industry Members to develop the capability of meeting CAT NMS Plan requirements relating to representative orders, the Commission believes it is appropriate to grant temporary exemptive relief, until July 31, 2023, from the CAT NMS Plan requirement that the Plan Processor create the lifecycle between customer orders to “representative” orders created in firm accounts for the purpose of facilitating a customer order, conditioned on the Participants continuing to require Industry Member reporting of representative orders as described in the Phased Industry Member Reporting Order. The Commission believes that granting relief until July 31, 2023 is appropriate because this would provide Participants the time necessary to determine how all representative orders are to be reported to CAT and time for Industry Members to make any changes necessary to report all representative orders. As a condition of this relief, and for purposes of the Quarterly Progress

¹⁵ See Industry Member Specifications, FINRA CAT, available at: <https://www.catnmsplan.com/specifications/im>.

¹⁶ In the Phased Industry Member Reporting Order, see supra note 14, the Commission granted exemptive relief from requirements in Sections 6.4, 6.7(a)(v) and 6.7(a)(vi) of the CAT NMS Plan related to Industry Member reporting of Industry Member Data to the Central Repository.

¹⁷ As a condition to the exemptive relief granted in the Phased Industry Member Reporting Order, the Participants represented that the full scope of CAT Data will be required to be reported to the CAT when Phase 2e has been implemented (by July 11, 2022), subject to any applicable exemptive relief or amendments to the CAT NMS Plan. See id. at 23076, 23079, 23080, 23081, 23083.

Reports, factual indicators that demonstrate the current level of completion with respect to this CAT NMS Plan requirement must include a description of progress made regarding the release of updated specifications and/or scenarios documents relating to the reporting of all representative orders. The Commission believes that this condition would allow the Commission to monitor the progress made towards meeting this CAT NMS Plan requirement prior to the expiration of the exemptive relief.

F. Participant Reporting of Rejected Orders

The CAT NMS Plan requires Participants to record and report to the Central Repository the receipt of an order and the time at which the order is received pursuant to Section 6.3(d) of the CAT NMS Plan. This requirement applies to when an order is received, which means that an order that a Participant receives, but then rejects (“rejected orders”) is a CAT Reportable event, and that the receipt of that order and the time at which that order was received also must be reported, pursuant to Section 6.3(d). Additionally, similar to all other CAT Data, rejected orders that are reported to the Central Repository must be processed and assembled to create the complete lifecycle of each Reportable Event.¹⁸ However, the Commission understands that the Participants are currently only able to report some but not all rejected orders, as required by Section 6.3(d).

In order to provide Participants more time to develop the changes necessary to meet the requirements of Section 6.3(d) of the CAT NMS Plan as they relate to rejected orders, the Commission believes it is appropriate to, until December 13, 2021, grant a temporary exemption to the Participants from the requirement in Section 6.3(d) of the CAT NMS Plan that requires the

¹⁸ See CAT NMS Plan at Appendix D, Section 3.

Participants to report rejected orders.¹⁹ As a condition to this relief, and for purposes of the Quarterly Progress Reports, factual indicators that demonstrate the current level of completion with respect to this CAT NMS Plan requirement must include a description of any updates to specifications and/or scenarios documents relating to the capture and reporting of rejected orders. The Commission believes that this condition would allow the Commission to monitor the progress made towards meeting this CAT NMS Plan requirement prior to the expiration of the exemptive relief.

III. Conclusion

For the reasons discussed above, the Commission believes that granting temporary exemptive relief, pursuant to Section 36 of the Exchange Act, is appropriate in the public interest and consistent with the protection of investors, and that pursuant to Rule 608(e), granting temporary exemptive relief 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.

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act,²⁰ and Rule 608(e) of the Exchange Act²¹ that the Participants are granted an exemption, from: (1) the requirement in Section 6.1 of Appendix D of the CAT NMS Plan that requires Participants to make lifecycle linkages of transaction data available by noon EST T+1, until July

¹⁹ The Commission understands that Industry Member Specifications accommodates the reporting of rejected orders through “New Order Event” reporting, and that if an Industry Member receives an order, the Industry Member must report the receipt of the order and time of order receipt. See FINRA CAT, Industry Member Specifications, available at: <https://www.catnmsplan.com/specifications/im>; FINRA CAT, FAQ D3, available at: <https://www.catnmsplan.com/faq>.

²⁰ 15 U.S.C. 78mm(a)(1).

²¹ 17 CFR 242.608(e).

31, 2023; (2) the requirement in Sections 3 and 6.2 of Appendix D of the CAT NMS Plan that the Participants process and assemble the complete lifecycle for corrected Reportable Events received by the Plan Processor made after T+5, until July 31, 2021; (3) the requirement in Section 6(b)(i) of the CAT NMS Plan that requires the Participants to ensure that information collected pursuant to paragraphs (c)(7) and (e)(7) of SEC Rule 613 shall be linked when made available to the Participant regulatory staff and the SEC, until July 31, 2023; (4) the requirement in Sections 6.3(d)(i)(F), (ii)(G), (iii)(F), (iv)(E) and 6.4(d)(i) of the CAT NMS Plan that the Participants report, and amend their Compliance Rules to require Industry Members report the Material Terms of an Order that are communicated in port-level settings or instructions, until July 31, 2023; (5) the requirement in Section 3, Appendix D of the CAT NMS Plan that the Participants create the lifecycle between customer orders to representative orders created in firm accounts for the purpose of facilitating a customer order, until July 31, 2023, and (6) the requirement in Section 6.3(d) of the CAT NMS Plan that requires Participants to report rejected orders, until December 13, 2021, subject to the conditions described above.

By the Commission.

J. Matthew DeLesDernier
Assistant Secretary