

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-95234)

July 8, 2022

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**

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”)<sup>1</sup> to jointly develop and submit to the Commission a national market system plan to create, implement, and maintain a consolidated audit trail (the “CAT”).<sup>2</sup> 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”).<sup>3</sup>

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<sup>1</sup> 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.

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

<sup>3</sup> 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

The Commission recognizes that the Participants have expended, and continue to expend, substantial resources and effort towards the development and implementation of the CAT. 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 “prior 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 (“OTQT”).<sup>4</sup> 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 (“SIP Data”); (4) reporting requirements for port-level settings; (5) requirements for lifecycle linkages between customer orders and “representative” orders; and (6)

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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).

<sup>4</sup> See Securities Exchange Act Release No. 90689 (Dec. 16, 2020), 85 FR 83667 (Dec. 22, 2020) (the “First Order”); 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”).

requirements for Participant reporting of rejected orders.<sup>5</sup> Although the Participants did not request the relief granted in the Second Order, the Commission believed that 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” at stake.<sup>6</sup>

On February 14, 2021, a subset of the Participants filed motions requesting that the Commission stay the December 2020 orders, based on their concern that portions of the orders “interpret and apply the Plan in ways that will produce unintended adverse consequences, present implementation challenges, or both.”<sup>7</sup> Corresponding petitions for judicial review were also filed with the D.C. Circuit by a smaller subset of the Participants.<sup>8</sup> 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 Order[s] [were] appropriate in light of that information.”<sup>9</sup> Alternatively, the Participants requested that the Commission stay portions of the prior Orders pending resolution of the petitions for judicial review.<sup>10</sup> Since that time, the Participants and Commission staff have been engaged in ongoing discussions with the goal of resolving or narrowing their differences with respect to the issues raised in the Participants’ stay

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<sup>5</sup> See Securities Exchange Act Release No. 90688 (Dec. 16, 2020), 85 FR 83634 (Dec. 22, 2020) (the “Second Order”).

<sup>6</sup> Id. at 83634.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> First Motion, supra note 7, at 2; Second Motion, supra note 7, at 2.

<sup>10</sup> First Motion, supra note 7, at 2; Second Motion, supra note 7, at 2.

motions. On January 12, 2022, the Participants requested that the Commission supplement the record to include certain additional materials prepared in connection with those discussions.<sup>11</sup>

The Commission granted this request.

After careful review of the arguments and evidence proffered by the Participants, the Commission has decided to issue a new order granting temporary exemptive relief that will supersede the prior Orders. This order (the “Third Order” or “Order”) revises the conditions with which the Participants must comply in order to qualify for the exemptive relief provided herein. As of the date that this Order is issued by the Commission, the terms of this Order will govern, and the terms of the First Order and the Second Order will no longer be in force.<sup>12</sup>

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

<sup>12</sup> 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 Third Order 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.

## 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 investors.”<sup>13</sup> 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.”<sup>14</sup>

In each of the areas of CAT operation addressed below, the current functionality of the CAT does not yet comply with CAT NMS Plan requirements. As explained above, the Commission’s intention in issuing the prior Orders was to provide the Participants with additional time in which to come into compliance with the CAT NMS Plan, subject to certain conditions generally intended to allow the Commission (and, in some instances, the public) to monitor progress towards that goal. The Participants represent that, in many of these areas, strict compliance with the CAT NMS Plan requirements and/or the conditions set forth in the prior Orders would not be cost-effective; in other areas, the Participants disagree with or seek clarification of the Commission’s interpretation of the CAT NMS Plan’s requirements. Upon consideration of the Participants’ arguments and evidence, the Commission has determined that

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<sup>13</sup> 15 U.S.C. 78mm(a)(1).

<sup>14</sup> 17 CFR 242.608(e).

the revised exemptive relief discussed herein 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. The Commission believes that providing the Participants with additional time to achieve such implementation will improve the functionality of the CAT for regulators and thus further 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.

In evaluating the Participants' implementation of the provisions of the CAT NMS Plan, the Commission is guided by the desire to realize the full spectrum of the CAT's intended benefits, as encompassed in the terms of the CAT NMS Plan and the CAT NMS Plan Approval Order. 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. The Commission is therefore issuing this new Order to clarify certain aspects of the prior Orders, to modify other aspects of the prior Orders in light of subsequent developments and/or additional information provided by the Participants, and to provide 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. In doing so, the Commission emphasizes its willingness to consider such alternative solutions in the form of a proposed CAT NMS Plan amendment or a request for permanent exemptive relief.

#### **A. OTQT Performance Requirements**

Section 6.10(c)(i) of the CAT NMS Plan requires the Plan Processor<sup>15</sup> to provide Participants and the Commission with access to CAT Data<sup>16</sup> stored in the Central Repository<sup>17</sup> through three different methods: (1) the OTQT, (2) user-defined direct queries, and (3) bulk extracts. Section 8.1.2 of Appendix D of the CAT NMS Plan sets forth certain performance requirements for the OTQT, including timeframes in which results must be returned for various types of queries (“Search Return Functionality”). Specifically, the CAT NMS Plan requires the OTQT to return results for searches that include only equities and options trade data within the following timeframes: (1) “within 1 minute for all trades and related lifecycle events for a specific Customer or CAT Reporter with the ability to filter by security and time range for a specified time window up to and including an entire day”; (2) “within 30 minutes for all trades

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<sup>15</sup> “Plan Processor” is a defined term under the CAT NMS Plan and means “the Initial Plan Processor or any other Person selected by the Operating Committee pursuant to SEC Rule 613 and Sections 4.3(b)(i) and 6.1, and with regard to the Initial Plan Processor, the Selection Plan, to perform the CAT processing functions required by SEC Rule 613 and set forth in this Agreement.” See CAT NMS Plan, supra note 3, at Section 1.1.

<sup>16</sup> “CAT Data” is a defined term under the CAT NMS Plan and means “data derived from Participant Data, Industry Member Data, SIP Data, and such other data as the Operating Committee may designate as ‘CAT Data’ from time to time.” See id.

<sup>17</sup> “Central Repository” is a defined term under the CAT NMS Plan and means “the repository responsible for the receipt, consolidation, and retention of all information reported to the CAT pursuant to SEC Rule 613 and this Agreement.” See id.

and related lifecycle events for a specific Customer or CAT Reporter in a specified date range (maximum 1 month”); and (3) “within 6 hours for all trades and related lifecycle events for a specific Customer or CAT Reporter in a specified date range (maximum 12-month duration from the most recent 24 months).”<sup>18</sup> Section 8.1.2 of Appendix D also requires the OTQT to “support parallel processing of queries” and states that the OTQT “must be able to process up to 300 simultaneous query requests with no performance degradation” (“Simultaneous Query Functionality”).

The Participants sought relief from these requirements in their December 1, 2020 letter.<sup>19</sup> The Participants explained that the OTQT provided by the Plan Processor is based on a model that responds to user queries by first collecting all relevant data into a “data mart” and then making this “data mart” available to the user for subsequent filtering and analysis.<sup>20</sup> This data mart functionality does not consistently return results to users in accordance with the timeframes specified by the Search Return Functionality requirements of the CAT NMS Plan.<sup>21</sup> Nor does the OTQT currently satisfy the Simultaneous Query Functionality requirements of the CAT

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<sup>18</sup> Different timeframes are identified for searches that include equities and options order and National Best Bid and National Best Offer data in search criteria. *Id.* at Appendix D, Section 8.1.2.

<sup>19</sup> See Participant Letter, *supra* note 4, at 3-6. The Participants also sought relief from certain requirements of Appendix D, Section 8.1.1 of the CAT NMS Plan in their Dec. 1, 2020 letter, *see id.* at 2-3, but the Participants have asserted that this functionality was implemented in Feb. 2021. See, e.g., CAT Q4 2021 Quarterly Progress Report, available at <https://catnmsplan.com/sites/default/files/2022-01/CAT-Q4-2021-QPR.pdf>.

<sup>20</sup> See Participant Letter, *supra* note 4, at 4; *see also* First Motion, *supra* note 7, at 6.

<sup>21</sup> See Participant Letter, *supra* note 4, at 4-5 (“It typically currently takes up to four minutes for queries for a single day involving equities trades and up to six minutes for options trade queries for a single day for the OTQT to create and return a data mart in response to targeted search requests with a required response time of one minute under Section 8.1.2 of Appendix D.”); First Motion, *supra* note 7, at 6 (“The OTQT query function can perform the latter step, but not both steps, in one minute.”).

NMS Plan, which require the OTQT “to process up to 300 simultaneous query requests with no performance degradation.”<sup>22</sup> As the Commission explained in the First Order, “performance degradation” is a deterioration in performance as measured according to a certain standard.<sup>23</sup> The OTQT’s ability to process up to 300 simultaneous queries with “no performance degradation” should accordingly be based on the ability of the OTQT to achieve the timeframes set forth in Appendix D, Section 8.1.2 of the CAT NMS Plan.<sup>24</sup> Because the current data mart model cannot consistently achieve these timeframes even on fewer than 300 simultaneous queries, the OTQT does not currently comply with the performance requirements of the CAT NMS Plan.<sup>25</sup> And, as discussed in the First Order, the OTQT does not currently meet the above-described 1-minute, 30-minute, and 6-hour requirements that apply to certain queries run on “all trades and related lifecycle events.”<sup>26</sup> The Participants argued, however, that the data mart model is a “more powerful, useful[,] and reliable regulatory surveillance tool” than “an alternative OTQT” that “might be constructed” that “returns results” within the required timeframes.<sup>27</sup>

In the First Order, the Commission granted the Participants’ request for temporary exemptive relief from the Search Return Functionality and Simultaneous Query Functionality

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<sup>22</sup> See CAT NMS Plan, supra note 3, at Appendix D, Section 8.1.2.

<sup>23</sup> See First Order, supra note 4, at 83670.

<sup>24</sup> See id.

<sup>25</sup> See Participant Letter, supra note 4, at 6 (requesting relief from the requirement that the OTQT achieve “parallel processing up to 300 simultaneous query requests with no performance degradation”).

<sup>26</sup> See First Order, supra note 4, at 83669.

<sup>27</sup> See Participant Letter, supra note 4, at 5.

requirements until July 31, 2023.<sup>28</sup> The Commission conditioned this exemptive relief on: (1) the satisfaction of all other requirements of the Full Implementation of Core Equity Reporting Requirements milestone by December 31, 2020; (2) the performance of benchmark queries to measure, on a monthly basis, the timeframes in which the OTQT returns results for specified types of queries, the provision of monthly reports containing certain data on the timeframes in which the OTQT returns results for any actual queries done by regulatory users, the provision of such information to the Operating Committee, and the inclusion of such information as factual indicators in the Quarterly Progress Reports required by Section 6.6(c) of the CAT NMS Plan; and (3) the monthly testing, using benchmark queries, of the time it takes to provide results to users from OTQT searches that are run concurrently with either 50-100, 100-200, or 200-300 queries, the provision of such information to the Operating Committee, and the inclusion of such information as factual indicators in the Quarterly Progress Reports required by Section 6.6(c) of the CAT NMS Plan.<sup>29</sup>

In requesting a stay of the conditions of the First Order, the Participants challenge the Commission’s conclusion that “[t]he timeframe for ‘returning results’ in Section 8.1.2 of Appendix D . . . begins with the submission of the query in the OTQT and ends with the return of the results of the query to user; it does not begin with the population of a data mart.”<sup>30</sup> The Participants argue that the CAT NMS Plan is “silent” as to “whether creation of the data mart counts toward” the timeframe for “returning results” and that the timeframe should thus be assessed after the system creates a data mart.<sup>31</sup> But in requiring results to be returned within a

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<sup>28</sup> See First Order, supra note 4, at 83670.

<sup>29</sup> See id. at 83670-71.

<sup>30</sup> Id. at 83669.

<sup>31</sup> See, e.g., First Motion, supra note 7, at 7.

specified timeframe, the CAT NMS Plan by its terms refers to the entirety of the time it takes to generate results in response to the user's initial query. It thus encompasses the time it takes the system to process the user's initial query, to generate results, and to return the results to the user. There is nothing in the natural reading of "returning results" that indicates that the timeframe actually begins at some point, undiscernible by the user, after query submission. Nor is there any other indication that the CAT NMS Plan contemplated such a possibility. Moreover, the CAT NMS Plan requires the OTQT to record the date and time the query request is submitted. It therefore stands to reason that the query response times set forth in the CAT NMS Plan were intended to be measured from the time of query submission.<sup>32</sup>

This plain language interpretation also accords with the purpose of the performance requirements. The OTQT is an important regulatory tool required by the CAT NMS Plan; it is one of only three methods that regulators have to access and query CAT Data, and it is the only method that can be used by regulatory staff without programming experience to directly access and query the CAT with tools provided by the Plan Processor. And to most efficiently enable regulatory use, a well-functioning regulatory tool should consistently return results in a predictable, reliable, and timely manner. Measuring the OTQT's performance from the time a data mart is generated would undermine that goal. Such an interpretation builds in an undetermined, undiscernible timeframe for the provisions of results to the user and, taken to its logical extreme, would essentially erase the required timeframes set forth in Appendix D,

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<sup>32</sup> Appendix D, Section 8.1.1 of the CAT NMS Plan requires that the OTQT "must provide a record count of the result set, the date and time the query request is submitted, and the date and time the result set is provided to the users." It also requires that the OTQT must "log submitted queries and parameters used in the query, the user ID of the submitter, the date and time of the submission, as well as the delivery of results."

Section 8.1.2 of the CAT NMS Plan.<sup>33</sup> Given its significance to regulators, it is critically important that the OTQT be subject to meaningful and enforceable performance standards.

The Participants assert that it is technologically infeasible for the OTQT, using the data mart functionality, to meet the requirements of the CAT NMS Plan and that the data mart functionality is beneficial to regulatory users. But, if that is the case, the more appropriate course is for the Participants to seek regulatory relief in the form of a CAT NMS Plan amendment or permanent exemptive relief, rather than adhere to an implausible interpretation of straightforward CAT NMS Plan requirements.

The Commission continues to believe that temporary conditional exemptive relief from the performance requirements set forth in Appendix D, Section 8.1.2 is appropriate. Such relief gives the Participants additional time either to implement the required functionality or to obtain the Commission's approval of an alternative solution that would meaningfully advance the goals that the standards were intended to promote. In light of information that the Participants have provided with the First Motion, and further developments in the interim period, the Commission believes it is appropriate for the Third Order to provide this exemptive relief until July 31, 2024 and to replace the conditions set forth in the First Order with the following conditions:

- The Participants must maintain or improve the existing performance of the OTQT.
- The Participants must continue to test the OTQT's performance with benchmark queries and to evaluate the response times for actual queries on a monthly basis. Such tests and

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<sup>33</sup> For instance, under this approach, the OTQT could be said to satisfy the 1-minute timeframe set forth in Appendix D, Section 8.1.2 if it took 72 hours to generate a data mart but only 30 seconds to return that data mart to the user. The Commission does not believe this is a sensible or plausible reading of the CAT NMS Plan.

evaluations should contain the same content that is currently provided to the Commission and should be provided to the Commission within 30 days from the end of each month.

- The Participants must provide the results of any concurrency testing performed on the OTQT within 30 days from the date of such testing.<sup>34</sup>
- 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, the Participants and the Plan Processor must meet with Commission staff on at least a monthly basis to provide a detailed status update regarding their current efforts towards this goal and promptly respond to related requests for additional information or data.

The Commission intends these conditions to preserve, as a baseline, the OTQT functionality that is already in place and expects that the Participants will provide the Commission with sufficient information to gather necessary insight into the performance of the OTQT and the impact of any changes or improvements made by the Participants.<sup>35</sup>

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<sup>34</sup> Unlike the First Order, the exemptive relief provided by the Third Order is not conditioned on the satisfaction of “all other requirements of the Full Implementation of Core Equity Reporting Requirements milestone by December 31, 2020.” See First Order, supra note 4, at 83670. This milestone has passed and is therefore no longer relevant to the exemptive relief provided herein. However, the Commission will consider the Participants’ compliance with that condition in assessing whether the Participants have met the target deadlines established for the Full Implementation of Core Equity Reporting Requirements milestone. See note 12 supra.

<sup>35</sup> Because these revised conditions only require the Participants to provide the Commission with the results of testing that is already performed, such revisions should also address the Participants’ objections that the testing conditions set forth in the First Order imposed significant and unwarranted new costs. See First Motion, supra note 7, at 9-10.

## B. Requirements for Lifecycle Linkages Timeframes

Appendix D, Section 6.1 of the CAT NMS Plan states that “Noon Eastern Time T+1 (transaction date + one day)” is the deadline for “initial data validation, lifecycle linkages and communication of errors to CAT Reporters.” The CAT NMS Plan further explains that the Plan Processor must “link and create the order lifecycle” using a “daisy chain approach,” in which “a series of unique order identifiers, assigned to all order events handled by CAT Reporters[,] are linked together by the Central Repository and assigned a single CAT-generated CAT-Order-ID that is associated with each individual order event and used to create the complete lifecycle of an order.”<sup>36</sup> This language makes clear that additional steps by the Plan Processor are required after the submission of certain “unique order identifiers” by CAT Reporters to “link and create the order lifecycle.” In context, the term “lifecycle linkages” in Section 6.1 of Appendix D is thus properly understood as a reference to this order event connection process (i.e., completed processing and linkage of the initial data) and not, as the Participants assert,<sup>37</sup> to the “unique order identifiers” that are used to create lifecycle linkages. Section 6.1 of Appendix D requires that the Plan Processor create these lifecycle linkages, and not just validate or verify them, by T+1 at noon Eastern Time. Initial data validation, including validation of data elements that can be used by the Plan Processor to create a lifecycle linkage, is a separate step that must also occur by T+1 at noon Eastern Time.<sup>38</sup>

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<sup>36</sup> CAT NMS Plan, supra note 3, at Appendix D, Section 3.

<sup>37</sup> See Second Motion, supra note 7, at 6.

<sup>38</sup> See CAT NMS Plan, supra note 3, at Appendix D, Section 6.1; see also Securities Exchange Act Release No. 77724 (Apr. 27, 2016), 81 FR 30614, 30691 (May 17, 2016) (“CAT NMS Plan Notice”) (“The CAT Data would be made available to regulators in raw form after it is received from reporters and passes basic validations; the Plan does not specify exactly when these validations would be complete, but the requirement to link records by 12:00 p.m. (noon) Eastern Time on day T+1 gives a practical upper bound on

The Plan Processor creates lifecycle linkages by assigning an interim CAT Order ID.<sup>39</sup> The Commission understands that, currently, the Plan Processor is generally capable of assigning interim CAT Order IDs by T+1 at 9 p.m. Eastern Time, rather than by the T+1 at noon Eastern Time deadline set forth in the CAT NMS Plan. Accordingly, in the Second Order, the Commission granted the Participants temporary exemptive relief, until July 31, 2023, to give the Participants time to achieve compliance with the CAT NMS Plan’s requirement that the Plan Processor create lifecycle linkages by noon Eastern Time on T+1.<sup>40</sup> The Commission conditioned this exemptive relief on the Participants “providing an interim CAT Order ID and lifecycle linkages by 9 p.m. EST T+1” – which it understood to represent current performance – and including in Quarterly Progress Reports factual indicators that describe “any improvements to the time by which the Plan Processor is capable of providing an interim CAT Order ID and lifecycle linkages.”<sup>41</sup>

The Participants requested a stay of this aspect of the Second Order, arguing that the CAT NMS Plan is “silent regarding when CAT Order IDs must be assigned” and does not “expressly recite” a requirement to assign interim CAT Order IDs.<sup>42</sup> But the CAT NMS Plan does expressly require the creation of lifecycle linkages by noon Eastern Time on T+1. And the

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this timeline for initial access to the data.”). If the Participants were only required to validate lifecycle linkages by T+1 at noon Eastern Time, the CAT NMS Plan would state that “lifecycle validations” – not “lifecycle linkages” – were due to be completed by that deadline.

<sup>39</sup> See, e.g., Second Order, supra note 5, at 83634.

<sup>40</sup> See id. at 83634-35.

<sup>41</sup> Id. at 83635.

<sup>42</sup> See Second Motion, supra note 7, at 5-6.

obligation to assign CAT Order IDs – the mechanism by which the Plan Processor creates lifecycle linkages – by noon Eastern Time on T+1 necessarily follows from that requirement.

Contrary to Participants’ suggestion,<sup>43</sup> this conclusion is not at odds with the CAT NMS Plan’s framework for identifying and correcting errors. Although the initial data submitted by CAT Reporters may contain errors, the CAT NMS Plan specifically contemplates regulator access to “all iterations of processed data” during the period between noon Eastern Time on T+1 (when such errors must be identified) and T+5 (when corrected data must be made available to regulators).<sup>44</sup> Consistent with this framework, the CAT NMS Plan requires that the Plan Processor first provide lifecycle linkages to regulators by T+1 at noon Eastern Time, and then, after any errors in linkage data have been identified and corrected, provide finalized and corrected lifecycle linkages by T+5 at 8:00 a.m. Eastern Time.<sup>45</sup> Indeed, the error correction process has not prevented the Plan Processor from generally providing interim CAT Order IDs by T+1 at 9 p.m. Eastern Time, which are then corrected if necessary by T+5.

The Participants also incorrectly assert that there is “no benefit” to requiring lifecycle linkages by noon Eastern Time on T+1.<sup>46</sup> Timely access to linked data was one of the underlying goals of Rule 613 and the CAT NMS Plan. Before the implementation of CAT, it could take up to several days for regulators to gain access to uncorrected order event data, and

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<sup>43</sup> See id. at 7.

<sup>44</sup> See, e.g., CAT NMS Plan, supra note 3, at Appendix D, Section 6.2.

<sup>45</sup> See id. None of the CAT NMS Plan provisions cited by the Participants state that the Plan Processor may wait until T+5 to assign CAT Order IDs given their role in creating lifecycle linkages. See Second Motion, supra note 7, at 7.

<sup>46</sup> See Second Motion, supra note 7, at 8.

regulators could spend additional days (or months) processing data to create lifecycle linkages.<sup>47</sup> The CAT NMS Plan proposed by the Participants and approved by the Commission therefore specifically included measures like Appendix D, Section 3 and Section 6.1 that require the Plan Processor to provide faster access to uncorrected data in a linked format.<sup>48</sup> These measures “generally represent[ed] a significant improvement in timeliness” and were intended to “reduce or eliminate the delays associated with merging and linking order events within the same lifecycle.”<sup>49</sup> The alternative approach suggested by the Participants in their Second Motion – e.g., that regulatory users should manually piece together lifecycle linkages using unique order identifiers submitted by CAT Reporters instead of the Plan Processor providing lifecycle linkages by T+1 at noon Eastern Time<sup>50</sup> – actively undercuts these goals by burdening regulatory users with the Plan Processor’s obligations. The expected regulatory benefits provided by timely access to linked CAT Data would be even further undermined if the CAT did not provide lifecycle linkages to regulatory users until T+5. In order to study and react to market events and/or problematic trading activity in an effective and expeditious way, regulators need access to relevant data as close in time to such events or activity as is possible. Delays in access to data could delay a regulator’s response time.

The Participants argue that, in exercising its discretionary authority to grant exemptive relief, the Commission must consider whether the regulatory benefits of the requirement to create lifecycle linkages by T+1 at noon justify the cost of reconfiguring the CAT system to enable it

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<sup>47</sup> See CAT NMS Plan Notice, supra note 38, at 30693.

<sup>48</sup> See id. at 30691-93.

<sup>49</sup> Id. at 30691, 30693.

<sup>50</sup> See Second Motion, supra note 7, at 6.

do so.<sup>51</sup> But in granting sua sponte exemptive relief from this requirement, the Commission was relieving burdens. The Commission has not altered the CAT NMS Plan requirement to create lifecycle linkages by T+1 at noon Eastern Time and the Participants configured the CAT System knowing what that requirement was. To the extent the Participants believe that requirement is no longer appropriate in light of the way the CAT System has been built, the Participants may propose an alternative solution that advances the relevant regulatory objectives in a more cost-effective manner, either through a CAT NMS Plan amendment or a request for permanent exemptive relief. The Commission is open to considering and working with the Participants to identify such a solution.

To give the Participants additional time either to implement the required functionality or to obtain the Commission's approval of an alternative solution, the Commission continues to believe that temporary conditional exemptive relief from the requirement set forth in Appendix D, Section 6.1 that lifecycle linkages be created by T+1 at noon Eastern Time is appropriate. However, in light of the information the Participants have provided with their stay motion and further developments in the interim period, the Commission believes it is appropriate for the Third Order to provide this exemptive relief until July 31, 2024, and to replace the conditions set forth in the Second Order with the following conditions:

- The Participants must maintain or improve the existing performance of functionality currently providing lifecycle linkages by T+1 at 9 p.m. Eastern Time.
- The Participants must provide, in Quarterly Progress Reports submitted pursuant to Section 6.6(c), factual indicators that describe any improvements to the time by which the Plan Processor is capable of providing lifecycle linkages.

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<sup>51</sup> See, e.g., id. at 8.

- 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, the Participants and the Plan Processor must meet with Commission staff on at least a monthly basis to provide a detailed status update regarding their current efforts towards this goal and promptly respond to related requests for additional information or data.

The Commission intends these conditions to preserve, as a baseline, the lifecycle linkage functionality that is already in place and expects that the Participants will provide the Commission with sufficient information to gather necessary insight into the Plan Processor’s ability to meet the T+1 at noon Eastern Time deadline and the impact of any changes or improvements made by the Participants.

### **C. Requirements for Re-Processing of Corrected Data Received After T+5**

Appendix D, Section 3 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.” The CAT NMS Plan sets a deadline of T+3 at 8:00 a.m. Eastern Time for the “[r]esubmission of corrected data” and a deadline of T+5 at 8:00 a.m. Eastern Time for the Plan Processor to make “[c]orrected data available to Participant regulatory staff and the SEC.”<sup>52</sup> For data corrections received after T+5, the CAT NMS Plan specifies that “Participants’ regulatory staff and the SEC must be notified and informed as to how re-processing will be completed.”<sup>53</sup> Together, these sections require the Plan Processor to process and assemble any corrected CAT

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<sup>52</sup> See CAT NMS Plan, supra note 3, at Appendix D, Section 6.1.

<sup>53</sup> See id. at Appendix D, Section 6.2.

Data received after T+5 into complete order event lifecycles and to notify regulatory users as to how such re-processing will be completed.

The Commission understands that the Participants do not currently process and assemble all corrected CAT Data received after T+5 into complete order event lifecycles; in some cases, for instance, the Plan Processor may simply add corrected CAT Data to the Central Repository without integrating such CAT Data into order event lifecycles.<sup>54</sup> In the Second Order, the Commission granted the Participants temporary exemptive relief, until July 31, 2021, to provide the Participants time to come into compliance with 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.<sup>55</sup> The Commission conditioned this exemptive relief on the Participants including in the Quarterly Progress Reports required by Section 6.6(c) of the CAT NMS Plan factual indicators that describe “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.”<sup>56</sup>

In their Second Motion, the Participants object that the Commission’s interpretation requires the Plan Processor to assign a new CAT Order ID every time a correction is received

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<sup>54</sup> See, e.g., Second Motion, supra note 7, at 11. For example, if a corrected record submitted after T+5 connects two broken order event lifecycles into one order event lifecycle, the Plan Processor does not join all relevant records into a single order event lifecycle as it would have if the corrected data had been received prior to T+5. As another example, in some instances the Plan Processor adds a corrected record to an order event lifecycle but also retains the original record, leaving two records representing the same event in the Central Repository – whereas the Plan Processor would have replaced the original record if the corrected data had been received prior to T+5.

<sup>55</sup> See Second Order, supra note 5, at 83635.

<sup>56</sup> See id.

after T+5.<sup>57</sup> But the Commission recognizes that, in many such circumstances, it may not be necessary to assign a new CAT Order ID. As discussed above, the CAT NMS Plan gives the Participants the discretion to choose how – but not whether – to process and assemble corrected CAT Data submitted after T+5 into complete order event lifecycles. Some re-processing is mandatory under Appendix D, Section 3 of the CAT NMS Plan to ensure that CAT Data submitted after T+5 is processed and assembled into complete order event lifecycles; if the Plan Processor is able to process and assemble CAT Data submitted after T+5 into complete and accurate order event lifecycles using existing CAT Order IDs, it need not assign a new CAT Order ID. To the extent the Participants believe that the above-described requirements should be revised because of the costs involved in or technological obstacles presented by implementing such requirements in certain circumstances, the Participants may propose an amendment to the CAT NMS Plan or request permanent exemptive relief from the Commission.

One of the main regulatory goals of Rule 613 and the CAT NMS Plan was to cure shortcomings in existing audit trail systems that made it impractical to follow orders through their entire lifecycles, as they may be routed, aggregated, re-routed, and disaggregated.<sup>58</sup> Failure to process and assemble corrected data received after T+5 into complete order event lifecycles would perpetuate a similar problem within the CAT by making it difficult and/or time-consuming for regulators to find the relevant data and by forcing individual regulatory users to manually process data and assemble lifecycles on their own.<sup>59</sup> These are burdens that the CAT

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<sup>57</sup> See, e.g., Second Motion, supra note 7, at 10.

<sup>58</sup> See, e.g., Rule 613 Adopting Release, supra note 2, at 45722. See also, e.g., CAT NMS Plan Notice, supra note 38, at 30615; CAT NMS Plan Approval Order, supra note 3, at 84698.

<sup>59</sup> Simply adding corrected data to the Central Repository, for example, could require regulators to run multiple, time-consuming searches to locate corrected data (or just to

NMS Plan was specifically designed to alleviate.<sup>60</sup>

To give the Participants additional time either to implement the required functionality or to obtain the Commission’s approval of an alternative solution, the Commission continues to believe that it is appropriate to grant temporary conditional exemptive relief from the requirements set forth in Appendix D, Section 3 and Appendix D, Section 6.2 of the CAT NMS Plan that the Plan Processor process and assemble any corrected CAT Data received after T+5 into complete order event lifecycles and notify regulatory users as to how such re-processing will be completed. However, in light of information the Participants have provided with their stay motion and further developments in the interim period, the Commission believes it is appropriate for the Third Order to provide this exemptive relief until July 31, 2024, and to replace the condition set forth in the Second Order with the following condition:

- The Participants must provide, in Quarterly Progress Reports submitted pursuant to Section 6.6(c), factual indicators that describe any improvements to functionality that processes and assembles corrected CAT Data submitted after T+5 into complete order event lifecycles.

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discover whether corrected data exists), to manually process data to weed out inaccurate event records, to manually format data to look the same as data that was submitted before T+5, and/or to manually construct lifecycles. Depending on the circumstances, this methodology may not satisfy the requirement that corrected data submitted after T+5 be “processed and assembled to create the complete lifecycle of each Reportable Event.”

<sup>60</sup> See, e.g., CAT NMS Plan Notice, *supra* note 38, at 30693 (“Currently regulators can spend days and up to months processing data they receive into a useful format. Part of this delay is due to the need to combine data across sources that could have non-uniform formats and to link data about the same event both within and across data sources. . . . [T]he Commission preliminarily believes that the Plan would reduce or eliminate the delays associated with merging and linking order events within the same lifecycle.”).

- 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, the Participants and the Plan Processor must meet with Commission staff on at least a monthly basis to provide a detailed status update regarding their current efforts towards this goal and promptly respond to related requests for additional information or data.

The Commission intends these conditions to provide the Commission with sufficient information to gather necessary insight into the Plan Processor’s ability to meet the above-described requirements and the impact of any changes or improvements made by the Participants.

#### **D. Requirements for SIP Data Linkage**

Section 6.5(a)(ii) of the CAT NMS Plan, which implements Rule 613(e)(7), requires that the Central Repository “collect . . . and retain on a current and continuing basis,” certain SIP Data “in a format compatible with” the Participant Data and Industry Member Data that is collected pursuant to Rule 613(c)(7).<sup>61</sup> This SIP Data must include: “(A) information, including the size and quote condition, on quotes including the National Best Bid and National Best Offer for each NMS Security; [and] (B) Last Sale Reports and transaction reports reported pursuant to an effective transaction reporting plan filed with the SEC pursuant to, and meeting the requirements of, SEC Rules 601 and 608.”<sup>62</sup> Section 6.5(b)(i) of the CAT NMS Plan further states that SIP Data, “when available to Participant regulatory staff and the SEC[,] shall be linked” to the Participant Data and Industry Member Data that is collected pursuant to Rule

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<sup>61</sup> See CAT NMS Plan, supra note 3, at Section 6.5(a)(ii)(A)-(B); 17 CFR 242.613(e)(7).

<sup>62</sup> See CAT NMS Plan, supra note 3, at Section 6.5(a)(ii)(A)-(B); see also 17 CFR 242.613(e)(7).

613(c)(7). Moreover, the CAT NMS Plan explicitly includes the SIP Data described in Section 6.5(a)(ii) in its definition of “CAT Data,”<sup>63</sup> thereby subjecting SIP Data to the same requirements that generally apply to CAT Data, including the requirement set forth in Appendix D, Section 3 that “[a]ll CAT Data reported to the Central Repository must be processed and assembled to create the complete lifecycle of each Reportable Event.”<sup>64</sup>

The Commission understands that the CAT currently does not link SIP Data to the “complete lifecycle of each Reportable Event,” but instead presents regulatory users with a side-by-side view of SIP Data and other transactional data reported to the CAT.<sup>65</sup> In other words, SIP Data is provided to regulatory users in a separate stream from order event lifecycles, such that regulatory users may only view SIP Data sequentially with other CAT Data, rather than as part of order event lifecycles. This side-by-side functionality forces regulatory users to perform the time-consuming and burdensome work of manually matching SIP Data with order event lifecycles and creating their own combined and linked audit trail.<sup>66</sup> In approving the CAT NMS Plan, the Commission explained that “regulators analyzing an event or running a surveillance pattern often need to link data,” but that “linking many different data sources” was “cumbersome and time-consuming” and that “the inability to link all records affects the accuracy of the

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<sup>63</sup> See CAT NMS Plan, *supra* note 3, at Section 1.1 (defining “CAT Data” as “data derived from Participant Data, Industry Member Data, SIP Data, and such other data as the Operating Committee may designate as ‘CAT Data’ from time to time”).

<sup>64</sup> See also 17 CFR 242.613(e)(1) (“The central repository shall store and make available to regulators data in a uniform electronic format, and in a form in which all events pertaining to the same originating order are linked together in a manner that ensures timely and accurate retrieval of the information required by paragraph (c)(7) of this section for all reportable events for that order.”).

<sup>65</sup> See, e.g., Second Order, *supra* note 5, at 83635.

<sup>66</sup> The Commission identified several possible uses for SIP Data in approving the CAT NMS Plan. See CAT NMS Plan Approval Order, *supra* note 3, at 84914 n.3222-23.

resulting data and can force an inefficient manual linkage process that would delay the completion of the data collection and analysis portion of an examination, investigation, or reconstruction.”<sup>67</sup> Linkage of all CAT Data – which includes SIP Data by definition – was intended to address these issues by improving the accuracy of the data provided to regulators and the timeliness of regulatory review.<sup>68</sup> SIP Data is a core component of market structure and established market control mechanisms; SIP Data linkage would better enable regulators to clearly and accurately identify the market participants involved in the order event lifecycles that cause SIP messages, which is critical in recreating market events and looking for problematic trading behaviors.

In the Second Order, the Commission granted the Participants temporary exemptive relief, until July 31, 2023, to give them more time to develop the changes necessary to meet the SIP data linkage requirements described above.<sup>69</sup> The Commission conditioned this exemptive relief on the Participants including in Quarterly Progress Reports factual indicators that describe “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.”<sup>70</sup>

In their Second Motion, the Participants argue that the Commission was obligated to consider various practical and technological obstacles before requiring them to link SIP data to

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<sup>67</sup> See, e.g., CAT NMS Plan Approval Order, supra note 3, at 84814-15.

<sup>68</sup> See notes 58, 60 and associated text supra; see also CAT NMS Plan Approval Order, supra note 3, at 84826-27.

<sup>69</sup> See Second Order, supra note 5, at 83635.

<sup>70</sup> Id.

the complete order lifecycle.<sup>71</sup> But as discussed above, that requirement was imposed by the CAT NMS Plan itself, not by the Commission’s exemptive order, which merely granted the Participants more time to meet the requirement. To the extent the Participants now believe this CAT NMS Plan requirement is inappropriate or unjustified in light of its costs, the Participants are free to propose an alternative solution that advances the relevant regulatory objectives in a more cost-effective manner, either through a CAT NMS Plan amendment or a request for permanent exemptive relief. The Commission is open to considering and working with the Participants to identify such a solution.

The Participants contend that linking SIP Data to complete order lifecycles is impractical, in part because it would require changes to the existing national market system plans that govern the collection, consolidation, processing, and dissemination of SIP Data (the “existing SIP Plans”),<sup>72</sup> and because of the new approach to SIP Data provided for under the Commission’s Market Data Infrastructure Rule (“MDI Rules”).<sup>73</sup> The Commission does not believe that amending the existing SIP Plans is impractical. The Commission also believes that there may be alternatives that would allow the Participants to achieve SIP Data linkage without changing the existing SIP Plans or the MDI Rules. Under the existing SIP Plans, which remain in effect despite the promulgation of the MDI Rules, the Participants provide data to the SIPs; under the MDI Rules, the Participants would provide data to competing consolidators. The Participants are also the parties that currently provide this data to the CAT and that would provide this data to the

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<sup>71</sup> See, e.g., Second Motion, supra note 7, at 15.

<sup>72</sup> See Securities Exchange Act Release No. 90610 (Dec. 9, 2020), 86 FR 18596, at 18598 n.10 (Apr. 9, 2021) (describing the three effective national market system plans that govern the collection, consolidation, processing, and dissemination of certain NMS information) (“MDI Release”).

<sup>73</sup> See id.; see also Second Motion, supra note 7, at 14-15.

CAT in the future. To achieve compliance with the CAT NMS Plan, the Participants may therefore be able to include in their data the information necessary for the Plan Processor to facilitate SIP Data linkage in a manner that would not require an amendment to the existing SIP Plans or the MDI Rules. In any event, if the Participants disagree, the appropriate course is for the Participants to seek regulatory relief in the form of a CAT NMS Plan amendment or permanent exemptive relief.

The Commission continues to believe that temporary conditional exemptive relief from the requirements set forth in Section 6.5(b)(i) and Appendix D, Section 3 of the CAT NMS Plan that SIP Data “shall be linked,” processed, and assembled to create complete order event lifecycles is appropriate to give the Participants time either to implement the required functionality or to obtain the Commission’s approval of an alternative solution. However, in light of information the Participants have provided with their stay motion, further developments in the interim period, and the current status of implementation of the MDI Rules, the Commission believes it is appropriate for the Third Order to provide this exemptive relief until July 31, 2024.<sup>74</sup> The Commission further believes it is appropriate to replace the condition set forth in the Second Order with the following conditions:

- The Participants must provide, in Quarterly Progress Reports submitted pursuant to Section 6.6(c), factual indicators that describe any improvements to functionality that

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<sup>74</sup> The MDI Rules, pursuant to which the SIPs will eventually be replaced by “competing consolidators,” are in the process of being implemented. The Commission has stated that as a result of the MDI Rules, “the Central Repository may have to collect the data from a different source,” which may be one or multiple competing consolidators. See MDI Release, supra note 72, at 18697. Therefore, the Participants can meet the requirements of Section 6.5(b)(i) and Appendix D, Section 3 of the CAT NMS Plan by July 31, 2024, by using the current SIPs or one or more competing consolidators that the Operating Committee may determine to use once they are operational.

links Participant Data and Industry Member Data with SIP Data, such that SIP Data is incorporated into complete order event lifecycles.

- To ensure that the Participants remain on track to either 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, the Participants and the Plan Processor must meet with Commission staff on at least a monthly basis to provide a detailed status update regarding their current efforts towards this goal and promptly respond to related requests for additional information or data.

The Commission intends these conditions to provide the Commission with sufficient information to gather necessary insight into the Participants’ efforts to meet the requirements of the CAT NMS Plan and the impact of any changes or improvements made by the Participants.

#### **E. Reporting Requirements for Port-Level Settings**

Rule 613 and Sections 6.3(d)(i)(F), 6.3(d)(ii)(G), 6.3(d)(iii)(F), 6.3(d)(iv)(E), and 6.4(d)(i) of the CAT NMS Plan require the Participants to report, and to amend their Compliance Rules to require Industry Members to report, the “Material Terms of the Order” for certain events in an order’s lifecycle, including “for original receipt or origination of an order,” “for the routing of an order,” “for the receipt of an order that has been routed,” and for orders that are “modified or cancelled.”<sup>75</sup> Rule 613 and the CAT NMS Plan further define the “Material Terms of the Order” to include “any special handling instructions.”<sup>76</sup> Port-level settings are used by Industry Members and Participants as one method of communicating various Material Terms of

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<sup>75</sup> See also 17 CFR 242.613(c)(7).

<sup>76</sup> See CAT NMS Plan, supra note 3, at Section 1.1; 17 CFR 242.613(j)(7).

the Order, including, in some cases, special handling instructions.<sup>77</sup> When port-level settings are used to communicate Material Terms of the Order, Rule 613 and the CAT NMS Plan thus require these port-level settings to be reported for that order by both senders and receivers.<sup>78</sup>

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 by both the sender and receiver of the order. In the Second Order, the Commission therefore granted the Participants temporary exemptive relief, until July 31, 2023, from the requirement 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.<sup>79</sup> The Commission

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<sup>77</sup> Material Terms of the Order can also be communicated verbally. In response to the Participants' request for exemptive relief, the Commission granted temporary exemptive relief from certain reporting requirements contained in the CAT NMS Plan that relate to such verbal communications. See Securities Exchange Act Release No. 90405 (Nov. 12, 2020), 85 FR 73544 (Nov. 18, 2020).

<sup>78</sup> The terms of Rule 613 and the CAT NMS Plan require that any special handling instructions be reported by senders (for "origination of an order" and "for the routing of an order") and receivers ("for original receipt" of an order and "for the receipt of an order that has been routed"), as well as by both Participants and Industry Members. Each party – sender and receiver, Participant and Industry Member – is therefore required to report any special handling instructions that it communicated through a port-level setting. Requiring both the sender and the receiver to report in this manner is not necessarily duplicative. Rather, this kind of differential reporting is of value to regulators; comparing the special handling instructions reported by senders and receivers can be used by regulators to identify inconsistencies in reporting. Moreover, even where two-sided reporting would be duplicative, it still provides value to regulators. Because of the differences between the technical specifications utilized by Industry Members and Participants, and the varied approach to applying and reporting port-level settings among the Participants, it is far more efficient for regulators evaluating the trading activity of one firm to analyze that firm's (e.g., the sender's) data directly. If only receivers are required to report, the regulatory user would be required to expend significant additional effort to run unique queries to find each receiver's data and process such data into a consistent and usable format.

<sup>79</sup> See Second Order, supra note 5, at 83636.

conditioned this relief on the Participants (1) including in the Quarterly Progress Reports required by Section 6.6(c) factual indicators that describe “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” and (2) engaging both the Commission and Industry Members on a plan to address the reporting of port-level settings on an exchange-by-exchange basis.<sup>80</sup>

The Participants correctly assert in the Second Motion that the CAT NMS Plan does not require all port-level settings to be reported to the CAT.<sup>81</sup> Rule 613 and the CAT NMS Plan only require Participants and Industry Members to report port-level settings that are used by a sender or a receiver of an order to communicate the Material Terms of the Order, including “any special handling instructions.” Furthermore, Rule 613 and the CAT NMS Plan only obligate the sender of an order to report the Material Terms of the Order that it communicated to and/or agreed upon with the receiver of the order, including default or implicit special handling instructions communicated through a port-level setting. If the receiver of an order subsequently attaches “any special handling instructions” to an order without informing the sender, including special handling instructions communicated through a port-level setting, only the receiver would be obligated to report those Material Terms of the Order.

However, the Participants go further, suggesting that the reporting obligation is only implicated when instructions communicated through such port-level settings are “applied” or “triggered,” but that fact is irrelevant to this inquiry.<sup>82</sup> A special handling instruction that a

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Id.

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See, e.g., Second Motion, supra note 7, at 16.

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See, e.g., Second Motion, supra note 7, at 16; see also FAQ D34, available at <https://catnmsplan.com/faq>.

sender or receiver communicates through a port-level setting must be reported as Material Terms of the Order regardless of whether it is subsequently “applied” or “triggered.” Neither Rule 613 nor the CAT NMS Plan state, for instance, “any special handling instructions applied to the order” or “Material Terms Applied to the Order.” Rather, as one 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.<sup>83</sup> Such information is valuable to regulators, regardless of whether it is applied, because it could potentially help regulators to identify and investigate trading behaviors like layering or wash sales and establish the intent of broker-dealers sending such orders.

The Participants also argue that, in exercising its discretion to grant a temporary exemption from the port-level settings reporting requirements, the Commission was obligated to consider certain costs and practical obstacles.<sup>84</sup> But in granting sua sponte exemptive relief from this requirement, the Commission was relieving burdens and did not alter the CAT NMS Plan requirement. To the extent the Participants now believe this CAT NMS Plan requirement is inappropriate or unjustified in light of its costs, the Participants are free to propose an alternative solution that advances the relevant regulatory objectives in a more cost-effective manner, either through a CAT NMS Plan amendment or a request for permanent exemptive relief. The Commission is open to considering and working with the Participants to identify such a solution.

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<sup>83</sup> See Second Order, supra note 5, at 83635-36.

<sup>84</sup> See, e.g., Second Motion, supra note 7, at 16.

To give the Participants and Industry Members additional time either to implement the required functionality or to obtain the Commission’s approval of an alternative solution, the Commission continues to believe that it is appropriate to grant temporary conditional exemptive relief from the requirement set forth in Rule 613(c)(7) and Sections 6.3(d)(i)(F), 6.3(d)(ii)(G), 6.3(d)(iii)(F), 6.3(d)(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 to report, the Material Terms of the Order for certain events in an order’s lifecycle that are communicated through a port-level setting. However, in light of information the Participants have provided with their stay motion and further developments in the interim period, the Commission believes it is appropriate for the Third Order to provide this exemptive relief until July 31, 2024, and to replace the conditions set forth in the Second Order with the following conditions:

- The Participants must provide, in Quarterly Progress Reports submitted pursuant to Section 6.6(c), factual indicators that describe any improvements to the Participants’ current efforts to report, and to require Industry Members to report, port-level settings that communicate “Material Terms of the Order,” including efforts to implement two-sided reporting (when required) and efforts to require that port-level settings that communicate “any special handling instructions” be reported regardless of whether such instructions are “applied.”
- To ensure that the Participants remain on track to either 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, the Participants and the Plan Processor must meet with Commission staff on at least a monthly basis to provide a detailed status update

regarding their current efforts towards this goal and promptly respond to related requests for additional information or data.<sup>85</sup>

The Commission intends these conditions to provide the Commission with sufficient information to gather necessary insight into the Participants' efforts to meet the requirements of the CAT NMS Plan and the impact of any changes or improvements made by the Participants.

**F. Requirements for Lifecycle Linkages Between Customer Orders and “Representative” Orders**

Appendix D, Section 3 of the CAT NMS Plan requires the Plan Processor to “link all related order events from all CAT Reporters involved in the lifecycle of an order. At a minimum,” the CAT NMS Plan specifies that the “Central Repository must be able to create the lifecycle between . . . [c]ustomer 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).”<sup>86</sup> As discussed above, one of the main regulatory goals of Rule 613 and the CAT NMS Plan was to cure shortcomings in existing audit trail systems that made it impractical to follow orders through their entire lifecycles, as they may be routed, aggregated, re-routed, and disaggregated.<sup>87</sup> Lifecycle linkage for all order events – including linkage of “representative orders” to customer orders and linkage of customer data across an order event lifecycle – was intended to alleviate the burdens associated with manual

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<sup>85</sup> The Commission believes the Participants will need to engage and meet regularly with Industry Members in order to satisfy this condition.

<sup>86</sup> See CAT NMS Plan, supra note 3, at Appendix D, Section 3. 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, e.g., Second Order, supra note 5, at 83636 n.14.

<sup>87</sup> See, e.g., note 58 and associated text supra.

processing and linkage of data and to provide regulators with information that is not otherwise available.<sup>88</sup> It is therefore critical that the Participants fully implement functionality to create complete order event lifecycle linkages, including linkage of “representative” orders to customer orders.

The Commission understands that the Participants do not currently have the ability to create lifecycles in certain representative order scenarios where Industry Members do not have a systematic or direct link between their order management systems and execution management systems. This is a critical loss of data that breaks order event lifecycles, because regulatory users would not be able to recreate these parts of the order event lifecycles on their own. In the Second Order, the Commission granted the Participants temporary exemptive relief, until July 31, 2023, to allow time for Participants and Industry Members to develop the capability of meeting this CAT NMS Plan requirement.<sup>89</sup> The Commission conditioned this relief on the Participants (1) continuing to require Industry Member reporting of representative orders as described in another exemptive relief order related to the timing and phasing of Industry Member reporting and (2) including in the Quarterly Progress Reports required by Section 6.6(c) factual indicators that describe “progress made regarding the release of updated specifications and/or scenarios documents relating to the reporting of all representative orders.”<sup>90</sup>

After challenging this part of the Second Order in the Second Motion, the Participants issued guidance indicating that Industry Members will be required to provide the data necessary

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<sup>88</sup> See, e.g., note 60 and associated text supra; see also, e.g., CAT NMS Plan Notice, supra note 38, at 30665-66 (describing difficulties involved in manual linkage of customer data across multiple parts of an order lifecycle).

<sup>89</sup> See Second Order, supra note 5, at 83636.

<sup>90</sup> Id.

for the Central Repository to create the required lifecycle linkages starting on July 31, 2023.<sup>91</sup> To give Industry Members additional time to implement the necessary reporting, the Commission believes that it is appropriate to grant temporary conditional exemptive relief from the requirement set forth in Appendix D, Section 3 of the CAT NMS Plan that the “Central Repository must be able to create the lifecycle between . . . [c]ustomer 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)” for representative order scenarios in which Industry Members do not have a systematic or direct link between their order management systems and execution management systems until July 31, 2024. The Commission also believes that it is appropriate to impose conditions on this relief similar to those set forth in the Second Order:

- The Participants must require Industry Members to report “representative” orders as currently described in FAQs F5-F7 and as described in other exemptive relief issued by the Commission by July 31, 2024.<sup>92</sup>
- The Participants must provide, in Quarterly Progress Reports submitted pursuant to Section 6.6(c), factual indicators that describe the progress made towards the release of updated specifications and/or scenarios documents relating to the reporting and linkage of all “representative” orders.
- To ensure that the Participants remain on track to come into compliance with the requirements of the CAT NMS Plan by July 31, 2024, the Participants and the Plan

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<sup>91</sup> See, e.g., FAQ F5-F7, available at <https://catnmsplan.com/faq>.

<sup>92</sup> See, e.g., Securities Exchange Act Release No. 88702 (Apr. 20, 2020), 85 FR 23075 (Apr. 24, 2020).

Processor must meet with Commission staff on at least a monthly basis to provide a detailed status update regarding their current efforts towards this goal and promptly respond to related requests for additional information or data.<sup>93</sup>

The Commission intends these conditions to preserve, as a baseline, the reporting and linkage functionality that is already in place for “representative” orders and expects the Participants and Industry Members to provide the Commission with sufficient information to gather necessary insight into the efforts made by both Participants and Industry Members to fully meet the requirements of the CAT NMS Plan.

### **G. Requirements for Participant Reporting of Rejected Orders**

Rule 613(c)(7) and Section 6.3(d)(i) of the CAT NMS Plan require Participants to “record and electronically report to the Central Repository” certain information for “each order and each Reportable Event,” including “for original receipt or origination of an order.”<sup>94</sup> The CAT NMS Plan specifies that “order” has “the meaning set forth in Rule 613(j)(8),”<sup>95</sup> which further defines “order” to include: “(i) [a]ny order received by a member of a national securities exchange or national securities association from any person; (ii) [a]ny order originated by a member of a national securities exchange or national securities association; or (iii) [a]ny bid or offer.”<sup>96</sup> These provisions require the Participants to report all orders that are “received,” not just those orders that are “received and successfully processed by the matching engine,” those orders that are “received and accepted,” and/or those orders that are “received and assigned an

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<sup>93</sup> The Commission believes the Participants will need to engage and meet regularly with Industry Members in order to satisfy this condition.

<sup>94</sup> 17 CFR 242.613(c)(7); CAT NMS Plan, supra note 3, at Section 6.3(d)(i).

<sup>95</sup> See CAT NMS Plan, supra note 3, at Section 1.1.

<sup>96</sup> 17 CFR 242.613(j)(8).

order ID”; the reporting requirement is not conditioned on how a Participant acts on an order that is received. For example, if a Participant receives a message that contains all of the terms necessary for an order to be executed, that message still constitutes a “received” order that must be reported pursuant to the provisions of Section 6.3(d) of the CAT NMS Plan regardless of whether it is subsequently rejected. Moreover, as “CAT Data,” rejected orders must also be “processed and assembled to create the complete lifecycle of each Reportable Event” under Appendix D, Section 3 of the CAT NMS Plan.

Orders that are received and rejected are part of a complete order event lifecycle, in the same way that cancelled orders are part of a complete order event lifecycle. Without information about these events, regulatory users reviewing trading activity could struggle to determine how orders that are received but rejected were resolved.<sup>97</sup> As discussed above, one of the main regulatory goals of Rule 613 and the CAT NMS Plan was to cure shortcomings in existing audit trail systems that made it impractical to follow orders through their entire lifecycles.<sup>98</sup> Providing regulatory users with a more complete and comprehensive set of audit trail data was another of the main regulatory goals of Rule 613 and the CAT NMS Plan.<sup>99</sup> Failure to report orders that are

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<sup>97</sup> Sometimes a rejected order may represent the final action in a complete order event lifecycle; other times, the sender may submit a second order as a “follow-up” to the rejected order. In both cases, data reflecting orders that were received and rejected provides useful and necessary context to regulatory users evaluating trading activity.

<sup>98</sup> See, e.g., note 58, note 60 and associated text supra.

<sup>99</sup> See, e.g., Rule 613 Adopting Release, supra note 2, at 45723 (“In performing their oversight responsibilities, regulators today must attempt to cobble together disparate data from a variety of existing information systems lacking in completeness, accuracy, accessibility, and/or timeliness – a model that neither supports the efficient aggregation of data from multiple trading venues nor yields the type of complete and accurate market activity data needed for robust market oversight.”); see also, e.g., CAT NMS Plan Notice, supra note 38, at 30652 (stating that the CAT NMS Plan would benefit regulators by

received and rejected and to create complete order lifecycles for such orders would subvert these two goals, because regulators would not have access to “all of the market activity of interest in sufficient detail in one consolidated audit trail.”<sup>100</sup>

In the Second Order, the Commission granted the Participants temporary exemptive relief, until December 13, 2021, from the requirement in Section 6.3(d) of the CAT NMS Plan that the Participants report rejected orders.<sup>101</sup> The Commission conditioned this relief on the Participants including in Quarterly Progress Reports factual indicators that describe “any updates to specifications and/or scenarios documents relating to the capture and reporting of rejected orders.”<sup>102</sup> The Participants represent in the Second Motion that they are reporting to the CAT “all messages rejected after receipt by an exchange.”<sup>103</sup> However, the Commission understands that the Participants are currently only reporting a subset of the rejected orders that are required to be reported by Section 6.3(d) and are working on implementing functionality that will permit the Participants to report additional rejected orders.

To give the Participants and Industry Members sufficient time either to implement the required functionality or to obtain the Commission’s approval of an alternative solution, the Commission continues to believe that it is appropriate to grant temporary conditional exemptive relief from the requirement set forth in Rule 613(c)(7) and Section 6.3(d)(i) of the CAT NMS Plan that Participants “record and electronically report to the Central Repository” certain

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improving the completeness of data by requiring the reporting of additional data fields, events, and products in Section 6.3 of the CAT NMS Plan).

<sup>100</sup> See CAT NMS Plan Notice, supra note 38, at 30662.

<sup>101</sup> See Second Order, supra note 5, at 83636.

<sup>102</sup> Id. at 83636-37.

<sup>103</sup> See Second Motion, supra note 7, at 3 n.8.

information for orders that are received and subsequently rejected, and from the requirement set forth in Appendix D, Section 3 of the CAT NMS Plan that “[a]ll CAT Data” related to such orders be “processed and assembled to create the complete lifecycle of each Reportable Event.” However, in light of further developments in the interim period, the Commission believes it is appropriate for the Third Order to provide this exemptive relief until July 31, 2024, and to replace the condition set forth in the Second Order with the following conditions:

- The Participants must maintain or improve their existing reporting of orders that are received and subsequently rejected, including existing efforts towards implementing functionality that would permit the Participants to report additional rejected orders.
- The Participants must provide, in Quarterly Progress Reports submitted pursuant to Section 6.6(c), factual indicators that describe any improvements to the Participants’ reporting of orders that are received and subsequently rejected, as well as improvements to the functionality that creates linkages for such orders.
- To ensure that the Participants remain on track to either 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, the Participants and the Plan Processor must meet with Commission staff on at least a monthly basis to provide a detailed status update regarding their current efforts towards this goal and promptly respond to related requests for additional information or data.

The Commission intends these conditions to preserve, as a baseline, the reporting functionality that is already in place and expects the Participants to provide the Commission with sufficient information to gather necessary insight into the Participants’ efforts to meet the requirements of the CAT NMS Plan.

### III. Conclusion

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act<sup>104</sup> and Rule 608(e) under the Exchange Act,<sup>105</sup> that the above-described temporary conditional exemptive relief be granted.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

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<sup>104</sup> 15 U.S.C. 78mm(a)(1).

<sup>105</sup> 17 CFR 242.608(e).