

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89051)

June 11, 2020

Order Granting 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 Sections 6.4(d)(ii)(A)(2) and (B) of the National Market System Plan Governing the Consolidated Audit Trail

I. Introduction

By letter dated June 5, 2020 (“Participant Letter”), 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. (“FINRA”), Investors Exchange LLC, Long Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, NASDAQ BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the “Participants”) request that the Securities and Exchange Commission (the “Commission” or the “SEC”), pursuant to the Commission’s authority under Section 36 of the Exchange Act¹ and Rule 608(e) of Regulation NMS under the Exchange Act,² grant exemptive relief from Sections 6.4(d)(ii)(A)(2) and (B) of the national market system plan governing the consolidated audit trail (the “CAT NMS Plan”).³ Specifically, the Participants request that the Commission provide

¹ 15 U.S.C. 78mm.

² 17 CFR 242.608(e).

³ The Commission approved the CAT NMS Plan, as modified, on November 15, 2016. See Securities Exchange Act Release Nos. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (“CAT NMS Plan Approval Order”). The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability

exemptive relief from Section 6.4(d)(ii)(A)(2) and (B) of the CAT NMS Plan, which state that each Participant, through its Compliance Rule,⁴ must require its Industry Members⁵ to record and report to the Central Repository⁶ the following information: (1) the SRO-Assigned Market Participant Identifier⁷ of the clearing broker or prime broker, if applicable, for orders that are executed in whole or in part;⁸ and (2) a cancelled trade indicator for trades that are cancelled.⁹

For the reasons set forth below, this Order grants the Participants' request for exemptive relief from the above-described provisions of the CAT NMS Plan, subject to certain conditions.

II. Description

As described in the Participant Letter, FINRA's Trade Reporting Facilities, FINRA's OTC Reporting Facility, and FINRA's Alternative Display Facility (collectively, "FINRA Facility") already collect and are required to report to the Central Repository, among other data, the clearing number of the clearing broker and the cancelled trade indicator in order to clear and

company formed under Delaware state law through which the Participants conduct activities related to the consolidated audit trail (the "Company").

⁴ The CAT NMS Plan defines "Compliance Rule" as "the rule(s) promulgated by such Participant as contemplated by Section 3.11." See id., at Section 1.1.

⁵ The CAT NMS Plan defines "Industry Member" as a "member of a national securities exchange or a member of a national securities association." See id.

⁶ The CAT NMS Plan defines "Central Repository" as "a 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.

⁷ The CAT NMS Plan defines "SRO-Assigned Market Participant Identifier" as "an identifier assigned to an Industry Member by a[self-regulatory organization or "SRO"] or an identifier used by a Participant." See id.

⁸ See id. at Section 6.4(d)(ii)(A)(2).

⁹ See id. at Section 6.4(d)(ii)(B). See also Letter from Mike Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated June 5, 2020, available at <https://catnmsplan.com/sites/default/files/2020-06/06.05.20-Exemptive-Request-RE-TRF-Facility.pdf> ("Participant Letter").

publish trades (“FINRA Facility Data”).¹⁰ The Participants propose an approach wherein the FINRA Facility Data submitted to the Central Repository would be used as the source for the clearing number of the clearing broker¹¹ instead of requiring Industry Members to record and report the SRO-Assigned Market Participant Identifier of the clearing broker (if applicable) for orders that are executed in whole or in part.¹² Likewise, instead of requiring Industry Members to record and report a cancelled trade indicator for trades that are cancelled, FINRA Facility Data submitted to the Central Repository would be the source of the cancelled trade indicator.¹³

The Participants explain that FINRA Facility Data would still be reported to the Central Repository in each instance currently required under the CAT NMS Plan. Industry Members would continue to be required to submit either a trade report or a trade cancellation with the requisite information to a FINRA Facility, in accordance with existing rules set by each Participant for its members.¹⁴ For cancelled trades, Industry Members would continue to be required to submit a trade cancellation to a FINRA Facility. The Compliance Rules would

¹⁰ See Participant Letter, at 2. FINRA Rules 6380A, 6380B, 6622, and 6282 require participants of a FINRA Facility to report transactional data. See FINRA Rules, available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules>.

¹¹ Although Section 6.4(d)(ii)(A)(2) of the CAT NMS Plan also states that the Participants must require, through their Compliance Rules, that Industry Members record and report the SRO-Assigned Market Participant Identifier of the prime broker (if applicable) for orders that are executed in whole or in part, the Participants have not requested exemptive relief from that requirement.

¹² The Participants state that the clearing number of the clearing broker is an SRO-Assigned Market Participant Identifier under the CAT NMS Plan, because it is assigned by The Depository Trust Company, which is an SRO under the Exchange Act. See Participant Letter, at 3 n.10.

¹³ See *id.* at 3.

¹⁴ See *id.* at 6.

further require Large Industry Members¹⁵ and Small Industry Members that report to the Order Audit Trail System (“Small OATS Reporters”) that are unable to submit a cancelled trade indicator to a FINRA Facility to record and report directly to the Central Repository a cancelled trade indicator, as well as a cancelled trade timestamp, beginning on June 22, 2020.¹⁶ Similarly, for orders executed in part or in whole, Industry Members would continue to be required to submit a trade report with the clearing number of the clearing broker to a FINRA Facility. The Compliance Rules would further require Large Industry Members and Small OATS Reporters that are unable to submit the clearing number of the clearing broker to a FINRA Facility to record and report directly to the Central Repository the clearing number for the order, as well as contra party information, beginning on April 26, 2021.¹⁷

In the Participant Letter, the Participants state that they would require the Plan Processor¹⁸ to link FINRA Facility Data to Industry Member execution reports submitted to the

¹⁵ For the purposes of this exemptive relief, the term “Large Industry Members” shall mean all Industry Members other than Small Industry Members. The CAT NMS Plan defines “Small Industry Member” as “an Industry Member that qualifies as a small broker-dealer as defined in SEC Rule 613.” See CAT NMS Plan, supra note 3, at Section 1.1. Small Industry Members that do not report to the Order Audit Trail System are not scheduled to begin reporting to the Central Repository until December 13, 2021, see Participant Letter, at 6 n.19, but they would be subject to the same Compliance Rules that would already be in place for Large Industry Members and Small OATS Reporters.

¹⁶ See Participant Letter, at 3, 6. If the cancellation is rejected by the FINRA Facility and is not successfully re-entered by the Industry Member, then the Industry Member would be required to report to the Central Repository a cancelled trade indicator, as well as a cancelled trade timestamp. If the cancellation is rejected but successfully re-entered by the Industry Member, the Industry Member would not be required to separately report the cancellation to the Central Repository. See id. at 3 n.10.

¹⁷ See id. at 6-7.

¹⁸ The CAT NMS Plan defines “Plan Processor” as “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

Central Repository beginning on October 26, 2020.¹⁹ The Participants explain that the Compliance Rules would require Industry Members to submit to the Central Repository an execution report submitted to a FINRA Facility for the corresponding trade report or trade cancellation, beginning on June 22, 2020.²⁰ Industry Members would be required to report a unique trade identifier, beginning on October 26, 2020, that would be used by the Plan Processor to link the FINRA Facility Data, including the number of the clearing broker and cancelled trade information, with the Industry Member's execution report.²¹ Specifically, if an Industry Member submits a trade report to a FINRA Facility pursuant to applicable Participant rules and reports the corresponding execution to the Central Repository, the Industry Member would also be required to report to the Central Repository the unique trade identifier reported by the Industry Member to such FINRA Facility for the trade.²²

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.

¹⁹ See Participant Letter, at 6. The Company has entered into an agreement with FINRA CAT LLC that obligates FINRA CAT LLC to act as the Plan Processor and to perform the functions and duties contemplated by the CAT NMS Plan. The Company may further obligate the Plan Processor to perform the necessary linkage through this agreement.

²⁰ See id. The Participants clarify that “the unique trade identifier for the OTC Reporting Facility and the Alternative Display Facility would be the Compliance ID, for the FINRA/Nasdaq Trade Reporting Facilities would be the Branch Sequence Number, and for the FINRA/NYSE Trade Reporting Facility would be the FINRA Compliance Number.” See id.

²¹ The Participants clarify that “the unique trade identifier for the OTC Reporting Facility and the Alternative Display Facility would be the Compliance ID, for the FINRA/Nasdaq Trade Reporting Facilities would be the Branch Sequence Number, and for the FINRA/NYSE Trade Reporting Facility would be the FINRA Compliance Number.” See id.

²² See id.

The Participants state that there are four limited instances in which an Industry Member would be unable to provide a link between the execution reported to the Central Repository and the related FINRA Facility trade report. The first scenario involves the circumstances in which an Industry Member executes a trade between two desks or departments involving proprietary accounts. Because there is no change in beneficial ownership, no trade is reported to a FINRA Facility.²³ The second scenario involves the circumstances in which an Industry Member executes a trade and must report the trade via Form T instead of to a FINRA Facility, such as where the security symbol is no longer available or the firm's market participant identifier is no longer active.²⁴ The third scenario involves the circumstances in which a trade is executed by a non-FINRA member firm that has no FINRA Facility reporting obligation and was reported to the FINRA Facility by the FINRA member counterparty.²⁵ The fourth scenario involves the circumstances in which an Industry Member is on the contra side of a negotiated trade reported to a FINRA Facility via a Qualified Service Representative Agreement or Automatic Give-up Agreement, such that the trade was automatically submitted to a FINRA Facility without the Industry Member taking any action on the trade.²⁶ The Participants represented to the Commission that these scenarios are rare and do not involve a large number of trades. In these

²³ See id. at 3. According to the Participants, these types of trade represented approximately 0.3 percent of the trades captured in FINRA's Order Audit Trail System in the fourth quarter of 2019. See id. at 3-4.

²⁴ See id. at 4. According to the Participants, in 2019, there were only 1,640 trades reported on Form T. See id.

²⁵ See id. The Participants do not provide statistics for this scenario, but stated that it did not implicate a large number of trades. See id.

²⁶ See id. According to the Participants, only 2 percent of the executions in the fourth quarter of 2019 were negotiated trades and only approximately 0.1 percent of executions were the above-described type of negotiated trades. Id.

instances, the Participants stated that the Compliance Rules would require an Industry Member to record and report the relevant data directly to the Central Repository by June 22, 2020 for cancelled trades and by April 26, 2021 for orders executed in whole or in part.²⁷

Noting the current difference in the timestamp granularity requirements for Industry Member reporting to a FINRA Facility and Industry Member reporting to the Central Repository,²⁸ the Participants further state that FINRA will seek to amend its FINRA Facility rules and technical specifications to accept timestamps up to the granularity required by the CAT NMS Plan and to implement such changes by December 15, 2021 for FINRA's Trade Reporting Facilities and FINRA's Alternative Display Facility and by December 15, 2022 for FINRA's OTC Reporting Facility.²⁹

III. Request for Relief

The Participants request that the Commission grant each Participant exemptive relief from Section 6.4(d)(ii)(A)(2) and (B) of the CAT NMS Plan, which state that the Participants must require, through their Compliance Rules, that Industry Members record and report to the

²⁷ See *id.* at 6-7. See also notes 14-17 and associated text *supra*, for a discussion of the data that the Compliance Rules would require an Industry Member to record and report to the Central Repository.

²⁸ The CAT NMS Plan states that Participants shall, through their Compliance Rules, require Industry Members to report transaction data to the Central Repository in milliseconds or in finer increments if Industry Members utilize such finer increments in their order handling or execution systems. See CAT NMS Plan, *supra* note 3, at Section 6.8(b); see also Securities Exchange Act Release No. 88608 (April 8, 2020), 85 FR 20743 (April 14, 2020) (granting time-limited exemptive relief allowing the Participants to require Industry Members using timestamps finer than the minimum required by the CAT NMS Plan to truncate such timestamps after the nanosecond level). A FINRA Facility, by contrast, only collects data using timestamps up to milliseconds. See Participant Letter, at 5.

²⁹ See Participant Letter, at 7.

Central Repository the SRO-Assigned Market Participant Identifier of the clearing broker, if applicable, for orders that are executed in whole or in part, and a cancelled trade indicator for trades that are cancelled, when such data is reported by FINRA to the Central Repository as part of the FINRA Facility Data and subject to the above-described conditions.³⁰

Once the alternative approach described above is fully implemented, the Participants believe that the FINRA Facility Data would be an equivalent and more reliable source for the clearing and cancellation data required by the CAT NMS Plan than similar data provided separately by each Industry Member.³¹ The FINRA Facility Data is already used for clearing and publishing trades.³² Inadvertent errors reported to a FINRA Facility may also result in a trade break.³³ In addition, the Participants state that their proposed alternative approach would avoid burdening Industry Members with the cost and effort of reporting data regarding clearing brokers and cancelled trades pursuant to two reporting regimes.³⁴

IV. Discussion

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

³⁰ See Participant Letter, at 5-7. See notes 14-22, 27-29 and associated text supra for a discussion of these conditions.

³¹ See Participant Letter, at 5.

³² See id.

³³ See id. at 2 n.9.

³⁴ See id. at 5.

consistent with the protection of investors.”³⁵ Rule 608(e) of Regulation NMS under the Exchange Act authorizes the Commission to exempt, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, from the provisions of the rule 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.³⁶

The Commission believes that, pursuant to Section 36 of the Exchange Act, exemptive relief is appropriate in the public interest and consistent with the protection of investors, and that, pursuant to Rule 608(e) under the Exchange Act, 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 the mechanisms of, a national market system. Relying on FINRA Facility Data in lieu of requiring Industry Members to report the SRO-Assigned Market Participant Identifier of the clearing broker, if applicable, and a cancelled trade indicator will be more efficient and more cost-effective for Industry Members, because this proposed alternative approach will avoid burdening Industry Members with reporting data regarding clearing brokers and cancelled trades pursuant to two reporting regimes. Moreover, once the alternative approach is fully implemented, FINRA Facility Data provided to the CAT would be equivalent to the data required by Sections 6.4(d)(ii)(A)(2) and (B).

The Commission believes that the conditions proposed by the Participants in their request for exemptive relief are also appropriate, including the condition that FINRA will continue to report FINRA Facility Data to the Central Repository, the condition that the Participants will

³⁵ 15 U.S.C. 78mm(a)(1).

³⁶ 17 CFR 242.608(e).

require the Plan Processor to link FINRA Facility Data to Industry Member execution reports submitted to the Central Repository, conditions specifying that the Participants' Compliance Rules will require Industry Members to report directly to the Central Repository if they do not submit the required information to a FINRA Facility or are unable to provide a link between the execution reported to the Central Repository and the corresponding FINRA Facility trade report or trade cancellation, and the condition that FINRA would seek to amend its FINRA Facility rules and technical specifications to permit each FINRA Facility to accept timestamps up to the granularity required by the CAT NMS Plan.³⁷ The Commission believes that such conditions will help to ensure the collection of relevant and equivalent data regarding cancelled trades and clearing brokers.

The Commission also believes that the phased implementation of the Participants' alternative approach is appropriate. Although some elements of the Participants' alternative approach will not be fully implemented until 2021 or 2022, including direct reporting by Industry Members of clearing numbers and contra party information in certain circumstances, the Participants have indicated that these elements would only affect a limited or de minimis amount of data.³⁸ The Commission therefore believes that granting the requested exemptive relief according to the timeline proposed by the Participants is unlikely to have a significant impact on regulators' short-term ability to use the transactional data reported to the Central Repository. Moreover, the Commission believes that granting exemptive relief according to the timeline proposed by the Participants will simultaneously provide Industry Members with immediate

³⁷ See notes 14-22, 27-29 and associated text supra for a discussion of these conditions. The Participants have an obligation to enforce Industry Member compliance with their own rules, including the Compliance Rules and FINRA's rules relating to its trade reporting facilities. See, e.g., note 10 supra.

³⁸ See, e.g., notes 23-26 and associated text supra.

relief from incurring duplicative costs and encourage progress towards full implementation of the alternative approach on a reasonable and feasible schedule.

To the extent that the Participants are availing themselves of exemptive relief from a CAT NMS Plan requirement, such requirement shall not be included in the requirements for a Financial Accountability Milestone, provided that the conditions of the exemption are satisfied.³⁹

³⁹ See Securities Exchange Act Release No. 88890 (May 15, 2020), 85 FR 31322, 31335 (May 22, 2020). If the Participants do not meet the conditions set forth herein, on the schedule set forth herein, their ability to recover fees from Industry Members could be impacted pursuant to the terms of Section 11.6 of the CAT NMS Plan. See CAT NMS Plan, *supra* note 3, at Section 11.6 (effective June 22, 2020). Specifically, linkage of execution reports submitted to the Central Repository by Industry Members to corresponding FINRA trade reports and Industry Member reporting of unique trade identifiers, scheduled to begin on October 26, 2020, along with any related changes to the Compliance Rules, will now be relevant to the Full Implementation of Core Equity Reporting milestone (Period 2), which must be satisfied no later than December 31, 2020. Functionality enabling Industry Members to report clearing numbers and contra party information directly to the Central Repository, scheduled to begin on April 26, 2021 for Large Industry Members and Small OATS Reporters, along with any related changes to the Compliance Rules and FINRA's Trade Reporting Facilities and FINRA's Alternative Display Facility acceptance of timestamps up to the granularity required by the CAT NMS Plan, scheduled to begin by December 15, 2021, will now be relevant to the Full Availability and Regulatory Utilization of Transactional Database Functionality milestone (Period 3), which must be satisfied no later than December 31, 2021. FINRA's OTC Reporting Facility acceptance of timestamps up to the granularity required by the CAT NMS Plan, scheduled to begin by December 15, 2022, will now be relevant to the Full Implementation of CAT NMS Plan Requirements milestone (Period 4), which must be satisfied no later than December 30, 2022.

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act⁴⁰ and Rule 608(e) under the Exchange Act,⁴¹ that the Commission grants the Participants' request for exemptive relief, as set forth in the Participant Letter, from the requirements in Section 6.4(d)(ii)(A)(2) and (B) of the CAT NMS Plan, subject to the conditions described by the Participants and in this Order.

By the Commission.

J. Matthew DeLesDernier,

Assistant Secretary.

⁴⁰ 15 U.S.C. 78mm(a)(1).

⁴¹ 17 CFR 242.608(e).