

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90223)

October 19, 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, Relating to the Reporting of Allocations Pursuant to the National Market System Plan Governing the Consolidated Audit Trail

I. Introduction

By letter dated August 27, 2020, BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc. (“FINRA”), Investors Exchange LLC, Long Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, NASDAQ BX, LLC, Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, NASDAQ PHLX LLC, The NASDAQ Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the “Participants”) requested that the Securities and Exchange Commission (“Commission” or “SEC”) grant them exemptive relief from the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”),¹ pursuant to its authority under Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”)² and Rule 608(e) of Regulation NMS under the Exchange Act, from

¹ The CAT NMS Plan was approved by the Commission, as modified, on November 15, 2016. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016).

² 15 U.S.C. 78mm(a)(1).

certain allocation reporting requirements of Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan.³

Section 36 of the Exchange Act grants the Commission the authority, with certain limitations, to “conditionally or unconditionally exempt any person, security, or transaction . . . from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder, to the extent that such exemption is necessary or appropriate in the public interest, and is consistent with the protection of investors.”⁴ Under Rule 608(e) of Regulation NMS, the Commission may “exempt from [Rule 608], either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanism of, a national market system.”⁵

For the reasons set forth below, this Order grants the Participants’ request for an exemption from Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan as set forth in the August 27, 2020 Exemption Request, subject to certain conditions.

II. Background

Pursuant to Section 6.4(d)(ii)(A) of the CAT NMS Plan, each Participant must, through its Compliance Rule, require its Industry Members to record and report to the Central

³ See letter from the Participants to Vanessa Countryman, Secretary, Commission, dated August 27, 2020 (the “August 27, 2020 Exemption Request”). Unless otherwise noted, capitalized terms are used as defined in the CAT NMS Plan.

⁴ 15 U.S.C. 78mm(a)(1).

⁵ 17 CFR 242.608(e).

Repository, if the order is executed, in whole or in part: (1) an Allocation Report;⁶ (2) the SRO- Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable; and the (3) CAT-Order-ID of any contra-side order(s). Accordingly, the Participants have implemented Compliance Rules that, among other things, require their Industry Members that are executing brokers to submit to the Central Repository, among other things, Allocation Reports and the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker, if applicable.⁷

III. Request for Relief

In the August 27, 2020 Exemption Request, the Participants request that the Participants be permitted to implement an alternative approach to reporting allocations to the Central Repository, the “Allocation Alternative.” Under the Allocation Alternative, any Industry Member that performs an allocation to a client account would be required through their Compliance Rules to submit an Allocation Report to the Central Repository when shares/contracts are allocated to the client account regardless of whether the Industry Member was involved in executing the underlying order(s). Under the Allocation Alternative, an “Allocation” would be defined as: (1) the placement of shares/contracts into the same account for which an order was originally placed; or (2) the placement of shares/contracts into an account

⁶ Section 1.1 of the CAT NMS Plan defines an “Allocation Report” as “a report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.”

⁷ See, e.g., Cboe Exchange, Inc. Rule 7.22(a)(2)(A); New York Stock Exchange LLC Rule 6830(a)(2)(A).

based on allocation instructions (e.g., subaccount allocations, delivery versus payment (“DVP”) allocations). Pursuant to this definition and the proposed Allocation Alternative, an Industry Member that performs an Allocation to an account that is not a client account, such as proprietary accounts and events including step outs,⁸ or correspondent flips,⁹ would not be required to submit an Allocation Report to the Commission for that allocation, but could do so on a voluntary basis. The Participants propose to allow Industry Members to report Allocations to accounts other than client accounts, but if Industry Members report such Allocations, such Allocations must be marked as Allocations to accounts other than client accounts.¹⁰

A. Executing Brokers and Allocation Reports

To implement the Allocation Alternative, the Participants request exemptive relief from Section 6.4(d)(ii)(A)(1) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members that are executing brokers, who do not perform Allocations, to record and report to the Central Repository, if the order is executed, in whole or in part, an Allocation Report. Under the Allocation Alternative, when an Industry Member other than an executing broker (e.g., a prime broker or clearing

⁸ “A step-out allows a broker-dealer to allocate all or part of a client’s position from a previously executed trade to the client’s account at another broker-dealer. In other words, a step-out functions as a client’s position transfer, rather than a trade; there is no exchange of shares and funds and no change in beneficial ownership.” See FINRA, Trade Reporting Frequently Asked Questions, at Section 301, available at: <https://www.finra.org/filing-reporting/market-transparency-reporting/trade-reporting-faq>.

⁹ Correspondent clearing flips are the movement of a position from an executing broker’s account to a different account for clearance and settlement, allowing a broker-dealer to execute a trade through another broker-dealer and settle the trade in its own account. See, e.g., The Depository Trust & Clearing Corporation, Correspondent Clearing, available at: <https://www.dtcc.com/clearing-services/equities-trade-capture/correspondent-clearing>.

¹⁰ The Participants state that a “client account” is any account that is not owned or controlled by the Industry Member.

broker) performs an Allocation, that Industry Member would be required to submit the Allocation Report to the Central Repository. When an executing broker performs an Allocation for an order that is executed, in whole or in part, the burden of submitting an Allocation Report to the Central Repository would remain with the executing broker under the Allocation Alternative. In certain circumstances this would result in multiple Allocation Reports – the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

The Participants state that granting exemptive relief from submitting Allocation Reports for executing brokers who do not perform an Allocation, and requiring the Industry Member other than the executing broker that is performing the Allocation to submit such Allocation Reports, is consistent with the basic approach taken by the Commission in adopting Rule 613. Specifically, the Participants believe that the Commission sought to require each broker-dealer and exchange that touches an order to record the required data with respect to actions it takes on the order.¹¹ Without the proposed exemptive relief, executing brokers that do not perform Allocations would be required to submit Allocation Reports. In addition, the Participants state because shares/contracts for every execution must be allocated to an account by the clearing broker, there would be no loss of information by shifting the reporting obligation from the executing broker to the clearing broker.

B. Identity of Prime Broker

¹¹ See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722, 45748 (Aug. 1, 2012).

To implement the Allocation Alternative, the Participants request exemptive relief from Section 6.4(d)(ii)(A)(2) of the CAT NMS Plan, to the extent that the provision requires each Participant to, through its Compliance Rule, require its Industry Members to record and report to the Central Repository, if an order is executed, in whole or in part, the SRO-Assigned Market Participant Identifier of the prime broker, if applicable. Currently, under the CAT NMS Plan, an Industry Member is required to report the SRO-Assigned Market Participant Identifier of the clearing broker or prime broker in connection with the execution of an order, and such information would be part of the order's lifecycle, rather than in an Allocation Report that is not linked to the order's lifecycle.¹² Under the Allocation Alternative, the identity of the prime broker would be required to be reported by the clearing broker on the Allocation Report, and, in addition, the prime broker itself would be required to report the ultimate allocation, which the Participants believe would provide more complete information.

The Participants state that associating a prime broker with a specific execution, as is currently required by the CAT NMS Plan, does not reflect how the allocation process works in practice as allocations to a prime broker are done post-trade and are performed by the clearing broker of the executing broker. The Participants also state that with the implementation of the Allocation Alternative, it would be duplicative for the executing broker to separately identify the prime broker for allocation purposes.

The Participants state that if a particular customer only has one prime broker, the identity of the prime broker can be obtained from the customer and account information through the DVP accounts for that customer that contain the identity of the prime broker. The Participants further

¹² The Participants are not requesting exemptive relief relating to the reporting of the SRO-Assigned Market Participant Identifier of clearing brokers.

state that Allocation Reports related to those executions would reflect that shares/contracts were allocated to the single prime broker. The Participants believe that there is no loss of information through the implementation of the Allocation Alternative compared to what is required in the CAT NMS Plan and that this approach does not decrease the regulatory utility of the CAT for single prime broker circumstances.

In cases where a customer maintains relationships with multiple prime brokers, the Participants assert that the executing broker will not have information at the time of the trade as to which particular prime broker may be allocated all or part of the execution.¹³ Under the Allocation Alternative, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts where the shares/contracts were ultimately allocated. To determine the prime broker for a customer, a regulatory user would query the customer and account database using the customer's CCID to obtain all DVP accounts for the CCID at broker-dealers. The Participants state that when a customer maintains relationships with multiple prime brokers, the customer typically has a separate DVP account with each prime broker, and the identities of those prime brokers can be obtained from the customer and account information.

C. Additional Conditions to Exemptive Relief

Currently, the definition of Allocation Report in the CAT NMS Plan only refers to shares. To implement the Allocation Alternative, the Participants propose to require that all required

¹³ Based on discussions with members of the Advisory Committee, the Participants understand that multiple prime broker arrangements are common, particularly with respect to customers that are large funds. August 27, 2020 Exemption Request, supra note 3, at 5, n.13.

elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. Specifically, Participants would require the reporting of the following in each Allocation Report: (1) the FDID for the account receiving the allocation, including subaccounts; (2) the security that has been allocated; (3) the identifier of the firm reporting the allocation; (3) the price per share/contracts of shares/contracts allocated; (4) the side of shares/contracts allocated; (4) the number of shares/contracts allocated; and (5) the time of the allocation.

Furthermore, to implement the Allocation Alternative, the Participants propose to require the following information on all Allocation Reports: (1) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (2) trade date; (3) settlement date; (4) IB/correspondent CRD Number (if applicable); (5) FDID of new order(s) (if available in the booking system);¹⁴ (6) allocation instruction time (optional); (7) if the account meets the definition of institution under FINRA Rule 4512(c);¹⁵ (8) type of allocation (allocation to a custody account, allocation to a DVP account, step out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (*e.g.*, option exercises, conversions); (9) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign

¹⁴ The Participants propose that for scenarios where the Industry Member responsible for reporting the Allocation has the FDID of the related new order(s) available, such FDID must be reported. This would include scenarios in which: (1) the FDID structure of the top account and subaccounts is known to the Industry Member responsible for reporting the Allocation(s); and (2) the FDID structure used by the IB/Correspondent when reporting new orders is known to the clearing firm reporting the related Allocations.

¹⁵ FINRA Rule 4512(c) states the for purposes of the rule, the term “institutional account” means the account of: (1) a bank, savings and loan association, insurance company or registered investment company; (2) an investment adviser registered either with the SEC under Section 203 of the Investment Advisers Act or with a state securities commission (or any agency or office performing like functions); or (3) any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least \$50 million.

indicator, if the custodian is a foreign entity; and (10) if an allocation was cancelled, a cancel flag, which indicates that the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

IV. Discussion

The Commission believes that granting exemptive relief from Sections 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan as set forth below to allow for the Allocation Alternative, subject to the conditions described herein, is appropriate in the public interest and consistent with the protection of investors, and that pursuant to Rule 608(e), this exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and the perfection of a national market system.

A. Executing Brokers and Allocation Reports

The Commission is granting the Participants an exemption from the requirement that the Participants, through their Compliance Rule, require executing brokers to submit Allocation Reports. The Commission understands that executing brokers that are not self-clearing do not perform allocations themselves, and such allocations are handled by prime and/or clearing brokers, and these executing brokers therefore do not possess the requisite information to provide Allocation Reports. Correspondingly, the Commission believes that it is appropriate to condition this exemption on the Participants adopting Compliance Rules that require prime and/or clearing brokers to submit Allocation Reports when such brokers perform allocations. The Commission believes granting exemptive relief would improve efficiency and reduce the costs and burdens of reporting allocations for Industry Members because the reporting obligation would belong to the Industry Member with the requisite information, and executing brokers that do not have the information required to provide an Allocation Report would not be required to develop the

infrastructure and processes required to obtain, store and report the information. This exemptive relief should not reduce the regulatory utility of CAT because an Allocation Report would still be submitted covering each executed trade allocated to a client account, which in certain circumstances could still result in multiple Allocation Reports,¹⁶ just not necessarily by the executing broker.

B. Identity of Prime Broker

The Commission believes that exempting Participants from the requirement that they, through their Compliance Rules, require executing brokers to provide the SRO-Assigned Market Participant Identifier of the prime broker is appropriate because, as stated by the Participants, allocations are done on a post-trade basis and the executing broker will not have the requisite information at the time of the trade. Because an executing broker, in certain circumstances, does not have this information at the time of the trade, this relief relieves executing brokers of the burdens and costs of developing infrastructure and processes to obtain this information in order to meet the contemporaneous reporting requirements of the CAT NMS Plan.¹⁷

The Commission believes that, although executing brokers would no longer be required to provide this information, regulators will still be able to determine the prime broker(s) associated with orders through querying the customer and account information database. If an executing broker has only one prime broker, the identity of the prime broker can be obtained from the customer and account information associated with the executing broker. For customers

¹⁶ As noted above, under the Allocation Alternative, for certain executions, the executing broker (if self-clearing) or its clearing firm would report individual Allocation Reports identifying the specific prime broker to which shares/contracts were allocated and then each prime broker would itself report an Allocation Report identifying the specific customer accounts to which the shares/contracts were finally allocated.

¹⁷ See CAT NMS Plan, supra note **Error! Bookmark not defined.**, at Section 6.4(b)(i).

with multiple prime brokers, the identity of the prime brokers can be obtained from the customer and account information which will list the prime broker, if there is one, that is associated with each account.

C. Additional Conditions for Exemptive Relief

The Commission is granting the relief conditioned upon the adoption of Compliance Rules that implement the reporting requirements of the Allocation Alternative. The Commission believes that the proposed definition of Allocation is reasonable. The Commission is also exempting Participants from the requirement that they amend their Compliance Rules to require Industry Members to report Allocations for accounts other than client accounts. The Commission believes that allocations to client accounts, and not allocations to proprietary accounts or events such as step-outs and correspondent flips,¹⁸ provide regulators the necessary information to detect abuses in the allocation process because it would provide regulators with detailed information regarding the fulfillment of orders submitted by clients, while reducing reporting burdens on broker-dealers. For example, Allocation Reports would be required for allocations to registered investment advisor and money manager accounts. The Commission further believes that the proposed approach should facilitate regulators' ability to distinguish Allocation Reports relating to allocations to client accounts from other Allocation Reports because Allocations to accounts other than client accounts would have to be identified as such. This approach could reduce the time CAT Reporters expend to comply with CAT reporting requirements and lower costs by allowing broker-dealers to use existing business practices.

¹⁸ See, supra notes 8 and 9.

The Commission is conditioning this exemption on the Participants amending their Compliance Rules to require additional elements in Allocation Reports.¹⁹ These additional elements would enhance the utility of CAT by providing more information related to allocations and will ultimately assist market surveillance, market reconstructions, and examinations. The Commission further believes that applying the requirements for Allocation Reports to contracts in addition to shares is appropriate because CAT reporting requirements apply to both options and equities.

The proposed approach described in the August 27, 2020 Exemption Request would require Participants to amend their Compliance Rules to require Industry Members to provide Allocation Reports to the Central Repository any time they perform Allocations to a client account, whether or not the Industry Member was the executing broker for the trades. The Participants also would be required to amend their Compliance Rules to require their Industry Members reporting the Allocation Reports to include the additional elements set forth above on

¹⁹ Specifically, the Participants would be required to modify their Compliance Rules such that all required elements of Allocation Reports apply to both shares and contracts, as applicable, for all Eligible Securities. In addition, the Participants would be required to modify their Compliance Rules so that Allocation Reports include the following additional elements: (1) Allocation ID, which is the internal allocation identifier assigned to the allocation event by the Industry Member; (2) trade date; (3) settlement date; (4) IB/correspondent CRD Number (if applicable); (5) FDID of new order(s) (if available in the booking system); (6) allocation instruction time (optional); (7) if account meets the definition of institution under FINRA Rule 4512(c); (8) type of allocation (allocation to a custody account, allocation to a DVP account, step out, correspondent flip, allocation to a firm owned or controlled account, or other non-reportable transactions (e.g., option exercises, conversions); (9) for DVP allocations, custody broker-dealer clearing number (prime broker) if the custodian is a U.S. broker-dealer, DTCC number if the custodian is a U.S. bank, or a foreign indicator, if the custodian is a foreign entity; and (10) if an allocation was cancelled, a cancel flag, which indicates if the allocation was cancelled, and a cancel timestamp, which represents the time at which the allocation was cancelled.

all Allocation Reports, in addition to those elements currently required under the CAT NMS Plan.

Based on the foregoing, the Commission believes that, pursuant to Section 36 of the Exchange Act, this exemption is appropriate in the public interest and consistent with the protection of investors, and that pursuant to Rule 608(e), this exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and the perfection of a national market system.

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act,²⁰ and Rule 608(e) of the Exchange Act²¹ and with respect to the proposed Allocation Alternative specifically described above, that the Participants are granted an exemption from the requirements set forth in Section 6.4(d)(ii)(A)(1) and (2) of the CAT NMS Plan, subject to the conditions described above.

By the Commission.

J. Matthew DeLesDernier
Assistant Secretary

²⁰ 15 U.S.C. 78mm(a)(1).

²¹ 17 CFR 242.608(e).