

February 3, 2020

VIA HAND DELIVERY

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Request for Exemption from Certain Provisions of the National Market System Plan Governing the Consolidated Audit Trail related to Small Industry Members

Dear Ms. Countryman:

The Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”)² respectfully request that the Securities and Exchange Commission (“Commission” or “SEC”) provide exemptive relief pursuant to the Commission’s authority under Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”)³ and Rule 608(e) of Regulation NMS under the Exchange Act⁴ from certain requirements in the CAT NMS Plan related to Industry Members other than Small Industry Members (“Large Industry Members”). Specifically, the Participants request that the Commission exempt broker-dealers that do not qualify as Small Industry Members solely because they satisfy Rule 0-10(i)(2) under the Exchange Act and, as a result, are deemed affiliated with an entity that is not a small business or small organization (“Introducing Industry Member”) from the requirements in the CAT NMS Plan applicable to Large Industry Members. Instead, such Introducing Industry Members would comply with the requirements in the CAT NMS Plan applicable to Small Industry Members. The Participants believe that the requested exemption is “necessary or appropriate in the public interest, and consistent with the protection of investors,”⁵ and is “consistent with the public

¹ The twenty-four Participants of the CAT NMS Plan are: BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc.; Financial Industry Regulatory Authority, Inc.; Investors Exchange 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; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., NYSE National, Inc., and Long Term Stock Exchange, Inc.

² The Limited Liability Company Agreement of Consolidated Audit Trail, LLC is the CAT NMS Plan. Unless otherwise noted, capitalized terms are used as defined in Rule 613, in the CAT NMS Plan, or in this letter.

³ See 15 U.S.C. § 78mm(a)(1), which provides, in relevant part, that the “Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of this title 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 17 C.F.R. § 242.608(e), which provides that “[t]he Commission may exempt from the provisions of this section, 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.”

⁵ 15 U.S.C. § 78mm(a)(1).

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.”⁶ In connection with the requested exemption, the Participants plan to file revisions to their Compliance Rules⁷ consistent with the exemptive relief requested in this letter as necessary.

1. Background

The CAT NMS Plan treats Small Industry Members and Large Industry Members differently. The CAT NMS Plan permits Small Industry Members to commence reporting to the CAT later than Large Industry Members because the Small Industry Members “would benefit from, an additional year to prepare for CAT reporting due to their relatively limited resources.”⁸ The Commission stated that “such an accommodation to small broker-dealers is reasonable, given the fact that small broker-dealers may face greater financial constraints in complying with Rule 613.”⁹

Section 1.1 of the CAT NMS Plan defines a “Small Industry Member” as “an Industry Member that qualifies as a small broker-dealer as defined in SEC Rule 613.” SEC Rule 613, in turn, defines “small broker-dealers” by referring to “those members that qualify as small broker-dealers as defined in §240.0-10(c) of this chapter.”¹⁰ Rule 0-10(c) under the Exchange Act states that the term small business or small organization shall,

[w]hen used with reference to a broker or dealer, mean a broker-dealer that:

- (1) Had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the date in the prior fiscal year as of which its audited financial statements were prepared pursuant to § 240.17a-5(d) or, if not required to file such statements, a broker or dealer that had total capital (net worth plus subordinated liabilities) of less than \$500,000 on the last business day of the preceding fiscal year (or in the time that it has been in business, if shorter); and
- (2) Is not affiliated with any person (other than a natural person) that is not a small business or small organization as defined in this section.

Rule 0-10(i) under the Exchange Act further states that

[f]or purposes of paragraph (c) of this section, a broker or dealer is affiliated with another person if:

⁶ 17 C.F.R. § 242.608(e).

⁷ Section 1.1 of the CAT NMS Plan defines “Compliance Rule” to mean, “with respect to a Participant, the rule(s) promulgated by such Participant as contemplated by Section 3.11.”

⁸ Securities Exchange Act Rel. No. 79318 (Nov. 15, 2016), 81 Fed. Reg. 84696, 84771 (Nov. 23, 2016) (“CAT NMS Plan Approval Order”).

⁹ Securities Exchange Act Rel. No. 67457 (July 18, 2012), 77 Fed. Reg. 45722, 45749 (August 1, 2012) (“Rule 613 Adopting Release”).

¹⁰ See 17 C.F.R. § 242.613(a)(3)(v) and (vi).

(1) Such broker or dealer controls, is controlled by, or is under common control with such other person; a person shall be deemed to control another person if that person has the right to vote 25 percent or more of the voting securities of such other person or is entitled to receive 25 percent or more of the net profits of such other person or is otherwise able to direct or cause the direction of the management or policies of such other person; or

(2) Such broker or dealer introduces transactions in securities, other than registered investment company securities or interests or participations in insurance company separate accounts, to such other person, or introduces accounts of customers or other brokers or dealers, other than accounts that hold only registered investment company securities or interests or participations in insurance company separate accounts, to such other person that carries such accounts on a fully disclosed basis.

Accordingly, under Rule 0-10(i)(2) under the Exchange Act, a broker-dealer would not be considered a small broker-dealer if it introduces transactions in securities to a clearing firm that is not a small broker-dealer, on a fully disclosed basis, regardless of the broker-dealer's capital level. As a result, only broker-dealers that perform their own trading and either self-clear or clear on an omnibus basis, rather than on a fully disclosed basis, would be considered a small broker-dealer under this Rule.

The Participants believe that excluding broker-dealers from the definition of a small broker-dealer based on the introducing relationship described in Rule 0-10(i)(2) is not consistent with the intent to provide small broker-dealers with extra time to comply with the CAT NMS Plan. Introducing Industry Members are only excluded from the definition of a small broker-dealer because of their introducing relationship with a clearing firm. They otherwise satisfy the capital threshold set forth in Rule 0-10(c)(1) for small broker-dealers. As a result, they are the type of broker-dealers the SEC and the Participants intended to provide additional time to prepare for reporting to the CAT.

Furthermore, the Participants believe that the proposed relief is supported by discussions of the definition of Small Industry Members in the context of the adoption of Rule 613 and the approval of the CAT NMS Plan. In adopting Rule 613 and approving the CAT NMS Plan, the SEC focused on the capital requirements in the definition of a small broker-dealer set forth in paragraph (1) of Rule 0-10(c). For example, in its order approving the CAT NMS Plan, the SEC emphasized that the CAT NMS Plan relies on "the capital-level based definition" of Small Industry Members.¹¹ The SEC also stated that Small Industry Members are "broker-dealers whose capital levels are below a certain limit defined by regulation."¹² The SEC does not address the requirements of paragraph (2) of Rule 0-10(i) regarding introducing broker-dealers.

¹¹ CAT NMS Plan Approval Order at 84771.

¹² *Id.*

Correspondingly, SEC statements about small broker-dealers in the adopting release for Rule 613 support including Introducing Industry Members within the definition of small broker-dealers. Specifically, the SEC stated in the adopting release:

If a clearing broker-dealer receives an order from a small broker-dealer during the period between the time the Rule is applicable to large broker-dealers and the time the Rule is applicable to small broker-dealers, the broker-dealer performing the clearing function for the small introducing broker will be subject to only the requirements of the Plan applicable directly to the clearing broker-dealer, while the small introducing broker will not be subject to the reporting requirements at that time.¹³

This example suggests that an Introducing Industry Member would be required to comply with the requirements of the CAT NMS Plan applicable to Small Industry Members, not Large Industry Members.

Finally, the Participants note that the proposed relief would not affect the type or amount of data that will be reported to the CAT. It will only affect the timing for when data will be reported. Under the proposed relief, CAT Data for Introducing Industry Members would be required to be reported when Small Industry Members begin reporting, rather than on the earlier date that Large Industry Members begin reporting.

2. Request for Exemption

The Participants request exemptive relief from compliance with the requirements in the CAT NMS Plan applicable to Large Industry Members for Introducing Industry Members. As a condition to this exemption, the Participants would require Introducing Industry Members to comply with the provisions of the CAT NMS Plan applicable to Small Industry Members.

¹³ Rule 613 Adopting Release at 45749.

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Thank you for your attention to this matter. Please contact me at (212) 229-2455 if you have any questions or comments.

Respectfully submitted,

Mike Simon / TCH

Mike Simon
CAT NMS Plan Operating Committee Chair

cc: The Hon. Jay Clayton, Chairman
The Hon. Hester M. Peirce, Commissioner
The Hon. Robert J. Jackson Jr., Commissioner
The Hon. Elad L. Roisman, Commissioner
The Hon. Allison Herren Lee, Commissioner
Mr. Brett Redfearn, Director, Division of Trading and Markets
Mr. David S. Shillman, Associate Director, Division of Trading and Markets
Mr. David Metzman, Counsel to the Director, Division of Trading and Markets
Mr. David Hsu, Assistant Director, Division of Trading and Markets
CAT NMS Plan Participants