

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99023; File No. 4-698)

November 27, 2023

Order Granting an Exemption Pursuant to Section 36(a)(1) of the Securities Exchange Act of 1934 and Rule 608(e) of Regulation NMS Under the Exchange Act, Relating to the Recordkeeping Requirements for Industry Test Data, as Required by Rule 17a-1 Under the Exchange Act and Certain Provisions of the National Market System Plan Governing the Consolidated Audit Trail

I. Introduction

By letter dated June 2, 2023, BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, 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”) grant exemptive relief to the Participants,¹ pursuant to its authority under Section 36(a)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)² and Rule 608(e) of Regulation NMS³ under the Exchange Act, from certain recordkeeping requirements for retaining data from industry testing, in Rule 17a-1⁴ of the

¹ See letter from the Participants to Vanessa Countryman, Secretary, Commission, dated June 2, 2023 (the “Exemption Request”). Unless otherwise noted, capitalized terms are used as defined in the CAT NMS Plan.

² 15 U.S.C. 78mm(a)(1).

³ 17 CFR 242.608(e).

⁴ 17 CFR 240.17a-1.

Exchange Act and certain provisions of the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”).⁵

Section 36(a)(1) 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.”⁶ 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.”⁷

For the reasons set forth below, the Commission believes that it is consistent with the purposes of the Exchange Act to grant exemptive relief relating to the Participants’ record-keeping and data retention requirements in Rule 17a-1 of the Exchange Act, Section 9.1 of the CAT NMS Plan, Section 1.4 of Appendix D of the CAT NMS Plan and certain provisions in Appendix C of the CAT NMS Plan (to the extent any may apply).

II. Background and Request for Relief

In the Exemption Request, the Participants state that CAT Reporters, including both Participants and Industry Members, engage in testing related to the reporting of order and

⁵ The CAT NMS Plan was approved by the Commission, as modified, on Nov. 15, 2016. See Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) (“CAT NMS Plan Approval Order”).

⁶ 15 U.S.C. 78mm(a)(1).

⁷ 17 CFR 242.608(e).

transaction data to the CAT, both pursuant to required testing and testing on a voluntary basis.⁸ The Participants explain that in connection with this testing, CAT LLC, through the Plan Processor, retains the test data submitted by Industry Members and Participants, feedback files related to such data, and output files that hold the detailed transactions (such test data and files are referred to herein as “Industry Test Data”).⁹ The Participants further state that this exemption request only involves Industry Test Data related to the CAT order and transaction system, not the customer account and information system.¹⁰ The Participants request that the Commission grant exemptive relief from the longer data retention time periods set forth in Rule 17a-1 of the Exchange Act, Section 9.1 of the CAT NMS Plan, Section 1.4 of Appendix D of the CAT NMS Plan and certain provisions in Appendix C of the CAT NMS Plan, only as those retention requirements pertain to Industry Test Data.¹¹ The Participants request that in granting this relief, the Commission will only require the Participants, acting through CAT LLC and the Plan Processor, to retain Industry Test Data for a period of three months.¹²

In support of their request, the Participants state that Appendix D of the CAT NMS Plan specifically requires the retention of Industry Test Data for only three months,¹³ and that this specific provision governs the retention period for Industry Test Data, in spite of the lengthier general recordkeeping provisions in the CAT NMS Plan and the even more general recordkeeping requirements of Rule 17a-1 under the Exchange Act.¹⁴ The Participants state

⁸ See Exemptive Request, at 2.

⁹ Id.

¹⁰ Id. at note 6.

¹¹ Id. at 4.

¹² Id. at 1.

¹³ Id. at 2.

¹⁴ See Exemptive Request, at 3.

that Section 9.1 of the CAT NMS Plan incorporates by reference Rule 17a-1 under the Exchange Act, which requires every national securities exchange and national securities association “to keep and preserve at least one copy of all documents, including all correspondence, memoranda, papers, books, notices, accounts, and other such records as shall be made or received by it in the course of its business as such and in the conduct of its self-regulatory activity,” and to keep all such documents “for a period of not less than five years, the first two years in an easily accessible place, subject to the destruction and disposition provisions of Rule 17a-6.”¹⁵ The Participants also state that they do not believe that Industry Test Data constitutes documents covered by Rule 17a-1 under the Exchange Act because to conclude as much would mean that the specific provision in Appendix D of the Plan calling for a three month retention of Industry Test Data would not have any application and would be rendered meaningless.¹⁶ The Participants further state that Section 1.4 of Appendix D, along with certain sections of Appendix C, of the CAT NMS Plan requires that the CAT have a record retention policy that makes “data directly available and searchable electronically without manual intervention for at least six years.”¹⁷ The Participants argue that this six-year requirement only applies to CAT data in the production environment of the Central Repository, and not to Industry Test Data, which has a specific provision calling for the data to be retained for three months only.¹⁸

¹⁵ Id. at 2–3.

¹⁶ Id.

¹⁷ Id., at 3 (referencing Appendix C of the CAT NMS Plan at C-13, C-29, C-129).

¹⁸ Id. The Participants reiterate their belief that the more specific three month requirement should apply by referring to a statement in Appendix C that “[t]he Central Repository will retain data, including the Raw Data, linked data, and corrected data, for at least six years,” to support this view. See id. (referencing Appendix C of the CAT NMS Plan at C-29 (“All of the data (including both corrected and uncorrected or rejected data) in the Central Repository must be kept online for a rolling six year period, which would create a six year historical audit trail.”); Appendix C of the CAT NMS Plan at C-129 (“The Participants are

The Participants state that retaining Industry Test Data for only three months would achieve approximately \$1 million per year in savings.¹⁹ In support of this claim, the Participants note that the Plan Processor has been accumulating and retaining Industry Test Data for years, and thus the current size of the Industry Test Data is approximately 20 petabytes, growing at an average rate of 500 terabytes per month.²⁰ The Participants state that if the Plan Processor were to remove Industry Test Data older than three months on a rolling monthly basis, then it estimates that the CAT would reach a steady state of retaining approximately two petabytes of Industry Test Data per year.²¹

The Participants further state that the costs of retaining the Industry Test Data far outweigh any benefits and that there is little to no regulatory value in retaining the data,²² and that the primary purpose for retaining Industry Test Data for three months is to allow CAT Reporters access to the data to facilitate their own testing needs.²³ While the Participants have used the Industry Test Data for user acceptance testing related to past CAT releases, to date, the Participants state that there has been limited use of the Industry Test Data that adds regulatory value.²⁴ The Participants state that on many days, there are no active queries related to Industry Test Data, and when there have been limited queries performed in the industry test environment, these queries generally were concentrated around Participant user acceptance test periods for

requiring data for six years to be kept online in an easily accessible format to enable regulators to have access to six years of audit trail materials for purposes of its regulation.”)).

¹⁹ Id. at 3–4.

²⁰ Id. at 3.

²¹ Id.

²² Id. at 4.

²³ Id.

²⁴ See Exemptive Request, at 4.

releases.²⁵ The Participants state that going forward, such Participant user acceptance testing would be limited as the CAT functionality is in the maintenance, not development, phase.²⁶ The Participants further state that the substantial price tag of \$1 million per year to retain the Industry Test Data beyond three months is not warranted by this limited incidental regulatory use, as the retention of Industry Test Data beyond three months provides little or no regulatory benefit.²⁷ The Participants also believe that the Commission's prior approval of the CAT NMS Plan with the specific requirement to retain such data for three months supports their conclusion that the retention of Industry Test Data beyond three months is not warranted.²⁸

III. Discussion of Participants' Exemption Request

The Commission has carefully considered the Participants' exemption request. The Commission believes, for the reasons stated below, that granting exemptive relief from the recordkeeping and data retention time periods set forth in Rule 17a-1 of the Exchange Act, Section 9.1 of the CAT NMS Plan, Section 1.4 of Appendix D of the CAT NMS Plan and certain provisions in Appendix C of the CAT NMS Plan (to the extent any may apply), for Industry Test Data, is, pursuant to Section 36(a)(1) of the Exchange Act, 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.

In their exemption request, the Participants state that they retain Industry Test Data through CAT LLC and the Plan Processor, and will continue to retain such data for three months

²⁵ Id.

²⁶ Id.

²⁷ Id.

²⁸ Id.

pursuant to the requirement in Section 1.2 of Appendix D of the CAT NMS Plan.²⁹ The Commission believes that the regulatory value does not justify the approximately \$1 million per year cost for retaining Industry Test Data beyond three months. As the Participants note, the primary purpose of Industry Test Data is to facilitate CAT Reporter testing needs. Indeed, the Participants stated that over the past fifteen months, queries of Industry Test Data generally were concentrated around Participant user acceptance test periods for releases.³⁰ Additionally, Section 1.2 of the CAT NMS Plan requires the operational metrics associated with industry testing to be retained for six years.³¹

Based on the foregoing, pursuant to Section 36(a)(1) of the Exchange Act, it is appropriate in the public interest and consistent with the protection of investors, and pursuant to Rule 608(e), it 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 to grant exemptive relief that exempts each Participant from the longer recordkeeping and data retention requirements for Industry Test Data as set forth in Rule 17a-1 under the Exchange Act, Section 9.1 of the CAT NMS Plan, Section 1.4 of Appendix D of the CAT NMS Plan and Appendix C of the CAT NMS Plan (to the extent any may apply).

IV. Conclusion

The Commission believes it is appropriate to grant exemptive relief that exempts each Participant from the longer recordkeeping and data retention requirements for Industry Test Data

²⁹ Id. at 4.

³⁰ Id. at 4. The Participants state that there have been 406 queries in the industry test environment, which is an average of 27 queries per month during this 15-month period. Id.

³¹ Id. at 2. Specifically, Section 1.2 of Appendix D of the CAT NMS Plan requires that “[o]perational metrics associated with industry testing (including but not limited to testing results, firms who participated, and amount of data reported and linked) must be stored for the same duration as the CAT production data.” Id. Industry Test Data does not include such operational metrics associated with industry testing, and operational metrics will continue to be retained for six years.

as set forth in Rule 17a-1 under the Exchange Act, Section 9.1 of the CAT NMS Plan, Section 1.4 of Appendix D of the CAT NMS Plan and Appendix C of the CAT NMS Plan (to the extent any may apply).

Accordingly, IT IS HEREBY ORDERED, pursuant to Section 36(a)(1) of the Exchange Act,³² and Rule 608(e) of the Exchange Act³³ that the Participants are granted an exemption from the longer recordkeeping and data retention requirements for Industry Test Data as set forth in Rule 17a-1 under the Exchange Act, Section 9.1 of the CAT NMS Plan, Section 1.4 of Appendix D of the CAT NMS Plan and Appendix C of the CAT NMS Plan (to the extent any may apply).

By the Commission.

Christina Z. Milnor,

Assistant Secretary.

³² 15 U.S.C. 78mm(a)(1).

³³ 17 CFR 242.608(e).