

November 22, 2022

VIA EMAIL (tradingandmarkets@sec.gov)

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

Re: Request for Exemption from Provisions of the National Market System Plan Governing the Consolidated Audit Trail Related to FAM 4

Dear Ms. Countryman:

Consolidated Audit Trail, LLC (“CAT LLC”), on behalf of the Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”)² respectfully requests that the Securities and Exchange Commission (“Commission” or “SEC”) use its exemptive authority under Section 36 of the Securities Exchange Act of 1934 (“Exchange Act”)³ and/or Rule 608(e) of Regulation NMS under the Exchange Act⁴ to provide temporary exemptive relief until June 30, 2023 from the provisions in Section 11.6(a)(i)(D) and 11.6(a)(iii) limiting the collection of the full amount of any Post-Amendment Industry Member Fees established or implemented to recover the Post-Amendment Expenses incurred from the date immediately following the achievement of Full Availability and Regulatory Utilization of Transaction Database Functionality to the date of Full Implementation of CAT NMS Plan Requirements (“Period 4”) if Period 4 extends beyond December 30, 2022. The Participants believe that the requested exemption is “necessary or appropriate in the public interest, and

¹ The twenty-five 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., 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, 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.

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.”

consistent with the protection of investors,”⁵ and 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.”⁶ This request for exemptive relief amends and replaces in its entirety the request previously submitted to the Commission on November 16, 2022.

A. Period 4 of the Financial Accountability Milestones

On May 15, 2020, the Commission adopted amendments to the CAT NMS Plan to establish financial accountability provisions to achieve full CAT implementation.⁷ Specifically, Section 11.6 of the CAT NMS Plan requires the Participants to meet four Financial Accountability Milestones by certain dates in order to collect the full amount of any fees established by the Operating Committee, or implemented by the Participants, to recover Post-Amendment Expenses from Industry Members (“Post-Amendment Industry Member Fees”). If the Participants meet the target deadline specified for each Financial Accountability Milestone, Section 11.6 of the CAT NMS Plan would entitle them to collect the full amount of any related Post-Amendment Industry Member Fees. However, if the Participants do not meet the date specified for each Financial Accountability Milestone, Section 11.6 of the CAT NMS Plan would reduce the amount of related Post-Amendment Industry Member Fees that the Participants may recover.

This exemptive request is related to the fourth and final Financial Accountability Milestone (“FAM 4”): Full Implementation of CAT NMS Plan Requirements. “Full Implementation of CAT NMS Plan Requirements” is defined to mean:

the point at which the Participants have satisfied all of their obligations to build and implement the CAT, such that all CAT system functionality required by Rule 613 and the CAT NMS Plan has been developed, successfully tested, and fully implemented at the initial Error Rates specified by Section 6.5(d)(i) or less, including functionality that efficiently permits the Participants and the Commission to access all CAT Data required to be stored in the Central Repository pursuant to Section 6.5(a), including Customer Account Information, Customer-ID, Customer Identifying Information, and Allocation Reports, and to analyze the full lifecycle of an order across the national market system, from order origination through order execution or order cancellation, including any related allocation information provided in an Allocation Report. This Financial Accountability Milestone shall be considered complete as of the date identified in a Quarterly Progress Report meeting the requirements of Section 6.6(c).⁸

⁵ 15 U.S.C. § 78mm(a)(1).

⁶ 17 C.F.R. § 242.608(e).

⁷ See Securities Exchange Act Release No. 88890 (May 15, 2020), 85 Fed. Reg. 31322 (May 22, 2020) (“Financial Accountability Milestones Release”), <https://www.govinfo.gov/content/pkg/FR-2020-05-22/pdf/2020-10963.pdf>.

⁸ Section 1.1 of the CAT NMS Plan.

FAM 4 would include, among other things, the implementation of the Customer Account and Information System (“CAIS”).

Section 11.6(a)(i)(D) of the CAT NMS Plan sets forth the target deadline of December 30, 2022. It states that:

[t]he Participants will be entitled to collect the full amount of: . . . (D) Any Post-Amendment Industry Member Fees established or implemented to recover the Post-Amendment Expenses incurred from the date immediately following the achievement of Full Availability and Regulatory Utilization of Transactional Database Functionality to the date of Full Implementation of CAT NMS Plan Requirements (“Period 4”), so long as such date is no later than December 30, 2022.

If the Participants miss the target deadline of December 30, 2022 for the final Financial Accountability Milestone, the amount of related Post-Amendment Industry Member Fees that the Participants will be entitled to recover for the final Financial Accountability Milestone will immediately be reduced by 25% and then further reduced by 25% for every 90 days by which the Participants miss the target deadline. Specifically, Section 11.6(a)(iii) of the CAT NMS Plan states that:

The amount of Post-Amendment Industry Member Fees that the Participants are entitled to collect for Periods 2, 3, and 4 will be reduced according to the following schedule if the Participants miss the deadline set forth for that Period:

(A) By 25% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by less than 90 days;

(B) By 50% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by 90 days or more, but less than 180 days;

(C) By 75% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by 180 days or more, but less than 270 days; and

(D) By 100% if the Participants miss the deadline set forth in Section 11.6(a)(i)(B)-(D) by 270 days or more.

B. Substantial Progress toward Implementation of FAM 4

CAT LLC has made substantial progress toward satisfaction of FAM 4. As indicated in prior Quarterly Progress Reports, the first three Financial Accountability Milestones have been completed on time. In addition, CAT LLC has made substantial progress in satisfying the primary new addition to the CAT for FAM 4 – the CAIS production environment for customer and account information. CAT LLC has established an implementation schedule for Industry Members and CAT Reporting Agents to achieve compliance with the CAIS reporting

requirements by December 12, 2022.⁹ As of September 30, 2022, 99% of Industry Members and CAT Reporting Agents had completed production readiness certification and 96% of Data Submitters had completed the first interim reporting obligation of the CAIS implementation schedule. As of November 14, 2022, 92% of Data Submitters have completed the second interim reporting obligation of the CAIS implementation schedule, which requires the submission of all active accounts to CAIS. Subject to certain CAIS issues described below, the CAIS production environment has been receiving data, and providing feedback to Industry Members, and such customer and account data is accessible to regulators for surveillance and oversight.

As Industry Members have increased reporting data to the testing and production environment for CAIS, however, the current CAIS system functionality has experienced processing delays and demonstrated certain other processing issues. CAT LLC previously raised the processing delays with the SEC staff with its proposed extension of the CAIS reporting deadline to December 12, 2022. Additional processing issues have been identified as CAT LLC has gained more experience with CAIS and its customer and account data. In response to these technology developments, all responsible parties – the Participants, the Plan Processor and the Plan Processor’s subcontractors – have been working to identify the technology issues, determine appropriate responses and implement solutions in a responsible manner. The Plan Processor identified a set of optimizations designed to address the identified processing delays and continues to evaluate others. Certain optimizations have been implemented and others are scheduled in the near term. Despite these efforts, additional time may be needed to address these new processing issues given the size and complexity of the files involved in CAIS.

The reporting of customer and account information to CAIS is a critically important aspect of the CAT. Accordingly, CAT LLC has determined that a brief delay of six months regarding CAIS would provide CAT LLC and the Plan Processor necessary additional time to properly analyze and responsibly address any issues related to CAIS without incurring a financial penalty in the interim.

C. Reasonable Implementation Delay

The SEC previously has indicated that it would consider the use of its exemptive authority with regard to the Financial Accountability Milestones if the CAT were to experience unforeseeable or reasonable delays in its implementation. When the SEC proposed the Financial Accountability Milestones, the Participants and Industry Members raised concerns about the possibility of unforeseeable or reasonable delays in the implementation of the CAT that should not give rise to financial penalties. For example, the Financial Information Forum stated that the “completion of current and upcoming CAT implementation milestones are all contingent on several challenging and aggressive deliverables, many of which will impact the development, testing, and roll-out of complex technology,” and that “factors outside of the Participants’ and/or Plan Processor’s control may require the regulators to revisit the reasonableness and viability of implementation milestones to preserve the ultimate delivery of a useable CAT in a reasonable

⁹ The phased implementation schedule is described in CAT Alert 2022-01, entitled Full CAIS Reporting Timeline and Interim Reporting Obligations.

timeframe.”¹⁰ Accordingly, FIF recommended that the Commission “allow, after the holistic assessment of all factors impacting the Participants’ ability to meet a particular milestone date, flexibility to extend milestone dates without holding Participants directly accountable (financially or otherwise),” reasoning that this approach would “allow the Commission and Participants to focus on the goal of successfully delivering a functional CAT, rather than focusing on a [sic] milestone target dates, which may raise the risk of lower-quality deliverables.”¹¹ Another commenter “recommend[ed] that the SEC allow for some flexibility or reasonable delays in target deadlines, particularly in matters that may impact data quality.”¹² This commenter noted that “financial penalties will create a degree of friction in the development process that is not conducive to the overall success of the CAT and that may prioritize rushing to complete a target deadline over a long-term view of the CAT.”¹³ The Securities Industry and Financial Markets Association likewise “‘recommended that the Commission take reasonable delays into account in imposing the proposed financial penalties,’ perhaps by ‘suspending the proposed financial penalties based on the cause, foreseeability and attempts to mitigate the impact of the delay.’”¹⁴ Similarly, the Participants stated that “the Commission and all market participants would benefit from a more flexible approach in which the Commission would assess the appropriateness of the recovery of Post-Amendment Industry Member Fees in the context of particular facts and circumstances in the event of a delay in meeting such a Milestone.”¹⁵

Although the SEC determined to include definitive dates in the Financial Accountability Milestones, it noted that “it is sensitive to the concerns expressed by commenters.”¹⁶ In response to these concerns, the Commission expressly indicated that its “authority to grant exemptive relief from any requirement associated with a particular Financial Accountability Milestone . . . should alleviate the Participants’ concerns regarding the potential impact of unforeseeable or reasonable delays.”¹⁷ The proposed brief delay related to CAIS is the type of reasonable delay in the implementation of CAT that was contemplated by this discussion.

The advantages of a brief delay in the application of the fee collection limitations related to Period 4 outweigh the disadvantages. The requested relief from the FAM 4 requirements would only be in place during a short period of six months. This brief delay would allow

¹⁰ Financial Accountability Milestones Release at 31335. *See* Letter from Christopher Bok, Director, Financial Information Forum, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“FIF Letter”), at 4, <https://www.sec.gov/comments/s7-13-19/s71319-6355358-196251.pdf>.

¹¹ FIF Letter at 4.

¹² Financial Accountability Milestones Release at 31335, n.165. *See* Letter from Thomas Tesauro, President, Fidelity Capital Markets, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“Fidelity Letter”), at 5, <https://www.sec.gov/comments/s7-13-19/s71319-6357608-196387.pdf>.

¹³ Fidelity Letter at 5.

¹⁴ Financial Accountability Milestones Release at 31335. *See* Letter from Theodore R. Lazo, Managing Director & Associate General Counsel, and Ellen Greene, Managing Director, Financial Services Operations, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“SIFMA Letter”), at 2, <https://www.sec.gov/comments/s7-13-19/s71319-6366765-195937.pdf>.

¹⁵ Financial Accountability Milestones Release at 31335 n.168. *See* Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated October 28, 2019 (“Participant Letter”), at 10, <https://www.sec.gov/comments/s7-13-19/s71319-6357609-196389.pdf>.

¹⁶ *Id.*

¹⁷ *Id.*

additional time for CAT LLC, the Plan Processor and the Plan Processor's subcontractors to address technology issues related to CAIS. During this time, progress will continue to be made toward full CAIS compliance. For example, it is expected that Industry Members will be required to report customer and account information to CAIS by December 30, 2022, although such reporting is not expected to include reporting requirements related to inconsistencies and reject repair. It is also anticipated that basic reporter portal functionality and enhanced operational monitoring will be in effect by December 30, 2022 as well. In addition, it is expected that the error correction, regulatory access and database management issues related to CAIS would be addressed in the first quarter of 2023. While CAT LLC currently anticipates addressing these issues in the first quarter of 2023, CAT LLC is requesting an exemption until June 30, 2023 to provide additional flexibility with respect to the timeline in the event that additional issues arise.

Furthermore, the requested relief is limited in scope to certain requirements of FAM 4 that are related to CAIS. CAT LLC has satisfied other requirements of FAM 4, including providing CAT system functionality required by Rule 613 and the CAT NMS Plan at or less than the initial Error Rates specified by Section 6.5(d)(i) related to Reportable Events. For example, CAT LLC has provided functionality that efficiently permits the Participants and the Commission to access CAT Data related to Reportable Events and "to analyze the full life cycle of an order across the national market system, from order origination through order execution or order cancellation, including any related allocation information provided in an Allocation Report."¹⁸

Despite the substantial progress toward completion of the CAT, without such additional time as requested herein, the application of the Financial Accountability Milestones would lead to a financial penalty of approximately \$43 million for up to a 90-day delay, and more for any additional delays.¹⁹

D. Request for Temporary Exemptive Relief Related to FAM 4

For the reasons discussed above, CAT LLC requests that the Commission provide temporary conditional exemptive relief from the provisions in Section 11.6(a)(i)(D) and (iii) limiting the collection of the full amount of any Post-Amendment Industry Member Fees established or implemented to recover the Post-Amendment Expenses incurred from the date immediately following the achievement of Full Availability and Regulatory Utilization of Transaction Database Functionality to the date of Full Implementation of CAT NMS Plan Requirements if Period 4 extends beyond December 30, 2022. Specifically, CAT LLC requests exemptive relief to extend the FAM 4 date of December 30, 2022 set forth in Section 11.6(a)(i)(D) to June 30, 2023. The Participants will only be permitted to collect Post-

¹⁸ Section 1.1 of the CAT NMS Plan.

¹⁹ Pursuant to Section 11.6(a)(iii)(A), a delay of up to 90-days in the completion of FAM 4 would result in a 25% reduction in costs that may be recovered. The budget for 2022 (*i.e.*, FAM 4) is approximately \$175 million. Accordingly, the application of the requirements of FAM 4 would lead to an approximately \$43.75 million reduction in the fees that could be collected to fund the CAT if there is a delay of up to 90 days. (The Commission has instituted proceedings to consider the Participants' proposed funding model, which would allocate two-thirds of CAT costs to Industry Members. *See* Securities Exchange Act Rel. No. 95634 (Aug. 30, 2022), 87 Fed. Reg. 54558 (Sept. 6, 2022).)

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Amendment Industry Member Fees for Period 4 after June 30, 2023, or such earlier date that FAM 4 has been satisfied. During this period, CAT LLC will continue to provide the current level of CAT functionality, and will work toward the full completion of the requirements for FAM 4.²⁰

In connection with this request, CAT LLC further requests that the Commission extend the deadline set forth in the Phased Reporting Exemption²¹ requiring each Participant to require, via its Compliance Rule, its Large Industry Members and Small Industry Members to commence full reporting to the Central Repository Phase 2e Industry Member Data from July 11, 2022 to a date no later than June 30, 2023, as determined by CAT LLC.²²

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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
CAT NMS Plan Operating Committee Chair

cc: The Hon. Gary Gensler, Chair
The Hon. Hester M. Peirce, Commissioner
The Hon. Caroline A. Crenshaw, Commissioner
The Hon. Mark T. Uyeda, Commissioner
The Hon. Jaime Lizárraga, Commissioner
Mr. Hugh Beck, Senior Advisor for Regulatory Reporting
Mr. Haoxiang Zhu, Director, Division of Trading and Markets
Mr. David S. Shillman, Associate Director, Division of Trading and Markets
Mr. David Hsu, Assistant Director, Division of Trading and Markets
Mr. Mark Donohue, Senior Policy Advisor, Division of Trading and Markets

²⁰ The Participants note that they have separately requested exemptive relief in other contexts that the Commission may view as relevant to satisfaction of Full Implementation of CAT NMS Plan Requirements. *See, e.g.*, Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated October 27, 2022 (requesting exemptive relief from certain provisions of the CAT NMS Plan related to creating a unique CAT Customer-ID (“CCID”) in certain limited scenarios). To the extent the Commission determines not to grant these exemptions, the Participants do not waive any arguments that they may assert concerning or related to their satisfaction of Full Implementation of CAT NMS Plan Requirements.

²¹ *See* Securities Exchange Act Rel. No. 88702 (Apr. 20, 2020), 85 Fed. Reg. 23075 (Apr. 24, 2020).

²² *See* Letter from Michael Simon, CAT NMS Plan Operating Committee Chair, to Vanessa Countryman, Secretary, Commission, dated June 30, 2022 (previously requesting an extension to December 12, 2022). Industry Members currently are reporting CAIS data to CAT and will continue to do so. The requested exemption would allow Industry Members additional time to repair rejects and report inconsistencies related to CAIS submissions.

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Ms. Erika Berg, Special Counsel, Division of Trading and Markets
CAT NMS Plan Participants