

June 2, 2023

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 Recordkeeping Requirements for Industry Test Data

Dear Ms. Countryman:

The Consolidated Audit Trail, LLC (“CAT LLC” or “Company”), on behalf of the Participants¹ in the National Market System Plan Governing the Consolidated Audit Trail (the “CAT NMS Plan” or “Plan”),² requests that the Securities and Exchange Commission (“Commission” or the “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 retention requirements set forth in Rule 17a-1 under the Exchange Act and certain provisions in the CAT NMS Plan (to the extent any may be applicable) if CAT LLC, through the Plan Processor, retains data from industry testing for both Industry Members and Participants (“Industry Test Data”) for three months only as described in the Plan. The Participants believe that the requested relief is “necessary or appropriate in the public interest, and is consistent with the protection of investors,” 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.”⁵

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., 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 See 17 CFR § 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 17 CFR § 242.608(e).

I. Background

CAT Reporters, including both Participants and Industry Members, engage in testing related to the reporting of order and transaction data to the CAT, both pursuant to required testing and testing on a voluntary basis.⁶ 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. CAT LLC is requesting exemptive relief with regard to such data, referred to herein as “Industry Test Data,” to the extent necessary.

Separate and apart from the Industry Test Data subject to this exemptive request, CAT LLC, through the Plan Processor, also retains operational metrics associated with industry testing for six years in accordance with the Plan. 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.” For purposes of this exemptive request, Industry Test Data does not include such operational metrics.

A. Recordkeeping Requirements

Ordinarily, specific provisions in a statute or regulation prevail over general provisions which might appear to the contrary.⁷ Here, Appendix D of the CAT NMS Plan specifically requires the retention of Industry Test Data for three months only. Specifically, Appendix D of the CAT NMS Plan states that “[d]ata from industry testing must be saved for three months.”⁸ CAT LLC believes that this specific provision governs the retention period for Industry Test Data. The primary purpose of such a provision was to assure that there would be some test data retained and available to the respective CAT Reporters (*i.e.*, Industry Members and Participants) to facilitate their own testing needs.

Separate from this specific three-month retention requirement in Appendix D of the CAT NMS Plan, Rule 17a-1 under the Exchange Act and other more general recordkeeping provisions of the CAT NMS Plan set forth lengthier record retention periods of five and six years, respectively. Rule 17a-1 under the Exchange Act 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,”⁹ 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

⁶ This exemption request only involves test data related to the CAT order and transaction system, not the customer account and information system (“CAIS”).

⁷ See, e.g., *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)).

⁸ Section 1.2 of Appendix D of the CAT NMS Plan at D-4.

⁹ Rule 17a-1(a) under the Exchange Act.

provisions of Rule 17a-6.”¹⁰ The CAT is a facility of each of the Participants to the CAT NMS Plan. In addition, Section 9.1 of the CAT NMS Plan, the general recordkeeping provision for the CAT NMS Plan, incorporates by reference the requirements of Rule 17a-1 under the Exchange Act. Specifically, Section 9.1 of the CAT NMS Plan states, in relevant part, that “[t]he Company shall maintain complete and accurate books and records of the Company in accordance with SEC Rule 17a-1.” However, CAT LLC does not believe that Industry Test Data constitutes documents covered by Rule 17a-1 under the Exchange Act. Among other reasons, 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.

Furthermore, 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.”¹¹ CAT LLC understands the six-year requirement to apply only to CAT data in the production environment of the Central Repository, not to Industry Test Data, which, again, has a specific provision calling for the data to be retained for three months only. Statements in Appendix C support this view. For example, Appendix C of the CAT NMS Plan states that “[t]he Central Repository will retain data, including the Raw Data, linked data, and corrected data, for at least six years.”¹²

The SEC staff indicated that the longer retention periods set forth in Rule 17a-1 under the Exchange Act and the CAT NMS Plan may apply to Industry Test Data, notwithstanding the specific provision in Appendix D of the CAT NMS Plan that Industry Test Data must be retained for three months only. Although CAT LLC disagrees with the staff’s interpretation and adheres to its view that the specific three-month period for Industry Test Data supersedes the more general, longer retention periods, CAT LLC is submitting this exemptive request to obtain clarity in light of the staff’s comments.

B. Cost of Retaining Industry Test Data

To date, the Plan Processor has been retaining Industry Test Data beyond the three-month period prescribed by Appendix D of the CAT NMS Plan. Accordingly, the Industry Test Data has been accumulating for years. The current size of the Industry Test Data is approximately 20 petabytes and is growing at an average rate of 500 terabytes per month. If the Plan Processor were to remove the Industry Test Data older than three months and continue to remove such Industry Test Data older than three months on a monthly basis, it is estimated that the CAT would reach a steady state of retaining approximately two petabytes of Industry Member Data

¹⁰ Rule 17a-1(b) under the Exchange Act.

¹¹ Section 1.4 of Appendix D of the CAT NMS Plan at D-5. *See also* Appendix C of the CAT NMS Plan at C-13, C-29, C-129.

¹² Appendix C of the CAT NMS Plan at C-13. *See also* 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 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.”).

per year. By reducing the retention of Industry Member Data from approximately 20 petabytes per year to approximately two petabytes per year, the CAT would achieve approximately \$1 million per year in savings.

C. No Regulatory Value of Industry Test Data

CAT LLC believes that the costs of retaining the Industry Test Data beyond three months far outweighs any benefits. As noted above, the primary purpose for retaining Industry Test Data for three months only is to allow CAT Reporters access to the data to facilitate their own testing needs. The substantial price tag of \$1 million per year to retain the data beyond three months is not warranted by any potential incidental regulatory benefits, as the retention of Industry Test Data beyond three months provides little or no regulatory benefit. The Participants use the Industry Test Data for user acceptance testing related to CAT releases. To date, there has been limited use of the Industry Test Data. For example, over the past fifteen months, there have been 406 queries in the industry test environment, which is an average of 27 queries per month. Moreover, these queries generally were concentrated around Plan Participant user acceptance test periods for releases. Going forward, such Plan Participant user acceptance testing would be limited as the CAT functionality is in the maintenance, not the development phase. Furthermore, on many days, there are no active queries related to Industry Test Data at all. The SEC's approval of the CAT NMS Plan with the specific requirement to only retain such data for three months supports the conclusion that the retention of Industry Test Data beyond three months is not required or warranted.

II. Request for Exemption

Given the specific three-month retention provision in the CAT NMS Plan as well as a cost-benefit analysis that supports the three-month retention period, CAT LLC requests that the Commission provide exemptive relief pursuant to the Commission's authority under Section 36 of the Exchange Act and Rule 608(e) of Regulation NMS under the Exchange Act from the retention requirements 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) if CAT LLC retains Industry Test Data for three months only. CAT LLC, through the Plan Processor, would continue to comply with the requirement in Section 1.2 of Appendix D of the CAT NMS Plan that states 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," that is, for six years.

Respectfully submitted,

/s/ Brandon Becker

Brandon Becker
CAT NMS Plan Operating Committee Chair

Ms. Vanessa Countryman

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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
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