

August 18, 2023

**Via Email**

Ms. Vanessa Countryman  
Secretary  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, D.C. 20549

Re: Application for Exemptive Relief Pursuant to Rule 602(d) of Regulation NMS

Dear Ms. Countryman:

Pursuant to Rule 602(d) of Regulation NMS<sup>1</sup> under the Securities Exchange Act of 1934 (the “Act”), NYSE National, Inc. (“NYSE National” or the “Exchange”) respectfully requests that the U.S. Securities and Exchange Commission (the “Commission”) exempt the Exchange from the provisions of Regulation NMS Rule 602 (the “Quote Rule”) with respect to its planned dissemination of a Retail Liquidity Identifier containing certain information regarding Retail Price Improvement Orders (“RPI Orders”) pursuant to the proposed NYSE National Retail Liquidity Program (the “Program”). The Exchange recently filed a proposed rule change to establish the Program and proposes to implement the rule change in the third quarter of 2023.<sup>2</sup> NYSE National requests that the Commission exempt the Exchange from the requirement of Regulation NMS Rule 602(a) to allow it to disseminate the Retail Liquidity Identifier to indicate the presence of RPI Order interest without including such interest in the Exchange’s quotation.<sup>3</sup> As described below, the Exchange believes that such exemption would be consistent with the public interest and the protection of investors and would remove impediments to and perfect the mechanism of a national market system.<sup>4</sup>

**Background**

On August 8, 2023, the Exchange filed a proposed rule change to implement the Program, which is designed to attract retail order flow to the Exchange and allow such order flow to

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<sup>1</sup> 17 CFR 242.602(d).

<sup>2</sup> See SR-NYSENAT-2023-17 (August 8, 2023).

<sup>3</sup> 17 CFR 242.600(b)(75). The Exchange notes that the Commission previously granted Investors Exchange LLC (“IEX”) an exemption from the Quote Rule in connection with the dissemination of a similar liquidity indicator pursuant to its retail price improvement program. See Securities Exchange Act Release No. 93217 (September 30, 2021), 86 FR 55663 (October 6, 2021) (Order Granting Application of Investors Exchange LLC for a Limited Exemption from Rule 602 of Regulation NMS for its Retail Price Improvement Program) (“IEX Rule 602 Exemptive Order”).

<sup>4</sup> 17 CFR 242.602(d).

receive potential price improvement at the midpoint or better. As described in greater detail below, the Program would allow NYSE National ETP Holders to provide potential price improvement to retail investor orders by submitting RPI Orders priced at the less aggressive of the midpoint of the PBBO or their limit price.<sup>5</sup> When there is an RPI Order in a particular security that is eligible to trade at the midpoint of the PBBO, the Exchange would disseminate the Retail Liquidity Identifier to indicate that such interest is available on the Exchange.<sup>6</sup> Retail Member Organizations (“RMOs”) would be able to submit a Retail Order to the Exchange, which interacts, to the extent possible, with available contra-side RPI Orders and may interact with other liquidity on the Exchange, depending on the Retail Order’s instructions.<sup>7</sup> The segmentation in the Program would allow retail order flow to receive potential price improvement as a result of that order flow being deemed more desirable by liquidity providers.

Below is a description of key aspects of the Program, as described in the Exchange’s rule filing:

**Participants and Order Types.** As described in the Exchange’s rule filing, the Program provides for a class of market participants known as Retail Member Organizations and two new order types (Retail Orders and RPI Orders).

- **Retail Member Organization.** An RMO is an ETP Holder approved by the Exchange to submit Retail Orders pursuant to the Program. To qualify as an RMO, an ETP Holder must conduct a retail business or handle retail orders on behalf of another broker-dealer. An RMO must submit an attestation that substantially all orders it submits will qualify as a Retail Order and provide supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant’s order flow. The Exchange may disqualify an RMO for submitting orders designated as Retail Orders that fail to meet the requirements of the Program, subject to the process set forth in Exchange rules.
- **Retail Order.** A Retail Order is an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 originating from a natural person, submitted by an RMO pursuant to the Program without modification with respect to price or side of market, and not generated by a trading algorithm or other computerized methodology. Retail Orders may interact, in accordance with the RMO’s instructions, with (1) liquidity in the Program and (2) other interest in Exchange systems.
- **Retail Price Improvement Order.** An RPI Order consists of non-displayed midpoint interest that is eligible to trade only with incoming Retail Orders submitted by an RMO.

**Retail Order Designations.** An RMO can designate how a Retail Order would interact with available contra-side interest as follows.

- A Type 1 Retail Order to buy (sell) is an MPL IOC Order and will have a working price at the lower (higher) of the midpoint of the PBBO or its limit price and trade only with available RPI Orders to sell (buy) and all other orders to sell (buy) with a working price

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<sup>5</sup> See NYSE National Rule 7.44(a)(3) (defining RPI Order).

<sup>6</sup> See NYSE National Rule 7.44(e) (defining Retail Liquidity Identifier).

<sup>7</sup> See NYSE National Rules 7.44(a)(1) (defining RMO), 7.44(a)(2) (defining Retail Order), and 7.44(f) (describing the operation and designation of Retail Orders).

below (above) or equal to the midpoint of the PBBO on the Exchange Book. A Type 1 Retail Order does not route, and any quantity of such order to buy (sell) that does not trade with eligible orders to sell (buy) will be immediately and automatically cancelled. A Type 1 Retail Order will be cancelled on arrival if there is no PBBO or the PBBO is locked or crossed.

- A Type 2 Retail Order to buy (sell) is a Limit IOC Order that will trade first with available RPI Orders to sell (buy) and all other orders to sell (buy) with a working price below (above) the PBO (PBB) on the Exchange Book. Any remaining quantity of the Type 2 Retail Order will trade with orders to sell (buy) on the Exchange Book at prices equal to or above (below) the PBO (PBB) and will be traded as a Limit IOC Order and will not route.

***Retail Liquidity Identifier.*** The Exchange will disseminate the Retail Liquidity Identifier through proprietary data feeds, the UTP Quote Data Feed, or the Consolidated Quotation System, as applicable, when RPI Order interest eligible to trade at the midpoint of the PBBO is available in Exchange systems. The Retail Liquidity Identifier will reflect the symbol and the side (buy or sell) of the RPI Order interest but will not include the price or size of such interest.

***Priority and Order Allocation.*** RPI Orders in the same security would be ranked together with all other non-displayed interest according to price then time of entry into Exchange systems. Any displayable odd lot interest would be ranked ahead of any RPI Orders and other non-displayed interest at any given price point. Executions would occur in price-time priority in accordance with NYSE National Rule 7.36. Any remaining unexecuted RPI Order interest would remain available to interact with other incoming Retail Orders if such interest was at an eligible price. Any remaining unexecuted portion of a Retail Order would cancel in accordance with NYSE National Rule 7.44(f).

In order to attract Retail Orders to the Program and promote competition among liquidity providers of RPI Order interest, the Program provides for the dissemination of a Retail Liquidity Identifier that will indicate the presence of RPI Order interest but not the explicit price or size of such interest. The purpose of the Retail Liquidity Identifier is to alert RMOs that there is RPI Order interest on the Exchange, thereby incentivizing them to send Retail Orders to the Exchange. In addition, liquidity providers for RPI Order interest will continue to compete for execution priority with earlier arriving non-displayed orders priced to trade at the midpoint.

## **Discussion**

The Exchange appreciates the positive impact that the Quote Rule, as amended, has had on the national market system. The obligations of exchanges to disseminate quotations under Regulation NMS Rule 602(a), and those of responsible brokers and dealers to communicate prices and quotation sizes to exchanges under Regulation NMS Rule 602(b), depend on the definition of “bid” and “offer” under Regulation NMS Rule 600(b)(11), which states in pertinent part:

*Bid or offer* means the bid price or the offer price communicated by a member of a national securities exchange...to any broker or dealer, or to any customer, at which it is willing to buy or sell one

or more round lots of any NMS security, as either principal or agent, but shall not include indications of interest.<sup>8</sup>

The Exchange notes that, because the Retail Liquidity Identifier would indicate that there are RPI Orders eligible to trade at the midpoint, dissemination of the Retail Liquidity Identifier will indicate to incoming marketable Retail Orders the availability of price improvement at the midpoint price.

The Exchange believes that the Program, including the dissemination of the Retail Liquidity Identifier, has the potential to provide additional trading opportunities for retail investors, further to the goals of the national market system in general and the Quote Rule in particular. The Program is intended to facilitate potential price improvement opportunities for retail order flow at the midpoint or better and could provide more deterministic price improvement opportunities for retail investors. The Retail Liquidity Identifier would support the objectives of the Program by notifying RMOs of the availability of RPI interest on the Exchange, thereby encouraging them to send Retail Orders to the Exchange to interact with those RPI Orders. In addition, as noted above, RPI Orders will continue to compete for priority to execute against incoming Retail Orders because RPI Orders and other orders eligible to trade with Retail Orders will be ranked and allocated based on price-time priority.

The Retail Liquidity Identifier would also provide additional transparency regarding liquidity available to retail investors. The Retail Liquidity Identifier would serve a similar purpose to the identifiers currently disseminated by other exchanges operating price improvement programs (including one that likewise indicates the availability of interest at the midpoint),<sup>9</sup> as it would inform RMOs about the availability of potential price improvement opportunities for Retail Orders at the midpoint or better. With the information provided by the Retail Liquidity Identifier, RMOs would be in a better position to seek price improvement for the benefit of their retail clients. The Exchange also believes that the dissemination of the Retail Liquidity Identifier through the appropriate securities information processor and the Exchange's proprietary market data feeds to identify the presence of RPI Orders available to trade with Retail Orders could result in more market participants competing to provide contra-side trading interest for retail liquidity at the midpoint, thereby providing additional and enhanced trading opportunities to retail investors, as well as increased retail order flow to the Exchange.

The Exchange also believes that the dissemination of the Retail Liquidity Identifier could encourage competition for retail order flow among execution venues by promoting price improvement opportunities for retail investors on a public exchange and enhance the ability of the Program to compete for retail order flow. The Exchange believes that dissemination of the Retail Liquidity Identifier is an important component of the Program because it is intended to attract both providers of RPI Order interest and Retail Orders to the Program, and identifying the presence of eligible RPI Order interest could help bring together retail order flow and contra-side interest for execution on the Exchange.

Finally, the Exchange notes that quotations to be included in an exchange's best bid and offer pursuant to Rule 602 are used to establish the national best bid and offer for an NMS stock and

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<sup>8</sup> 17 CFR 242.600(b)(9).

<sup>9</sup> See, e.g., IEX Rule 11.232(f); New York Stock Exchange LLC Rule 7.44(j); NYSE Arca, Inc. Rule 7.44-E(j).

are eligible for protection against trade-throughs under Rule 611 of Regulation NMS.<sup>10</sup> Accordingly, such quotations are required to be accessible to all market participants on terms that are not unfair or unreasonably discriminatory. By contrast, as the Commission has previously noted, access to RPI Order interest is reasonably limited to Retail Orders because many market participants may be willing to offer liquidity to retail investors at better prices than they would be willing to offer to all market participants; RPI Order interest thus can benefit retail investors by providing opportunities for price improvement on exchanges, but may not be suitable for purposes of establishing a national best bid and offer and eligibility for Rule 611 protection.<sup>11</sup> Accordingly, the Exchange believes that a limited exemption from the Quote Rule to permit the dissemination of the Retail Liquidity Identifier without including RPI Order interest in the Exchange's quotation would be consistent with the public interest and the protection of investors and would remove impediments to and perfect the mechanism of a national market system.

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For the reasons set forth above, the Exchange respectfully requests an exemption pursuant to Regulation NMS Rule 602(d) with respect to the dissemination of the Retail Liquidity Identifier via proprietary data feeds and through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable, to permit NYSE National to disseminate the Retail Liquidity Identifier to indicate the availability of RPI Order interest without including such interest in the Exchange's quotation.

Thank you for your consideration of this request.

Respectfully submitted,



CC: David Shillman  
Associate Director  
Division of Trading and Markets

Kelly Riley  
Senior Special Counsel  
Division of Trading and Markets

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<sup>10</sup> 17 CFR 242.611.

<sup>11</sup> See IEX Rule 602 Exemptive Order, note 3, supra.