

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98206)

August 23, 2023

Order Granting Application of NYSE National, Inc. for a Limited Exemption from Rule 602 of Regulation NMS for its Retail Liquidity Program

By letter dated August 18, 2023 (the “Application”),<sup>1</sup> NYSE National, Inc. (“NYSE National” or the “Exchange”) requests a limited exemption from the requirements of Rule 602 of Regulation NMS<sup>2</sup> (the “Quote Rule”) for its planned dissemination of a Retail Liquidity Identifier (“RLI”) that would contain certain information regarding non-displayed Retail Price Improvement Orders (“RPI Orders”) pursuant to the NYSE National’s Retail Liquidity Program (the “Program”).<sup>3</sup>

The purpose of the Program is to attract retail order flow to the Exchange by allowing ETP Holders to provide potential price improvement to retail investor orders (“Retail Orders”)<sup>4</sup> in the form of an RPI Order. An RPI Order is defined as “an MPL Order that is eligible to trade only with incoming Retail Orders submitted by an RMO.”<sup>5</sup> An MPL or Mid-Point Liquidity Order is defined as “[a] Limit Order to buy (sell) that is not displayed and does not route, with a

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<sup>1</sup> See Letter from Hope M. Jarkowski, General Counsel, New York Stock Exchange to Vanessa Countryman, Secretary, Commission, dated August 18, 2023.

<sup>2</sup> 17 CFR 242.602.

<sup>3</sup> See Securities Exchange Act Release No. 98169 (August 18, 2023)(Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.44)(“Notice”).

<sup>4</sup> NYSE National Rule 7.44(a)(3) defines a Retail Order as “an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted by an RMO provided that no change is made to the terms of the order with respect to price or side of market and that the order does not originate from a trading algorithm or other computerized methodology.”

<sup>5</sup> NYSE National Rule 7.44(a)(3). This section of the NYSE National Rule also defines an RMO or Retail Member Organization as “an ETP Holder that is approved by the Exchange under this rule to submit Retail Orders.” 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. The segmentation in the Program would allow retail order flow to receive potential price improvement. See Notice at 2.

working price at the lower (higher) of the midpoint of the [protected bid and protected offer] PBBO or its limit price.”<sup>6</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 RLI through proprietary data feeds and through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable.<sup>7</sup> The RLI would reflect the symbol for the particular security and the side (buy or sell) of the RPI interest but would not include the price or size of the RPI interest.<sup>8</sup>

When the Commission adopted the Quote Rule (then Rule 11Ac1-1) it sought to facilitate the establishment of a comprehensive composite quotation system across market centers as an integral component of a national market system.<sup>9</sup> The Quote Rule requires national securities exchanges and national securities associations to, among other things, collect, process, and make available to vendors the best bid, the best offer, and aggregate quotation sizes for each subject security listed or admitted to unlisted trading privileges that is communicated on any national securities exchange by any responsible broker or dealer.<sup>10</sup> Regulation NMS defines a “bid” or “offer” as the bid price or the offer price communicated by a member of a national securities exchange or member of a national securities association to any broker or dealer, or to any customer, at which it is willing to buy or sell one or more round lots of an NMS security, as

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<sup>6</sup> NYSE National Rule 7.31(d)(3).

<sup>7</sup> NYSE National Rule 7.44(e).

<sup>8</sup> Id.

<sup>9</sup> See Securities Exchange Act Release No. 14415 (January 26, 1978), 43 FR 4342 (February 1, 1978). Regulation NMS redesignated Rule 11Ac1-1 as Regulation NMS Rule 602, but left the substance of the rule largely intact. See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37570 (June 29, 2005) (File No. S7-10-04).

<sup>10</sup> See 17 CFR 242.602(a)(1). The Quote Rule further provides that nothing shall preclude any national securities exchange from making available to vendors indications of interest or bids and offers for a subject security at any time such exchange is not required to do so. See 17 CFR 242.602(a)(4).

either principal or agent, but shall not include indications of interest.

Other exchanges that operate retail liquidity programs also disseminate retail liquidity identifiers in order to attract retail order flow.<sup>11</sup> NYSE National's RLI would serve a similar purpose to the identifiers currently disseminated by other exchanges operating retail liquidity programs,<sup>12</sup> including one that likewise indicates the availability of potentially price-improving interest at the midpoint,<sup>13</sup> as it would inform market participants about the availability of potential price improvement opportunities for Retail Orders. The NYSE National RLI will indicate the availability of RPI Orders priced at the midpoint, which can potentially benefit retail investors by offering price improvement opportunities. NYSE National's Program, like other exchanges' retail liquidity programs, allows for the limited segmentation of retail order flow for the express purpose of allowing NYSE National to compete with other exchanges and off-exchange market makers to provide price improvement to retail customers, thus ensuring that retail customers can benefit from the willingness of liquidity providers to give their orders better prices.

Under Rule 602(d) of Regulation NMS, the Commission may exempt from the provisions of the Quote Rule, either unconditionally or on specified terms and conditions, a national securities exchange (among others) if it determines that such exemption is consistent with the public interest, the protection of investors and the removal of impediments to and

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<sup>11</sup> See, e.g., Cboe BYX Exchange, Inc. Rule 11.24(e); Nasdaq BX, Inc. Rule 4780(e); Investors Exchange LLC ("IEX") Rule 11.232(f); New York Stock Exchange LLC Rule 7.44(j). The Commission previously granted 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).

<sup>12</sup> See e.g., Cboe BYX Exchange, Inc. Rule 11.24(e); Nasdaq BX, Inc. Rule 4780(e); and New York Stock Exchange LLC Rule 7.44(j).

<sup>13</sup> See, e.g., IEX Rule 11.232(f); and New York Stock Exchange LLC Rule 7.44(j).

perfection of the mechanism of a national market system.<sup>14</sup>

The Commission hereby grants the Exchange a limited exemption from the Quote Rule to operate the Program and disseminate the RLI without having to include RPI Order interest in NYSE National's best bid or offer. For the reasons discussed below, the Commission has determined that it is consistent with the public interest, the protection of investors and the removal of impediments to and perfection of the mechanism of a national market system to provide a limited exemption from Rule 602 of Regulation NMS with respect to NYSE National's RLI disseminated under the Program.

In light of the opportunity for retail customers to obtain potentially substantial price improvement at midpoint prices under NYSE National's Program, and in the interests of facilitating the ability of NYSE National to compete to be able to provide that opportunity to Retail Orders in the limited context of the Program, providing a limited exemption should promote competition between exchanges and between NYSE National and off-exchange market makers.

Broad dissemination of the RLI through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable, should benefit retail customers by providing broker-dealers that route Retail Orders with limited supplemental information about the availability of price improvement opportunities for Retail Orders under the Program.<sup>15</sup> To the extent the RLI is successful in attracting Retail Orders to the Program, the increased competition should benefit retail customers by providing a mechanism through which they can receive the better prices for their orders from willing liquidity providers. This exemption also should benefit market

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<sup>14</sup> 17 CFR 242.602(d).

<sup>15</sup> The RLI will not reveal the presence of other midpoint interest. Non-displayed midpoint interest could be present on NYSE National outside of the Program, and Retail Orders will be able to trade with that interest.

participants that seek the opportunity to interact directly with Retail Orders, as any liquidity provider may submit RPI Orders to provide better prices to retail customers on the Exchange. Quotations that Rule 602 requires to be included in an exchange's best bid and offer are used to establish the national best bid and offer for an NMS stock and are eligible for protection against trade-throughs under Rule 611 of Regulation NMS.<sup>16</sup> Such quotations therefore must be accessible to all market participants on terms that are not unfair or unreasonably discriminatory. In contrast, access to RPI Order interest is 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 all market participants. RPI Order interest thereby can benefit retail investors by giving them an opportunity to receive better prices on exchanges, but it is unsuitable for other purposes, including establishing a national best bid and offer and eligibility for Rule 611 protection.

Accordingly, IT IS ORDERED, pursuant to Rule 602(d) of Regulation NMS, that NYSE National is exempt from Rule 602 of Regulation NMS with respect to NYSE National's Program specifically concerning the dissemination of the RLI to advertise the presence of RPI Order interest under the Program without including RPI Orders in the Exchange's quotation. This exemption is conditioned on the Exchange continuing to conduct the Program substantially as described in the Exchange's request for exemptive relief and the current applicable Exchange rules, including the dissemination of the RLI through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable. Any changes thereto may cause the Commission to reconsider this exemption. The foregoing exemption is subject to modification or revocation at

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<sup>16</sup> See 17 CFR 242.611.

any time if the Commission determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act.

For the Commission, by the Division of Trading and Markets pursuant to delegated authority.<sup>17</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>17</sup> 17 CFR 200.30-3(a)(28).