

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93804)

December 16, 2021

Order Granting Applications by Nasdaq BX, Inc., The Nasdaq Stock Market LLC, and Nasdaq PHLX LLC for Exemption Pursuant to Section 36(a) of the Exchange Act from the Rule Filing Requirements of Section 19(b) of the Exchange Act with Respect to the Nasdaq ISE, LLC Options 4 Options Listing Rules Incorporated by Reference

Nasdaq BX, Inc. (“BX”), The Nasdaq Stock Market LLC (“Nasdaq”), and Nasdaq PHLX LLC (“Phlx”) (collectively the “Exchanges”) have filed with the Securities and Exchange Commission (the “Commission”) an application for an exemption under Section 36(a)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ from the rule filing requirements of Section 19(b) of the Exchange Act² with respect to certain rules of Nasdaq ISE, LLC (“ISE”) that the Exchanges seek to incorporate by reference (“ISE Options 4 Rules”).³ Section 36(a)(1) of the Exchange Act,⁴ subject to certain limitations, authorizes the Commission to conditionally or unconditionally exempt any person, security, or transaction, or any class thereof, from any provision of the Exchange Act or rule thereunder, if necessary or appropriate in the public interest and consistent with the protection of investors.

The Exchanges each filed a proposed rule change⁵ under Section 19(b) of the Exchange Act to replace its Options 4 Options Listing Rules (“Options Listing Rules”), as set forth in

¹ 15 U.S.C. 78mm(a)(1).

² 15 U.S.C. 78s(b).

³ See letter from Angela S. Dunn, Principal Associate General Counsel, Nasdaq Inc., to J. Matthew DeLesDernier, Assistant Secretary, Commission, dated September 3, 2021 (“Exemptive Request”).

⁴ 15 U.S.C. 78mm(a)(1).

⁵ See Securities Exchange Act Release Nos. 92987 (September 15, 2021), 86 FR 52511 (September 21, 2021) (SR-BX-2021-038); 93003 (September 15, 2021), 86 FR 52534 (September 21, 2021) (SR-NASDAQ-2021-070); 92990 (September 15, 2021) 86 FR 52513 (September 21, 2021) (SR-PHLX-2021-53). Although the proposed rule changes

Options 4 of their respective rulebooks, with the Options 4 Rules of the ISE rulebook, as such rules may be in effect from time to time. Namely, in the proposed rule changes, the Exchanges each proposed to incorporate by reference the ISE Options 4 Rules such that ISE Options 4 Rules would be applicable to each of the Exchanges' respective members, member organizations, Participants, Options Participants, associated persons and personnel, and other persons subject to the Exchanges' jurisdiction as though such rules were fully set forth within each of the Exchanges' rulebooks.⁶

The Exchanges have requested, pursuant to Rule 0-12 under the Exchange Act,⁷ that the Commission grant the Exchanges an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to each of the Exchanges' rules that are effected solely by virtue of a change to the ISE Options 4 Rules that are incorporated by reference. Specifically, the Exchanges request that they be permitted to incorporate by reference changes made to the ISE Options 4 Rules that are cross-referenced in each of the Exchanges' rules without the need for each of the Exchanges to file separately the same proposed rule change pursuant to Section 19(b) of the Exchange Act.⁸

The Exchanges represent that the ISE Options 4 Rules are not trading rules.⁹ Moreover, the Exchanges state that in each instance, they propose to incorporate by reference a category of

were filed pursuant to Section 19(b)(3)(A)(iii) of the Exchange Act, and thereby became effective upon filing with the Commission, the Exchanges stipulated in their proposals that the incorporation by reference would not be operative until such time as the Commission grants this Exemptive Request.

⁶ See note 5, supra.

⁷ 17 CFR 240.0-12.

⁸ See Exemptive Request, supra note 3.

⁹ Id. at 2.

rules (rather than individual rules within a category).¹⁰ The Exchanges also represent that, as a condition of this exemption, the Exchanges will provide written notice to their respective members, member organizations, Participants, Options Participants, associated persons and personnel, whenever ISE proposes a change to ISE Options 4 Rules.¹¹ Additionally, the Exchange will similarly inform their members, member organizations, Participants, associated persons and personnel, in writing when the Commission approves any such proposed changes.¹²

According to the Exchanges, this exemption is necessary and appropriate because it will result in the Exchanges' Options Listing Rules being consistent with the relevant cross-referenced ISE Options Listing Rules at all times.¹³ The Exchanges states that harmonization of the Options Listing Rules between the Exchanges and ISE will ensure consistent regulation of joint members of the Phlx, Nasdaq, BX and ISE and increase internal efficiencies associated with administering the options listing rules of each exchange.¹⁴

The Commission has issued exemptions similar to the Exchanges' request.¹⁵ The Commission has stated that it would consider exemption requests, provided that:

¹⁰ Id. at 2, n.7.

¹¹ Id. at 3. The Exchanges state that they will provide such notice via a posting on the same website location where the Exchanges post their own rule filings pursuant to Rule 19b-4(l) within the timeframe required by such Rule. In addition, the Exchanges state that the website posting will include a link to the location on ISE's website where the applicable proposed rule change is posted. Id. at 3 n.8.

¹² See id. at 3.

¹³ See id. at 2.

¹⁴ See id.

¹⁵ See Securities Exchange Act Release No. 70050 (July 26, 2013), 78 FR 46622 (August 1, 2013) (order granting approval of Topaz Exchange, LLC as a national securities exchange and incorporating by reference listing rules of Nasdaq ISE, LLC). See also, e.g., Securities Exchange Act Release Nos. 92136 (June 9, 2021), 86 FR 31772 (June 15, 2021) (order granting exemptive request from Nasdaq GEMX, LLC and Nasdaq MRX, LLC relating to rules of The Nasdaq Stock Market LLC incorporation by reference);

- A self-regulatory organization (“SRO”) wishing to incorporate rules of another SRO by reference has submitted a written request for an order exempting it from the requirement in Section 19(b) of the Exchange Act to file proposed rule changes relating to the rules incorporated by reference, has identified the applicable originating SRO(s), together with the rules it wants to incorporate by reference, and otherwise has complied with the procedural requirements set forth in the Commission’s release governing procedures for requesting exemptive orders pursuant to Rule 0-12 under the Exchange Act;¹⁶

91202 (February 24, 2021), 86 FR 12250 (March 2, 2021) (order granting application by Nasdaq ISE, LLC for exemption pursuant to Section 36(a) of the Exchange Act from the rule filing requirements of section 19(b) of the Exchange Act with respect to the Nasdaq Rule 1000 Series incorporated by reference); 89902 (September 17, 2020), 85 FR 59843 (September 23, 2020) (order granting exemptive request from Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, and Nasdaq PHLX LLC relating to investigatory, disciplinary, and adjudication rules of The Nasdaq Stock Market LLC incorporation by reference); 86896 (September 6, 2019), 84 FR 48186 (September 12, 2019) (order granting exemptive request from Nasdaq BX, Inc. relating to rules of The Nasdaq Stock Market LLC incorporation by reference); 80338 (March 29, 2017), 82 FR 16464 (April 4, 2017) (order granting exemptive request from MIAX PEARL, LLC relating to rules of Miami International Securities Exchange, LLC incorporated by reference); 72650 (July 22, 2014), 79 FR 44075 (July 29, 2014) (order granting exemptive requests from NASDAQ OMX BX, Inc. and the NASDAQ Stock Market LLC relating to rules of NASDAQ OMX PHLX LLC incorporated by reference); 67256 (June 26, 2012), 77 FR 39277, 39286 (July 2, 2012) (order approving SR-BX-2012-030 and granting exemptive request relating to rules incorporated by reference by the BX Options rules); 61534 (February 18, 2010), 75 FR 8760 (February 25, 2010) (order granting BATS Exchange, Inc.’s exemptive request relating to rules incorporated by reference by the BATS Exchange Options Market rules) (“BATS Options Market Order”); and 57478 (March 12, 2008), 73 FR 14521, 14539-40 (March 18, 2008) (order approving SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080, and granting exemptive request relating to rules incorporated by reference by The NASDAQ Options Market).

¹⁶ See 17 CFR 240.0-12 and Securities Exchange Act Release No. 39624 (February 5, 1998), 63 FR 8101 (February 18, 1998) (“Commission Procedures for Filing Applications for Orders for Exemptive Relief Pursuant to Section 36 of the Exchange Act; Final Rule”).

- The incorporating SRO has requested incorporation of categories of rules (rather than individual rules within a category) that are not trading rules (e.g., the SRO has requested incorporation of rules such as margin, suitability, or arbitration); and
- The incorporating SRO has reasonable procedures in place to provide written notice to its members each time a change is proposed to the incorporated rules of another SRO.¹⁷

The Commission believes that the Exchanges have satisfied each of these conditions. Further, the Commission also believes that granting the Exchanges an exemption from the rule filing requirements under Section 19(b) of the Exchange Act will promote efficient use of the Commission's and the Exchanges' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO.¹⁸ The Commission therefore finds it appropriate in the public interest and consistent with the protection of investors to exempt the Exchanges from the rule filing requirements under Section 19(b) of the Exchange Act with respect to the above-described rules it incorporates by reference. This exemption is conditioned upon the Exchanges promptly providing written notice to their respective members, member organizations, Participants, Options Participants, associated persons and personnel whenever ISE proposes to change a rule that the Exchanges incorporate by reference and whenever the Commission approves any such proposed rule change.

¹⁷ See BATS Options Market Order, supra note 15 (citing Securities Exchange Act Release No. 49260 (February 17, 2004), 69 FR 8500 (February 24, 2004) (order granting exemptive request relating to rules incorporated by reference by several SROs) ("2004 Order")).

¹⁸ See BATS Options Market Order, supra note 15, 75 FR at 8761; see also 2004 Order, supra note 17, 69 FR at 8502.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,¹⁹ that the Exchanges are exempt from the rule filing requirements of Section 19(b) of the Exchange Act solely with respect to changes to the rules identified in the Exemptive Request, provided that the Exchanges promptly provide written notice to their applicants and members whenever ISE proposes to change a rule that the Exchanges have incorporated by reference.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 15 U.S.C. 78mm.

²⁰ 17 CFR 200.30-3(a)(76).