

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85203)

February 26, 2019

Order Granting Applications by Nasdaq BX, Inc. 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 Certain Order Audit Trail System Rules Incorporated by Reference

Nasdaq BX, Inc. (“BX”) and Nasdaq PHLX LLC (“Phlx”) (each the “Exchange” and collectively, the “Exchanges”) have filed with the Securities and Exchange Commission (“Commission”) an application for an exemption from the rule filing requirements of Section 19(b) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ with respect to certain rules of Financial Industry Regulatory Authority (“FINRA”) that the Exchanges seek to incorporate by reference. Section 36(a)(1) of the Exchange Act,² 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 change³ under Section 19(b) of the Exchange Act to amend their respective Order Audit Trail System (“OATS”) rules, some of which incorporate by reference the rules contained in the FINRA Rule 7400 Series entitled “Order Audit Trail System,” as such rules may be in effect from time to time, and reference FINRA Rule 4590 entitled “Synchronization of Member Business Clocks.” In the proposed rule changes, the Exchanges proposed to incorporate by reference FINRA Rules 4590, 7440, and

¹ 15 U.S.C. 78s(b).

² 15 U.S.C. 78mm(a)(1).

³ See Securities Exchange Act Release Nos. 84227 (September 20, 2018), 83 FR 48483 (September 25, 2018) (SR-BX-2018-045) and 84545 (November 6, 2018), 83 FR 56387 (November 13, 2018) (SR-Phlx-2018-68).

7450, and thus make these rules applicable to Exchange members in the case of BX, and member organizations in the case of Phlx.⁴

The Exchanges request, pursuant to Rule 0-12 under the Exchange Act,⁵ 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 Exchange's rules that are effected solely by virtue of a change to FINRA Rules 4590, 7440, and 7450 that are incorporated by reference. Specifically, the Exchanges request that they be permitted to incorporate by reference changes made to FINRA Rules 4590, 7440, and 7450 that are cross-referenced in the Exchanges' rules without the need for each Exchange to separately file, pursuant to Section 19(b) of the Exchange Act, the same proposed rule change as filed by FINRA.⁶

The Exchanges represent that FINRA Rules 4590, 7440, and 7450 are regulatory in nature and that they do not intend to incorporate by reference any trading rules.⁷ Further, the Exchanges represent that they will, as a condition of this exemption, provide written notice to their members whenever FINRA proposes a change to FINRA Rules 4590, 7440, and 7450.⁸ Such notice will alert the members of each Exchange to the proposed rule change and give them

⁴ The Exchanges stated in their proposed rule changes specified in note 3 above that the changes would not be operative until such time as the Commission granted their request for an exemption from the rule filing requirements of Section 19(b) of the Exchange Act.

⁵ 17 CFR 240.0-12.

⁶ See Letter from T. Sean Bennett, Principal Associate General Counsel, Nasdaq Inc., to Brent J. Fields, Secretary, Commission, dated November 29, 2018.

⁷ See id. at 2.

⁸ The Exchanges also state that they will provide such notice on their websites in the same section they use to post their own proposed rule changes pursuant to Rule 19b-4(l) of the Exchange Act. In addition, the Exchanges state that their websites will include a link to the FINRA website where the proposed rule change would be located. Id.

an opportunity to comment on the proposal. The Exchanges state that they will also inform members in writing when the Commission approves any such proposed rule change.⁹

The Exchanges believe this exemption is appropriate because it will result in the Exchanges' rules pertaining to OATS compliance remaining consistent at all times, thus ensuring consistent regulation of joint members of the Exchanges, as well as the Nasdaq Market.¹⁰

The Commission has issued exemptions similar to the Exchanges' request.¹¹ In granting one such exemption in 2010, the Commission repeated a prior, 2004 Commission statement that it would consider similar future exemption requests from other self-regulatory organizations ("SROs"), provided that:

- An 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

⁹ Id.

¹⁰ Id.

¹¹ See, e.g., Securities Exchange Act Release Nos. 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).

release governing procedures for requesting exemptive orders pursuant to Rule 0-12 under the Exchange Act;¹²

- 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.¹³

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.¹⁴ 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 they incorporate by reference. This exemption is conditioned upon the Exchanges promptly providing written notice to their members whenever FINRA changes a rule that the Exchanges have incorporated by reference.

¹² 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”).

¹³ See BATS Options Market Order, supra note 11 (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”).

¹⁴ See BATS Options Market Order, supra note 11, 75 FR at 8761; see also 2004 Order, supra note 13, 69 FR at 8502.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,¹⁵ 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 their request that incorporate by reference certain FINRA rules that are the result of changes to such FINRA rules, provided that the Exchanges promptly provide written notice to their members whenever FINRA 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.¹⁶

Eduardo A. Aleman
Deputy Secretary

¹⁵ 15 U.S.C. 78mm.

¹⁶ 17 CFR 200.30-3(a)(76).