

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92934)

September 10, 2021

Order Granting Application by The Nasdaq Stock Market LLC and Nasdaq BX, Inc. for an 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 Rules Incorporated by Reference

The Nasdaq Stock Market LLC (“Nasdaq”) and Nasdaq BX, Inc. (“BX” and together with Nasdaq, the “Exchanges”) have filed with the Securities and Exchange Commission (“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 the Financial Industry Regulatory Authority, Inc. (“FINRA”) that the Exchanges seek to incorporate by reference.³ Section 36 of the Exchange Act, 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 filed proposed rule changes under Section 19(b) of the Exchange Act to amend General 9, Section 18 (Payments for Market Making) of their respective rulebooks to incorporate by reference FINRA 5250 (Payments for Market Making).⁴ Because FINRA Rule

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, to J. Matthew DeLesDernier, Assistant Secretary, Commission, dated June 14, 2021 (“Exemptive Request”).

⁴ See Securities Exchange Act Release Nos. 92242 (June 23, 2021), 86 FR 34286 (June 29, 2021) (SR-NASDAQ-2021-051); 92243 (June 23, 2021), 86 FR 34288 (June 29, 2021) (SR-BX-2021-029). Although the proposed rule changes were filed pursuant to Section 19(b)(3)(A) of the Exchange Act, and thereby became immediately effective upon filing

5250 references the definition of “affiliate” in FINRA Rule 5121, the proposed rule changes also would incorporate by reference the definition of “affiliate” and related definitions within FINRA Rule 5121. As such, the Exchanges’ members and persons associated with a member would be required to comply with FINRA Rule 5250 and the definition of “affiliate” and related definitions within FINRA Rule 5121 as though such rules are part of the Exchanges’ rulebooks.

The Exchanges have requested, 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 the Exchanges’ rules that are effected solely by virtue of a change to FINRA Rule 5250 or to the definition of “affiliate” and related definitions within FINRA Rule 5121, which are incorporated by reference.⁶ Specifically, the Exchanges request that they be permitted to incorporate by reference changes made to FINRA Rule 5250 and the definition of “affiliate” and related definitions within FINRA Rule 5121 that are cross-referenced in General 9, Section 18 of their respective rulebooks without the need for the Exchanges to file separately the same proposed rule changes pursuant to Section 19(b) of the Act.⁷

The Exchanges represent that FINRA Rule 5250 and the definition of “affiliate” and related definitions within FINRA Rule 5121 are regulatory rules and not trading rules.⁸ The Exchanges represent that, as a condition to the requested exemption from Section 19(b) of the

with the Commission, the Exchanges stipulated in the proposed rule changes that the proposals would not be operative until the Commission grants this Exemptive Request.

⁵ 17 CFR 240.0-12.

⁶ See Exemptive Request, supra note 3, at 2.

⁷ See id.

⁸ See id. at 2, n.7. The Exchanges also state that they are not “cherry picking” because the Exchanges would be incorporating the entire FINRA Rule 5250, and the definition of “affiliate” is explicitly cross-referenced within FINRA Rule 5250. See id.

Exchange Act, the Exchanges will provide written notice to their applicants, members, and associated persons whenever FINRA proposes a change to a cross-referenced rule.⁹ The Exchanges state that such notice will alert their applicants, members, and associated persons to the proposed FINRA rule change and give them an opportunity to comment on the proposal.¹⁰ The Exchanges further represent that they will inform applicants, members, and associated persons in writing when the Commission approves any such proposed rule changes.¹¹

According to the Exchanges, this exemption is necessary and appropriate because it would result in the Exchanges' General 9, Section 18 being consistent with the relevant cross-referenced FINRA rules at all times, thus ensuring consistent regulation of joint members of the Exchanges and FINRA with respect to payments for market making.¹²

The Commission has issued exemptions similar to the Exchanges' request.¹³ In granting similar exemptions, the Commission stated that it would consider similar future exemption requests, provided that:

⁹ See id. at 2-3. The Exchanges represent 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 time frame required by such rule. See id. at 3, n.8. The website posting will include a link to the location on FINRA's website where the applicable proposed rule change is posted. See id.

¹⁰ See id. at 3.

¹¹ See id.

¹² See id. at 2.

¹³ See, e.g., Securities Exchange Act Release Nos. 83296 (May 21, 2018), 83 FR 24362 (May 25, 2018) (order granting NYSE National, Inc.'s exemptive request relating to rules of FINRA incorporated by reference); 83040 (April 12, 2018), 83 FR 17198 (April 18, 2018) (order granting MIAX PEARL, LLC's exemptive request relating to rules of the Miami International Securities Exchange, LLC incorporated by reference); 76998 (January 29, 2016), 81 FR 6066, 6083-84 (February 4, 2016) (order granting application for registration as a national securities exchange of ISE Mercury, LLC and exemptive request relating to rules of certain self-regulatory organizations ("SROs") (including FINRA) incorporated by reference); 61534 (February 18, 2010), 75 FR 8760 (February 25, 2010) (order granting BATS Exchange, Inc.'s exemptive request relating to rules

- 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 release governing procedures for requesting exemptive orders pursuant to Rule 0-12 under the Exchange Act;¹⁴

- 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.¹⁵

The Commission believes that the Exchanges have satisfied each of these conditions. 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

incorporated by reference by the BATS Exchange Options Market rules) (“BATS Options Market Order”); 61152 (December 10, 2009), 74 FR 66699, 66709-10 (December 16, 2009) (order granting application for registration as a national securities exchange of C2 Options Exchange, Incorporated and exemptive request relating to rules of the Chicago Board Options Exchange, Incorporated, incorporated by reference).

¹⁴ 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).

¹⁵ See BATS Options Market Order, supra note 13 (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”)).

simultaneous changes to identical rule text sought by more than one SRO.¹⁶ 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 FINRA rules they have incorporated by reference. This exemption is conditioned upon the Exchanges promptly providing written notice to their applicants, members, and associated persons whenever FINRA changes a rule that the Exchanges have incorporated by reference.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,¹⁷ 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, members, and associated persons 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.¹⁸

J. Matthew DeLesDernier
Assistant Secretary

¹⁶ See BATS Options Market Order, supra note 13, 75 FR at 8761; see also 2004 Order, supra note 15, 69 FR at 8502.

¹⁷ 15 U.S.C. 78mm.

¹⁸ 17 CFR 200.30-3(a)(76).