

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-89902)

September 17, 2020

Order Granting Applications by Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, 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 Certain Rules Incorporated by Reference

Nasdaq BX, Inc. (“BX”), Nasdaq GEMX, LLC (“GEMX”), Nasdaq ISE, LLC (“ISE”), Nasdaq MRX, LLC (“MRX”), and Nasdaq PHLX LLC (“Phlx”) (collectively, the “Nasdaq Affiliated 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”)<sup>1</sup> from the rule filing requirements of Section 19(b) of the Exchange Act<sup>2</sup> with respect to certain rules of The Nasdaq Stock Market LLC (“Nasdaq”), an affiliate of the Nasdaq Affiliated Exchanges, that the Nasdaq Affiliated Exchanges seek to incorporate by reference.<sup>3</sup> Section 36 of the Exchange Act 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.

Recently, the Nasdaq Affiliated Exchanges each filed a proposed rule change<sup>4</sup> under Section 19(b) of the Exchange Act to replace their existing investigatory, disciplinary, and

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<sup>1</sup> 15 U.S.C. 78mm(a)(1).

<sup>2</sup> 15 U.S.C. 78s(b).

<sup>3</sup> See Letter from Angela S. Dunn, Principal Associate General Counsel, Nasdaq, Inc., to Vanessa Countryman, Secretary, Commission, dated June 15, 2020 (“Exemption Request”).

<sup>4</sup> See Securities Exchange Act Release Nos. 88938 (May 26, 2020), 85 FR 33235 (June 1, 2020) (SR-BX-2020-009); 89071 (June 15, 2020), 85 FR 37129 (June 19, 2020) (SR-GEMX-2020-15); 89069 (June 15, 2020), 85 FR 37120 (June 19, 2020) (SR-ISE-2020-

adjudicatory rules with those contained in the Nasdaq Rule 8000 and 9000 Series, as such rules may be in effect from time to time, with certain specified exceptions. In the proposed rule changes, BX proposed to incorporate by reference the Nasdaq Rule 8000 and 9000 Series into General 5, Sections 1 and 2 of the BX rulebook, and GEMX, ISE, MRX, and Phlx each proposed to incorporate by reference the Nasdaq Rule 8000 and 9000 Series into General 5, Sections 2 and 3 of their respective rulebooks, thus making these Nasdaq rules applicable to the Nasdaq Affiliated Exchanges' respective members, member organizations,<sup>5</sup> associated persons, and other persons subject to their jurisdiction. When the proposed rule changes become operative, the Nasdaq Affiliated Exchanges' members, member organizations, associated persons, and other persons subject to the jurisdiction of the Nasdaq Affiliated Exchanges will be required to comply with the Nasdaq Rule 8000 and 9000 Series as though such rules are fully set forth within each of the Nasdaq Affiliated Exchanges' rulebooks.

The Nasdaq Affiliated Exchanges have requested, pursuant to Rule 0-12 under the Exchange Act,<sup>6</sup> that the Commission grant the Nasdaq Affiliated Exchanges an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to each of the Nasdaq Affiliated Exchanges' rules that are effected solely by virtue of a change to the Nasdaq

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22); 89070 (June 15, 2020), 85 FR 37142 (June 19, 2020) (SR-MRX-2020-12); and 88519 (March 31, 2020), 85 FR 19203 (April 6, 2020) (SR-Phlx-2020-09).

<sup>5</sup> The Commission notes that the term "member organization," as defined under Phlx General 1, Section 1(17), applies only to legal entities that are members of the Phlx exchange, and is not utilized by any other of the Nasdaq Affiliated Exchanges. See Exemption Request, supra note 3, at 2 n.5. See also Securities Exchange Act Release No. 82143 (November 22, 2017), 82 FR 56672, 56672 n.3 (November 29, 2017) (SR-Phlx-2017-92) (describing that, on the Phlx exchange, the term "member" refers to a natural person, whereas the term "member organization" refers to an entity, which must have at least one "member," as that term is defined by the Phlx exchange).

<sup>6</sup> 17 CFR 240.0-12.

Rule 8000 and 9000 Series that are incorporated by reference. Specifically, the Nasdaq Affiliated Exchanges request that they be permitted to incorporate by reference changes made to the Nasdaq Rule 8000 and 9000 Series that are cross-referenced in each of the Nasdaq Affiliated Exchanges' rules, without the need for each of the Nasdaq Affiliated Exchanges to file separately the same proposed rule changes pursuant to Section 19(b) of the Exchange Act.<sup>7</sup>

The Nasdaq Affiliated Exchanges represent that the Nasdaq Rule 8000 and 9000 Series are not trading rules. Moreover, the Nasdaq Affiliated Exchanges state that in each instance, the Nasdaq Affiliated Exchanges propose to incorporate by reference categories of rules (rather than individual rules within a category) that are regulatory in nature. The Nasdaq Affiliated Exchanges will, as a condition of this exemption, provide written notice to their respective members (or member organizations) whenever Nasdaq proposes a change to its Rule 8000 and 9000 Series.<sup>8</sup> Such notice will alert the members (or member organizations) of each of the Nasdaq Affiliated Exchanges to the proposed rule change and give them an opportunity to comment on the proposal. The Nasdaq Affiliated Exchanges state that they will also inform their respective members (or member organizations) in writing when the Commission approves any such proposed rule changes.<sup>9</sup>

The Nasdaq Affiliated Exchanges believe this exemption is necessary and appropriate because it will result in the Nasdaq Affiliated Exchanges' rules being consistent with the relevant

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<sup>7</sup> See Exemptive Request, supra note 3, at 2.

<sup>8</sup> The Nasdaq Affiliated Exchanges state that they will provide such notice on their websites in the same section they use to post their own proposed rule change filings pursuant to Rule 19b-4(l) within the timeframe required by such Rule. In addition, the Nasdaq Affiliated Exchanges state that their websites will also include a link to the Nasdaq website where the proposed rule change filings are located. Id. at 3 n.8.

<sup>9</sup> Id. at 3.

cross-referenced Nasdaq rules at all times, thus ensuring that the Nasdaq Affiliated Exchanges and Nasdaq maintain a harmonious system of investigating, disciplining, and adjudicating the rights of their respective members, member organizations, associated persons, and other persons subject to their jurisdiction. Without such an exemption, the Nasdaq Affiliated Exchanges and Nasdaq could subject their respective members, member organizations, associated persons, and other persons subject to their jurisdiction to different standards for investigations and disciplinary actions.<sup>10</sup>

The Commission has issued exemptions similar to the Nasdaq Affiliated Exchanges' request.<sup>11</sup> 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

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<sup>10</sup> Id. at 2.

<sup>11</sup> See, e.g., Securities Exchange Act Release Nos. 83887 (August 20, 2018), 83 FR 42722 (August 23, 2018) (order granting exemptive request from Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, LLC relating to rules of Nasdaq BX, Inc. incorporated 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).

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;<sup>12</sup>

- 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.<sup>13</sup>

The Commission believes that the Nasdaq Affiliated Exchanges have satisfied each of these conditions. The Commission also believes that granting the Nasdaq Affiliated 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 Nasdaq Affiliated Exchanges' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO.<sup>14</sup> The Commission therefore finds it appropriate in the public interest and consistent with the protection of investors to exempt the Nasdaq Affiliated Exchanges from the

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<sup>12</sup> 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").

<sup>13</sup> 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")).

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

rule filing requirements under Section 19(b) of the Exchange Act with respect to the above-described rules they have incorporated by reference. This exemption is conditioned upon the Nasdaq Affiliated Exchanges promptly providing written notice to their members (or member organizations) whenever Nasdaq changes a rule that the Nasdaq Affiliated Exchanges have incorporated by reference.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,<sup>15</sup> that the Nasdaq Affiliated 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 Nasdaq rules that are the result of changes to such Nasdaq rules, provided that the Nasdaq Affiliated Exchanges promptly provide written notice to their members (or member organizations) whenever Nasdaq proposes to change a rule that the Nasdaq Affiliated Exchanges have incorporated by reference.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>15</sup> 15 U.S.C. 78mm.

<sup>16</sup> 17 CFR 200.30-3(a)(76).