

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83757)

August 1, 2018

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 CAT 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”) (each the “Exchange” and collectively, the “Exchanges”) have filed with the Securities and Exchange Commission (the “Commission”) an application for an exemption from the rule filing requirements of Section 19(b) of the Securities Exchange Act of 1934 (the “Exchange Act”)¹ with respect to certain rules of The Nasdaq Stock Market LLC (the “Nasdaq Market”) 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 Nasdaq Market and the Exchanges are Participants in the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”).³ Each Participant in the CAT NMS Plan is required to enforce compliance by its members with the provisions of the

¹ 15 U.S.C. 78s(b).

² 15 U.S.C. 78mm(a)(1).

³ See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016) (“CAT NMS Plan Approval Order”). All capitalized terms not otherwise defined herein have the meaning ascribed to them in the CAT NMS Plan or CAT NMS Plan Approval Order.

Plan by adopting a Compliance Rule applicable to its members.⁴ In 2017, pursuant to the CAT NMS Plan, the Nasdaq Market and the Exchanges each adopted a Compliance Rule.⁵ On April 10, 2018, the Exchanges filed proposed rule changes with the Commission to delete each Exchange’s Compliance Rule from the rulebook and instead incorporate by reference, in each respective Exchange’s rulebook, the Nasdaq Market’s Compliance Rule (“Nasdaq Market Compliance Rule”).⁶

The Exchanges request, 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 Exchange’s rules that are effected solely by virtue of a change to the Nasdaq Market Compliance Rule. Specifically, the Exchanges request that they be permitted to incorporate by reference changes made to the Nasdaq Market Compliance Rule that would be incorporated by reference in the Exchanges’ rulebooks, without the need for each Exchange to file separately the same proposed rule changes pursuant to Section 19(b) of the

⁴ Id. at 84945, 84950.

⁵ See Securities Exchange Act Release No. 80256, 82 FR 14526 (March 21, 2017) (order approving the Compliance Rules for the Nasdaq Market and the Exchanges). On January 29, 2018, the Nasdaq Market filed a proposed rule change with the Commission to relocate the Nasdaq Market Compliance Rule to a new section General 7 in its rulebook. See Securities Exchange Act Release No. 82604 (January 30, 2018), 83 FR 5154 (February 5, 2018) (SR-NASDAQ-2018-007).

⁶ See Securities Exchange Act Release Nos. 83077 (April 20, 2018), 83 FR 18358 (April 26, 2018) (SR-Phlx-2018-30); 83081 (April 20, 2018), 83 FR 18371 (April 26, 2018) (SR-BX-2018-015); 83079 (April 20, 2018), 83 FR 18362 (April 26, 2018) (SR-ISE-2018-35); 83083 (April 20, 2018), 83 FR 18384 (April 26, 2018) (SR-GEMX-2018-13); and 83085 (April 20, 2018), 83 FR 18364 (April 26, 2018) (SR-MRX-2018-12). Although the proposed rule changes 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 filings that the incorporation by reference would not be operative until such time as the Commission grants this exemptive request.

⁷ 17 CFR 240.0-12.

Exchange Act.⁸ By virtue of incorporating the Nasdaq Market Compliance Rule by reference, members of each Exchange will be required to comply with the Nasdaq Market Compliance Rule as though it is fully set forth within each of the Exchanges' rulebooks.⁹

The Exchanges do not intend to incorporate by reference any trading rules. Instead, they represent that the Nasdaq Market Compliance Rule is regulatory in nature. Further, the Exchanges represent that they will, as a condition of this exemption, provide written notice to their members whenever the Nasdaq Market proposes a change to the Nasdaq Market Compliance Rule.¹⁰ Such notice will alert the members of each Exchange to the proposed rule change and give them 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.¹¹

The Exchanges believe this exemption is appropriate because it will result in the Exchanges' rules pertaining to CAT NMS Plan compliance to remain consistent at all times, thus ensuring consistent regulation of joint members of the Nasdaq Market and Exchanges with respect to the incorporated rules.¹²

⁸ See Letter from Angela S. Dunn, Principal Associate General Counsel, Nasdaq Inc., to Brent J. Fields, Secretary, Commission, dated April 10, 2018, at 2-3.

⁹ Id. at 2.

¹⁰ 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 change pursuant to Rule 19b-4(l) of the Exchange Act. In addition, the Exchanges state that their website will include a link to the Nasdaq Market website where the proposed rule change would be located. Id.

¹¹ Id.

¹² Id.

The Commission has issued exemptions similar to the Exchanges' request.¹³ 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 release governing procedures for requesting exemptive orders pursuant to Rule 0-12 under the Exchange Act;¹⁴

¹³ 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).

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").

- 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. 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.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 rules they incorporate by reference. This exemption is conditioned upon the Exchanges promptly providing written notice to their members whenever the Nasdaq Market 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 its request that incorporate by reference certain Nasdaq Market rules that are the result of changes to such Nasdaq Market rules, provided

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”).

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.

that the Exchanges promptly provide written notice to their members whenever the Nasdaq Market 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

Brent J. Fields
Secretary

¹⁸ 17 CFR 200.30-3(a)(76).