

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83887)

August 20, 2018

Order Granting Applications by Nasdaq ISE, LLC, Nasdaq GEMX, LLC, and Nasdaq MRX, 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 ISE, LLC (“ISE”), Nasdaq GEMX, LLC (“GEMX”), and Nasdaq MRX, LLC (“MRX”) (each, a “Nasdaq Exchange,” and collectively, the “Nasdaq 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 Nasdaq BX, Inc. (“BX”), an affiliate of the Nasdaq Exchanges, that the Nasdaq Exchanges seek to incorporate by reference.³ 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 Exchanges each filed a proposed rule change⁴ under Section 19(b) of the Exchange Act to largely replace their existing investigatory, disciplinary, and adjudicatory rules with those contained in the BX Rule 8000 and 9000 Series, as such rules may be in effect from time to time. In the proposed rule changes, the Nasdaq Exchanges proposed to incorporate

¹ 15 U.S.C. 78mm(a)(1).

² 15 U.S.C. 78s(b).

³ See Letter from Brett M. Kitt, Senior Associate General Counsel, Nasdaq Inc., to Brent Fields, Secretary, Commission, dated July 16, 2018 (“Exemptive Request”).

⁴ See Securities Exchange Act Release Nos. 83703 (July 25, 2018) (SR-ISE-2018-59); 83704 (July 25, 2018) (SR-GEMX-2018-24); and 83705 (July 25, 2018) (SR-MRX-2018-23).

by reference the BX Rule 8000 and 9000 Series into new Chapters 80 and 90 of their respective rulebooks, and thus make these BX Rules applicable to their members, associated persons, and other persons subject to their jurisdiction. When the proposed rule changes become operative, Nasdaq Exchange members, associated persons, and other persons subject to the jurisdiction of the Nasdaq Exchanges will be required to comply with the BX Rule 8000 and 9000 Series as though such rules are fully set forth within each of the Nasdaq Exchange's rulebooks.

The Nasdaq Exchanges have requested, pursuant to Rule 0-12 under the Exchange Act,⁵ that the Commission grant the Nasdaq Exchanges an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to each of the Nasdaq Exchange's rules that are effected solely by virtue of a change to the BX Rule 8000 and 9000 Series that are incorporated by reference. Specifically, the Nasdaq Exchanges request that they be permitted to incorporate by reference changes made to the BX Rule 8000 and 9000 Series that are cross-referenced in each of the Nasdaq Exchange's rules, without the need for each Nasdaq Exchange to file separately the same proposed rule changes pursuant to Section 19(b) of the Exchange Act.⁶

The Nasdaq Exchanges represent that the BX Rule 8000 and 9000 Series are not trading rules. Moreover, the Nasdaq Exchanges state that in each instance, the Nasdaq Exchanges propose to incorporate by reference categories of rules (rather than individual rules within a category) that are regulatory in nature. The Nasdaq Exchanges will, as a condition of this exemption, provide written notice to their members whenever BX proposes a change to its Rule 8000 and 9000 Series.⁷ Such notice will alert the members of each Nasdaq Exchange to the

⁵ 17 CFR 240.0-12.

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

⁷ The Nasdaq Exchanges state that they will provide such notice on their websites in the

proposed rule change and give them an opportunity to comment on the proposal. The Nasdaq Exchanges state that they will also inform members in writing when the Commission approves any such proposed changes.⁸

The Nasdaq Exchanges believe this exemption is necessary and appropriate, because it will result in the Nasdaq Exchanges' rules being consistent with the relevant cross-referenced BX rules at all times, thus ensuring that the Nasdaq Exchanges and BX maintain a harmonious system of investigating, disciplining, and adjudicating the rights of their respective members, associated persons, and other persons subject to their jurisdiction. Without such an exemption, members of the Nasdaq Exchanges and BX could become subject to different standards for investigations and disciplinary actions.⁹

The Commission has issued exemptions similar to the Nasdaq Exchanges' request.¹⁰ In granting one such exemption in 2010, the Commission repeated a prior, 2004 Commission

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 Exchanges state that their website will also include a link to the BX website where the proposed rule change filings are located. Id. at 3.

⁸ Id.

⁹ Id. at 2.

¹⁰ 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).

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;¹¹
- 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.¹²

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

The Commission also believes that granting the Nasdaq Exchanges an exemption from the rule filing requirements under Section 19(b) of the Exchange Act will promote efficient use of Commission and Nasdaq Exchange resources by avoiding duplicative rule filings based on

¹¹ 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”).

¹² See BATS Options Market Order, *supra* note 10 (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.¹³ The Commission therefore finds it appropriate in the public interest and consistent with the protection of investors to exempt the Nasdaq Exchanges from the 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 Exchanges promptly providing written notice to their members whenever the BX changes a rule that the Nasdaq Exchanges have incorporated by reference.

¹³ See BATS Options Market Order, supra note 10, 75 FR at 8761; see also 2004 Order, supra note 12, 69 FR at 8502.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,¹⁴ that the Nasdaq 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 BX rules that are the result of changes to such BX rules, provided that the Nasdaq Exchanges promptly provide written notice to their members whenever the BX proposes to change a rule that the Nasdaq Exchanges have incorporated by reference.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

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Assistant Secretary

¹⁴ 15 U.S.C. 78mm.

¹⁵ 17 CFR 200.30-3(a)(76).