

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86896)

September 6, 2019

Order Granting Application by Nasdaq BX, Inc. 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 the Nasdaq Rule 1000 Series Incorporated by Reference

Nasdaq BX, Inc. (the “Exchange”) has filed with the Securities and Exchange Commission (the “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 Nasdaq Stock Market LLC (“Nasdaq”) that the Exchange seeks to incorporate by reference.³ Section 36(a)(1) of the Exchange Act,⁴ 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 Exchange filed a proposed rule change⁵ under Section 19(b) of the Exchange Act to replace its existing membership rules, as set forth in the Rule 1000 Series of its rulebook, with

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 Vanessa Countryman, Secretary, Commission, dated June 17, 2019, at 2 (“Exemptive Request”).

⁴ 15 U.S.C. 78mm(a)(1).

⁵ See Securities Exchange Act Release No. 86425 (July 22, 2019), 84 FR 36139 (July 26, 2019) (SR-BX-2019-022). Although the proposed rule change was filed pursuant to Section 19(b)(3)(A)(iii) of the Exchange Act, and thereby became effective upon filing with the Commission, the Exchange stipulated in its proposal that the incorporation by reference would not be operative until such time as the Commission grants this Exemptive Request.

the Rule 1000 Series of the Nasdaq rulebook, as such rules may be in effect from time to time.⁶ Namely, in the proposed rule change, the Exchange proposed to incorporate by reference the Nasdaq Rule 1000 Series such that Nasdaq Rule 1000 Series would be applicable to the Exchange's applicants, members, associated persons, and other persons subject to the Exchange's jurisdiction as though such rules were fully set forth within the Exchange's rulebook.⁷

The Exchange has requested, pursuant to Rule 0-12 under the Exchange Act,⁸ that the Commission grant the Exchange an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to the Exchange's rules that are effected solely by virtue of a change to the Nasdaq Rule 1000 Series that are incorporated by reference. Specifically, the Exchange requests that it be permitted to incorporate by reference changes made to the Nasdaq Rule 1000 Series that are cross-referenced in the Exchange's rules without the need for the Exchange to file separately the same proposed rule change pursuant to Section 19(b) of the Exchange Act.⁹

The Exchange represents that the Nasdaq Rule 1000 Series are not trading rules.¹⁰ Moreover, the Exchange states that it proposes to incorporate by reference a category of rules (rather than individual rules within a category).¹¹ The Exchange also represents that, as a

⁶ For purposes of this application, the Nasdaq Rule 1000 Series refers to the Nasdaq Rule 1000 Series with the exception of Nasdaq Rules 1031, 1050, 1090, 1130, 1150, 1160, or 1170. The Exchange will retain its existing corresponding versions of each of these rules and will not incorporate by reference the Nasdaq versions of the same.

⁷ See note 5, supra.

⁸ 17 CFR 240.0-12.

⁹ See Exemptive Request, supra note 3.

¹⁰ Id. at 2.

¹¹ Id.

condition of this exemption, the Exchange will provide written notice to its applicants and members whenever Nasdaq proposes a change to Nasdaq Rule 1000 Series.¹²

According to the Exchange, this exemption is necessary and appropriate because it will result in the Exchange's membership rules and processes being consistent with the relevant cross-referenced Nasdaq membership rules and processes at all times.¹³ The Exchange states that harmonization of the membership rules and processes between the Exchange and Nasdaq will ease compliance burdens for those seeking membership on both exchanges and increase internal efficiencies associated with administering the membership rules and processes of each exchange.¹⁴

The Commission has issued exemptions similar to the Exchange's request.¹⁵ In granting similar exemptions, the Commission stated that it would consider future exemption requests, provided that:

¹² The Exchange states that it will provide such notice via a posting on the same website location where the Exchange posts its own rule filings pursuant to Rule 19b-4(l) within the timeframe required by such Rule. In addition, the Exchange states that the website posting will include a link to the location on Nasdaq's website where the applicable proposed rule change is posted. Id. at 2-3.

¹³ See Exemptive Request, supra note 3, at 2.

¹⁴ See id.

¹⁵ 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

- A self-regulatory organization (“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;¹⁶

- 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.¹⁷

The Commission believes that the Exchange has satisfied each of these conditions. Further, the Commission also believes that granting the Exchange 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 Exchange’s resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO.¹⁸ The Commission

incorporated by reference by The NASDAQ Options Market).

¹⁶ 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”).

¹⁷ See BATS Options Market Order, supra note 15 (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”).

¹⁸ See BATS Options Market Order, supra note 15, 75 FR at 8761; see also 2004 Order,

therefore finds it appropriate in the public interest and consistent with the protection of investors to exempt the Exchange from the rule filing requirements under Section 19(b) of the Exchange Act with respect to the above-described rules it incorporates by reference. This exemption is conditioned upon the Exchange promptly providing written notice to its applicants and members whenever Nasdaq changes a rule that the Exchange incorporates by reference.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,¹⁹ that the Exchange is 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 Exchange promptly provides written notice to its applicants and members whenever Nasdaq proposes to change a rule that the Exchange has incorporated by reference.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Jill M. Peterson
Assistant Secretary

supra note 17, 69 FR at 8502.

¹⁹ 15 U.S.C. 78mm.

²⁰ 17 CFR 200.30-3(a)(76).