

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-72650)

July 22, 2014

Order Granting Applications by NASDAQ OMX BX, Inc. and The NASDAQ Stock Market 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 OMX BX, Inc. (“BX”) and The NASDAQ Stock Market LLC (“NASDAQ” or collectively, “Exchanges”) have filed with the Securities and Exchange Commission (“Commission”) applications 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 NASDAQ OMX PHLX LLC (“PHLX”) that the Exchanges seek to incorporate by reference. 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.

BX and NASDAQ each recently filed rule changes with the Commission to incorporate by reference comparable position and exercise limit rules of PHLX.<sup>3</sup> Specifically, in both the BX Options and NOM Rules, (i) Chapter III, Section 7 incorporates the position limit rules of

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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> BX modified its Options Rules Chapter III, Sections 7 (Position Limits) and 9 (Exercise Limits) and Chapter XIV, Sections 5 (Position Limits for Broad-Based Index Options) and 7 (Position Limits for Industry and Micro-Narrow Based Index Options). See Securities Exchange Act Release No. 71977 (April 21, 2014), 79 FR 23023 (April 25, 2014) (SR-BX-2014-019). NASDAQ modified its NASDAQ Options Market (“NOM”) Rules bearing the same section references and headings. See Securities Exchange Act Release No. 71978 (April 21, 2014), 79 FR 23036 (April 25, 2014) (SR-NASDAQ-2014-039).

PHLX for U.S. Dollar-Settled Foreign Currency Options; (ii) Chapter III, Section 9 incorporates the exercise limit rules of PHLX for U.S. Dollar-Settled Foreign Currency Options; (iii) Chapter XIV, Section 5 incorporates the position limit rules of PHLX for PHLX proprietary broad-based index options products; and (iv) Chapter XIV, Section 7 incorporates the exercise limit rules of PHLX for PHLX proprietary industry and micro-narrow based index options products. Thus, BX Options Participants and NOM Participants comply with these BX Options and NOM rules by complying with the relevant, incorporated PHLX rule.<sup>4</sup>

The Exchanges have requested, pursuant to Rule 0-12 under the Exchange Act,<sup>5</sup> that the Commission grant them an exemption from the rule filing requirements of Section 19(b) of the Exchange Act for changes to BX Options and NOM Rules Chapter III, Sections 7 and 9, and Chapter XIV, Sections 5 and 7 that are effected solely by virtue of a change to the corresponding cross-referenced rules of PHLX. Specifically, the Exchanges request that they be permitted to incorporate by reference changes made to each such PHLX rule without the need for them to file separately the same proposed rule changes pursuant to Section 19(b) of the Exchange Act.<sup>6</sup> By virtue of these incorporations by reference, the requirements applicable to BX Options Participants and NOM Participants will change when the applicable incorporated PHLX rules change, without the need for the Exchanges to file separately the proposed rule changes pursuant to Section 19(b) of the Exchange Act.<sup>7</sup> The Exchanges state that the PHLX rules the Exchanges seek to incorporate by reference are regulatory in nature and that these incorporations by

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<sup>4</sup> The Exchanges have not previously sought an exemption from the Commission pursuant to Section 36(a)(1) of the Exchange Act from the rule filing requirements of Section 19(b) of the Exchange Act with respect to these incorporations by reference.

<sup>5</sup> 17 CFR 240.0-12.

<sup>6</sup> See Letters from Angela S. Dunn, BX and NASDAQ, to Secretary, Commission, dated April 25, 2014 (“Exemptive Requests”), at 1.

<sup>7</sup> Id. at 1-2.

reference of PHLX rules are intended to be a comprehensive integration of the relevant rules of PHLX into the Exchanges' rules. The Exchanges have agreed to provide written notice to their Options Participants whenever PHLX proposes a change to a cross-referenced rule.<sup>8</sup>

The Exchanges believe this exemption is necessary and appropriate because it will result in the BX Options and NOM rules being consistent with the relevant cross-referenced PHLX rules at all times, thus ensuring identical regulation of joint members of PHLX, BX, and NOM with respect to the incorporated rules.<sup>9</sup> The Exchanges also believe that, without such an exemption, such members could be subject to two different standards.<sup>10</sup>

The Commission has issued exemptions similar to the Exchanges' requests.<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 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

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<sup>8</sup> Id. at 2. The Exchanges state that they will provide such notice via a posting on the same websites where they post their own proposed rule change filings pursuant to Rule 19b-4(l). In addition, the Exchanges state that the website postings will include a link to the location on the PHLX website where the proposed rule change is posted. Id. at 2 n.3.

<sup>9</sup> Id. at 2.

<sup>10</sup> Id.

<sup>11</sup> For example, on behalf of their respective options markets, BX, BATS Exchange, Inc. ("BATS"), and NASDAQ incorporate, among other things, the position limit rules of other exchanges. See, e.g., Securities Exchange Act Release Nos. 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' exemptive request relating to rules incorporated by reference by the BATS Options Market rules) ("BATS Options Market Order"); 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 NOM).

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>

- An 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 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 Commission and the Exchanges' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by BX, NASDAQ, and PHLX.<sup>14</sup> 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 have incorporated by reference. This exemption is conditioned upon the Exchanges promptly providing written notice to their BX Options

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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.

Participants and NOM Participants, respectively, whenever PHLX changes a rule that they have incorporated by reference.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,<sup>15</sup> 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 their requests that incorporate by reference certain PHLX rules that are the result of changes to such PHLX rules, provided that the Exchanges promptly provide written notice to their BX Options Participants and NOM Participants, respectively, whenever PHLX 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.<sup>16</sup>

Kevin M. O'Neill  
Deputy Secretary

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

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