

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-83296)

May 21, 2018

Order Granting Application by NYSE National, Inc. for an 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

NYSE National, Inc. (“NYSE National” or “Exchange”) has 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 Financial Industry Regulatory Authority, Inc. (“FINRA”) that the Exchange seeks 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.

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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 Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange, to Brent J. Fields, Secretary, Commission, dated May 18, 2018 (“Exemptive Request”). The Exchange submitted the Exemptive Request in connection with a proposed rule change, in connection with the re-launch of trading on NYSE National on the Pillar trading platform. The proposal, as amended by Amendment No. 1, which was filed by the Exchange on May 16, 2018, includes: (1) amendments to Article V, Sections 5.01 and 5.8 of the Fourth Amended and Restated Bylaws of NYSE National (“Bylaws”); (2) new rules based on the rules of the Exchange’s affiliates relating to (a) trading securities on an unlisted trading privileges basis (Rule 5), (b) trading on the Pillar trading platform (Rules 1 and 7), (c) disciplinary rules (Rule 10), and (d) administration of the Exchange (Rules 3, 12 and 13); (3) rule changes that renumber and update current Exchange rules relating to (a) membership (Rule 2), (b) order audit trail requirements (Rule 6), and (c) trading practices (Rule 11); and (4) deletion of Chapters I – XVI and the rules contained therein.

On May 17, 2018, the Commission approved the Exchange's proposed rule change that would delete the Exchange's current rules and replace them with rules to accommodate the re-launch of trading on the Exchange through the Pillar platform.<sup>4</sup> Among other things, the new rules include rules relating to the obligations and business conduct of the Exchange's members, referred to as ETP Holders.

NYSE National has requested, pursuant to Rule 0-12 under the Exchange Act,<sup>5</sup> that the Commission grant the Exchange an exemption from the rule filing requirements of Section 19(b) of the Act for changes to those Exchange rules that are effected solely by virtue of a change to a cross-referenced FINRA rule, including FINRA rules designated as NASD rules.<sup>6</sup> Specifically, the Exchange requests that it be permitted to incorporate by reference changes made to each FINRA rule (or series of rules, in the case of FINRA's Code of Arbitration Procedure) that is cross-referenced in the following proposed NYSE National Rules, without the need for the Exchange to file separately the same proposed rule changes pursuant to Section 19(b) of the Act:<sup>7</sup>

- Rule 2.2 (Obligations of ETP Holders and the Exchange) cross-references NASD Rule 1032(f)(1),
- Rule 6.7440 (Recording of Order Information) cross-references FINRA Rule 7740,
- Rule 6.7450 (Order Data Transmission Requirements) cross-references FINRA Rule 7450,
- Rule 11.2111 (Suitability) cross-references FINRA Rule 2111,

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<sup>4</sup> See Securities Exchange Act Release No. 83289 (May 17, 2018).

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

<sup>6</sup> See Exemptive Request, supra note 3, at 1-2.

<sup>7</sup> Id.

- Rule 11.2210 (Communications with the Public) cross-references FINRA Rule 2210 (except FINRA Rule 2210(c)),
- Rule 11.2232 (Customer Confirmations) cross-references FINRA Rule 2232,
- Rule 11.3310 (Anti-Money Laundering Compliance Program) cross-references FINRA Rule 3310,
- Rule 11.5320 (Prohibition Against Trading Ahead of Customer Orders) cross-references FINRA Rule 5310,
- Rule 11.5320 Commentary .01 (Large Orders and Institutional Account Exceptions) cross-references FINRA Rule 4512(c), and
- Rule 12 (Code of Arbitration Procedure for Customer and Industry Disputes) cross-references the 12000 and the 13000 Series of the FINRA Code of Arbitration and FINRA Rule 2268.

The Exchange states that the direct incorporations by reference of FINRA rules, certain of which are regulatory in nature,<sup>8</sup> are intended to be a comprehensive integration of the relevant FINRA rules into NYSE National's rules.<sup>9</sup> The Exchange represents that, as a condition to the requested exemption from Section 19(b) of the Act, the Exchange agrees to provide written notice to its members whenever FINRA proposes a change to a cross-referenced rule.<sup>10</sup> Such

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<sup>8</sup> The Exchange represents that the FINRA rules proposed to be incorporated by reference are not trading rules. In addition, the Exchange notes that several other self-regulatory organizations ("SROs") incorporate by reference certain regulatory rules of another SRO and have received from the Commission similar exemptions from Section 19(b) of the Exchange Act. See Exemptive Request, supra note 3, at 2, n. 5.

<sup>9</sup> See Exemptive Request, supra note 3, at 2-3.

<sup>10</sup> See Exemptive Request, supra note 3, at 3. The Exchange represents that it will provide such notice via a posting on the same website location where the Exchange will post its own rule filings pursuant to Rule 19b-4(1) within the time frame required by such Rule. The website posting will include a link to the location on FINRA's website where the

notice will alert Exchange members to the proposed rule change and give them an opportunity to comment on the proposal. The Exchange further represents that it will inform members in writing when the Commission approves any such proposed rule changes.<sup>11</sup>

According to the Exchange, this exemption is necessary and appropriate because it would result in the Exchange's rules being consistent with the relevant cross-referenced FINRA rules at all times, thus ensuring identical regulation of joint members of the Exchange and FINRA with respect to such rules. Without such an exemption, joint members of the Exchange and FINRA could be subject to two different standards.<sup>12</sup> Moreover, the Exchange believes that by incorporating the above-referenced FINRA rules in the Exchange's rulebook as rules of the Exchange, the exemption would ensure consistent regulation of Exchange ETP Holders that are not FINRA members and Exchange ETP Holders that are FINRA members.<sup>13</sup> In addition, the Exchange believes that the exemption would ensure consistency between certain Exchange and FINRA rules that are covered by the Exchange's regulatory services agreement ("RSA") with FINRA, which would facilitate FINRA's provision of services to the Exchange under the RSA within the scope of those rules.<sup>14</sup>

The Commission has issued exemptions similar to the Exchange's request.<sup>15</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:

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applicable proposed rule change is posted. Id.

<sup>11</sup> See Exemptive Request, supra note 3, at 3.

<sup>12</sup> See Exemptive Request, supra note 3, at 2.

<sup>13</sup> Id.

<sup>14</sup> Id.

<sup>15</sup> See, e.g., Securities Exchange Act Release Nos. 83040 (April 12, 2018), 75 FR 17198 (April 18, 2018)(order granting MIA X PEARL, LLC's exemptive request relating to

- 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;<sup>16</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

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rules of the Miami International Securities Exchange, LLC incorporated by reference); 76998 (January 29, 2016), 81 FR 6066, 6083-84 (February 4, 2016) (order granting application for registration as a national securities exchange of ISE Mercury, LLC (now known as Nasdaq MRX, LLC) and exemptive request relating to rules of the International Securities Exchange, LLC (now known as Nasdaq ISE, LLC) (“ISE”) incorporated by reference, including index options rules); 70050 (July 26, 2013), 78 FR 46622, 46642 (August 1, 2013) (order granting application for registration as a national securities exchange of Topaz Exchange, LLC (now known as Nasdaq GEMX, LLC) and exemptive request relating to rules of ISE incorporated by reference, including index options rules); 61152 (December 10, 2009), 74 FR 66699, 66709-10 (December 16, 2009) (order granting application for registration as a national securities exchange of C2 Options Exchange, Incorporated (“C2”) and exemptive request relating to rules of the Chicago Board Options Exchange, Incorporated (“CBOE”) incorporated by reference, including index options rules). See also, e.g., Securities Exchange Act Release No. 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”).

<sup>16</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”).

members each time a change is proposed to the incorporated rules of another SRO.<sup>17</sup>

The Commission believes that the Exchange has satisfied each of these conditions. 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 Commission and Exchange resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought by more than one SRO.<sup>18</sup> The Commission 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 has incorporated by reference. This exemption is conditioned upon the Exchange promptly providing written notice to its members whenever FINRA changes a rule that the Exchange has incorporated by reference.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,<sup>19</sup> 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 its request that incorporate by reference certain FINRA rules that are the result of changes to such FINRA rules, provided that the

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<sup>17</sup> 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”)).

<sup>18</sup> See BATS Options Market Order, supra note 15, 75 FR at 8761; see also 2004 Order, supra note 17, 69 FR at 8502.

<sup>19</sup> 15 U.S.C. 78mm.

Exchange promptly provides written notice to its members whenever FINRA 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.<sup>20</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(76).