

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91877)

May 12, 2021

Order Granting Application by Nasdaq PHLX LLC 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

Nasdaq PHLX LLC (“PHLX” or the “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 (“Act” or “Exchange Act”)<sup>1</sup> from the rule filing requirements of Section 19(b) of the 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.

On March 17, 2021, the Commission published notice of the Exchange’s proposal to adopt rules that update an existing but outdated reference to an NASD rule to refer instead to a current FINRA rule, and that incorporate certain FINRA rules related to recordkeeping

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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 Angela Dunn, Principal Associate General Counsel, to J. Matthew DeLesDernier, Assistant Secretary, Securities and Exchange Commission, dated March 5, 2021 (“Exemptive Request”).

requirements.<sup>4</sup> The proposed rule change was immediately effective upon filing pursuant to Section 19(b)(3)(A)(iii)<sup>5</sup> of the Exchange Act<sup>4</sup>, and Rule 19b-4(f)(6) thereunder.<sup>6</sup>

The Exchange has requested, pursuant to Rule 0-12 under the Exchange Act,<sup>7</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 PHLX rules that are effected solely by virtue of a change to a FINRA rule that is incorporated by reference.<sup>8</sup> Specifically, PHLX requests that it be permitted to incorporate changes made to each FINRA rule (or series of rules as the case may be) that is incorporated by reference in the following PHLX Rules, without the need for the Exchange to file separately the same proposed rule changes pursuant to Section 19(b) of the Exchange Act:<sup>9</sup>

- General 9, Section 19 (Discretionary Accounts), which incorporates by reference FINRA Rule 3260 ;
- General 9, Section 30 (Books and Records), which incorporates by reference FINRA Rule 4511; and
- General 9, Section 45 (Customer Account Information), which incorporates by reference FINRA Rule 4512.

The Exchange states that the direct incorporations by reference of FINRA rules, which are regulatory in nature,<sup>10</sup> are intended to ensure that the Exchange's Rulebook will remain

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<sup>4</sup> See Exchange Act Release No. 91342 (Mar. 17, 2021), 86 FR 15538 (Mar. 23, 2021) (SR-PHLX-2021-13).

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>6</sup> 17 CFR 240.19b-4(f)(6).

<sup>7</sup> 17 CFR 240.0-12.

<sup>8</sup> See Exemptive Request, supra note 3, at 2.

<sup>9</sup> Id.

<sup>10</sup> See id. The Exchange represents that the FINRA rules proposed to be incorporated by

consistent at all times with respect to the Exchange’s Rulebook pertaining to Discretionary Accounts, Books and Records, and Customer Account Information, and for that reason, the Exchange believes the exemption is appropriate.<sup>11</sup>

The Exchange represents that, as a condition to the requested exemption from Section 19(b) of the Exchange Act, the Exchange will provide written notice to its members whenever FINRA proposes a change to a cross-referenced rule.<sup>12</sup> Such notice will alert Exchange members to the proposed rule change and give them an opportunity to comment on the proposal.<sup>13</sup>

The Commission has issued exemptions similar to the Exchange’s request.<sup>14</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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reference are not trading rules.

<sup>11</sup> See id. at 3.

<sup>12</sup> The Exchange represents that it will provide such notice on its website in the same website location it uses to post its own proposed rule change filings pursuant to Rule 19b-4(l) within the same timeframe required by such Rule. The PHLX website will also include a link to the FINRA website where applicable proposed rule change is posted. See id. at 2.

<sup>13</sup> See id.

<sup>14</sup> See, e.g., Exchange Act Release Nos. 83296 (May 21, 2018), 83 FR 24362 (May 25, 2018) (order granting NYSE National, Inc.’s exemptive request relating to rules of FINRA incorporated by reference); 83040 (April 12, 2018), 83 FR 17198 (April 18, 2018) (order granting MIAX PEARL’s exemptive request relating to rules of MIAX incorporated by reference); 78101 (June 17, 2016), 81 FR 41141, 41165 (June 23, 2016) (order granting application for registration as a national securities exchange of Investors’ Exchange, LLC and exemptive request relating to rules of FINRA 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

- 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 Act;<sup>15</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 members each time a change is proposed to the incorporated rules of another SRO.<sup>16</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

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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 and exemptive request relating to rules of CBOE incorporated by reference, including index options rules). See also, e.g., 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>15</sup> See 17 CFR 240.0-12; 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 Act).

<sup>16</sup> See BATS Options Market Order, supra note 14 (citing 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”).

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>17</sup> Finally, the Commission notes that any changes that the Exchange would make to General 9, Section 19 (Discretionary Accounts), General 9, Section 30 (Books and Records), and General 9, Section 45 (Customer Account Information), other than those changes that incorporate by reference changes to the FINRA rules specifically referenced herein, are not exempted from Section 19(b) of the Exchange Act. 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 following PHLX rules: General 9, Section 19 (Discretionary Accounts), which incorporates by reference FINRA Rule 3260; General 9, Section 30 (Books and Records), which incorporates by reference FINRA Rule 4511; and General 9, Section 45 (Customer Account Information), which incorporates by reference FINRA Rule 4512. 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.

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<sup>17</sup> See id. at 8761. See also 2004 Order, supra note 16, at 8502.

Accordingly, IT IS ORDERED, pursuant to Section 36 of the Exchange Act,<sup>18</sup> that the Exchange is exempt from the rule filing requirements of Section 19(b) of the Act solely with respect to changes to PHLX Rules General 9, Section 19 (Discretionary Accounts), which incorporates by reference FINRA Rule 3260; General 9 Section 30 (Books and Records), which incorporates by reference FINRA Rule 4511; and General 9, Section 45 (Customer Account Information), which incorporates by reference FINRA Rule 4512, provided that the 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>19</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>18</sup> 15 U.S.C. 78mm.

<sup>19</sup> 17 CFR 200.30-3(a)(76).