

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-94091)

January 27, 2022

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 “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, 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 has requested, pursuant to Rule 0-12 under the Exchange Act,<sup>4</sup> 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 a cross-referenced FINRA rule. Specifically, the Exchange requests that it be permitted to incorporate by reference changes made to the FINRA rules that are cross-referenced

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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 S. Dunn, Principal Associate General Counsel, Phlx, to J. Matthew DeLesDernier, Assistant Secretary, Commission, dated August 26, 2021 (“Exemptive Request”).

<sup>4</sup> 17 CFR 240.0-12.

in the Exchange’s rules identified below, without the need for the Exchange to file separately similar proposed rule changes pursuant to Section 19(b) of the Exchange Act:<sup>5</sup>

- General 9, Section 1(a) (Prohibition Against Trading Ahead of Customer Orders) cross-references FINRA Rule 5320 (except for FINRA Rule 5320.02(b) and the reference to FINRA Rule 6420 in FINRA Rule 5320).
- Options 10, Section 20 (Options Communications) cross-references FINRA Rule 2220 (except for FINRA Rule 2220(c)).

The Exchange represents that the FINRA rules listed above are regulatory rules and not trading rules.<sup>6</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 and member organizations whenever FINRA proposes a change to FINRA Rule 2220 or 5320.<sup>7</sup> The Exchange states that such notice will alert its members, member organizations, and associated persons to the proposed FINRA rule change and give them an opportunity to comment on the proposal.<sup>8</sup> The Exchange further represents that it will inform members, member organizations, and associated persons in writing when the Commission approves any such proposed rule changes.<sup>9</sup>

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<sup>5</sup> See Exemptive Request, *supra* note 3, at 2.

<sup>6</sup> See *id.* at 2, n.8. The Exchange also states that it is not “cherry picking” because the Exchange would be incorporating categories of rules. See *id.*

<sup>7</sup> See *id.* at 2-3. The Exchange represents 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(1) within the time frame required by such rule. See *id.* at 3, n.9. The website posting will include a link to the location on FINRA’s website where the applicable proposed rule change is posted. See *id.*

<sup>8</sup> See *id.* at 3.

<sup>9</sup> See *id.*

According to the Exchange, this exemption is appropriate because it would result in the Exchange's rules pertaining to prohibition against trading ahead of customer orders and options communications being consistent with the relevant cross-referenced FINRA rules at all times, thus ensuring consistent regulation of joint members of Phlx and FINRA.<sup>10</sup> The Exchange further states that, even if members are not joint members of Phlx and FINRA, the exemption is appropriate because it will permit its rules to remain consistent with FINRA's rules and ensure consistent treatment of industry members with respect to the aforementioned rules.<sup>11</sup>

The Commission has issued exemptions similar to the Exchange's request.<sup>12</sup> In granting similar exemptions, the Commission stated that it would consider similar future exemption requests, 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

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<sup>10</sup> See id. at 2.

<sup>11</sup> See id.

<sup>12</sup> See, e.g., Securities 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, LLC's exemptive request relating to 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 and exemptive request relating to rules of certain self-regulatory organizations ("SROs") (including FINRA) incorporated by reference); 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"); 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 the Chicago Board Options Exchange, Incorporated, incorporated by reference).

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>13</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>14</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 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.<sup>15</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 FINRA rules it has incorporated by reference. This

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<sup>13</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>14</sup> See BATS Options Market Order, supra note 12 (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>15</sup> See BATS Options Market Order, supra note 12, 75 FR at 8761; see also 2004 Order, supra note 14, 69 FR at 8502.

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>16</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 the Exemptive Request, 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>17</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>16</sup> 15 U.S.C. 78mm.

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