

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-95461)

August 10, 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 Nasdaq Stock Exchange, LLC (“Nasdaq”) 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 Nasdaq rule. Specifically, the Exchange requests that it be permitted to incorporate by reference changes made to the General 3 Membership and Access

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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 July 8, 2022 (“Exemptive Request”).

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

Rule 1000 Series (“Rule 1000 Series”) of the Nasdaq rulebook into General 3 Membership and Access of the Exchange’s rulebook.<sup>5</sup>

The Exchange represents that the Nasdaq 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 applicants, members, and member organizations whenever Nasdaq proposes a change to the Rule 1000 Series.<sup>7</sup> The Exchange states that such notice will alert its applicants, members, and member organizations to the proposed Nasdaq rule change and give them an opportunity to comment on the proposal.<sup>8</sup> The Exchange further represents that it will inform applicants, members, and member organizations in writing when the Commission approves any such proposed rule changes.<sup>9</sup>

According to the Exchange, this exemption is appropriate because it would result in the Exchange’s rules pertaining to membership being consistent with the relevant cross-referenced

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<sup>5</sup> See Exemptive Request, supra note 3, at 2. The Exchange notes that it recently filed a proposed rule change under Section 19(b) of the Exchange Act to replace its existing membership rules, as set forth in General 3 of its rulebook, with the Rule 1000 Series of the Nasdaq rulebook, as such rules may be in effect from time to time. See id., at 1, n. 4. See also Securities Exchange Act Release No. 95219 (July 7, 2022), 87 FR 41814 (July 13, 2022) (SR-Phlx-2022-28).

<sup>6</sup> See id. at 2, n.7. 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 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.8. The website posting will include a link to the location on Nasdaq’s website where the applicable proposed rule change is posted. See id.

<sup>8</sup> See id.

<sup>9</sup> See id.

Nasdaq rules at all times.<sup>10</sup> The Exchange further states that harmonization of these membership rules and processes 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.<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 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

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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 Nasdaq 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 Nasdaq) 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).

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 Nasdaq rules it has incorporated 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 has incorporated by reference.

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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.

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 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.<sup>17</sup>

J. Matthew DeLesDernier

Deputy Secretary

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

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