

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NASDAQ-2022-006 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2022-006. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2022-006 and should be submitted on or before February 23, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94091]

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

January 27, 2022.

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")¹ from the rule filing requirements of Section 19(b) of the Exchange Act² with respect to certain rules of the Financial Industry Regulatory Authority, Inc. ("FINRA") that the Exchange seeks to incorporate by reference.³ 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,⁴ 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 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:⁵

- 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.⁶ 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 5320.⁷ 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.⁸ 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.⁹

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.¹⁰ 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.¹¹

The Commission has issued exemptions similar to the Exchange's

⁵ See Exemptive Request, *supra* note 3, at 2.

⁶ 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.*

⁷ 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(l) 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.*

⁸ See *id.* at 3.

⁹ See *id.*

¹⁰ See *id.* at 2.

¹¹ See *id.*

¹⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78mm(a)(1).

² 15 U.S.C. 78s(b).

³ See Letter from Angela S. Dunn, Principal Associate General Counsel, Phlx, to J. Matthew DeLesDernier, Assistant Secretary, Commission, dated August 26, 2021 ("Exemptive Request").

⁴ 17 CFR 240.0-12.

request.¹² 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 release governing procedures for requesting exemptive orders pursuant to Rule 0–12 under the Exchange Act;¹³

- 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.¹⁴

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.¹⁵ 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 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,¹⁶ 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.¹⁷

J. Matthew DeLesDernier,

Assistant Secretary.

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SURFACE TRANSPORTATION BOARD

[Docket No. FD 36560]

BNSF Railway Company—Lease Exemption—Union Pacific Railroad Company

On November 9, 2021, BNSF Railway Company (BNSF) filed a petition under 49 U.S.C. 10502 seeking exemption from the prior approval requirements of 49 U.S.C. 11323–25 for BNSF to lease from Union Pacific Railroad Company (UP) approximately 25 miles of rail line extending from Sterling, Colo., near UP milepost 56.71, to Union, Colo., near UP milepost 81.1, on UP's Julesburg Subdivision (the Line).¹

¹⁵ See BATS Options Market Order, *supra* note 12, 75 FR at 8761; *see also* 2004 Order, *supra* note 14, 69 FR at 8502.

¹⁶ 15 U.S.C. 78mm.

¹⁷ 17 CFR 200.30–3(a)(76).

¹ An executed, redacted version of the lease agreement was filed with the petition for exemption. An unredacted version was submitted to the Board under seal along with a motion for protective order, which was granted by decision served on November 24, 2021.

The petition explains that BNSF and its predecessors have operated over the Line since 1900, and that, concurrently with the petition, BNSF filed a verified notice of exemption pursuant to 49 CFR 1180.2(d)(7) pertaining to a trackage rights agreement to supersede the agreement that had been in effect since 1951. (Pet. 2.)² According to the petition, BNSF and UP have agreed to enter into a lease that would modify certain roles and responsibilities set forth in the new trackage rights agreement; in particular, the lease would “allow BNSF to occupy UP's property for the purposes of maintenance, construction, repair, and renewal of the track and appurtenant structures and facilities on the Line.” (Pet. 2.)³ BNSF states that by permitting maintenance responsibilities to shift to BNSF, the sole user of the Line, the lease will streamline maintenance activity and produce more efficient rail operations. (Pet. 2.) According to BNSF, the lease transaction will have no adverse impact on commercial or operational access to the Line. (*Id.* at 5; *see also id.* at 6–7 (stating that the lease “is simply intended to produce more efficient rail operations by streamlining the Line's maintenance activities” and “will have no adverse impact on the national, regional, or local rail industry”).)⁴

BNSF asserts that the Board has previously exempted similar lease agreements from the prior approval requirements of sections 11323–25 pursuant to section 10502, and that the Board should grant this petition and exempt the lease for the same reasons. (Pet. 3.)

Discussion and Conclusions

Under 49 U.S.C. 11323(a)(2), prior Board approval is required for a rail carrier to lease the property of another rail carrier. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) Regulation is not necessary to carry out the rail

² Notice of the trackage rights exemption was published in the **Federal Register** on November 24, 2021 (86 FR 67111), and the exemption took effect on December 9, 2021. *See BNSF Ry.—Trackage Rts. Exemption—Union Pac. R.R.*, FD 36561 (STB served Nov. 24, 2021).

³ BNSF's reference to “construction” is in connection with the planned repair and maintenance of the existing Line. (*See* Pet. 2.) Therefore, the Board does not construe that reference as involving any new line of railroad for which construction authority would be needed pursuant to 49 U.S.C. 10901, and this decision does not grant any such authority.

⁴ Pursuant to 49 CFR 1121.3(d), BNSF certifies that the lease does not contain a provision or agreement that may limit future interchange with a third-party connecting carrier. (Pet. 7–8.)

¹² *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).

¹³ *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).

¹⁴ *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”)).