

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-EDGX-2012-25 on the subject line.

Paper Comments

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

All submissions should refer to File No. SR-EDGX-2012-25. 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 Web site (<http://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 Web site 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-EDGX-2012-25 and should be submitted on or before July 26, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Kevin M. O'Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67294; File No. SR-PHLX-2012-68]

**Self-Regulatory Organizations;
NASDAQ OMX PHLX LLC; Order
Approving a Proposed Rule Change,
as Modified by Amendment No. 1, To
Accept Inbound Orders From NASDAQ
OMX BX's New Options Market**

June 28, 2012.

I. Introduction

On May 15, 2012, NASDAQ OMX PHLX LLC ("Exchange" or "PHLX") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to accept inbound options orders routed by NASDAQ Options Services LLC ("NOS") from NASDAQ OMX BX ("BX") on a one year pilot basis in connection with the establishment of a new options market by BX. The proposed rule change was published for comment in the **Federal Register** on May 24, 2012.³ The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

II. Background

PHLX Rule 985(b) prohibits the Exchange or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an ownership interest in, or engaging in a business venture with, an Exchange member or an affiliate of an Exchange member in the absence of an effective filing under Section 19(b) of the Act.⁴ NOS is a registered broker-dealer that is a member of the Exchange, and currently provides to members of the Exchange optional routing services to other markets.⁵ NOS is owned by NASDAQ OMX Group, Inc. ("NASDAQ OMX"), which also owns three registered securities exchanges—the Exchange, BX, and the NASDAQ Stock Market LLC

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 67026 (May 18, 2012), 77 FR 31053 ("Notice"). The Commission notes that on May 17, 2012, the Exchange submitted Amendment No. 1 to the proposed rule change, to make technical amendments to Item 3.a of the Form 19b-4 and Item II of Exhibit 1.

⁴ 15 U.S.C. 78s(b). PHLX Rule 985 also prohibits a PHLX member from being or becoming an affiliate of PHLX, or an affiliate of an entity affiliated with PHLX, in the absence of an effective filing under Section 19(b). See PHLX Rule 958(b)(1)(B).

⁵ See PHLX Rule 1080(m)(iii). See also Notice, *supra* note 3, at 31054 n.5 and accompanying text.

("NASDAQ").⁶ Thus, NOS is an affiliate of these exchanges.⁷ Absent an effective filing, PHLX Rule 985(b) would prohibit NOS from being a member of the Exchange. The Commission initially approved NOS's affiliation with PHLX and its affiliated exchanges in connection with NASDAQ OMX's acquisition of PHLX and BX,⁸ and NOS currently performs certain limited activities for each.⁹ With the current proposed rule change, the Exchange seeks approval to permit NOS to perform a new function.

On May 1, 2012, BX filed a proposed rule change to establish a new BX options market ("BX Options"), which will be an electronic trading system that trades options.¹⁰ As part of its proposal, BX proposed that NOS provide BX with outbound options routing services to other markets, including its affiliate PHLX. On May 15, 2012, the Exchange filed the instant proposal to allow the Exchange to accept such options orders routed inbound by NOS from BX on a one year pilot basis subject to certain limitations and conditions.¹¹

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹² Specifically, the

⁶ See Securities Exchange Act Release No. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (SR-BSE-2008-02; SR-BSE-2008-23; SR-BSE-2008-25; SR-BSECC-2008-01) (order approving NASDAQ OMX's acquisition of BX) ("BX Acquisition Order"); Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-PHLX-2008-31) (order approving NASDAQ OMX's acquisition of PHLX) ("PHLX Acquisition Order").

⁷ See *id.* See also Notice, *supra* note 3, at 31054.

⁸ See PHLX Acquisition Order, *supra* note 6, at 42877; and BX Acquisition Order, *supra* note 6, at 46944. See also Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521, 14532-14533 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (initially approving NASDAQ's affiliation with NOS in connection with the establishment of the NASDAQ Options Market ("NOM") ("NOM Approval Order").

⁹ See, e.g., PHLX Rule 1080(m) (governing order routing by PHLX); and Securities Exchange Act Release No. 65399 (September 26, 2011), 76 FR 60955 (September 30, 2011) (SR-PHLX-2011-111) (approving routing of orders by NOS inbound to PHLX from NOM) ("PHLX Routing Order").

¹⁰ See Securities Exchange Act Release No. 66983 (May 14, 2012), 77 FR 29730 (May 18, 2012) (SR-BX-2012-030) (notice of propose rule change to adopt rules for the new BX options market) ("BX Options Proposal"). On June 26, 2012, the Commission approved the BX Options Proposal. See Securities Exchange Act Release No. 67256 (June 26, 2012) ("BX Options Approval").

¹¹ See Notice, *supra* note 3.

¹² In approving this proposed rule change, the Commission has considered the proposed rule's

Continued

¹⁴ 17 CFR 200.30-3(a)(12).

Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,¹³ which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act, and to comply and enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulation thereunder, and the rules of the Exchange. Further, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁴ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest. Section 6(b)(5) also requires that the rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

NOS will operate as a facility of BX that provides outbound options routing from BX Options to other market centers, subject to certain conditions.¹⁵ The operation of NOS as a facility of BX providing outbound routing services from BX Options will be subject to BX oversight, as well as Commission oversight. BX will be responsible for ensuring that NOS's outbound options routing service is operated consistent with Section 6 of the Act and BX rules. In addition, BX must file with the Commission rule changes and fees relating to BX's outbound options routing services.

Recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange of which it is a member, the Exchange previously proposed, and the Commission approved, limitations and conditions on NOS's affiliation with the Exchange.¹⁶

impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹³ 15 U.S.C. 78f(b)(1).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ See BX Options Approval, *supra* note 10, at Section II.D.

¹⁶ See PHLX Acquisition Order, *supra* note 6, at 42887. See also Notice, *supra* note 3, at 31054 n.10 and accompanying text. In addition, the Exchange has authority to accept inbound orders that NOS

Also recognizing that the Commission has previously expressed concern regarding the potential for conflicts of interest in instances where a member firm is affiliated with an exchange to which it is routing orders, the Exchange proposed the following limitations and conditions to NOS's affiliation with the Exchange to permit the Exchange to accept inbound options orders that NOS routes in its capacity as a facility of BX:¹⁷

- First, the Exchange and the Financial Industry Regulatory Authority ("FINRA") will maintain a Regulatory Contract, as well as an agreement pursuant to Rule 17d-2 under the Act ("17d-2 Agreement").¹⁸ Pursuant to the Regulatory Contract and the 17d-2 Agreement, FINRA will be allocated regulatory responsibilities to review NOS's compliance with certain PHLX rules.¹⁹ Pursuant to the Regulatory Contract, however, the Exchange retains ultimate responsibility for enforcing its rules with respect to NOS.

- Second, FINRA will monitor NOS for compliance with PHLX's trading rules, and will collect and maintain certain related information.²⁰

- Third, FINRA will provide a report to the Exchange's chief regulatory officer ("CRO"), on a quarterly basis, that: (i) Quantifies all alerts (of which the Exchange or FINRA is aware) that identify NOS as a participant that has potentially violated Commission or Exchange rules, and (ii) lists all investigations that identify NOS as a participant that has potentially violated Commission or PHLX rules.

- Fourth, the Exchange has in place PHLX Rule 985, which requires NASDAQ OMX, as the holding company owning both the Exchange and NOS, to establish and maintain procedures and internal controls reasonably designed to ensure that NOS does not develop or implement changes to its system, based on non-public

routes in its capacity as a facility of NASDAQ, subject to certain limitations and conditions. See PHLX Routing Order, *supra* note 9, at 60956.

¹⁷ See Notice, *supra* note 3, at 31054.

¹⁸ 17 CFR 240.17d-2.

¹⁹ NOS is also subject to independent oversight by FINRA, its designated examining authority, for compliance with financial responsibility requirements.

²⁰ Pursuant to the Regulatory Contract, both FINRA and the Exchange will collect and maintain all alerts, complaints, investigations and enforcement actions in which NOS (in its capacity as a facility of BX routing orders to the Exchange) is identified as a participant that has potentially violated applicable Commission or Exchange rules. The Exchange and FINRA will retain these records in an easily accessible manner in order to facilitate any potential review conducted by the Commission's Office of Compliance Inspections and Examinations. See Notice, *supra* note 3, at 31054 n.14.

information obtained regarding planned changes to the Exchange's systems as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members, in connection with the provision of inbound options order routing to the Exchange.

- Fifth, the Exchange proposes that the routing of options orders from NOS to the Exchange, in NOS's capacity as a facility of BX be authorized for a pilot period of one year.

In the past, the Commission has expressed concern that the affiliation of an exchange with one of its members raises potential conflicts of interest, and the potential for unfair competitive advantage.²¹ Although the Commission continues to be concerned about potential unfair competition and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members, for the reasons discussed below, the Commission believes that it is consistent with the Act to permit NOS, in its capacity as a facility of BX, to route options orders inbound to the Exchange on a pilot basis, subject to the limitations and conditions described above.²²

The Commission believes that these limitations and conditions enumerated above will mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that a non-

²¹ See, e.g., Securities Exchange Act Release Nos. 54170 (July 18, 2006), 71 FR 42149 (July 25, 2006) (SR-NASDAQ-2006-006) (order approving NASDAQ's proposal to adopt NASDAQ Rule 2140, restricting affiliations between NASDAQ and its members); 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR-NYSE-2005-77) (order approving the combination of the New York Stock Exchange, Inc. and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62 and SR-NYSE-2008-60) (order approving the combination of NYSE Euronext and the American Stock Exchange LLC); 59135 (December 22, 2008), 73 FR 79954 (December 30, 2008) (SR-ISE-2009-85) (order approving the purchase by ISE Holdings of an ownership interest in Direct Edge Holdings LLC); 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (SR-NYSE-2008-120) (order approving a joint venture between NYSE and BIDS Holdings L.P.); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order granting the exchange registration of BATS Exchange, Inc.); 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (File Nos. 10-194 and 10-196) (order granting the exchange registration of EDGX Exchange, Inc. and EDGA Exchange, Inc.); and 62716 (August 13, 2010), 75 FR 51295 (August 19, 2010) (File No. 10-198) (order granting the exchange registration of BATS-Y Exchange, Inc.).

²² The Commission notes that these limitations and conditions are consistent with those previously approved by the Commission for other exchanges. See, e.g., BX Options Approval, *supra*, note 10, at Section II.D.2.

affiliated SRO's oversight of NOS,²³ combined with a non-affiliated SRO's monitoring of NOS's compliance with the Exchange's rules and quarterly reporting to the Exchange, will help to protect the independence of the Exchange's regulatory responsibilities with respect to NOS. The Commission also believes that the Exchange's proposed amendments to PHLX Rule 985(b) are designed to ensure that NOS cannot use any information advantage it may have because of its affiliation with the Exchange. Furthermore, the Commission believes that the Exchange's proposal to allow NOS to route options orders inbound to the Exchange from BX, on a pilot basis, will provide the Exchange and the Commission an opportunity to assess the impact of any conflicts of interest of allowing an affiliated member of the Exchange to route orders inbound to the Exchange and whether such affiliation provides an unfair competitive advantage.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁴ that the proposed rule change, as modified by Amendment No. 1 (SR-PHLX-2012-68), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁵

Kevin M. O'Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67292; File No. SR-NASDAQ-2012-073]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Its Excess Order Fee

June 28, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 25, 2012, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange

Commission ("Commission") a proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of the Substance of the Proposed Rule Change

NASDAQ proposes to institute an excess order fee. [sic] NASDAQ will implement the proposed change on July 2, 2012. The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com>, at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

NASDAQ recently submitted a proposed rule change to introduce an Excess Order Fee,³ aimed at reducing inefficient order entry practices of certain market participants that place excessive burdens on the systems of NASDAQ and its members and that may negatively impact the usefulness and life cycle cost of market data. The fee is scheduled to be implemented on July 2, 2012. In general, the determination of whether to impose the fee on a particular market participant identifier ("MPID") is made by calculating the ratio between (i) entered orders, weighted by the distance of the order from the national best bid or offer ("NBBO"), and (ii) orders that execute in whole or in part. The fee is imposed on MPIDs that have an "Order Entry Ratio" of more than 100.

Through this proposed rule change, the Exchange is modifying the parameters of the fee slightly to provide that all calculations under the rule establishing the fee will be based on orders received by NASDAQ during regular market hours (generally, 9:30 a.m. to 4:00 p.m.)⁴ and will exclude orders received at other times, even if they execute during regular market hours. NASDAQ is making the change because the concerns about inefficient order entry practices that have prompted the fee are generally not present with regard to trading activity outside of regular market hours, when volumes are light. NASDAQ is also concerned that lower execution rates outside of regular market hours may skew calculations under the rule, such that an MPID that is considered acceptably efficient during regular market hours would be required to pay a fee under the rule due to its activity outside of regular market hours.

2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁵ in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,⁶ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which NASDAQ operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As originally proposed and as modified by this proposed rule change, NASDAQ believes that the Order Entry Fee is reasonable because it is designed to achieve improvements in the quality of displayed liquidity and market data that will benefit all market participants. In addition, although the level of the fee may theoretically be very high, the fee is reasonable because market participants may readily avoid the fee by making improvements in their order entry practices that reduce the number of orders they enter, bring the prices of their orders closer to the NBBO, and/or increase the percentage of their orders that execute. The proposed change to the fee is reasonable because it will reduce the likelihood of the fee being imposed on an MPID that is considered acceptably efficient during regular market hours, when the impact of

⁴ Regular market hours may be different in some circumstances, such as on the day after Thanksgiving, when regular market hours on all exchanges traditionally end at 1:00 p.m.

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(4) and (5).

²³ This oversight will be accomplished through the 17d-2 Agreement between FINRA and the Exchange and the Regulatory Contract. See Notice, *supra* note 3, at 31054 n.12 and accompanying text.

²⁴ 15 U.S.C. 78s(b)(2).

²⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 66951 (May 9, 2012), 77 FR 28647 (May 15, 2012) (SR-NASDAQ-2012-055).