

rules of an exchange not be designed to permit unfair discrimination among customers, issuers, brokers, or dealers.

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 previously implemented limitations and conditions to BATS Trading's affiliation with the Exchange to permit the Exchange to accept inbound orders that BATS Trading routes in its capacity as a facility of BATS, on a pilot basis.<sup>14</sup> The Exchange now seeks to make this pilot permanent. Specifically, the Exchange states it is in compliance with the following limitations and conditions:<sup>15</sup>

- The Exchange shall enter into a plan pursuant to Rule 17d-2 under the Exchange Act with a non-affiliated self-regulatory organization ("SRO") to relieve the Exchange of regulatory responsibilities for BATS Trading with respect to rules that are common rules between the Exchange and the non-affiliated SRO, and enter into a regulatory contract ("Regulatory Contract") with a non-affiliated SRO to perform regulatory responsibilities for BATS Trading for unique Exchange rules.

- The Regulatory Contract shall require the Exchange to provide the non-affiliated SRO with information, in an easily accessible manner, regarding all exception reports, alerts, complaints, trading errors, cancellations, investigations, and enforcement matters (collectively "Exceptions") in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission Rules, and shall require that the non-affiliated SRO provide a report, at least quarterly, to the Exchange quantifying all Exceptions in which BATS Trading is identified as a participant that has potentially violated Exchange or Commission Rules.

- The Exchange, on behalf of the Corporation, shall establish and maintain procedures and internal controls reasonably designed to ensure that BATS Trading does not develop or implement changes to its system on the basis of non-public information regarding planned changes to Exchange systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated member organizations of the Exchange in connection with the

provision of inbound order routing to the Exchange.

- The Exchange may furnish to BATS Trading the same information on the same terms that the Exchange makes available in the normal course of business to any other member organization.

The Exchange believes that by meeting the above-listed conditions it has set up mechanisms that protect the independence of the Exchange's regulatory responsibility with respect to BATS Trading, and has demonstrated that BATS Trading cannot use any information that it may have because of its affiliation with the Exchange to its advantage.<sup>16</sup>

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.<sup>17</sup> 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 BATS Trading, in its capacity as a facility of BATS, to provide inbound routing to the Exchange on a permanent basis instead of a pilot basis, subject to the other conditions described above.

The Exchange has proposed four ongoing conditions applicable to BATS Trading's inbound routing activities in its capacity as a facility of BATS, which are enumerated above. The Commission believes that these conditions mitigate its concerns about potential conflicts of interest and unfair competitive advantage. In particular, the Commission believes that a non-affiliated SRO's oversight of BATS

<sup>16</sup> See *id.*

<sup>17</sup> 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 8, 2008) (SR-Amex-2008-62) (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 DirectEdge Holdings LLC); and 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.).

Trading,<sup>18</sup> combined with a non-affiliated SRO's monitoring of BATS Trading'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 BATS Trading.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>19</sup> that the proposed rule change (SR-BYX-2012-006) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

Kevin M. O'Neill,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66799; File No. SR-Phlx-2012-38]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to FINRA Fees

April 12, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on April 11, 2012, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II 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 Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule at Section VII, C to update FINRA fees to mirror the text of The NASDAQ Stock Market LLC ("NASDAQ Stock Market") and NASDAQ OMX BX, Inc. ("BX").

The text of the proposed rule change is available on the Exchange's Web site

<sup>18</sup> This oversight will be accomplished through a 17d-2 Agreement. See BYX Approval Order, 75 FR at 51304.

<sup>19</sup> 15 U.S.C. 78s(b)(2).

<sup>20</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>14</sup> See BYX Approval Order, 75 FR at 51304.

<sup>15</sup> See Notice, 77 FR at 15154.

at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, at the principal office of the Exchange, on the Commission's Web site at <http://www.sec.gov>, 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 Exchange 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 these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

#### 1. Purpose

The purpose of the proposed rule change is to both amend and update the Exchange's FINRA fees on its Pricing Schedule at Section VII, C entitled "FINRA Fees" to mirror the rules of the NASDAQ Stock Market and BX. Currently, the Exchange displays all the FINRA fees that are billed and collected by FINRA at Section VII, C on behalf of the Exchange. The Exchange is proposing to replace the relevant text in the Pricing Schedule with text similar to that of NASDAQ Stock Market Rule 7003(a)(1)–(5)<sup>3</sup> and BX Rule 7003(a)(1)–(5).<sup>4</sup> This amendment would serve to (1) conform the Exchange's Pricing Schedule to that of NASDAQ Stock Market and BX rules in order to avoid confusion over similar FINRA fees listed in those rules, however reflected differently on the Phlx Pricing Schedule as compared to the NASDAQ Stock Market and BX Rules with respect to DOJ related costs;<sup>5</sup> and (2) update Phlx's current fees so

that the fees comport with a recent amendment to the DOJ pass-through fee,<sup>6</sup> which is billed and collected by FINRA.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>8</sup> in particular, in that it is designed to promote just and equitable principles of trade, 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, by conforming the text of the Exchange's Pricing Schedule regarding certain fees billed and collected by FINRA to that of the NASDAQ Stock Market Rule and BX, to the extent the fees apply to the Exchange, so that there is no confusion as to the amount of fees which are similarly billed and collected by FINRA to members of the various exchanges.

### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become

effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>11</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay and designate the proposed rule change operative upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest and, therefore, designates the proposal operative upon filing.<sup>12</sup> The proposed rule change is not controversial as it would conform the text of the Exchange's Pricing Schedule to similar rule text on the NASDAQ Stock Market and BX. In addition, the proposed rule change would update the Exchange's Pricing Schedule to make the amount of the FINRA fingerprinting fees displayed on the Pricing Schedule accurate.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2012-38 on the subject line.

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>3</sup> Rule 7003(a)(6) and (b) are specific to NASDAQ Stock Market and not applicable to Phlx. Also the NASDAQ Stock Market rule has a reference to NASD which is being reflected as FINRA in the Exchange's proposed rule text similar to the text of BX Rule 7003.

<sup>4</sup> Rule 7003(a)(6) and (b) are specific to BX and not applicable to Phlx.

<sup>5</sup> The Phlx Pricing Schedule calculates the cost of the FINRA fingerprint processing fee (\$13) together with the pass through fee imposed by the United States Department of Justice ("DOJ") while NASDAQ Stock Market Rule 7003(a)(4) and (5) and BX Rule 7003(a)(4) and (5) only displays the \$13 FINRA fingerprint processing fee and does not display the pass-through amount to the DOJ but rather notes such a cost is assessed by FINRA.

<sup>6</sup> FINRA notified its members through an Information Notice that there was a reduction to the DOJ pass-through fee from \$17.25 to \$14.50. The amounts currently displayed for fingerprint processing fees on Phlx's Pricing Schedule would therefore need to be amended from \$30.25 to \$27.50 to update the current Pricing Schedule. However, the proposed amendment to the Pricing Schedule would only reference the FINRA fees and would not reference the DOJ pass-through fees therefore obviating the amendment to the proposed text to display the price decrease as the exact DOJ fee would no longer be displayed.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

## 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 Number SR-Phlx-2012-38. 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 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; 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 Number SR-Phlx-2012-38 and should be submitted on or before May 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-66798; File No. SR-NYSEArca-2012-27]

**Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Recent Changes to FINRA Rules 7440 and 7450, and To Adopt Recent Changes to FINRA Rule 5320 by Amending Commentary .02 to NYSE Arca Equities Rule 5320 To Require That ETP Holders Report to the Order Audit Trail System Information Barriers Put Into Place by the ETP Holder in Reliance on Commentary .02 to NYSE Arca Equities Rule 5320**

April 12, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on April 2, 2012, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II 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 Substance of the Proposed Rule Change**

The Exchange proposes to (i) adopt recent changes to Financial Industry Regulatory Authority, Inc. ("FINRA") Rules 7440 and 7450, which the Exchange has incorporated by reference in its own rules, and (ii) adopt recent changes to FINRA Rule 5320 by amending Commentary .02 to NYSE Arca Equities Rule 5320 to require that ETP Holders report to the Order Audit Trail System ("OATS") information barriers put into place by the ETP Holder in reliance on Commentary .02 to NYSE Arca Equities Rule 5320. The text of the proposed rule change is available at the Exchange, [www.nyse.com](http://www.nyse.com), the Commission's Public Reference Room, and the Commission's Web site at [www.sec.gov](http://www.sec.gov).

**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 IV 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**

The Exchange proposes to (i) adopt recent changes to FINRA Rules 7440 and 7450, which the Exchange has incorporated by reference in its own rules, and (ii) adopt recent changes to FINRA Rule 5320 by amending Commentary .02 to NYSE Arca Equities Rule 5320 to require that ETP Holders report to OATS information barriers put into place by the ETP Holders in reliance on Commentary .02 to NYSE Arca Equities Rule 5320.

FINRA recently received Commission approval of changes to the order recording and transmission requirements of the OATS rules in FINRA Rules 7440 and 7450.<sup>3</sup> First, FINRA amended FINRA Rule 7440 to require FINRA members relying on the no-knowledge exception in Supplementary Material .02 to FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders) to report information to OATS regarding the information barriers adopted by the member in reliance on the exception—FINRA also added this requirement under Supplementary Material .02 to FINRA Rule 5320. Second, FINRA amended FINRA Rule 7440 to extend, to all OATS-eligible securities, the existing requirement to reflect on OATS reports a customer's instruction regarding display of the customer's limit orders—the requirement previously applied only to limit orders involving NMS stocks. Finally, FINRA amended FINRA Rule 7450 to codify the specific time by which OATS reports must be transmitted to FINRA.

The Exchange recently adopted the NYSE Arca Equities Rule 7400 Series, which consists of NYSE Arca Equities Rules 7410 through 7470 and is based substantially on the FINRA Rule 7400 Series.<sup>4</sup> In this regard, NYSE Arca Equities Rules 7440 and 7450

<sup>3</sup> See Securities Exchange Act Release No. 66021 (December 21, 2011), 76 FR 81551 (December 28, 2011) (SR-FINRA-2011-63) [sic].

<sup>4</sup> See Securities Exchange Act Release No. 65544 (October 12, 2011), 76 FR 64406 (October 18, 2011) (SR-NYSEArca-2011-69).

<sup>13</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.