

Moreover, prior to the commencement of trading, the Exchange will inform its ETP Holders in an Information Bulletin of the special characteristics and risks associated with trading the Shares. The Information Bulletin will also reference the FINRA Regulatory Notices regarding sales practice and customer margin requirements for FINRA members applicable to leveraged ETFs and options on leveraged ETFs.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that it will facilitate the listing and trading of additional types of exchange-traded products that will enhance competition among market participants, to the benefit of investors and the marketplace. As noted above, the Exchange has in place surveillance procedures relating to trading in the Shares and may obtain information via ISG from other exchanges that are members of ISG or with which the Exchange has entered into a comprehensive surveillance sharing agreement. In addition, as noted above, investors will have ready access to information regarding the Funds' holdings, IOPV, and quotation and last sale information for the Shares.

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 that is 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 solicited or received with respect to the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

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. Please include File Number SR-NYSEArca-2012-04 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 Number SR-NYSEArca-2012-04. 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 Section, 100 F Street, NE., Washington, DC 20549-1090, on official business days between 10 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at www.nyse.com. 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-NYSEArca-2012-04 and should be submitted on or before February 14, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Kevin M. O'Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66178; File No. SR-Phlx-2011-170]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving a Proposed Rule Change Requesting Permanent Approval of the Pilot Program Permitting NASDAQ OMX PSX To Accept Inbound Orders That Nasdaq Execution Services, LLC Routes in Its Capacity as a Facility of the NASDAQ Stock Market LLC

January 18, 2012.

I. Introduction

On December 1, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") 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 requesting permanent approval of the Exchange's pilot program to permit the Exchange's NASDAQ OMX PSX system ("PSX") to accept certain inbound orders that Nasdaq Execution Services, LLC ("NES") routes in its capacity as a facility of the NASDAQ Stock Market LLC ("Nasdaq"). The proposed rule change was published for comment in the **Federal Register** on December 15, 2011.³ The Commission received no comment letters regarding the proposed rule change. This order approves the proposed rule change.

II. Background

Exchange 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 Exchange Act.⁴ NES is a broker-dealer that is a member of the Exchange, and currently provides to members of Nasdaq optional routing

²¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 65934 (December 9, 2011), 76 FR 78060 ("Notice").

⁴ 15 U.S.C. 78s(b).

services to other market centers.⁵ NES is owned by The NASDAQ OMX Group, Inc. (“NASDAQ OMX”), which also owns three registered securities exchanges—Nasdaq, the Exchange, and NASDAQ OMX BX, Inc.⁶ Thus, NES is an affiliate of each of these exchanges. Absent an effective filing, Exchange Rule 985(b) would prohibit NES from being a member of the Exchange.

On September 9, 2010, the Commission approved the Exchange’s proposed rule change relating to the establishment of PSX as a platform for trading NMS stocks.⁷ As part of this approval, the Exchange was approved to receive inbound routes of cash equities orders by NES in its capacity as an order routing facility of Nasdaq on a pilot basis.⁸ The Exchange now seeks permanent approval of this inbound routing pilot.⁹

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.¹⁰ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,¹¹ 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,¹² 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.

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 NES’s affiliation with the Exchange to permit the Exchange to accept inbound orders that NES routes in its capacity as a facility of Nasdaq, on a pilot basis.¹³ The Exchange now seeks to make this pilot permanent. Specifically, the Exchange states it is in compliance with the following limitations and conditions:¹⁴

- First, the Exchange and FINRA have entered into a regulatory services agreement (“FINRA RSA”) pursuant to which FINRA reviews NES’s compliance with the Exchange’s rules through FINRA’s examination program.¹⁵ Pursuant to the FINRA RSA, however, the Exchange retains ultimate responsibility for enforcing its rules with respect to NES.

- Second, FINRA and the Exchange¹⁶ will monitor NES for compliance with PSX’s trading rules, and collect and maintain certain related information.¹⁷

- Third, FINRA will provide a report to the Exchange’s Chief Regulatory Officer (“CRO”), on at least a quarterly basis, that: (i) quantifies all alerts (of which the Exchange and FINRA become aware) that identify NES as a participant that has potentially violated Commission or Exchange rules and (ii) quantifies the number of investigations that identify NES as a participant that has potentially violated Exchange or Commission Rules.¹⁸

- Fourth, the Exchange adopted Rule 985(c)(2), which requires NASDAQ OMX, as the holding company owning NES and the Exchange, to establish and maintain procedures and internal controls reasonably designed to ensure that NES does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange’s systems, obtained 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 routing to the Exchange.¹⁹

- Fifth, routing of orders from NES to the Exchange, in NES’s capacity as a facility of Nasdaq, will be authorized for a pilot period of twelve months, as further extended to April 8, 2012.²⁰ 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 NES, and has demonstrated that NES cannot use any information advantage it may have because of its affiliation with the Exchange.²¹

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.²² Although the Commission

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, 76 FR at 78061, n.7.

¹⁸ *See id.*

¹⁹ *See* Phlx Rule 985(c)(2). *See also* Notice, 76 FR at 78061.

²⁰ *See* Notice, 76 FR at 78061.

²¹ *See id.*

²² *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

⁵ NES operates as a facility of Nasdaq that provides outbound routing from Nasdaq to other market centers, subject to certain conditions. *See* Nasdaq Exchange Rule 4758(b).

⁶ *See* Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR–Phlx–2008–31) (“Phlx Approval Order”). *See also* 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–BSEC–2008–01).

⁷ *See* Securities Exchange Act Release No. 62877 (September 9, 2010), 75 FR 56633 (September 16, 2010) (SR–Phlx–2010–79) (“PSX Approval Order”).

⁸ *See* PSX Approval Order. *See also* Securities Exchange Act Release No. 65552 (October 13, 2011), 76 FR 64989 (October 19, 2011) (SR–Phlx–2011–139) (extending the inbound routing pilot through April 8, 2012).

⁹ *See* Notice.

¹⁰ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

¹¹ 15 U.S.C. 78f(b)(1).

¹² 15 U.S.C. 78f(b)(5).

¹³ *See* PSX Approval Order, 75 FR at 56637–56638.

¹⁴ *See* Notice, 76 FR at 78061.

¹⁵ The Exchange also states that NES is subject to independent oversight by FINRA, its Designated Examining Authority, for compliance with financial responsibility requirements. *See* Notice, 76 FR at 78061, n.5.

¹⁶ Personnel performing real-time oversight of equity trading on Nasdaq will also perform similar functions with respect to PSX pursuant to a regulatory services agreement among Nasdaq, the Exchange, NASDAQ OMX BX, Inc., and NASDAQ OMX (the “Intercompany RSA”) under the direction, authority, and oversight of Phlx’s Chief Regulatory Officer (“CRO”) and the Regulatory Oversight Committee (“ROC”) of its Board of Directors.

¹⁷ Pursuant to the FINRA RSA, both the Exchange and FINRA will collect and maintain all alerts, complaints, investigations and enforcement actions in which NES (in its capacity as a facility of Nasdaq routing orders to the Exchange) is identified as a

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 NES, in its capacity as a facility of Nasdaq, 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 NES's inbound routing activities in its capacity as a facility of Nasdaq, 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 FINRA's oversight of NES,²³ combined with FINRA's monitoring of NES's compliance with the Exchange's rules and quarterly reporting to Phlx's CRO, will help to protect the independence of the Exchange's regulatory responsibilities with respect to NES.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁴ that the proposed rule change (SR-Phlx-2011-170) 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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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.).

²³ This oversight will be accomplished through the FINRA RSA between the Exchange and FINRA, and, as applicable, a 17d-2 Agreement. See PSX Approval Order, 75 FR at 56638, n.80 and accompanying text.

²⁴ 15 U.S.C. 78s(b)(2).

²⁵ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66176; File No. SR-EDGX-2012-03]

Self-Regulatory Organizations; EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend EDGX Rule 1.5(q)

January 18, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 13, 2012, the EDGX Exchange, Inc. (the "Exchange" or the "EDGX") 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 self-regulatory organization. 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

EDGX Exchange, Inc. ("EDGX" or the "Exchange"), proposes to amend EDGX Rule 1.5(q) to change the starting time of the Pre-Opening Session from 7 a.m. Eastern Time ("ET") to 8 a.m. ET. The Exchange proposes to make a conforming amendment to Rule 14.1(c)(2) to change the reference for the starting time of the Pre-Opening Session from 7 a.m. ET to 8 a.m. ET. Through this filing, the Exchange proposes to amend the rule text from SR-EDGX-2011-27,³ which proposed to change the Pre-Opening Session starting time to 7 a.m. ET. The text of the proposed rule change is attached as Exhibit 5 and is available on the Exchange's Web site at www.directedge.com, at the Exchange's principal office, and at the Public Reference Room of the Commission.

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 self-regulatory organization 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 Exchange filed a rule change to amend EDGX Rule 1.5(q) to change the starting time of the Pre-Opening Session from 8 a.m. ET to 7 a.m. ET.⁴ This change would have allowed the Exchange to compete with other exchanges that open their markets for entry of orders prior to 8 a.m. ET.⁵ The Exchange proposes to amend the rule text of its August 25 Rule Filing at this time in order to accommodate Members who initially expressed an interest in the change in Pre-Opening Session time to begin at 7 a.m. ET; but, after further consideration, Members confirmed that they were no longer interested because the additional costs and resources needed to open earlier outweighed any incidental benefits from increased trading activity that they would incur. As such, based on the Exchange's feedback from Members it surveyed in September 2011, the Exchange confirmed that no Members adversely relied upon the August 25 Rule Filing.

At this time, the Exchange has not implemented the 7 a.m. ET starting time for the Pre-Opening Session because it has not notified its Members pursuant to the language in the August 25 Rule Filing.⁶ In addition, the Exchange notes Members are not adversely impacted by the amendment to the rule text of the August 25 Rule Filing as no Members were required to incur any costs or make any changes to their systems to comply with the earlier Pre-Opening time if they were not planning to trade beginning at 7 a.m. ET.

⁴ *Id.* The Exchange initially proposed to expand its operational hours to open the System earlier so that Members could enter and execute orders beginning at 7 a.m. ET rather than 8 a.m. ET.

⁵ See The NASDAQ Stock Market LLC Rule 4617 (opens at 7 a.m. EST). See also NASDAQ OMX BX Rule 4617 (opens at 7 a.m. EST); NYSE Arca Equities Rule 7.34 (opens at 1 a.m. Pacific Time).

⁶ See Securities Exchange Act Release No. 65197 (August 25, 2011), 76 FR 54281 (August 31, 2011) (SR-EDGX-2011-27), stating the Exchange will provide notice to Members in an information circular when the proposed rule change will be effective, which will be no later than January 1, 2012.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 65197 (August 25, 2011), 76 FR 54281 (August 31, 2011) (SR-EDGX-2011-27). For the purposes of this filing, the Exchange will refer to SR-EDGX-2011-27 as the "August 25 Rule Filing." Given that the August 25 Rule Filing was immediately effective but not operative, the Exchange proposes to amend its rule text in this filing.