

and investors regarding its intention to terminate the actions taken.

#### Conclusion

Because the purpose of the proposed rule is to grant authority to the Exchange to act in the event of an Emergency Condition, the terms of the rule are necessarily inclusive and flexible. At all times, the Exchange will continue to act in a manner consistent with the public interest and for the protection of investors, and it intends to be bound by and guided by these underlying precepts should there be a need to invoke proposed NYSE Rule 49 and exercise such proposed emergency powers.

#### 2. Statutory Basis

The basis for this proposed rule change is the requirement under Section 6(b)(5)<sup>17</sup> of the Act that an exchange have rules that are 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. Proposed NYSE Rule 49 would provide the Exchange with the regulatory flexibility to take action, as necessary, in the event of an Emergency Condition, as defined.

#### *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 35 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 Exchange consents, the Commission will:

(A) By order approve such 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2009-105 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-NYSE-2009-105. This file number should be included on the subject line if e-mail 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 inspection and copying 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 NYSE. 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-NYSE-2009-105 and should be submitted on or before December 3, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-27128 Filed 11-10-09; 8:45 am]

BILLING CODE 8011-01-P

#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-60921; File No. SR-NYSEArca-2009-90]

#### **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Amending NYSE Arca Equities Rule 2.100 To Provide the NYSE Arca With the Authority to Declare an Emergency Condition With Respect to Trading on or Through the Systems and Facilities of the NYSE Arca and Enable the NYSE Arca to Act as a Back-Up Trading Facility for Affiliated Exchanges Owned and Operated by NYSE Euronext**

November 3, 2009.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 13, 2009, NYSE Arca Inc. (the "Corporation" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III 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**

NYSE Arca proposes to amend NYSE Arca Equities Rule 2.100 governing the Corporation's equities trading systems and facilities (also referred to as the "NYSE Arca Marketplace"). The proposed rule change would (i) provide the Corporation with the authority to declare an Emergency Condition (defined below) with respect to trading on or through the systems and facilities of the Corporation as necessary in the public interest and for the protection of investors, and (ii) under such circumstances, enable the Corporation to act as a back-up trading facility for affiliated exchanges owned and operated by NYSE Arca's corporate

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>17</sup> 15 U.S.C. 78f(b)(5).

parent, NYSE Euronext.<sup>4</sup> The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

## 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

NYSE Arca proposes to amend NYSE Arca Equities Rule 2.100 to (1) delete the existing text as obsolete; (2) provide the Corporation with the authority to declare an Emergency Condition with respect to trading on or through the systems and facilities of the Corporation (for the purposes of this filing, an "Emergency Condition") as necessary in the public interest and for the protection of investors; and (3) under such circumstances, enable the Corporation to act as a back-up trading facility for an Affiliated Exchange in the event that it is unable to trade because of an emergency condition declared under its rules.

This rule filing responds to an initiative of the Commission to ensure that regulatory agencies and self-regulatory organizations have rules and procedures in place to effectively address an Emergency Condition. The Corporation has been participating as a member of the inter-regulatory "Pandemic Planning and Regulatory Coordination Working Group," which is working on developing effective strategies and coordination among regulators to prepare for an Emergency Condition.

As described more fully below, the authority contemplated in the proposed rule could be exercised when, due to an Emergency Condition, NYSE Euronext

facilities located at 11 Wall Street, New York, New York, including the Trading Floor of an Affiliated Exchange, are inoperable. As proposed for amendment, NYSE Arca Equities Rule 2.100 is intended to be invoked only in the event of emergencies, as defined in Section 12(k)(7) of the Act.<sup>5</sup> As proposed, the rule would provide the Corporation with regulatory flexibility to mitigate the effects of an Emergency Condition so that the securities markets in general, and the systems and facilities of the Corporation or an Affiliated Exchange in particular, may continue to perform in a manner consistent with the protection of investors and in pursuit of the public interest.

The proposed amendments are described in detail below:

#### 1. Deletion of Current NYSE Arca Equities Rule 2.100 as Obsolete

Current NYSE Arca Equities Rule 2.100 was adopted in November 2000 in connection with the proposal by Pacific Stock Exchange, Inc., through its wholly-owned subsidiary PCX Equities, Inc. ("PCXE"), to create a new electronic trading facility of PCXE called the Archipelago Exchange ("Arca"). Rule 2.100 provided a mechanism for allowing PCXE members to trade uninterrupted when PCXE transitioned to Arca.<sup>6</sup> The circumstances that originally required the adoption of Rule 2.100 are no longer applicable, as all former PCXE members either became NYSE Arca ETP Holders or opted not to become members of NYSE Arca. Accordingly, the Corporation is proposing to delete the current language of Rule 2.100.

#### 2. Establishing Emergency Powers under Proposed New NYSE Arca Equities Rule 2.100

Under current NYSE Arca Equities rules, in the event of an Emergency Condition that would impact the Corporation's and/or an Affiliated Exchange's ability to operate normally, the Corporation does not currently have authority to permit it to accept the transfer of trading from an Affiliated Exchange to the Corporation. The Corporation is proposing to amend

NYSE Arca Equities Rule 2.100 to provide such authority to the Corporation. As defined in the proposed rule, such authority would be available only in the rare event of exigent circumstances that would prevent the Corporation or an Affiliated Exchange from operating normally, such as a pandemic or similar occurrence that affects its facilities.

The proposed amendments to NYSE Arca Equities Rule 2.100 would provide the Corporation with emergency powers so that in the event of an Emergency Condition, the Corporation can act as necessary in the public interest and for the protection of investors. As noted above, to ensure consistency among the Commission and other exchanges, the Corporation proposes adopting the definition of "emergency" set forth in Section 12(k)(7) of the Act. Such definition is broad enough to ensure that the Corporation will have the authority to invoke its emergency powers as necessary to respond to both regional and national emergencies, such as a pandemic crisis, or other situations in which trading on the systems and facilities of the Corporation and/or an Affiliated Exchange is restricted or substantially impaired, such as by government action or environmental causes.

Under the proposed rule, when an Emergency Condition exists that would prevent the Corporation and/or an Affiliated Exchange from operating normally, a "qualified Corporation officer" would have the authority to declare an Emergency Condition with respect to trading on or through the systems and facilities of the Corporation and/or the Affiliated Exchange and as necessary in the public interest and for the protection of investors. A "qualified Corporation officer" is defined as the NYSE Euronext Chief Executive Officer or his or her designee, or the NYSE Regulation, Inc. ("NYSER") Chief Executive Officer<sup>7</sup> or his or her designee. In the event that none of these individuals is able to assume this responsibility due to incapacitation, the next most senior officer of NYSE Euronext or NYSER would be a "qualified Corporation officer" for purposes of the proposed rule.

<sup>5</sup> 15 U.S.C. 78l(k)(7) [sic].

<sup>6</sup> See Securities Exchange Act Release No. 43608 (November 21, 2000), 65 FR 78821 (December 15, 2000) (SR-PCX-00-25). In April 2006, although Rule 2.100 was no longer being used, the names of the entities in Rule 2.100 were changed in a rule filing that made global name changes to all NYSE Arca Equities rules to reflect changes resulting from the merger of NYSE Group, Inc. and Archipelago Holdings, Inc. See Securities Exchange Act Release No. 53615 (April 7, 2006), 71 FR 19226 (April 13, 2006) (SR-PCX-2006-24). The substance of the rule, however, did not change.

<sup>4</sup> The Corporation's affiliated exchange is New York Stock Exchange LLC ("NYSE" or "Affiliated Exchange"). The NYSE has submitted a companion filing to provide for the same emergency authority proposed herein. See SR-NYSE-2009-105.

<sup>7</sup> Upon completion of the merger between NYSE Group, Inc. and Archipelago Holdings, Inc. on March 7, 2006, the regulatory personnel of the Corporation were re-designated as NYSER employees. Therefore, the NYSER Chief Executive Officer or his or her designee may make such determinations and decisions as contemplated by proposed NYSE Arca Equities Rule 2.100 on behalf of the Corporation.

### 3. Contingency Trading Facility for an Affiliated Exchange

NYSE Euronext has determined to designate the Corporation, and specifically the NYSE Arca Marketplace, as a back-up trading facility for an Affiliated Exchange. In the event that an Emergency Condition is so disruptive as to render the trading systems and facilities of an Affiliated Exchange effectively inoperable, a contingency plan has been developed to allow for the Corporation to receive, process and execute orders for members, member organizations and sponsored participants of the Affiliated Exchange (designated as "Affiliated Participants") in its listed and traded securities.

#### a. Use of the Corporation's Trading Systems and Facilities

Under the proposed arrangement between the Corporation and the Affiliated Exchange, the systems and facilities of the Corporation would effectively become the systems and facilities of the Affiliated Exchange, as necessary, such that its Affiliated Participants would be able to submit bids and offers and execute trades in Affiliated Exchange-listed securities on or through the NYSE Arca Marketplace systems and facilities, regardless of whether such Affiliated Participants are ETP Holders<sup>8</sup> or Sponsored Participants<sup>9</sup> of the Corporation at the time the Emergency Condition is declared (*see* part "b" below). During these times, quotes or orders of Affiliated Exchange-listed securities entered or executed on or through NYSE Arca Marketplace would be published as quotes and executions of the Affiliated Exchange (*see* part "c" below).<sup>10</sup>

<sup>8</sup> An "ETP Holder" is a broker or dealer registered pursuant to Section 15 of Act that has been issued an Equity Trading Permit ("ETP") by the Corporation for effecting approved equities securities transactions on NYSE Arca Marketplace. *See* NYSE Arca Equities Rule 1.1(m)-(n).

<sup>9</sup> A "Sponsored Participant" is a person or entity that has entered into a sponsorship arrangement with a Sponsoring ETP Holder pursuant to NYSE Arca Equities Rule 7.29. *See* NYSE Arca Equities Rule 1.1(tt). A "Sponsoring ETP Holder" is a broker-dealer that has been issued an ETP by the Corporation who has been designated by a Sponsored Participant to execute, clear and settle transactions on NYSE Arca Marketplace. The Sponsoring ETP Holder must be either (i) a clearing firm with membership in a clearing agency registered with the Commission that maintains facilities through which transactions may be cleared or (ii) a correspondent firm with a clearing arrangement with any such clearing firm. *See* NYSE Arca Equities Rule 1.1(uu).

<sup>10</sup> Currently, the Corporation trades NYSE-listed equities securities on a UTP basis. However, in the event of the declaration of an emergency condition under proposed NYSE Rule 49 such that the NYSE Trading Floor and systems and facilities are

Under such circumstances, the Corporation and the Affiliated Exchange would broadcast to the market using any and all methods available that they have declared a triggering event and the Affiliated Exchange would then halt all trading conducted on its systems and facilities. All unexecuted orders would remain on the Affiliated Exchange's systems unless cancelled by the entering member or member organization. The Corporation and the Affiliated Exchange would then open trading of the Affiliated Exchange-listed securities on the systems and facilities of the Corporation as soon thereafter as possible, but not earlier than at least the next trading day. As soon as practicable following the commencement of trading on the Corporation's systems and facilities, any unexecuted orders shall be purged from the Affiliated Exchange's own systems and facilities.<sup>11</sup>

Orders in Affiliated Exchange-listed securities entered on the Corporation's systems and facilities on a UTP basis that are unexecuted prior to the declaration of an Emergency Condition would remain available for execution on the NYSE Arca systems (that is they will not be cancelled). Once trading on the Affiliated Exchange resumes on the Corporation's systems executions of such orders would be printed with an "N" modifier on the Consolidated Tape (*see* part "c" below).<sup>12</sup>

#### b. Obligations of Affiliated Participants During Emergency Condition

The use of NYSE Arca as a back-up facility for the Affiliated Exchange presents certain logistical hurdles. Specifically, NYSE Arca Equities Rule 7.29(a) provides that only "Users" having authorized access to the NYSE Arca Marketplace may enter and execute orders. Pursuant to NYSE Arca Equities Rule 1.1(yy), a "User" is defined as an ETP Holder or Sponsored Participant who is authorized to obtain access to the NYSE Arca Marketplace. However, it is almost certain that some Affiliated Participants will not be ETP Holders or Sponsored Participants at the time of an Emergency Condition and, therefore, would not be able to trade directly on the NYSE Arca Marketplace in the event that an Affiliated Exchange is required to close its systems and

inoperable and trading is conducted on or through the systems and facilities of the Corporation, NYSE-listed securities traded on the NYSE Arca Marketplace would be NYSE trades rather than NYSE Arca trades. Under such circumstances, the NYSE would use NYSE Arca Marketplace as the execution engine for NYSE trades and would ensure that these trades are executed in compliance with Regulation NMS.

<sup>11</sup> *See* SR-NYSE-2009-105.

<sup>12</sup> *See* SR-NYSE-2009-105.

facilities. Although such Affiliated Participants can become ETP Holders or Sponsored Participants of the Corporation if they so choose, some choose not to for business reasons (*i.e.*, to avoid the payment of additional registration fees).

To effectuate the business continuity plan in which trades of securities listed on an Affiliated Exchange are executed on or through the systems and facilities of the Corporation, the Corporation is proposing to amend NYSE Arca Equities Rule 2.100 in order to provide temporary membership and/or access to the NYSE Arca Marketplace if an Affiliated Exchange declares an Emergency Condition.

The Corporation will establish inactive equity trading permits and connectivity for Affiliated Participants that are not current ETP Holders of NYSE Arca Marketplace that would become active in the event that the Corporation is designated as an alternative facility of an Affiliated Exchange. Similarly, Affiliated Participants that trade on an Affiliated Exchange pursuant to sponsored access that do not have sponsored access to the NYSE Arca Marketplace at the time of an Emergency Condition would be permitted to obtain such access through either an existing NYSE Arca ETP Holder or through an Affiliated Participant that is granted temporary membership in accordance with proposed NYSE Arca Equities Rule 2.100, provided the sponsored Affiliated Participants could establish connectivity and complete the required documentation incident to such sponsored access. Temporary membership or access granted under the proposed Rule will be valid only for the duration of the Emergency Condition.

The ability to trade directly on the NYSE Arca Marketplace in this manner would be available only in the event that an Affiliated Exchange declared an emergency condition under its own rules and designated the Corporation as the back-up execution facility. During the pendency of an Emergency Condition, the Affiliated Participants would be subject to the NYSE Arca Equities rules governing trading (*e.g.* NYSE Arca Equities Rule 7) and such rules would be considered the rules of the Affiliated Exchange for the duration of the declaration.<sup>13</sup>

<sup>13</sup> Even though the applicable NYSE Arca Equities Rules governing trading would apply for the duration of an emergency condition, the Affiliated Exchange's rules governing member firm conduct would continue to apply to its Affiliated Participants, including membership requirements and net capital requirements. In addition, the

Because of differences between the systems of the Affiliated Exchange and the Corporation, NYSE Arca Marketplace is not able to support “Designated Market Makers” (“DMMs”) operating in the same manner that they operate on the Affiliated Exchange. In particular, DMMs would not have access to orders on NYSE Arca Marketplace any different than other market participants. Thus, DMMs of an Affiliated Exchange would not be able to fulfill their DMM obligations, including the affirmative obligation to make a market in a reasonable depth and with reasonable price continuity, and would be severely hampered in their ability to stabilize the market. As a result, in the event that an Affiliated Exchange is unable to operate its systems and facilities and instead designates the Corporation to receive and process quotes and trades, such DMMs would not be considered DMMs under the NYSE Arca Equities Rules for the duration of the designation. In order to ensure that there continues to be a market for Affiliated Exchange-listed securities, DMMs would be designated as “Market Makers” in accordance with NYSE Arca Equities Rule 7.23 and would be required to meet the requirements of that Rule for the duration of an Emergency Condition.<sup>14</sup> Once trading resumed on the Affiliated Exchange, DMMs would resume their roles as DMMs and would be subject to their obligations under the Affiliated Exchange rules.

Similarly, in the event of a declaration of an Emergency Condition, the Affiliated Exchange would, as applicable, provide temporary membership and/or authorized access to those Corporation ETP Holders and Sponsored Participants that are not already members or sponsored participants of the Affiliated Exchange at the time of an Emergency Condition. The temporary designation of NYSE Arca-only ETP Holders as members of the Affiliated Exchange is necessary because, in the event of an Emergency Condition when Affiliated Exchange-listed securities are trading on the Corporation’s systems and facilities and are being printed as trades of the Affiliated Exchange, the system would not be able to prevent NYSE Arca-only ETP Holders from trading Affiliated Exchange-listed securities. By granting NYSE Arca-only ETP Holders temporary membership in the Affiliated Exchange, the Affiliated Exchange seek to avoid

any issue as to the legitimacy of such trades.

Corporation-only members that are granted a temporary membership by an Affiliated Exchange will not be required to meet any of the Affiliated Exchange’s membership requirements. Sponsored Participants of the Corporation that are not set up with sponsored access to the Affiliated Exchange would be authorized for such access through either an existing member of the Affiliated Exchange or a Corporation ETP Holder that is granted temporary membership in accordance with the rules of the Affiliated Exchange. Such temporary memberships and/or authorized access would be valid only for the duration of the Emergency Condition.

#### c. Processing Trades of Affiliated Exchange-Listed Securities Executed on or Through the Corporation’s Systems and Facilities

For the duration of the Emergency Condition, trades in securities listed on an Affiliated Exchange would print on the Consolidated Tape as trades of the Affiliated Exchange, and quotes would be designated as quotes of the Affiliated Exchange in the Consolidated Quote Stream, notwithstanding the fact that they were processed on or through the Corporation’s systems and facilities. Because an Affiliated Exchange would, as a practical and legal matter, continue to operate—albeit using different systems and facilities for processing trades and quotes—the Corporation submits that no modifications would be necessary to either the Consolidated Quote Plan or the Consolidated Tape Association Plan.<sup>15</sup>

The surveillance of the trading of Affiliated Exchange-listed securities on or through the systems and facilities of the Corporation would be conducted by NYSE Arca on behalf of the Affiliated Exchange.<sup>16</sup> In the event that an Affiliated Participant failed to comply with the Corporation’s rules while

trading Affiliated Exchange-listed securities, they would—for jurisdictional reasons—be referred to the Affiliated Exchange and be investigated by, and if warranted, prosecuted by, NYSE Regulation, Inc. on behalf of the Affiliated Exchange rather than on behalf of the Corporation.

A description of the procedures that Affiliated Participants would need to follow in order to access and effect transactions through the facilities and systems of the Corporation will be made available through the normal communication systems of the Corporation and the Affiliated Exchange. In addition, members of the Corporation are required to take appropriate actions as instructed by the Corporation to accommodate the use of its systems and facilities to trade Affiliated Exchange-listed securities pursuant to this Rule.

The Corporation recognizes that, by cross-designating Affiliated Exchange-only and NYSE Arca-only members and member organizations and requiring that all trades of Affiliated Exchange-listed securities executed on the NYSE Arca Marketplace be printed as trades of the Affiliated Exchange, its business continuity plan effectively combines the two markets for those securities. The Corporation believes, however, that its business continuity plan is appropriate and consistent with the provisions of the Act. To begin with, such consolidation would only be on a temporary basis. In addition, the Corporation notes that this arrangement would not harm customers or unfairly advantage the Corporation by distorting the allocation of market data revenue or quoting revenue to the various exchanges; because NYSE and NYSE Arca share a common corporate parent, NYSE Euronext, and revenues are reported on a consolidated basis, there is no net economic benefit to NYSE Euronext.

The Corporation believes that any confusion caused by designating all prints of Affiliated Exchange-listed securities executed on the NYSE Arca Marketplace as trades of those exchanges is far outweighed by the benefits of maintaining the ability for the Affiliated Exchange to provide primary market prints to market participants during an Emergency Condition. Among other things, the Corporation notes that certain indices, funds and derivative products require primary market prints for pricing and valuation, and that, similarly, private corporate transactional contracts involving stock purchase or valuation frequently make reference to the primary market print rather than to the

Affiliated Exchange’s listing requirements for its listed securities would continue to apply.

<sup>14</sup> DMMs will be required to meet the same margin requirements as NYSE Arca Market Makers.

<sup>15</sup> The Corporation notes that there is precedent for this type of arrangement: after the collapse of the World Trade Centers on September 11, 2001, the American Stock Exchange (“Amex”) was unable to open its trading floor because of its proximity to the collapse site. To ensure that the Amex could continue to operate, the Amex utilized the systems and facilities of the NYSE (and a portion of its trading floor) to process and trade Amex-listed securities. Indeed, for the duration of that emergency, Amex quotes and trades were considered to have originated from the Amex, notwithstanding that they were processed on the systems and facilities of the NYSE.

<sup>16</sup> The Corporation’s mnemonic identification system for its ETP Holders is different than that used by the Affiliated Exchange for its members and member organizations. Thus, trades executed by Affiliated Exchange-only members or member organizations can be readily identified if necessary.

Consolidated Tape print. The Corporation believes that without a primary market print, there could be unnecessary disruption to other areas of an already fragile marketplace that is likely facing significant challenges in dealing with other consequences of the Emergency Condition.

#### 4. Limitations on Invocation of Authority Under Proposed NYSE Arca Equities Rule 2.100

Before invoking the proposed emergency powers, the Corporation will make concerted efforts to alert and consult with the Commission via electronic, telephonic and in-person communications, and to continue to maintain an open dialogue with the Commission regarding the responses being taken. In the event that Corporation staff is unable to communicate with Commission staff, the proposed rule permits the Corporation to take appropriate action and to subsequently advise the Commission of such action at the earliest available time.

The Corporation's authority under this rule would be available for up to 10 calendar days from the date that the Corporation invoked such authority. At any time after invoking such emergency powers, the Corporation, with Commission approval, may cease or alter such emergency powers. If conditions are warranted, and subject to Commission approval of a rule filing pursuant to Section 19(b)(2) of the Act, the Corporation could extend this emergency authority for a specific amount of time longer than the initial 10 calendar day period.

Before seeking Commission approval for such an extension, the Corporation will re-evaluate the specific regulatory actions taken. The Commission may also unilaterally direct that the Corporation cease or alter such emergency powers. Once such authority has been invoked, the Corporation will use its available communications resources, including its Web site and other public channels, as well as regulatory channels such as Regulatory Bulletins, to provide ETP Holders and Sponsored Participants with advance notice of when such actions will expire. The Corporation shall provide adequate prior notice to ETP Holders, Sponsored Participants and investors regarding its intention to terminate the actions taken.

#### Trading Halts Due to Extraordinary Market Volatility

NYSE Arca currently has the authority to halt all stocks eligible for trading on NYSE Arca Equities in the event of extraordinary market

volatility,<sup>17</sup> consistent with the authority granted to other self-regulatory organizations ("SROs").<sup>18</sup> The Corporation believes that the NYSE is currently the only SRO that monitors for the thresholds (*i.e.*, a specified decline of the Dow Jones Industrial Average<sup>SM</sup> ("DJIA")) from such index's previous close during a trading day, based on a quarterly calculation of the average closing value for DJIA during such quarter) as noted within these common rules. Due to this, the Corporation shall establish a mechanism to calculate these thresholds in the event trading on the NYSE becomes inoperable and the Corporation acts as the alternative trading facility of that Affiliated Exchange, as contemplated by this proposed rule.

#### Conclusion

Because the purpose of the proposed rule is to grant authority to the Corporation to act in the event of an Emergency Condition, the terms of the rule are necessarily inclusive, and flexible. At all times, the Corporation will continue to act in a manner consistent with the public interest and for the protection of investors, and it intends to be bound by and guided by these underlying precepts should there be a need to invoke proposed NYSE Arca Equities Rule 2.100 and exercise such proposed emergency powers.

#### 2. Statutory Basis

The basis for this proposed rule change is the requirement under Section 6(b)(5)<sup>19</sup> of the Act that an exchange have rules that are 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. Proposed NYSE Arca Equities Rule 2.100 would provide the Corporation with the regulatory flexibility to take action, as necessary, in the event of an Emergency Condition, as defined.

#### 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 35 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 Exchange consents, the Commission will:

(A) By order approve such 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2009-90 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-2009-90. This file number should be included on the subject line if e-mail 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 Commissions 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

<sup>17</sup> See NYSE Arca Equities Rule 7.12.

<sup>18</sup> See, e.g., NYSE Rule 80B, Rule 80B-NYSE Amex Equities, NASDAQ Stock Market Rules 4120 and 4121.

<sup>19</sup> 15 U.S.C. 78f(b)(5).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying 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 NYSE Arca. 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-2009-90 and should be submitted on or before December 3, 2009.

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

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. E9-27127 Filed 11-10-09; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60942; File No. SR-Phlx-2009-93]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Extension of Sponsored Access Pilot Program

November 4, 2009.

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 October 26, 2009, NASDAQ OMX PHLX, Inc. ("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 extend its sponsored access rule for a pilot period ending on January 31, 2010.

The text of the proposed rule change is available on the Exchange's Web site at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, at the principal office of the Exchange, 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 attract additional business by extending its sponsored access rule, which is similar to that of other exchanges. During the previous pilot program, very few member organizations availed themselves of the program, but the Exchange seeks to make it available for an additional pilot period expiring January 31, 2010.

A Sponsored Participant is a non-member of the Exchange, such as an institutional investor, that gains access to the Exchange and trades under a Sponsoring Member's execution and clearing identity pursuant to a sponsorship arrangement between such non-member and a member organization. Specifically, the Exchange proposes to permit Sponsored Participants to be sponsored by Sponsoring Member Organizations, and thereby access the Exchange, subject to certain requirements. These requirements are intended to confirm that the Sponsored Participant is required to and had procedures in place to comply with Exchange rules, and that the Sponsoring Member Organization takes responsibility for the Sponsored Participant's activity on the Exchange.

First, the Sponsored Participant and its Sponsoring Member Organization must have entered into and maintained an Access Agreement with the Exchange. The Sponsoring Member Organization must designate the

Sponsored Participant by name in an addendum to the Access Agreement.

Second, there must be a Sponsored Participant Agreement between the Sponsoring Member Organization and the Sponsored Participant that contains the following sponsorship provisions, enumerated in full in Rule 1094(b)(ii):

(i) The orders of the Sponsored Participant are binding in all respects on the Sponsoring Member Organization;

(ii) the Sponsoring Member Organization is responsible for the actions of the Sponsored Participant;

(iii) in addition to the Sponsoring Member Organization being required to comply with the Exchange Certificate of Incorporation, By-laws, Rules and procedures of the Exchange, the Sponsored Participant shall do so as if such Sponsored Participant were an Exchange member organization;

(iv) the Sponsored Participant shall maintain, keep current and provide to the Sponsoring Member Organization a list of individuals authorized to obtain access to the Exchange on behalf of the Sponsored Participant;

(v) the Sponsored Participant shall familiarize its authorized individuals with all of the Sponsored Participant's obligations under this Rule and will assure that they receive appropriate training prior to any use or access to the Exchange;

(vi) the Sponsored Participant may not permit anyone other than authorized individuals to use or obtain access to the Exchange;<sup>3</sup>

(vii) the Sponsored Participant shall take reasonable security precautions to prevent unauthorized use or access to the Exchange, including unauthorized entry of information into the Exchange, and agrees that it is responsible for any and all orders, trades and other messages and instructions entered, transmitted or received under identifiers, passwords and security codes of authorized individuals, and for the trading and other consequences thereof;

(viii) the Sponsored Participant acknowledges its responsibility to establish adequate procedures and controls that permit it to effectively monitor its employees', agents' and Participants' use and access to the Exchange for compliance with the terms of this agreement;

(ix) the Sponsored Participant shall pay when due all amounts, if any, payable to Sponsoring Member

<sup>3</sup> If the Exchange determines that an authorized individual has caused a Member Organization to violate the Exchange's Rules, the Exchange could direct the Member Organization to suspend or withdraw the person's status as an authorized individual.

<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.