

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60967; File No. SR-NYSEArca-2009-84]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Permitting Affiliation With NYFIX Millennium LLC and NYFIX Securities Corporation

November 9, 2009.

#### I. Introduction

On September 22, 2009, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission" or "SEC") a proposed rule change, 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> proposing that the Exchange be affiliated with two registered broker-dealer subsidiaries of NYFIX, Inc. ("NYFIX"), NYFIX Millennium LLC ("NYFIX Millennium") and NYFIX Securities Corporation ("NYFIX Securities"), for a period not to exceed six months and subject to certain limitations and obligations. The proposed rule change was published for comment in the **Federal Register** on October 5, 2009.<sup>3</sup> On November 6, 2009, NYSE Arca filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission received no comments on the proposal. This order approves the proposed rule change as modified by Amendment No. 1.

#### II. Overview

On August 26, 2009, NYSE Technologies entered into an Agreement and Plan of Merger ("Merger Agreement") with NYFIX and CBR Acquisition Corp., a Delaware corporation and a wholly owned subsidiary of NYSE Technologies. Under the terms of the Merger Agreement, CBR Acquisition Corp. will merge with and into NYFIX, with NYFIX surviving the merger as a direct wholly owned subsidiary of NYSE Technologies ("Merger"). Following the Merger, both the Exchange and NYFIX will be indirect wholly owned subsidiaries of NYSE Euronext.

Consequently, NYFIX, and its subsidiaries NYFIX Millennium and NYFIX Securities, will be affiliates of the Exchange.

As a result of the Merger, NYSE Technologies will acquire, among other things, NYFIX's Transaction Services Division. In the U.S., the Transaction Services Division is currently composed of two U.S. registered broker-dealer subsidiaries: NYFIX Millennium, which is also an alternative trading system registered under Regulation ATS under the Act;<sup>5</sup> and, NYFIX Securities. In addition to other services provided by NYFIX Millennium and NYFIX Securities, (1) NYFIX Millennium provides routing of orders that are not matched within the NYFIX Millennium matching system to marketplaces such as exchanges, electronic communication networks, and ATSs, which are not operated by NYFIX; and (2) NYFIX Securities provides direct electronic market access and algorithmic trading products (together, "Routing Services").

The Exchange proposes to be affiliated with NYFIX Millennium and NYFIX Securities for a period not to exceed six months and subject to certain terms and conditions that the Exchange believes effectively address concerns regarding the (1) the potential for conflicts of interest where an exchange is affiliated with a broker-dealer conducting an order routing business that may interact with the Exchange itself, and (2) the potential for informational advantages that could place such an affiliated broker-dealer at a competitive advantage in comparison with other non-affiliated broker-dealers.

#### III. Discussion and Commission Findings

After careful consideration, 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.<sup>6</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>7</sup> 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.

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>8</sup> The proposed relationship raises similar concerns in that the Exchange will be affiliated with two broker-dealers that provide Routing Services for orders that may be routed to the Exchange in competition with Exchange members. The Exchange has requested that the Commission approve its proposed affiliation with NYFIX Millennium and NYFIX Securities on a temporary basis, not to exceed six months, subject to certain conditions designed to address such concerns.

Specifically, so long as the Exchange is affiliated with NYFIX Millennium or NYFIX Securities and with respect to the Routing Services provided by each:<sup>9</sup>

- (1) Neither NYFIX Millennium nor NYFIX Securities are members of the Exchange nor will they become members of the Exchange;
- (2) NYFIX does not offer order routing services other than the Routing Services, and none of the Routing Services will be modified unless such modification is approved by the Commission;
- (3) NYFIX will not engage in proprietary trading;
- (4) NYFIX will not accept any new clients for the Routing Services after the Merger;
- (5) There will continue to be independent functionality of, and full public access to, NYSE facilities; and
- (6) There will be a complete separation between NYFIX, on the one hand, and the Exchange and its affiliates, on the other (e.g., no shared

<sup>8</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 combination of NYSE and Archipelago Holdings, Inc.); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62) (order approving acquisition of the American Stock Exchange by NYSE Euronext); 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.).

<sup>9</sup> For the conditions set forth below, references to NYFIX also refer to its subsidiaries NYFIX Millennium and NYFIX Securities. See Amendment No. 1, *supra* note 4.

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

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

<sup>3</sup> Securities Exchange Act Release No. 60738 (September 29, 2009), 74 FR 51211 ("Notice").

<sup>4</sup> In Amendment No. 1, the Exchange clarified that, with respect to the conditions on the Exchange's affiliation with NYFIX Millennium and NYFIX Securities, references to NYFIX also refer to its subsidiaries, NYFIX Millennium and NYFIX Securities. This technical amendment does not require notice and comment, as it did not materially affect the substance of the rule filing.

<sup>5</sup> 17 CFR 242.300-303.

<sup>6</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78f(b)(5).

office space, no shared employees, no shared systems).

The Exchange may furnish to NYFIX the same information on the same terms that the Exchange makes available in the normal course of business to any other person. Specifically:

(a) NYFIX must not be provided an information advantage concerning the operation of the Exchange or any of its facilities, particularly regarding changes and improvements to the trading systems, that are not available to the industry generally.

(b) NYFIX will be prevented from having any advance knowledge of proposed changes or modifications to the operations of the Exchange or its facilities, including but not limited to advance knowledge of related filings by the Exchange pursuant to Rule 19b-4 of the Act.<sup>10</sup>

(c) NYFIX will not share employees or databases with the Exchange, any facility of the Exchange, or any other affiliate of the Exchange or their facilities, and will be housed in a separate office.

(d) NYFIX will only be notified of any changes or improvements to any of the Exchange's operations or trading facilities in the same manner that other persons are notified of such changes or improvements;

(e) NYFIX will not disclose any system or design specifications, or any other information, to any employees of the Exchange, any facility of the Exchange, or any other affiliate of the Exchange or their facilities that would give NYFIX an unfair advantage over its competitors.

(f) None of the Exchange, any facility of the Exchange, or any other affiliate of the Exchange or their facilities will disclose any system or design specifications, or any other information, to any employees of NYFIX or any affiliate of NYFIX that would give the Exchange, any other facility of the Exchange, any other affiliate of the Exchange, or NYFIX an unfair advantage over its competitors.

The Commission also notes that each of NYFIX Millennium and NYFIX Securities has the Financial Industry Regulatory Authority ("FINRA"), an unaffiliated self-regulatory organization ("SRO"), as its designated examining authority and neither broker-dealer is a member of the Exchange.<sup>11</sup>

The Commission finds that the temporary proposed affiliation between the Exchange and NYFIX Millennium and NYFIX Securities, pursuant to the proposed terms and conditions, is

consistent with the Act, particularly Section 6(b)(5) thereunder.<sup>12</sup> The Commission continues to be concerned about potential unfair competition and conflicts of interest when an exchange, or one of its affiliates, is the parent company of a broker-dealer that provides Routing Services that may be in competition with services provided by members of that exchange. The Commission believes, however, that the temporary nature of the affiliation, together with the proposed terms and conditions, are reasonably designed to mitigate concern about potential unfair competition and conflicts of interest between the commercial interests of the Exchange or its affiliates, and the Exchange's regulatory responsibilities.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the proposed rule change (SR-NYSEArca-2009-84), as amended, is hereby approved.

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

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60966; File No. SR-Phlx-2009-94]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change, as Modified by Amendment No. 1, To Add Seventy-Five Options Classes to the Penny Pilot Program

November 9, 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 28, 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, II and III below, which Items have been prepared by the Exchange. Phlx filed Amendment No. 1 to the proposal on

<sup>12</sup> 15 U.S.C. 78(f)(b)(5).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</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.

November 5, 2009.<sup>3</sup> 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 is filing with the Commission a proposal to designate seventy-five options classes to be added to the Penny Pilot in options classes in certain issues ("Penny Pilot" or "Pilot") on November 2, 2009.<sup>4</sup> The Exchange is not proposing to amend any rule text, but simply administering or enforcing an existing rule.<sup>5</sup>

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqomxphlx.cchwallstreet.com>, 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 this filing is to identify the next seventy-five options classes to be added to the Penny Pilot effective November 2, 2009.

In the Exchange's immediately effective filing to extend and expand the Penny Pilot through December 31,

<sup>3</sup> In Amendment No. 1, Phlx proposed to correct a technical error in Section III. The change has no effect on the substance of the proposed rule change.

<sup>4</sup> The Penny Pilot was established in January 2007 and in October 2009 was expanded and extended through December 31, 2010. See Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006-74) (notice of filing and approval order establishing Penny Pilot); and 60873 (October 23, 2009) (SR-Phlx-2009-91) (notice of filing and immediate effectiveness expanding and extending Penny Pilot).

<sup>5</sup> See Rule 1034 regarding the Penny Pilot.

<sup>10</sup> 15 U.S.C. 78a.

<sup>11</sup> See Notice.