

### 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 self-regulatory organization 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-2009-42 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-2009-42. 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, 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-NYSE-2009-42 and should be submitted on or before May 15, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

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

[FR Doc. E9-9387 Filed 4-23-09; 8:45 am]

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59790; File No. SR-NYSEArca-2009-32]

#### **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Implementing the NYSE Arca Realtime Reference Prices Service on a Permanent Basis**

April 20, 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 April 15, 2009, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to establish the NYSE Arca Realtime Reference Prices service and to establish a flat monthly fee for that service. The Exchange currently provides this service pursuant to a pilot program<sup>3</sup> and now proposes to make the service permanent. The service allows a vendor to redistribute on a real-time basis last sale prices of transactions that take place on the Exchange ("NYSE Arca

Realtime Reference Prices"). 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 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*

##### *a. The Service*

The Exchange currently conducts a pilot program that has tested the viability of NYSE Arca Realtime Reference Prices. In its filing, the Exchange stated that prior to the end of the pilot period, the Exchange would assess its experience with the service and either submit a proposed rule change that seeks to modify or eliminate the pilot program or to make it permanent.<sup>4</sup>

The Exchange has found that the pilot program provides a low-cost service that makes real-time prices widely available to casual investors, provides vendors with a useful real-time substitute for delayed prices; and relieves vendors of administrative burdens. The product responds to the requirements for distribution of real-time last sale prices over the internet for reference purposes, rather than as a basis for making trading decisions. For those reasons, the Exchange is now proposing to make it a permanent part of the Exchange's market data offerings.

<sup>4</sup> The Exchange initially proposed to end the pilot program on November 1, 2008. The Exchange has submitted three extensions of the end date for the pilot program on Forms 19b-4. (See Securities Exchange Act Release No. 34-58895 (October 31, 2008), 73 FR 66956 (November 12, 2008) (File No. SR-NYSEArca-2008-122), Securities Exchange (sic) Release No. 34-59184 (December 30, 2008), 74 FR 755 (January 7, 2009) (File No. SR-NYSEArca-2008-143) and Securities Exchange Act Release No. 34-59662 (March 31, 2009), 74 FR 15571 (April 6, 2009) (File No. SR-NYSEArca-2009-25)). The pilot program is currently scheduled to end on June 30, 2009.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

<sup>27</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 34-58444 (August 29, 2008), 73 FR 51872 (September 5, 2008) (SR-NYSEArca-2008-96).

The NYSE Arca Realtime Reference Prices service allows internet service providers, traditional market data vendors, and others ("NYSE Arca-Only Vendors") to make available NYSE Arca Realtime Reference Prices on a real-time basis.<sup>5</sup> The NYSE Arca Realtime Reference Price information includes last sale prices for all securities that trade on the Exchange. The product includes only prices; it does not include the size of each trade or bid/asked quotations.

Under the pilot program, the Exchange does not permit NYSE Arca-Only Vendors to provide NYSE Arca Realtime Reference Prices in a context in which a trading or order-routing decision can be implemented unless the NYSE Arca-Only Vendor also provides consolidated displays of Network A last sale prices available in an equivalent manner, as Rule 603(c)(1) of Regulation NMS requires. The Exchange proposes to keep this same prohibition in the permanent offering.

As with the pilot program, the permanent service would eliminate some of the administrative burdens associated with the distribution of real-time CTA prices. The permanent service would feature the same flat, fixed monthly vendor fee, no user-based fees, no vendor reporting requirements, and no professional or non-professional subscriber agreements.

#### b. The Fee

During the pilot program, the Exchange established a \$30,000 monthly flat fee that entitles an NYSE Arca-Only Vendor to receive access to the NYSE Arca Realtime Reference Prices datafeed. The Exchange proposes to retain that fee for the permanent service. For that fee, the NYSE Arca-Only Vendor may provide unlimited NYSE Arca Realtime Reference Prices to an unlimited number of the NYSE Arca-Only Vendor's subscribers and customers. The pilot program does not impose any device or end-user fee for the NYSE Arca-Only Vendors' distribution of NYSE Arca Realtime Reference Prices and the Exchange is not proposing to add any new fees for the permanent service.

As with the pilot program, the Exchange proposes to require the NYSE Arca-Only Vendor to identify the NYSE Arca trade price by placing the text "NYSE Arca Data" in close proximity to the display of each NYSE Arca Realtime Reference Price or series of NYSE Arca

Realtime Reference Prices, or by complying with such other identification requirement as to which NYSE may agree.

The NYSE Arca-Only Vendor may make NYSE Arca Realtime Reference Prices available without having to differentiate between professional subscribers and nonprofessional subscribers, without having to account for the extent of access to the data, and without having to report the number of users.

The flat fee enables internet service providers and traditional vendors that have large numbers of casual investors as subscribers and customers to contribute to the Exchange's operating costs in a manner that is appropriate for their means of distribution.

In setting the level of the NYSE Arca Realtime Reference Prices fee, the Exchange took into consideration several factors, including:

- (1) The fees that Nasdaq and NYSE are charging for similar services;
- (2) Consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;
- (3) The contribution of market data revenues that the Exchange believes is appropriate for entities that provide market data to large numbers of investors, which are the entities most likely to take advantage of the proposed service;
- (4) The contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations;
- (5) The savings in administrative and reporting costs that the NYSE Arca Realtime Reference Prices service will provide to NYSE Arca-Only Vendors; and
- (6) The fact that the proposed fee provides an alternative to existing fees under the CTA and Nasdaq/UTP Plans, an alternative that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

The Exchange believes that the level of the fee is consistent with the approach set forth in the order by which the Commission approved NYSE Arca's ArcaBook fees.<sup>6</sup> In the ArcaBook Approval Order, the Commission stated that "when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory."<sup>7</sup> It noted

that if significant competitive forces apply to a proposal, the Commission will approve it unless a substantial countervailing basis exists.

NYSE Arca Realtime Reference Prices constitute "non-core data." The Exchange does not require a central processor to consolidate and distribute the product to the public pursuant to joint-SRO plans. Rather, the Exchange distributes the product voluntarily.

In the case of NYSE Arca Realtime Reference Prices, both of the two types of competitive forces that the Commission described in the ArcaBook Approval Order are present: The Exchange has a compelling need to attract order flow and the product competes with a number of alternative products.

The Exchange must compete vigorously for order flow to maintain its share of trading volume. This requires the Exchange to act reasonably in setting market data fees for non-core products such as NYSE Arca Realtime Reference Prices. The Exchange hopes that NYSE Arca Realtime Reference Prices will enable vendors to distribute NYSE Arca last sale price data widely among investors, and thereby provide a means for promoting the Exchange's visibility in the marketplace.

In addition to the need to attract order flow, the availability of alternatives to NYSE Arca Realtime Reference Prices significantly constrains the prices at which the Exchange can market NYSE Arca Realtime Reference Prices. All national securities exchanges, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data, as well as the core data feed, are all sources of competition for NYSE Arca Realtime Reference Prices. Currently, NYSE and Nasdaq offer similar services. (The Exchange anticipates that NYSE will soon file for permanent approval of the fee for its counterpart product.)

The information available in NYSE Arca Realtime Reference Prices is included in the CTA and Nasdaq UTP core data feeds, which also include the size of trades, as well as last sale information from other markets. Even though NYSE Arca Realtime Reference Prices omits size and provides prices that are not consolidated with those of other markets, investors may select it as a less expensive alternative to the CTA and Nasdaq/UTP Plans' consolidated last sale price services for certain purposes. (Rule 603(c) of Regulation NMS requires vendors to make the core data feeds available to customers when trading and order-routing decisions can be implemented.)

<sup>5</sup> The Exchange notes that it will make the NYSE Arca Realtime Reference Prices available to vendors no earlier than it makes those prices available to the processor under the CTA and Nasdaq/UTP Plans.

<sup>6</sup> See Release No. 34-59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (the "ArcaBook Approval Order").

<sup>7</sup> Id. at 74771.

## c. Contracts

As with the pilot program, NYSE Arca proposes to allow NYSE Arca-Only Vendors to provide NYSE Arca Realtime Reference Prices without requiring the end-users to enter into contracts for the benefit of the Exchange.

Instead, the Exchange proposes to require NYSE Arca-Only Vendors to provide a readily visible hyperlink that will send the end-user to a warning notice about the end-user's receipt and use of market data. The notice would be similar to the notice that vendors provide today when providing CTA delayed data services.

The Exchange will require NYSE Arca-Only Vendors to enter into the form of "vendor" agreement into which the CTA and CQ Plans require recipients of the Network A datafeeds to enter (the "Network A Vendor Form"). The Network A Vendor Form will authorize the NYSE Arca-Only Vendor to provide the NYSE Arca Realtime Reference Prices service to its subscribers and customers.

The Network A Participants drafted the Network A Vendor Form as a one-size-fits-all form to capture most categories of market data dissemination. It is sufficiently generic to accommodate NYSE Arca Realtime Reference Prices. The Commission has approved the Network A Vendor Form.<sup>8</sup>

The Exchange will supplement the Network A Vendor Form with an *Exhibit C* that will provide above-described terms and conditions that are unique to the NYSE Arca Realtime Reference Prices service. The proposed *Exhibit C* is substantially similar to the Exhibit C that NYSE Arca uses for the pilot program (except for provisions related to the conduct of the pilot program) and is attached to this proposed rule change as *Exhibit 5*, marked to show changes from the version used for the pilot program. The supplemental *Exhibit C* terms and conditions would govern:

- The restriction against providing the service in the context of a trading or order-routing service;
- The replacement of end-user agreements with a hyperlink to a notice;
- The substance of the notice; and
- The "NYSE Arca Data" labeling requirement.

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement

under Section 6(b)(4)<sup>9</sup> that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities and the requirements under Section 6(b)(5)<sup>10</sup> that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

The proposed rule change would benefit investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the NYSE Arca Realtime Reference Prices service. In addition, the Exchange believes that the proposed fee would allow entities that provide market data to large numbers of investors, which are the entities most likely to take advantage of the proposed service, to make an appropriate contribution towards meeting the overall costs of the Exchange's operations.

The Exchange notes that its proposed fee compares favorably with the fees that Nasdaq and NYSE are charging for similar services. Because the proposed fee is substantially lower than those of Nasdaq and NYSE, it offers any vendor that wishes to provide its customers with a single market's data (as opposed to a more expensive consolidated data service) a less expensive alternative to Nasdaq and NYSE. In addition, for that lower fee, vendors receive Exchange prices for securities of Networks A, B and C, something that differentiates the Exchange's product from the NYSE product.

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

NYSE Arca Realtime Reference Prices proposes to provide an alternative to existing fees and does not alter or rescind any existing fees. In addition, it amounts to a competitive response to the products that Nasdaq and NYSE have commenced to make available. For those reasons, the Exchange does not believe that this proposed rule change will result in 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

The Exchange has discussed the proposed rules change with those entities that the Exchange believes would be the most likely to take

advantage of the proposed NYSE Arca Realtime Reference Prices service by becoming NYSE Arca-Only Vendors. While those entities have not submitted formal, written comments on the proposal, the Exchange has incorporated some of their ideas into the proposal and this proposed rule change reflects their input. The Exchange has not received any unsolicited written comments from members or other interested parties.

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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 self-regulatory organization 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-2009-32 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-2009-32. 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

<sup>8</sup> See Securities Exchange Act Release Nos. 28407 (September 6, 1990), 55 FR 37276 (September 10, 1990) (File No. 4-281); 49185 (February 4, 2004), 69 FR 6704 (February 11, 2004) (SR-CTA/CQ-2003-01).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

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, 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-NYSEArca-2009-32 and should be submitted on or before May 15, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59794; File No. SR-Phlx-2009-17]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc., Order Approving Proposed Rule Change Relating to the Nomination and Election of Candidates for Governor and Independent Governor

April 20, 2009.

On February 23, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to amend its Certificate of Incorporation and By-Laws to modify its processes relating to the nomination and election of candidates for the Board of Governors ("Board"). The proposed rule change was published for comment in the **Federal Register** on March 16, 2009.<sup>3</sup> The Commission received no comments regarding the proposal. This

order approves the proposed rule change.

In its filing, the Exchange sought to conform its governance structure, including its process for the nomination and election of candidates for Governor and Designated Independent Governor positions, to more closely resemble that of its corporate sibling, The NASDAQ Stock Market LLC ("Nasdaq").<sup>4</sup> In particular, the Exchange proposed several changes to its governance structure, including (i) bifurcating the "Nominating, Elections and Governance Committee" into a separate "Nominating Committee" and a "Member Nominating Committee"; (ii) modifying the processes for nominating candidates for Governor and Designated Independent Governor; (iii) modifying the procedures for Member Organization Representatives to vote for Designated Governor nominees and the procedures for meetings of Members and Member Organizations; (iv) changing the procedures for filling vacancies on the Board, and the timeframe for submitting Board resignations; and (v) adding several new definitions, including "Industry Member," "Non-Industry Member," and "Member Representative member." The Exchange also proposed to amend its Certificate of Incorporation and its By-Laws to delete the positions of Vice Chair and PBOT Governor.

The Commission has carefully reviewed the proposed rule change and 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>5</sup> including, in particular, Section 6(b)(1) of the Act,<sup>6</sup> which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act; Section 6(b)(3) of the Act,<sup>7</sup> which requires that the rules of a national securities exchange assure a fair representation of its members in the selection of its directors and administration of its affairs, and provided that one or more directors shall be representative of issuers and

investors and not be associated with a member of the exchange, broker or dealer; and Section 6(b)(5) of the Act,<sup>8</sup> which requires that an exchange have rules designed to prevent fraudulent and manipulative acts and practices, 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, protect investors and the public interest.

Among other things, the Exchange proposed to bifurcate its Nominating, Elections and Governance Committee into (1) a Member Nominating Committee that would be responsible for nominating candidates for each vacant Designated Governor<sup>9</sup> position and would also nominate candidates for appointment by the Board for each vacant or new position on any committee that is to be filled with a Member Representative member, and (2) a Nominating Committee that would nominate candidates for all other vacant Governor positions that are not nominated by the Member Nominating Committee. All members of the Member Nominating Committee would be a current associated person of a current member organization and would be appointed annually by the Board following consultations with Member Organization Representatives. The Nominating Committee would consist of a number of non-industry members that equal or exceed the number of industry members. In addition, a number of Public Members would be represented on the Nominating Committee, and no officer or employee of the Exchange could serve in any voting or non-voting capacity on the committee.

Further, the Exchange proposed to modify its nominating process, including the procedures for Member Organization Representatives to vote for Designated Governor nominees and the procedures for meetings of Members and Member Organizations, to more closely align them with Nasdaq's process and procedures. Among other things, the proposed procedures would continue to afford Member Organization Representatives the ability to nominate candidates for Designated Governor positions subject to certain conditions. In addition, in the event of a contested

<sup>4</sup> Both the Exchange and Nasdaq are subsidiaries of The NASDAQ OMX GROUP, Inc. See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31) (order approving changes to the Exchange's governing documents in connection with its acquisition by The NASDAQ OMX Group, Inc.).

<sup>5</sup> 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).

<sup>6</sup> 15 U.S.C. 78f(b)(1).

<sup>7</sup> 15 U.S.C. 78f(b)(3).

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

<sup>9</sup> The term "Designated Governor," which includes the Member Governor and a number of Designated Independent Governors, refers to a Governor who is selected through a process that is subject to the input of the Exchange's Member Organization Representatives. See Proposed Phlx By-Law Article I, Section 1-1(e) (defining "Designated Governor" as proposed to be amended by Phlx to exclude the PBOT Governor position).

<sup>11</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>3</sup> See Securities Exchange Act Release No. 59538 (March 9, 2009), 74 FR 11152 ("Notice").