

security is required to file reports with the Commission pursuant to Section 13 or Section 15(d) of the Exchange Act;<sup>86</sup>

(b) Is a closing transaction to offset a position in a contract of sale for future delivery that satisfied the conditions in paragraph (1)(a) of this order at the time such position was opened.

(2) Is executed on, or subject to the rules of, an exchange or contract market that has its principal place of business outside the U.S., that is regulated as an exchange or contract market in a country other than the U.S., and that is not required to register with the Commission under Section 5 of the Exchange Act;<sup>87</sup>

(3) Is cleared and settled on, and with respect to such clearance and settlement subject to the rules of, an exchange, contract market, or clearing entity that is regulated as an exchange, contract market, or clearing entity in a country other than the U.S. and that is not required to register with the Commission under Section 5 or Section 17A of the Exchange Act;<sup>88</sup>

(4) Is for a security future, that cannot be closed or liquidated by effecting an offsetting transaction on or through the facility of any exchange or association registered in the U.S. under Section 6 or Section 15A of the Exchange Act,<sup>89</sup> respectively; and

(5) Does not result in such person taking physical delivery of the underlying security in the U.S. in connection with settlement;

#### *B. Conditional Exemptions From Section 15(a)(1) of the Exchange Act and Certain Other Requirements*

For the reasons stated in, and by, this order, the Commission is exempting foreign brokers or dealers (as defined in Rule 15a-6(b)(3) under the Exchange Act)<sup>90</sup> that induce or attempt to induce the purchase or sale of any foreign security futures by a QIB that is subject to the exemption from Section 6(h)(1) of the Exchange Act, from the registration requirements of Section 15(a)(1) of the Exchange Act<sup>91</sup> and the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),<sup>92</sup> and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission; *provided that* the foreign broker or dealer and the registered broker or

dealer (as defined in Rule 15a-6(b)(5) under the Exchange Act), through which any resulting transactions with QIBs are effected, comply with the requirements of paragraphs (a)(3)(i) through (iii)<sup>93</sup> of Rule 15a-6 under the Exchange Act, except as otherwise provided below.<sup>94</sup> If the registered broker or dealer through which any resulting transactions with QIBs are effected is a broker or dealer registered with the Commission pursuant to Section 15(b)(11) of the Exchange Act ("Notice BD"), then:

(1) In lieu of the requirement in paragraph (a)(3)(iii)(A)(5) of Rule 15a-6, the Notice BD shall be responsible for complying with Rule 1.17 under the Commodity Exchange Act ("CEA") (17 CFR 1.17) with respect to the transactions; and

(2) In lieu of the requirement in paragraph (a)(3)(iii)(A)(6) of Rule 15a-6, the Notice BD shall be responsible for receiving, delivering, and safeguarding funds and securities in connection with transactions on behalf of the QIB in compliance with the segregation requirements of the CEA and the regulations thereunder.

Accordingly,

*It is hereby ordered*, pursuant to Section 36 of the Exchange Act,<sup>95</sup> that certain persons are exempt from the provisions of Section 6(h)(1) of the Exchange Act<sup>96</sup> that prohibit persons from effecting transactions in security futures products that are not listed on a national securities exchange or a national securities association registered pursuant to Section 15A(a) of the Exchange Act,<sup>97</sup> subject to the conditions set forth above.

*It is hereby further ordered*, pursuant to Section 15(a)(2) of the Exchange Act,<sup>98</sup> that a foreign broker or dealer as defined in Rule 15a-6(b)(3)<sup>99</sup> is exempt, with respect only to the activities described above in Section V.B. of this

<sup>93</sup> For purposes of this exemption, references in paragraphs (a)(3)(i) through (iii) and paragraph (b)(2) of Rule 15a-6 to major U.S. institutional investors shall be deemed to be references to QIBs. In addition, for purposes of this exemption, the reference in paragraph (a)(3)(iii)(D) to Form BD shall be deemed a reference to Form BD-N with respect to Notice BDs.

<sup>94</sup> Notwithstanding paragraph (a)(3)(ii)(A)(1) of the rule, foreign associated persons of the foreign broker or dealer may have in-person contacts (without the participation of an associated person of a registered broker or dealer) during visits to the United States with QIBs, so long as the number of days on which such in-person contacts occur does not exceed 30 per year and the foreign associated persons engaged in such in-person contacts do not accept orders to effect securities transactions while in the United States. *See supra* note 65.

<sup>95</sup> 15 U.S.C. 78mm.

<sup>96</sup> 15 U.S.C. 78f(h)(1).

<sup>97</sup> 15 U.S.C. 78o-3(a).

<sup>98</sup> 15 U.S.C. 78o(a)(2).

<sup>99</sup> 17 CFR 240.15a-6(b)(3).

order, from the registration requirements of Section 15(a)(1) of the Exchange Act, subject to the conditions set forth above.<sup>100</sup>

*It is hereby further ordered*, pursuant to Section 36 of the Exchange Act,<sup>101</sup> that a foreign broker or dealer as defined in Rule 15a-6(b)(3)<sup>102</sup> is exempt, with respect only to the activities described above in Section V.B. of this order, from the reporting and other requirements of the Exchange Act (other than Sections 15(b)(4) and 15(b)(6)),<sup>103</sup> and the rules and regulations thereunder, that apply specifically to a broker or dealer whether or not registered with the Commission, subject to the conditions set forth above.

By the Commission.

**Elizabeth M. Murphy,**  
*Secretary.*

[FR Doc. E9-15890 Filed 7-6-09; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60183; File No. SR-NASDAQ-2009-039]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1 Thereto, to Amend the By-Laws of The NASDAQ OMX Group, Inc.

June 26, 2009.

On April 27, 2009, The NASDAQ Stock Market LLC ("NASDAQ 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 the By-Laws of The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The proposed rule change was published for comment in the **Federal Register** on May 12, 2009.<sup>3</sup> On June 2, 2009, the NASDAQ Exchange filed Amendment No. 1 to the proposed rule change.<sup>4</sup> The Commission

<sup>100</sup> 15 U.S.C. 78o(a)(1).

<sup>101</sup> 15 U.S.C. 78mm.

<sup>102</sup> 17 CFR 240.15a-6(b)(3).

<sup>103</sup> 15 U.S.C. 78o(b)(4) and 78o(b)(6).

<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. 59858 (May 4, 2009), 74 FR 22191 ("Notice").

<sup>4</sup> Amendment No. 1 modified the original rule proposal to indicate that the Board of Directors of NASDAQ OMX approved the proposed rule change on May 28, 2009, in addition to December 17, 2008, and to revise the proposed rule change with respect to "Extension of Time Period for Commission Action." Because these are technical modifications,

Continued

<sup>86</sup> 15 U.S.C. 78m and 78o(d).

<sup>87</sup> 15 U.S.C. 78e.

<sup>88</sup> 15 U.S.C. 78e and 78q-1.

<sup>89</sup> 15 U.S.C. 78f and 15 U.S.C. 78o-3.

<sup>90</sup> 17 CFR 240.15a-6(b)(3).

<sup>91</sup> 15 U.S.C. 78o(a)(1).

<sup>92</sup> 15 U.S.C. 78o(b)(4) and 78o(b)(6).

received no comments regarding the proposal. This order approves the proposed rule change.

### I. Description of the Proposal

As provided in Article XI of the NASDAQ OMX By-Laws, proposed amendments to the By-Laws are to be reviewed by the Board of Directors of each self-regulatory subsidiary of NASDAQ OMX, and if any such proposed amendment must, under Section 19 of the Act and the rules promulgated thereunder, be filed with, or filed with and approved by, the Commission before such amendment may be effective, then such amendment shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be. Consistent with such requirement, the NASDAQ Exchange has filed proposed amendments to the NASDAQ OMX By-Laws.<sup>5</sup> As described more fully in the Notice, the NASDAQ Exchange proposed the following amendments to the By-Laws.

1. Amend Article I to reflect the recent name changes of the Philadelphia Stock Exchange and the Boston Stock Exchange to NASDAQ OMX PHLX, Inc. and NASDAQ OMX BX, Inc., respectively;

2. Amend Article III to require a stockholder making a proposal to supply more complete information about the stockholder's background.

3. Amend Article IV to state that both the NASDAQ OMX Audit and Management Compensation Committees shall be composed of independent directors within the meaning of the rules of the NASDAQ Exchange that govern NASDAQ OMX's listing (and, in the case of the Audit Committee, Section 10A of the Act).

4. Amend Article IV to revise the compositional requirements of the NASDAQ OMX Nominating Committee.

5. Amend Article VIII to: (a) Require NASDAQ OMX to provide indemnification against liability, advancement of expenses, and the power to purchase and maintain insurance on behalf of persons serving as a director, officer, or employee of any wholly owned subsidiary of NASDAQ OMX to the same extent as indemnification, advancement of

expenses, and the power to maintain insurance is provided for directors, officers, or employees of NASDAQ OMX; (b) extend the discretionary authority of NASDAQ OMX under Section 8.1(c) of the By-Laws to provide indemnification to persons serving as an agent of NASDAQ OMX to persons serving as an agent of any wholly owned subsidiary of NASDAQ OMX; and (c) clarify that any repeal, modification or amendment of, or adoption of any provision inconsistent with, the indemnification and advancement of expenses provided for in Article VIII will not adversely affect the right of any person covered by the provision if the act or omission that any proceeding arises out of or is related to had occurred prior to the time for the repeal, amendment, adoption or modification.

6. Amend Article IX to revise the language of the provisions dealing with capital stock to reflect possible participation in the Direct Registration System ("DRS").

7. Amend Article XII to conform certain provisions applicable to NASDAQ OMX's directors, officers, employees, and/or agents more closely to corresponding provisions in the Amended and Restated By-Laws of NYSE Euronext ("NYSE Euronext By-Laws").

### II. Discussion and Commission's 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.<sup>6</sup> In particular, for the reasons discussed below, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>7</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, and Section 6(b)(5) of the Act,<sup>8</sup> in that it is designed, among other things, 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, to protect investors and the public interest.

The NASDAQ Exchange proposes to revise the structure of the NASDAQ OMX Nominating Committee. Currently, the NASDAQ OMX Nominating Committee is required to be composed solely of persons who are not directors, or who are directors not standing for re-election. Under the amended By-Laws, the NASDAQ OMX Nominating Committee would be composed of four or five directors, all of whom must be independent within the meaning of the rules of the NASDAQ Exchange.<sup>9</sup> Further, the number of Non-Industry Directors (*i.e.*, Directors without material ties to the securities industry) must equal or exceed the number of Industry Directors, and at least two members of the committee must be Public Directors (*i.e.*, directors who have no material business relationship with a broker or dealer, NASDAQ OMX or its affiliates, or FINRA).<sup>10</sup>

The Commission believes that it is appropriate for NASDAQ OMX to revise the composition of its Nominating Committee so that it is composed exclusively of directors that would be considered independent within the meaning of the listing rules of the NASDAQ Exchange,<sup>11</sup> to provide for a compositional balance between Industry Directors, Non-Industry Directors, and to specify that at least two Nominating Committee members must be Public Directors. The Commission further believes that it is appropriate for the By-Laws to be amended to specify that the NASDAQ OMX Management Compensation Committee and the Audit Committee must be composed exclusively of independent director members within the meaning of the listing rules of the NASDAQ Exchange (and, in the case of the Audit Committee, Section 10A of the Act).<sup>12</sup> The NASDAQ Exchange has represented that NASDAQ OMX adheres to the director independence requirements in the NASDAQ Exchange's listing rules and, in the case of the Audit Committee) Section 10A of the Act, but believed that such requirements should be set forth expressly in the By-Laws.

Currently, NASDAQ OMX directors, officers, and employees, as well as

the Commission is not publishing Amendment No. 1 for comment.

<sup>5</sup> Although there is a reference in the Notice to a proposed amendment to the Certificate of Incorporation of NASDAQ OMX ("NASDAQ OMX Certificate"), this proposal does not in fact amend the NASDAQ OMX Certificate. The Exchange recently amended the NASDAQ OMX Certificate pursuant to a separate filing with the Commission. See Securities Exchange Act Release No. 59460 (February 26, 2009), 74 FR 9841 (March 6, 2009).

<sup>6</sup> In approving this proposed rule change, the Commission notes that it 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. 78(b)(1).

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

<sup>9</sup> See NASDAQ Exchange Rule 5605(a)(2). Rule 5605(a)(2) was formerly designated Rule 4200(a)(15). See Securities Exchange Act Release No. 59663 (March 31, 2009), 74 FR 15552 (April 6, 2009) (SR-NASDAQ-2009-018).

<sup>10</sup> See NASDAQ OMX By-laws, Article I (j), (m), and (n) for the definitions of Industry Director, Non-Industry Director, and Public Director, respectively.

<sup>11</sup> *Id.*

<sup>12</sup> See NASDAQ Exchange Rule 5605(a)(2). 15 U.S.C. 78j-1(m).

agents, are required by the By-Laws to give due regard to the preservation of the independence of each self-regulatory subsidiary of NASDAQ OMX, not to take any actions that would interfere with each self-regulatory subsidiary's regulatory functions, to cooperate with the Commission, to consent to U.S. jurisdiction, and to consent in writing to the applicability of these provisions. As more fully described in the Notice, the proposed rule change would conform Article XII of the By-Laws more closely to corresponding provisions in the NYSE Euronext By-Laws, which the Commission previously approved.<sup>13</sup>

### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>14</sup> that the proposed rule change (SR-NASDAQ-2009-039) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Elizabeth M. Murphy,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60184; File No. SR-NYSEArca-2009-52]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change To Amend the Schedule of Fees and Charges for Exchange Services

June 29, 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 June 10, 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 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, Inc. ("NYSE Arca" or "Exchange") [sic], through its wholly owned subsidiary NYSE Arca Equities, Inc. ("NYSE Arca Equities"), is proposing to amend its Schedule of Fees and Charges for Exchange Services ("Fee Schedule") to revise the Listing Fees applicable to Derivative Securities Products under NYSE Arca Rules 5.2(j)(3), 8.100, 8.200, 8.201, 8.202, 8.203, 8.204, 8.300, 8.500 and 8.600 on NYSE Arca, LLC ("NYSE Arca Marketplace"), the equities facility of NYSE Arca Equities. The revised Fee Schedule is attached as Exhibit 5 [sic]. The text of the proposed rule change is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office 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 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 the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

NYSE Arca has determined to amend the Exchange's Fee Schedule to revise the Listing Fee applicable to Derivative Securities Products listed on the NYSE Arca Marketplace under Rules 5.2(j)(3) (Investment Company Units), 8.100 (Portfolio Depositary Receipts), 8.200 (Trust Issued Receipts), 8.201 (Commodity-Based Trust Shares), 8.202 (Currency Trust Shares), 8.203 (Commodity Index Trust Shares), 8.204 (Commodity Futures Trust Shares), 8.300 (Partnership Units), 8.500 (Trust Units), and 8.600 (Managed Fund Shares). Specifically, the Exchange proposes to add a new provision to the Fee Schedule which states that in the case where a sponsor, managing owner, general partner or equivalent

(collectively, the "Sponsor") is listing a new Derivative Securities Product on the Exchange for the first time, the Sponsor will be charged a one time consultation fee in the amount of \$20,000.

Under the current Fee Schedule for Derivative Securities Products, the Listing Fee is \$5,000 and the Annual Fees range between \$2,000 and \$25,000 depending on the number of shares outstanding for each issue. The current Listing and Annual Fees applicable to Derivative Securities Products will remain unchanged and be applicable to all Sponsors of Derivative Securities Products. The proposed consulting charge would apply to all new Sponsors listing for the first time, a new Derivative Securities Product. Therefore, existing issuers, issuing a new Derivative Securities Product would not be charged the proposed consulting fee.

The Exchange believes that the imposition of this proposed one time consulting charge to new Sponsors of new Derivative Securities Products is necessary in order to adequately compensate the Exchange for all of the additional Exchange resources dedicated to such new Sponsors, such as the additional legal and business resources required to properly advise novice Sponsors through the listing process. The Exchange dedicates extensive time and resources to new Sponsors in the way of conference calls, meetings, correspondences, *etc.*, to educate such new Sponsors about the listing and approval process, a process that veteran Sponsors are already familiar with. The Exchange notes that the proposed new Sponsor Fee is substantially below the initial listing fee for issuers of traditional equity securities, *e.g.*, common stock. The Exchange further believes that the proposed consulting fee will enable the Exchange to continue to provide new issuers with the level of service necessary to successfully navigate an initial launch of a Derivative Securities Product.

##### 2. Statutory Basis

NYSE Arca believes that the proposal is consistent with Section 6(b) <sup>4</sup> of the Securities Exchange Act of 1934 (the "Act") [sic], in general, and Section 6(b)(4) <sup>5</sup> of the Act, in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among its issuers and other persons using its facilities. The Exchange believes that the proposal is

<sup>13</sup> See NYSE Euronext Bylaws, Article III, Section 9.3; NYSE Euronext Bylaws, Article VII, Section 7.1. See also Securities Exchange Act Release No. 55293 (February 14, 2007), 72 FR 8033 (February 22, 2007) (SR-NYSE-2006-120).

<sup>14</sup> 15 U.S.C. 78s(b)(2).

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

<sup>5</sup> 15 U.S.C. 78f(b)(4).