

*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 No. SR-NASDAQ-2010-101. 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 Web site viewing and printing 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 NASDAQ. 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 No. SR-NASDAQ-2010-101 and should be submitted on or before September 13, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62736; File No. SR-NASDAQ-2010-100]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change Regarding Routing to an Affiliated Exchange

August 17, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 6, 2010, The NASDAQ Stock Market LLC ("NASDAQ" or the "Exchange") filed with the Securities and Exchange Commission (the "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

NASDAQ is proposing a rule change to amend Rule 4751 to modify the restriction on routing of Directed Orders to a facility of an exchange that is an affiliate of NASDAQ. The text of the proposed rule change is available from NASDAQ's Web site at <http://nasdaq.cchwallstreet.com>, at NASDAQ'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, NASDAQ included statements concerning the purpose of, and basis for, the proposed rule change. The text of these statements may be examined at the places specified in Item III below, and is set forth in Sections A, B, and C below.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), a Delaware corporation, owns three U.S. registered securities exchanges—NASDAQ, NASDAQ OMX PHLX, Inc. ("PHLX") and NASDAQ OMX BX, Inc. ("BX"). In addition, NASDAQ OMX currently

indirectly owns Nasdaq Execution Services, LLC ("NES"), a registered broker-dealer and a member of PHLX. Thus, NES is an affiliate of each of NASDAQ, PHLX and BX.

PHLX has proposed to launch NASDAQ OMX PSX ("PSX")<sup>3</sup> as a new platform for trading NMS stocks (as defined in Rule 600 under Regulation NMS).<sup>4</sup> Although PSX will not route to other market centers, PSX will receive orders routed to it by other market centers, including NASDAQ. In this respect, PSX will be similar to the NASDAQ OMX BX Equities System, which does not currently route orders to other venues.

NES is the approved outbound routing facility of NASDAQ for cash equities, providing outbound routing from NASDAQ to other market centers. NES does not provide inbound routing to NASDAQ. The acquisition of NES by NASDAQ OMX was approved by the Commission in 2004 and 2005<sup>5</sup> and the rules under which NES currently routes orders from NASDAQ to other market centers were approved initially by the Commission in 2006 and have been amended on numerous occasions since then.<sup>6</sup> Rules 4751 and 4758 establish the conditions under which NASDAQ is permitted to own and operate NES in its

<sup>3</sup> Securities Exchange Act Release No. 62519 (July 16, 2010), 75 FR 43497 (July 26, 2010) (SR-PHLX-2010-79) ("PSX Proposal").

<sup>4</sup> 17 CFR 242.600.

<sup>5</sup> See Securities Exchange Act Release Nos. 50311 (September 3, 2004), 69 FR 54818 (September 10, 2004) (Order Granting Application for a Temporary Conditional Exemption Pursuant To Section 36(a) of the Exchange Act by the National Association of Securities Dealers, Inc. Relating to the Acquisition of an ECN by The Nasdaq Stock Market, Inc.) and 52902 (December 7, 2005), 70 FR 73810 (December 13, 2005) (SR-NASD-2005-128) (Order Approving a Proposed Rule Change To Establish Rules Governing the Operation of the INET System).

<sup>6</sup> See Securities Exchange Act Release Nos. 61682 (March 10, 2010), 75 FR 12592 (March 16, 2010) (SR-NASDAQ-2010-030); 61460 (February 1, 2010), 75 FR 6077 (February 5, 2010) (SR-NASDAQ-2010-018); 60570 (August 26, 2009), 74 FR 45504 (September 2, 2009) (SR-NASDAQ-2009-079); 60039 (June 3, 2009), 74 FR 27365 (June 9, 2009) (SR-NASDAQ-2009-050); 59875 (May 6, 2009), 74 FR 22794 (May 14, 2009) (SR-NASDAQ-2009-043); 59807 (April 21, 2009), 74 FR 19251 (April 28, 2009) (SR-NASDAQ-2009-036); 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR-NASDAQ-2008-098); 58752 (October 8, 2008), 73 FR 61181 (October 15, 2008) (SR-NASDAQ-2008-079); 58135 (July 10, 2008), 73 FR 40898 (July 16, 2008) (SR-NASDAQ-2008-061); 58069 (June 30, 2008), 73 FR 39360 (July 9, 2008) (SR-NASDAQ-2008-054); 56708 (October 26, 2007), 72 FR 61925 (November 1, 2007) (SR-NASDAQ-2007-078); 56867 (November 29, 2007), 72 FR 69263 (December 7, 2007) (SR-NASDAQ-2007-065); 55335 (February 23, 2007), 72 FR 9369 (March 1, 2007) (SR-NASDAQ-2007-005); 54613 (October 17, 2006), 71 FR 62325 (October 24, 2006) (SR-NASDAQ 2006-043); 54271 (August 3, 2006), 71 FR 45876 (August 10, 2006) (SR-NASDAQ-2006-027); and 54155 (July 14, 2006), 71 FR 41291 (July 20, 2006) (SR-NASDAQ-2006-001).

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

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

<sup>6</sup> 17 CFR 200.30-3(a)(12).

capacity as a facility of NASDAQ that routes orders from NASDAQ to other market centers. The conditions include requirements that: (1) NES is operated as a facility of NASDAQ; (2) NES will not engage in any business other than: (i) as an outbound router for NASDAQ and (ii) any other activities it may engage in as approved by the Commission; (3) for purposes of Commission Rule 17d-1, the designated examining authority of NES is a self-regulatory organization unaffiliated with NASDAQ; (4) use of NES to route orders to other market centers is optional;<sup>7</sup> and (5) NASDAQ will not route orders to an affiliated exchange, such as PHLX, unless they check the NASDAQ book prior to routing.

The Commission has approved NES's affiliation with PHLX subject to the conditions that: (1) NES remains a facility of NASDAQ; (2) use of NES's routing function by NASDAQ members continues to be optional; (3) NES does not provide routing of orders to PHLX or any trading facilities thereof, unless such orders first attempt to access any liquidity on the NASDAQ book; and (4) for purposes of Commission Rule 17d-1, the designated examining authority of NES is a self-regulatory organization unaffiliated with NASDAQ.<sup>8</sup>

NASDAQ is proposing that, upon the resumption of cash equity trading by PHLX, NES, in its operation as a facility of NASDAQ, be permitted to route all orders, including Directed Orders, to PSX without checking the NASDAQ book prior to routing. Directed Orders are orders that route directly to other exchanges on an immediate-or-cancel basis without first checking the NASDAQ book for liquidity.<sup>9</sup> In order to modify the conditions regarding the operation of NES and allow NES to route Directed Orders to PSX, NASDAQ is proposing to modify the restriction in Rule 4751(f)(9) that prohibits the routing of Directed Orders to a facility of an exchange that is an affiliate of NASDAQ. Under the proposed rule change, inbound routing of Directed

Orders to the NASDAQ OMX PSX facility of PHLX would be permitted.

The Commission has previously noted concerns about potential informational advantages and conflicts of interest between an exchange's self-regulatory obligations and its commercial interest when the exchange is affiliated with one of its members.<sup>10</sup> In order to address the concerns identified by the Commission regarding the potential for informational advantages favoring NES vis-à-vis other non-affiliated members of BX, NASDAQ previously adopted Rule 4758(b)(8) to provide that NES shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between NASDAQ and its facilities (including NES) and any other entity (including PHLX).<sup>11</sup>

In connection with the proposed launch of PSX, PHLX has proposed a new rule and made certain undertakings intended to manage the flow of confidential and proprietary information between NES and PHLX and to minimize potential conflicts of interest.<sup>12</sup> PHLX's proposed Rule 985(c)(2) will provide:

The NASDAQ OMX Group, Inc., which owns Nasdaq Execution Services, LLC and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that Nasdaq Execution Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated exchange members in connection with the provision of inbound routing to the Exchange.

Pursuant to the new rule, PHLX has proposed to allow PSX to receive inbound routed orders for a twelve-month pilot period.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>13</sup> in general, and with Section 6(b)(5) of the Act,<sup>14</sup> in particular, in that the proposal is 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, 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. The proposed rule change would permit inbound routing of Directed Orders and other orders to PHLX from its affiliate NES while minimizing the potential for conflicts of interest and informational advantages involved where a member firm is affiliated with an exchange to which it is routing orders.

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

NASDAQ 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*

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup>

At any time within the 60-day period beginning on the date of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>7</sup> Because only NASDAQ members may enter orders into NASDAQ, it also follows that routing by NES is available only to NASDAQ members.

<sup>8</sup> See Securities Exchange Act Release No. 58179 (July 17, 2008), 73 FR 42874 (July 23, 2008) (SR-Phlx-2008-31).

<sup>9</sup> Rules 4751 and 4755 provide for routing of "directed orders" to automated market centers other than NASDAQ on an "immediate-or-cancel" basis. Such directed orders may be designated as intermarket sweep orders ("ISOs"), which may be executed by the receiving venue based on the representation of the market participant that it has routed to all superior protected quotations, or not so designated, in which case the orders will execute only if their execution would not result in a trade-through.

<sup>10</sup> See, e.g., Securities Exchange Act Release Nos. 59153 (December 23, 2008), 73 FR 80485 (December 31, 2008) (SR-NASDAQ-2008-098) ("BX Order"); 58681 (September 29, 2008), 73 FR 58285 (October 6, 2008) (SR-NYSEArca-2008-90) ("NYSE Arca Order"); 58680 (September 29, 2008), 73 FR 58283 (October 6, 2008) (SR-NYSE-2008-76) ("NYSE Order"); 58673 (September 29, 2008), 73 FR 57707 (October 3, 2008) (SR-Amex-2008-62) ("NYSE Alternext US Order").

<sup>11</sup> BX Order, *supra* n. 10.

<sup>12</sup> PSX Proposal, *supra* n. 3.

<sup>13</sup> 15 U.S.C. 78f.

<sup>14</sup> 15 U.S.C. 78f(b)(5).

#### 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-NASDAQ-2010-100 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.

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For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62737; File No. SR-NYSEArca-2010-64]

#### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change Relating to Listing of the Wilshire Micro-Cap ETF

August 17, 2010.

##### I. Introduction

On July 1, 2010, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") 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 list and trade shares ("Shares") of the Wilshire Micro-Cap ETF. The proposed rule change was published for comment in the **Federal Register** on July 15, 2010.<sup>3</sup> The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

##### II. Description of the Proposed Rule Change

The Exchange proposes to list and trade the Shares of the Wilshire Micro-Cap ETF (the "Fund")<sup>4</sup> under NYSE Arca Equities Rule 5.2(j)(3), the Exchange's listing standards for Investment Company Units ("Units").<sup>5</sup> The Fund is a series of the Claymore Exchange-Traded Fund Trust.

The Fund seeks investment results that correspond generally to the performance, before fees and expenses, of the Wilshire US Micro-Cap Index<sup>SM</sup>

("Index"). The Index is designed to represent micro-sized companies and is a subset of the Wilshire 5000 Total Market Index<sup>SM</sup> (the "Wilshire 5000"). The Index represents a float-adjusted, market capitalization-weighted index of the issues ranked below 2500 by market capitalization of the Wilshire 5000. As of March 31, 2010, the Index was comprised of approximately 1,564 securities of micro-capitalization companies.

The Exchange represents that: (i) Except for Commentaries .01(a)(A)(1)<sup>6</sup> and .01(a)(A)(5)<sup>7</sup> to NYSE Arca Equities Rule 5.2(j)(3), the Shares of the Fund currently satisfy all of the other generic listing standards under NYSE Arca Equities Rule 5.2(j)(3); (ii) the continued listing standards under NYSE Arca Equities Rules 5.2(j)(3) and 5.5(g)(2) applicable to Units shall apply to the Shares; and (iii) the Trust is required to comply with Rule 10A-3<sup>8</sup> under the Act for the initial and continued listing of the Shares. Additionally, the Exchange represents that the Shares will comply with all other requirements applicable to Units including, but not limited to, requirements relating to the dissemination of key information such as the value of the Index and Intraday Indicative Value, rules governing the trading of equity securities, trading hours, trading halts, surveillance, and Information Bulletin to ETP Holders, as set forth in Exchange rules applicable to Units and prior Commission orders approving the generic listing rules applicable to the listing and trading of Units.<sup>9</sup>

<sup>6</sup> Commentary .01(a)(A)(1) to NYSE Arca Equities Rule 5.2(j)(3) provides that component stocks (excluding Units and securities defined in Section 2 of NYSE Arca Equities Rule 8, collectively, "Derivative Securities Products") that in the aggregate account for at least 90% of the weight of the index or portfolio (excluding such Derivative Securities Products) each shall have a minimum market value of at least \$75 million. The Exchange has represented that, as of April 21, 2010, 76.93% of the weight of the Index components had a market capitalization greater than \$75 million.

<sup>7</sup> Commentary .01(a)(A)(5) to NYSE Arca Equities Rule 5.2(j)(3) provides that all securities in the index or portfolio shall be US Component Stocks listed on a national securities exchange and shall be NMS Stocks as defined in Rule 600 of Regulation NMS under the Act. The Exchange has represented that, as of April 21, 2010, 201 of approximately 1,564 components in the Index, accounting for approximately 12.8% of the total stocks in the Index and approximately 3.7% of the Index weight, were non-NMS stocks that trade either on the OTC Bulletin Board or the Pink OTC Markets.

<sup>8</sup> 17 CFR 240.10A-3.

<sup>9</sup> See, e.g., Securities Exchange Act Release Nos. 44551 (July 12, 2001), 66 FR 37716 (July 19, 2001) (SR-PCX-2001-14) (order approving generic listing standards for Units and Portfolio Depositary Receipts); and 41983 (October 6, 1999), 64 FR 56008 (October 15, 1999) (SR-PCX-98-29) (order approving rules for listing and trading of Units).

<sup>17</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. 62471 (July 8, 2010), 75 FR 41252 ("Notice").

<sup>4</sup> See the Claymore Exchange-Traded Fund Trust's registration statement on Form N-1A, dated May 18, 2010 (File Nos. 333-134551; 811-21906) ("Registration Statement").

<sup>5</sup> An Investment Company Unit is a security that represents an interest in a registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities (or holds securities in another registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities). See NYSE Arca Equities Rule 5.2(j)(3)(A).