

make and keep records to document all determinations to treat positions as error positions; all determinations to assign error positions to members or to liquidate error positions; and the liquidation of error positions through the third-party broker-dealer.

### III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of Section 6(b) of the Act<sup>19</sup> and the rules and regulations thereunder applicable to a national securities exchange.<sup>20</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>21</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, 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. In addition, the Commission believes the proposed rule change is consistent with Section 11A(a)(1)(C) of the Act<sup>22</sup> in that it seeks to assure economically efficient execution of securities transactions.

The Commission recognizes that technical or systems issues may occur, and believes that Phlx Rule 3315, in allowing Phlx or NES to cancel orders affected by technical or systems issues, should provide a reasonably efficient means for Phlx to handle such orders, and appears reasonably designed to permit Phlx to maintain fair and orderly markets.<sup>23</sup>

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

<sup>20</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>21</sup> 15 U.S.C. 78f(b)(5).

<sup>22</sup> 15 U.S.C. 78k-1(a)(1)(C).

<sup>23</sup> The Commission notes that Phlx states that the proposed amendments to Phlx Rule 3315 are designed to maintain fair and orderly markets, ensure full trade certainty for market participants, and avoid disrupting the clearance and settlement process. See Notice, 77 FR at 40687. The Commission also notes that Phlx states that a decision to cancel orders due to a technical or systems issue is not equivalent to the Exchange declaring self-help against a routing destination pursuant to Rule 611 of Regulation NMS. See 17

The Commission also believes that allowing the Exchange to resolve error positions through the use of an error account maintained by NES pursuant to the procedures set forth in the rule, and as described above, is consistent with the Act. The Commission notes that the rule establishes criteria for determining which positions are error positions,<sup>24</sup> and that Phlx or NES, in connection with a particular technical or systems issue, will be required to either (i) assign all resulting error positions to members or (ii) have all resulting error positions liquidated.<sup>25</sup> Also, Phlx or NES will assign error positions that result from a particular technical or systems issue to members only if all such error positions can be assigned to all of the members affected by that technical or systems issue.<sup>26</sup> If Phlx or NES cannot assign all error positions to all members, NES will liquidate all of those error positions.<sup>27</sup> In this regard, the Commission believes that the new rule appears reasonably designed to further just and equitable principles of trade and the protection of investors and the public interest, and to help prevent unfair discrimination, in that it should help assure the handling of error positions will be based on clear and objective criteria, and that the resolution of those positions will occur promptly through a transparent process.

Additionally, the Commission notes that it has previously expressed concern about the potential for unfair competition 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>28</sup> The Commission is also concerned about the potential for misuse of confidential and proprietary information. The Commission believes that the requirement that NES provide complete time and price discretion for the liquidation of error positions to a third-party broker-dealer, including that NES not attempt to exercise any influence or control over the timing or methods of such trading, combined with the requirement that Phlx establish and enforce policies and procedures that are reasonably designed to restrict the flow of confidential and proprietary information to the third-party broker-dealer liquidating such positions,

CFR 242.611(b). See also Notice, 77 FR at 40686 n.10.

<sup>24</sup> See Phlx Rule 3315(d)(2).

<sup>25</sup> See Phlx Rule 3315(d)(3).

<sup>26</sup> See Phlx Rule 3315(d)(3)(A).

<sup>27</sup> See Phlx Rule 3315(d)(3)(B).

<sup>28</sup> See, e.g., Securities Exchange Act Release No. 65455 (September 30, 2011), 76 FR 62119 (October 6, 2011) (SR-NYSEArca-2011-61) at 62120 n.16 and accompanying text.

should help mitigate the Commission's concerns. In particular, the Commission believes that these requirements should help assure that none of Phlx, NES, or the third-party broker-dealer is able to misuse confidential or proprietary information obtained in connection with the liquidation of error positions for its own benefit. The Commission also notes that Phlx and NES would be required to make and keep records to document all determinations to treat positions as error positions; all determinations to assign error positions to members or liquidate error positions; and the liquidation of error positions through the third-party broker-dealer.<sup>29</sup>

Finally, the Commission notes that the proposed procedures for canceling orders and the handling of error positions are consistent with procedures the Commission has approved for other exchanges.<sup>30</sup>

### IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>31</sup> that the proposed rule change (SR-Phlx-2012-81) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2012-20317 Filed 8-17-12; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67652; File No. SR-NYSEArca-2012-83]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Arca Equities Rule 7.31 To Specify How MPL Orders With ALO Order Instructions May Interact

August 14, 2012.

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>

<sup>29</sup> See Phlx Rule 3315(d)(4).

<sup>30</sup> See, e.g., Securities Exchange Act Release Nos. 67281 (June 27, 2012), 77 FR 39543 (July 3, 2012) (SR-NASDAQ-2012-057); 69663 (May 10, 2012), 77 FR 28919 (May 16, 2012) (SR-NYSEArca-2012-22); 67010 (May 17, 2012), 77 FR 30564 (May 23, 2012) (SR-EDGX-2012-08); and 67011 (May 17, 2012), 77 FR 30562 (May 23, 2012) (SR-EDGA-2012-09).

<sup>31</sup> 15 U.S.C. 78s(b)(2).

<sup>32</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.

notice is hereby given that, on August 6, 2012, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") 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 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**

The Exchange proposes to amend NYSE Arca Equities Rule 7.31 to specify how MPL Orders with ALO Order instructions may interact. The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.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 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**

The Exchange proposes to amend NYSE Arca Equities Rule 7.31 to specify how MPL Orders with ALO Order instructions may interact.

##### **Background**

An MPL Order is a type of Working Order that has conditional or undisplayed price and/or size. As set forth in NYSE Arca Equities Rule 7.31(h)(5), an MPL Order is a Passive Liquidity Order that is priced at the midpoint of the PBBO and does not trade through a Protected Quotation. An MPL Order has a minimum order entry size of one share and Users may specify a minimum executable size for an MPL Order, which must be no less than one share. If an MPL Order has a specified minimum executable size, it will execute against an incoming order that

meets the minimum executable size and is priced at or better than the midpoint of the PBBO. If the leaves quantity becomes less than the minimum size, the minimum executable size restriction will no longer be enforced on executions.

If the market is locked or crossed, the MPL Order will wait for the market to unlock or uncross before becoming eligible to trade again. MPL Orders are ranked in time priority for the purposes of execution as long as the midpoint is within the limit range of the order. MPL Orders always execute at the midpoint and do not receive price improvement. MPL Orders are valid for any session, but do not participate in auctions. Users that choose not to trade with MPL Orders may mark incoming limit orders with a "No Midpoint Execution" designator and such limit orders will ignore MPL Orders. MPL Orders do not route out of the Exchange to other market centers.

An ALO Order is a limit order that Exchange systems will accept and place in the NYSE Arca book only when the order adds liquidity. As set forth in NYSE Arca Equities Rule 7.31(nn), ALO Orders will not route to an away market, shall be day only, and may not be designated as GTC. In addition, the rule specifies when Exchange systems will reject incoming ALO orders at the time of entry, including when the ALO Order is marketable or if the ALO Order will lock or cross the market. The rule also specifies that an ALO Order will be rejected if it would interact with undisplayed orders on NYSE Arca. However, the rule further specifies that the system will not reject an incoming ALO Order if it would interact with an MPL Order. Rather, the incoming ALO order will ignore the MPL Order and proceed to post to the NYSE Arca book.

Currently, Users may designate an MPL Order to also be an ALO Order ("MPL-ALO Order"). If an MPL Order (or MPL-ALO Order) is resting on the NYSE Arca book and an incoming contra-side MPL-ALO Order is marketable against the resting MPL Order, pursuant to current rules, the incoming MPL-ALO Order will ignore the resting MPL Order and be placed in the NYSE Arca Book. As a result, there may be a buy and sell MPL Order resting on the NYSE Arca Book at the same price that cannot interact.

##### **Proposed Rule Change**

The Exchange proposes to amend both NYSE Arca Equities Rules 7.31(h)(5) and (nn) to specify how MPL Orders with ALO Order instructions may interact. First, the Exchange proposes to amend Rule 7.31(h)(5) to

specify that User may designate an MPL Order as an ALO Order and to name such orders as an "MPL-ALO Order".

The Exchange also proposes to amend Rule 7.31(nn) to provide that a User may specify that a resting MPL Order or MPL-ALO Order may execute against an arriving marketable MPL-ALO Order. By providing Users with the choice for an MPL Order to interact with an incoming MPL-ALO Order, the Exchange believes that it will reduce the potential for two orders that are marketable against one another to be placed in the NYSE Arca book.

The Exchange recognizes that if a User designates an MPL or MPL-ALO Order to execute against an incoming marketable MPL-ALO Order, the incoming order would technically not be a liquidity providing order, since it would be executing against a resting order, and proposes to amend Rule 7.31(nn) accordingly. However, for purposes of determining which order is a "liquidity taker" and which order is a "liquidity provider", the Exchange will designate the User who chooses for a marketable MPL-ALO Order to execute to be the liquidity taker. Accordingly, if the resting interest chooses to interact, but the arriving MPL-ALO Order does not, the two orders will execute, but the arriving MPL-ALO Order will be considered the liquidity provider. If both the resting interest and the arriving MPL-ALO Order are designated to interact, the Exchange will consider the arriving interest as the liquidity taker interest.

The Exchange further proposes to make technical, non-substantive changes to Rule 7.31(nn). The Exchange proposes to use consistent terminology for orders that are placed in the NYSE Arca book and replace the term "post to" with "placed in." The Exchange notes that orders "placed in" the NYSE Arca book are not necessary [sic] displayed orders. The Exchange also proposes to amend Rule 7.31(nn)(1) to clarify that ALO Orders that are marketable will be rejected, except as provided for in Rule 7.31(nn)(3), which, as noted above, concerns the proposed new rule text enabling User-directed MPL or MPL-ALO Orders to interact with incoming marketable MPL-ALO Orders.

The Exchange will announce the implementation date of the proposed rule change in a Trader Update to be published no later than 90 days following Commission approval. The implementation date will be no later than 90 days following publication of the Trader Update announcing Commission approval.

## 2. Statutory Basis

The statutory basis for the proposed rule change is Section 6(b)(5) of the Securities Exchange Act of 1934 (the "Act"),<sup>4</sup> which requires the rules of an exchange 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 Exchange believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market by reducing the potential for two orders that are marketable against one another from resting on the NYSE Arca book and not executing. The proposed rule change will also provide transparency in the Exchange rules of how MPL Orders with ALO Order instructions would interact.

### *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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>5</sup> and Rule 19b-4(f)(6) thereunder.<sup>6</sup> Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.<sup>7</sup>

At any time within 60 days of the filing of such 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.

## 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2012-83 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-2012-83. This file number should be included on the subject line if email 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 the Exchange. All comments received will

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 fulfilled this requirement.

be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-NYSEArca-2012-83 and should be submitted on or before September 10, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Elizabeth M. Murphy,**  
Secretary.

[FR Doc. 2012-20316 Filed 8-17-12; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67655; File No. SR-NASDAQ-2012-059]

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Establish "Benchmark Orders" Under NASDAQ Rule 4751(f)**

August 14, 2012.

## I. Introduction

On May 1, 2012, The NASDAQ Stock Market LLC ("NASDAQ" or "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 establish various "Benchmark Orders" under NASDAQ Rule 4751(f). The proposed rule change was published for comment in the **Federal Register** on May 17, 2012.<sup>3</sup> The Commission received no comments on the proposal. On June 26, 2012, the Commission extended to August 15, 2012, the time period in which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>4</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposed rule change.

<sup>8</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. 66972 (May 11, 2012), 77 FR 29435 (May 17, 2012) ("Notice").

<sup>4</sup> See Securities Exchange Act Release No. 67258 (June 26, 2012), 77 FR 39314 (July 2, 2012).

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

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>6</sup> 17 CFR 240.19b-4(f)(6).

<sup>7</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of