

period for Commission action on the proposed rule change to August 15, 2012.<sup>6</sup> The Commission subsequently received one additional comment letter on the NYSE Arca Proposal.<sup>7</sup> On July 11, 2012, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.<sup>8</sup> The Commission thereafter received six comment letters and a response letter from the Exchange.<sup>9</sup>

Section 19(b)(2) of the Act<sup>10</sup> provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change. The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination. The proposed rule change was published for notice and comment in the **Federal Register** on May 17, 2012. November 13, 2012 is 180 days from that date, and January 12, 2013 is 240 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider this proposed rule change, the issues raised in the comment letters that have been submitted in response to the proposed rule change, including comment letters submitted in response to the Order Instituting Proceedings, and the Exchange's responses to such comments.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the

Act,<sup>11</sup> designates January 12, 2013 as the date by which the Commission should either approve or disapprove the proposed rule change (File Number SR-NYSEArca-2012-37).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67960; File No. SR-EDGA-2012-44]

### Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to EDGA Rule 11.5 To Add a New Order Type

October 2, 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> notice is hereby given that on September 25, 2012, EDGA Exchange, Inc. (the "Exchange" or "EDGA") 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 Rule 11.5(c) to add a new order type, the NBBO Offset Peg Order, to the rule. The text of the proposed rule change is available on the Exchange's Web site at [www.directedge.com](http://www.directedge.com), at the Exchange's principal office and at the Public Reference Room of the Commission.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The 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

The Exchange proposes to add a new order type to Exchange Rule 11.5(c), the NBBO Offset Peg Order. While the NBBO Offset Peg Order would be available for all Users,<sup>4</sup> the Exchange believes it would be particularly useful for, and therefore used predominately, if not exclusively, by Members<sup>5</sup> acting as Market Makers<sup>6</sup> in accordance with applicable Exchange Rules.<sup>7</sup>

The NBBO Offset Peg Order would enable Users to submit buy and sell orders to the Exchange that are pegged to a designated percentage away from the National Best Bid (the "NBB") and National Best Offer (the "NBO", and together with the NBB, the "NBBO"), respectively, while providing them full control over order origination and order marking. This retention of control, in turn, would enable Market Makers to comply independently with the requirements of Regulation SHO<sup>8</sup> under the Securities Exchange Act of 1934 (the "Act") and Rule 15c3-5<sup>9</sup> under the Act (the "Market Access Rule"), as described in more detail below.<sup>10</sup>

##### Background

The Market Access Rule requires that any broker-dealer with market access, or that provides a customer or any other person with market access, must establish, document and maintain a system of risk management controls and supervisory procedures reasonably designed to manage the financial, regulatory and other risks of this

<sup>4</sup> As defined in Exchange Rule 1.5(ee).

<sup>5</sup> As defined in Exchange Rule 1.5(n).

<sup>6</sup> As defined in Exchange Rule 1.5(l).

<sup>7</sup> See Exchange Rules 11.18 (Registration of Market Makers), 11.19 (Obligations of Market Maker Authorized Traders), 11.20 (Registration of Market Makers in a Security) and 11.21 (Obligations of Market Makers).

<sup>8</sup> 17 C.F.R. 242.200 through 242.204.

<sup>9</sup> 17 CFR 242.15c3-5.

<sup>10</sup> The Exchange notes that the NBBO Offset Peg Order represents new functionality for the Exchange, which has not previously offered and does not currently offer any automated quote management ("AQ") functionality, in contrast to other exchanges, such as The NASDAQ Stock Market LLC ("NASDAQ") and BATS Exchange, Inc. ("BATS"), whose respective Market Maker Peg Orders replaced their previous AQ functionality.

<sup>6</sup> See Securities Exchange Act Release No. 67222 (June 20, 2012), 77 FR 38116 (June 26, 2012).

<sup>7</sup> See Letter from John T. Hyland, CFA, Chief Investment Officer, United States Commodity Funds LLC, dated June 27, 2012.

<sup>8</sup> See Securities Exchange Act Release No. 67411, 77 FR 42052 (July 17, 2012).

<sup>9</sup> See Letter from Joseph Cavatoni, Managing Director, and Joanne Medero, Managing Director, BlackRock, Inc., dated July 11, 2012; Letter from Stanislav Dolgoplov, Assistant Adjunct Professor, UCLA School of Law, dated August 15, 2012; Letter from James E. Ross, Global Head, SPDR Exchange Traded Funds, State Street Global Advisors, dated August 16, 2012; Letter from Ari Burstein, Senior Counsel, Investment Company Institute, dated August 16, 2012; Letter from F. William McNabb, Chairman and Chief Executive Officer, Vanguard, dated August 16, 2012; and Letter from Andrew Stevens, Legal Counsel, IMC Chicago, LLC d/b/a IMC Financial Markets, dated August 16, 2012. See Letter from Jane McGinness, EVP & Corporate Secretary, General Counsel, NYSE Markets, dated August 14, 2012.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 15 U.S.C. 78s(b)(2).

<sup>12</sup> 17 CFR 200.30-3(a)(57).

<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.

business activity. These controls include financial risk management controls reasonably designed to prevent the entry of orders that exceed appropriate pre-set credit or capital thresholds in the aggregate for each customer and the broker-dealer itself, and to prevent the entry of erroneous orders. In addition, the Market Access Rule requires certain regulatory risk management controls that, among other things, prevent the entry of orders unless compliance with applicable regulatory requirements has been satisfied on a pre-order entry basis, and restrict access to trading systems and technology that provide market access to persons and accounts that have been pre-approved and authorized by the broker-dealer. These regulatory risk management controls also include measures designed to prevent the entry of orders for a broker-dealer, customer or other person if such person is restricted from trading those securities, and to assure that appropriate surveillance personnel receive immediate, post-trade execution reports that result from market access.<sup>11</sup>

In addition to the Market Access Rule, broker-dealers have independent obligations that arise under Regulation SHO. Regulation SHO obligations generally include properly marking orders to sell as “long”, “short” or “short exempt”, obtaining a “locate” for short sale orders, closing out fail to deliver positions and, where applicable, complying with the short sale price test.<sup>12</sup> While Regulation SHO provides certain exceptions when a market maker is engaged in *bona fide* market making activity,<sup>13</sup> the availability of those

exceptions would be distinct and independent from whether a Market Maker submitted an NBBO Offset Peg Order.

#### NBBO Offset Peg Order

In an effort to simplify Members' compliance with the requirements of the Market Access Rule and Regulation SHO, the Exchange is proposing to adopt a new order type, the NBBO Offset Peg Order, and add it to Rule 11.5(c) as new subparagraph (15). An NBBO Offset Peg Order would be a one-sided limit order<sup>14</sup> and, similar to other pegged orders available to Users, it would be tied or “pegged” to a certain price.<sup>15</sup> An NBBO Offset Peg Order would not be eligible for routing pursuant to Rule 11.9(b)(2) and would always be displayed on the Exchange. It is expected that Members would perform the necessary checks to comply with applicable regulatory requirements, including the Market Access Rule and Regulation SHO, as discussed above, prior to the entry of an NBBO Offset Peg Order.

As noted above, while use of the NBBO Offset Peg Order would not be limited to Market Makers, the Exchange believes that Market Makers would likely be the predominant, if not exclusive, users of the order type. Thus, the NBBO Offset Peg Order is designed such that its price would be automatically set and adjusted, both upon entry and at any time thereafter, in order to comply with the Exchange's Market Maker quotation requirements.<sup>16</sup> Users may submit NBBO Offset Peg Orders to the Exchange starting at the beginning of the Pre-Opening Session,<sup>17</sup>

roughly comparable amounts to provide liquidity to customers or other broker-dealers). Thus, Market Makers would not be able to rely solely on quotations priced in accordance with the Designated Percentages under proposed Rule 11.5(c)(15) for eligibility for the *bona fide* market making exception to the “locate” requirement based on the criteria set forth by the Commission. It should also be noted that a determination of *bona fide* market making is relevant for purposes of a broker-dealer's close-out obligations under Rule 204 of Regulation SHO. See also 17 CFR 242.204(a)(3).

<sup>14</sup> The NBBO Offset Peg Order would be a one-sided order. Therefore, a Member acting as a Market Maker seeking to use the NBBO Offset Peg Order to comply with the Exchange's Market Maker quotation requirements would need to submit and maintain continuously both a bid and an offer using the order type.

<sup>15</sup> Rule 11.5(c)(6) defines “Pegged Order”.

<sup>16</sup> Exchange Rule 11.21 describes the obligations of Members registered with the Exchange as Market Makers. Among other things, Market Makers are required to maintain continuous, two-sided quotations consistent with the requirements of paragraph (d) of Rule 11.21, which generally states that such quotations must be priced within a designated percentage of the NBB for buy quotations, and the NBO for sell quotations.

<sup>17</sup> Rule 1.5(s) defines “Pre-Opening Session”.

but the order is not executable or automatically priced until the beginning of Regular Trading Hours<sup>18</sup> and expires at the end of Regular Trading Hours.

Specifically, upon entry and at any time the price of the order reached the “Defined Limit”,<sup>19</sup> or moved a specified number of percentage points away from the “Designated Percentage”<sup>20</sup> toward the then current NBB (for NBBO Offset Peg Orders to buy) or NBO (for NBBO Offset Peg Orders to sell), the price of the NBBO Offset Peg Order would be automatically adjusted by the System to the Designated Percentage away from the then current NBB or NBO, as the case may be. In the event that there was no NBB or NBO, the price of the NBBO Offset Peg Order would be automatically adjusted by the System to the Designated Percentage away from the last reported sale from the responsible single plan processor, unless the User instructed the Exchange upon entry to cancel or reject the order under such circumstances. In the absence of an NBB or NBO and last reported sale, the order would be cancelled or rejected. Adjustment to the Designated Percentage would be designed to avoid an execution against an NBBO Offset Peg Order that would initiate an individual stock trading pause.

In the event that pricing an NBBO Offset Peg Order at the Designated Percentage away from the then current NBB or NBO, or, if no NBB or NBO, to the Designated Percentage away from the last reported sale from the responsible single plan processor, would result in the order exceeding its limit price, the order would be cancelled or rejected.

In the event of an execution against an NBBO Offset Peg Order that reduced the

<sup>18</sup> Rule 1.5(y) defines “Regular Trading Hours”.

<sup>19</sup> The “Defined Limit” is defined in Rule 11.21(d)(2)(F) to mean 9.5% for securities included in the S&P 500® Index and the Russell 1000® Index, as well as a pilot list of Exchange Traded Products for securities subject to an individual stock pause trigger under the applicable rules of a listing market (the “Original Circuit Breaker Securities”). For times during Regular Trading Hours when stock pause triggers are not in effect under the rules of a security's listing market, the Defined Limit is 21.5% for Original Circuit Breaker Securities. For all NMS securities that are not Original Circuit Breaker Securities (“Non-Original Circuit Breaker Securities”) with a price equal to or greater than \$1, the Defined Limit is 29.5%, and 31.5% for those with a price less than \$1. See Rule 11.21(d)(2)(G).

<sup>20</sup> The “Designated Percentage” is defined in Rule 11.21(d)(2)(D) to mean 8% with respect to Original Circuit Breaker Securities. For times during Regular Trading Hours when stock pause triggers are not in effect under the rules of a security's listing market, the Designated Percentage is 20% for Original Circuit Breaker Securities. For Non-Original Circuit Breaker Securities with a price equal to or greater than \$1, the Designated Percentage is 28%, and 30% for those with a price less than \$1. See Rule 11.21(d)(2)(E).

<sup>11</sup> See *supra* note 9.

<sup>12</sup> 17 CFR 242.200 through 242.204.

<sup>13</sup> See 17 CFR 242.203(b)(1). The Commission adopted a narrow exception to Regulation SHO's “locate” requirement for market makers that may need to facilitate customer orders in a fast moving market without possible delays associated with complying with such requirement. Only market makers engaged in *bona fide* market making in the security at the time they effect the short sale are excepted from the “locate” requirement. See also Securities Exchange Act Release No. 50103 (July 28, 2004), 69 FR 48008, 48015 (August 6, 2004) (providing guidance as to what does not constitute *bona fide* market making for purposes of claiming the exception to Regulation SHO's “locate” requirement). See also Securities Exchange Act Release No. 58775 (October 14, 2008), 73 FR 61690, 61698–9 (October 17, 2008) (providing guidance regarding what is *bona fide* market making for purposes of complying with the market maker exception to Regulation SHO's “locate” requirement including without limitation whether the market maker incurs any economic or market risk with respect to the securities, continuous quotations that are at or near the market on both sides and that are communicated and represented in a way that makes them widely accessible to investors and other broker-dealers and a pattern of trading that includes both purchases and sales in

size of the order below one round lot, a Member acting as a Market Maker would need to enter a new order, after performing the regulatory checks discussed above, to satisfy its obligations under Rule 11.21. A new timestamp would be created each time an NBBO Offset Peg Order was automatically adjusted.

Users utilizing the NBBO Offset Peg Order would have control over order origination, as required by the Market Access Rule, while also enabling them to satisfy their order marking and locate obligations prior to order entry, as required by Regulation SHO. Thus, Members would be in a position to comply with the Market Access Rule and Regulation SHO just as they would when placing any other order on the Exchange, while also enabling Members acting as Market Makers using coupled buy and sell NBBO Offset Peg Orders to satisfy their Exchange Market Making obligations.<sup>21</sup>

The Exchange intends to implement the proposed rule change on or about November 19, 2012, and will notify its Members and other market participants in an information circular to be posted on the Exchange's Web site.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act<sup>22</sup> and furthers the objectives of Section 6(b)(5) of the Act,<sup>23</sup> in that it 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, and, in general, to protect investors and the public interest. Moreover, the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposed rule change also is designed to support the principles of Section 11A(a)(1)<sup>24</sup> of the Act in that it seeks to assure fair competition among brokers and dealers and among exchange markets. The Exchange believes that the proposed rule meets these requirements in that it promotes transparency and uniformity across markets concerning

minimum Market Maker quotation requirements and Member obligations generally to comply with the requirements of the Market Access Rule and Regulation SHO.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from its Members or other interested parties.

## 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 after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>25</sup> and Rule 19b-4(f)(6)<sup>26</sup> thereunder.

At any time within 60 days 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-EDGA-2012-44 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-EDGA-2012-44. 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 10:00 a.m. and 3:00 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-EDGA-2012-44 and should be submitted on or before October 30, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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<sup>21</sup> In this regard, the NBBO Offset Peg Order would not ensure that the Member was satisfying the requirements of Regulation SHO, including the satisfaction of the locate requirement of Rule 203(b)(1) or an exception thereto.

<sup>22</sup> 15 U.S.C. 78f(b).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>24</sup> 15 U.S.C. 78k-1(a)(1).

<sup>25</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>26</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>27</sup> 17 CFR 200.30-3(a)(12).