

error positions.<sup>81</sup> Also, the Exchange and NES will 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 to liquidate error positions; and the liquidation of error positions through the third-party broker-dealer.<sup>82</sup>

The Commission recognizes that technical or systems issues may occur, and believes that proposed ISE Rule 1904, in allowing the Exchange or NES to cancel orders affected by technical or systems issues, should provide a reasonably efficient means for the Exchange to handle such orders, and appears reasonably designed to permit the Exchange to maintain fair and orderly markets.<sup>83</sup> 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>84</sup> and that the Exchange or NES, in connection with a particular technical or systems issue, will be required to either assign or liquidate all resulting error positions.<sup>85</sup> Also, the Exchange 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>86</sup> If the Exchange or NES cannot assign all error positions to all Members, NES will liquidate all of those error positions.<sup>87</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.

In addition, 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>88</sup> The Commission has also previously expressed its concern about the potential for misuse of confidential and proprietary information.<sup>89</sup> 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 the Exchange 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, should help mitigate the Commission's concerns. In particular, the Commission believes that these requirements should help assure that none of the Exchange, 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 the Exchange and NES would be required to make and keep records to document all determinations concerning error positions and resulting assignments or liquidations.<sup>90</sup> In addition, the Commission notes that the proposed procedures for cancelling orders and the handling of error positions are consistent with procedures the Commission has approved for other exchanges.<sup>91</sup>

#### IV. Implementation of Proposed Rule Change

ISE stated that it intends to begin implementation of the proposed rule change in the second quarter of 2017, in tandem with a technology migration to

<sup>88</sup> See *supra* notes 21 and 57 and accompanying text.

<sup>89</sup> See, e.g., Securities Exchange Act Release No. 67280, *supra* note 23, at 39554.

<sup>90</sup> See proposed ISE Rule 1904(d).

<sup>91</sup> See, e.g., Securities Exchange Act Release Nos. 66963 (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); 67011 (May 17, 2012), 77 FR 30562 (May 23, 2012) (SR-EDGA-2012-09); and 67280, *supra* note 23. The Commission also notes that ISE's proposed rule is consistent with the corresponding rules of the Nasdaq Exchanges. See Phlx Rule 1080(m)(v); Nasdaq Options Rules, Chapter VI, Section 11(g); BX Options Rules, Chapter VI, Section 11(g).

Nasdaq INET architecture, and that the migration will be on a symbol-by-symbol basis. ISE has represented that it will issue an alert to Members to announce the relevant migration date for specific symbols.<sup>92</sup> ISE explained that the rules in ISE Chapter 19, including ISE Rules 1901, 1903, 1904, and 1905, are incorporated by reference into the rulebooks of ISE Gemini and ISE Mercury.<sup>93</sup> ISE Gemini and ISE Mercury submitted proposed rule changes that, among other things, would permit ISE Gemini and ISE Mercury to each use NES to route options orders outbound to away markets, route options orders inbound from the Affiliated Exchanges, and utilize the same procedures for cancellation of orders and handling of error accounts described herein.<sup>94</sup> ISE stated that it intends to begin implementation of the proposed rule changes for ISE Gemini and ISE Mercury in the first quarter and third quarter of 2017, respectively, on a symbol-by-symbol basis. ISE further represented that it will add notations in each rulebook to cross-reference the amended rule text and clarify the respective implementation dates.<sup>95</sup>

#### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>96</sup> that the proposed rule change (SR-ISE-2016-27), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>97</sup>

**Eduardo A. Aleman,**  
Assistant Secretary.

[FR Doc. 2017-02991 Filed 2-14-17; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

### Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission; Office of FOIA Services; 100 F Street NE., Washington, DC 20549-2736.

Extension:

<sup>92</sup> See ISE Notice, *supra* note 4, at 96098.

<sup>93</sup> See *id.*

<sup>94</sup> See Securities Exchange Act Release Nos. 79664, *supra* note 49; and 79663, *supra* note 49. The Commission is also today approving these proposed rule changes. See ISE Gemini and ISE Mercury Exchange Routing Order, *supra* note 49.

<sup>95</sup> See ISE Notice, *supra* note 4, at 96098.

<sup>96</sup> 15 U.S.C. 78s(b)(2).

<sup>97</sup> 17 CFR 200.30-3(a)(12).

<sup>81</sup> See proposed ISE Rule 1904(c)(B)(ii).

<sup>82</sup> See proposed ISE Rule 1904(d).

<sup>83</sup> The Commission notes that ISE stated that the proposed amendments to ISE Rule 1904 are designed to maintain fair and orderly markets, ensure full trade certainty for market participants, and avoid disrupting the clearance and settlement process. See ISE Notice, *supra* note 4, at 96099. The Commission also notes that ISE stated 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 ISE Rule 1901(b)(1)(i). See *id.* at 96097 n.29.

<sup>84</sup> See proposed ISE Rule 1904(b).

<sup>85</sup> See proposed ISE Rule 1904(c).

<sup>86</sup> See proposed ISE Rule 1904(c)(A).

<sup>87</sup> See proposed ISE Rule 1904(c)(B).

Rule 17a-10; SEC File No. 270-507, OMB Control No. 3235-0563.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) the Securities and Exchange Commission (“Commission”) has submitted to the Office of Management and Budget (“OMB”) a request for extension of the previously approved collection of information discussed below.

Section 17(a) of the Investment Company Act of 1940 (the “Act”), generally prohibits affiliated persons of a registered investment company (“fund”) from borrowing money or other property from, or selling or buying securities or other property to or from, the fund or any company that the fund controls.<sup>1</sup> Section 2(a)(3) of the Act defines “affiliated person” of a fund to include its investment advisers.<sup>2</sup> Rule 17a-10 (17 CFR 270.17a-10) permits (i) a subadviser<sup>3</sup> of a fund to enter into transactions with funds the subadviser does not advise but that are affiliated persons of a fund that it does advise (*e.g.*, other funds in the fund complex), and (ii) a subadviser (and its affiliated persons) to enter into transactions and arrangements with funds the subadviser does advise, but only with respect to discrete portions of the subadvised fund for which the subadviser does not provide investment advice.

To qualify for the exemptions in rule 17a-10, the subadvisory relationship must be the sole reason why section 17(a) prohibits the transaction. In addition, the advisory contracts of the subadviser entering into the transaction, and any subadviser that is advising the purchasing portion of the fund, must prohibit the subadvisers from consulting with each other concerning securities transactions of the fund, and limit their responsibility to providing advice with respect to discrete portions of the fund’s portfolio.<sup>4</sup> Section 17(a) of the Investment Company Act of 1940 (the “Act”), generally prohibits affiliated persons of a registered investment company (“fund”) from borrowing money or other property from, or selling or buying securities or other property to or from, the fund or any company that the fund controls. Section 2(a)(3) of the Act defines “affiliated person” of a fund to include its investment advisers. Rule 17a-10 permits (i) a subadviser of a fund to enter into transactions with funds the subadviser does not advise but that are affiliated persons of a fund

that it does advise (*e.g.*, other funds in the fund complex), and (ii) a subadviser (and its affiliated persons) to enter into transactions and arrangements with funds the subadviser does advise, but only with respect to discrete portions of the subadvised fund for which the subadviser does not provide investment advice.

To qualify for the exemptions in rule 17a-10, the subadvisory relationship must be the sole reason why section 17(a) prohibits the transaction. In addition, the advisory contracts of the subadviser entering into the transaction, and any subadviser that is advising the purchasing portion of the fund, must prohibit the subadvisers from consulting with each other concerning securities transactions of the fund, and limit their responsibility to providing advice with respect to discrete portions of the fund’s portfolio. This requirement regarding the prohibitions and limitations in advisory contracts of subadvisors relying on the rule constitutes a collection of information under the Paperwork Reduction Act of 1995 (“PRA”).<sup>5</sup>

The staff assumes that all existing funds with subadvisory contracts amended those contracts to comply with the adoption of rule 17a-10 in 2003, which conditioned certain exemptions upon these contractual alterations, and therefore there is no continuing burden for those funds.<sup>6</sup> However, the staff assumes that all newly formed subadvised funds, and funds that enter into new contracts with subadvisers, will incur the one-time burden by amending their contracts to add the terms required by the rule.

Based on an analysis of fund filings, the staff estimates that approximately 319 funds enter into new subadvisory agreements each year.<sup>7</sup> Based on discussions with industry representatives, the staff estimates that it will require approximately 3 attorney hours to draft and execute additional clauses in new subadvisory contracts in

order for funds and subadvisers to be able to rely on the exemptions in rule 17a-10. Because these additional clauses are identical to the clauses that a fund would need to insert in their subadvisory contracts to rely on rules 10f-3, 12d3-1, and 17e-1, and because we believe that funds that use one such rule generally use all of these rules, we apportion this 3 hour time burden equally among all four rules. Therefore, we estimate that the burden allocated to rule 17a-10 for this contract change would be 0.75 hours.<sup>8</sup> Assuming that all 319 funds that enter into new subadvisory contracts each year make the modification to their contract required by the rule, we estimate that the rule’s contract modification requirement will result in 239 burden hours annually, with an associated cost of approximately \$90,820.<sup>9</sup>

The estimate of average burden hours is made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules. Complying with this collection of information requirement is necessary to obtain the benefit of relying on rule 17a-10. Responses will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

The public may view the background documentation for this information collection at the following Web site, [www.reginfo.gov](http://www.reginfo.gov). Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: [Shagufta.Ahmed@omb.eop.gov](mailto:Shagufta.Ahmed@omb.eop.gov); and (ii) Pamela Dyson, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 100 F Street NE., Washington, DC 20549

<sup>5</sup> 44 U.S.C. 3501.

<sup>6</sup> Transactions of Investment Companies With Portfolio and Subadviser Affiliates, Investment Company Act Release No. 25888 (Jan. 14, 2003) [68 FR 3153, (Jan. 22, 2003)]. We assume that funds formed after 2003 that intended to rely on rule 17a-10 would have included the required provision as a standard element in their initial subadvisory contracts.

<sup>7</sup> Based on data from Morningstar, as of June 2016, there are 12,485 registered funds (open-end funds, closed-end funds, and exchange-traded funds), 4,629 funds of which have subadvisory relationships (approximately 37%). Based on data from the 2016 ICI Factbook, 862 new funds were established in 2015 (594 open-end funds + 258 exchange-traded funds + 10 closed-end funds) from the ICI Research Perspective, April 2016). 862 new funds × 37% = 319 funds.

<sup>8</sup> This estimate is based on the following calculation: 3 hours ÷ 4 rules = 0.75 hours.

<sup>9</sup> These estimates are based on the following calculations: (0.75 hours × 319 portfolios = 239 burden hours); (\$380 per hour × 239 hours = \$90,820 total cost). The Commission’s estimates concerning the wage rates for attorney time are based on salary information for the securities industry compiled by the Securities Industry and Financial Markets Association. The estimated wage figure is based on published rates for in-house attorneys, modified to account for a 1,800-hour work-year and multiplied by 5.35 to account for bonuses, firm size, employee benefits, and overhead, yielding an effective hourly rate of \$380. See Securities Industry and Financial Markets Association, Report on Management & Professional Earnings in the Securities Industry 2013.

<sup>1</sup> 15 U.S.C. 80a-17(a).

<sup>2</sup> 15 U.S.C. 80a-2(a)(3)(E).

<sup>3</sup> As defined in rule 17a-10(b)(2). 17 CFR 270.17a-10(b)(2).

<sup>4</sup> 17 CFR 270.17a-10(a)(2).

or send an email to: *PRA Mailbox@sec.gov*. Comments must be submitted to OMB within 30 days of this notice.

Dated: February 8, 2017.

**Eduardo A. Aleman,**  
Assistant Secretary.

[FR Doc. 2017-02974 Filed 2-14-17; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79996; File Nos. SR-BX-2016-068; SR-NASDAQ-2016-169; SR-Phlx-2016-120]

### Self-Regulatory Organizations; NASDAQ BX, Inc.; The Nasdaq Stock Market LLC; NASDAQ PHLX LLC; Order Granting Approval of Proposed Rule Changes, as Modified by Amendment No. 1s, To Accept Orders Routed Inbound From the International Stock Exchange, LLC, ISE Gemini, LLC, and ISE Mercury, LLC, by Nasdaq Execution Services, LLC

February 9, 2017.

#### I. Introduction

On December 9, 2016, NASDAQ BX, Inc. (“BX”), The NASDAQ Stock Market LLC (“Nasdaq”), and NASDAQ PHLX LLC (“Phlx” and, each of BX, Nasdaq, and Phlx a “NASDAQ Exchange” 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> proposed rule changes to permit BX, Phlx, and The NASDAQ Options Market LLC (“NOM”)<sup>3</sup> to accept options orders routed inbound from the International Stock Exchange, LLC (“ISE”), ISE Gemini, LLC (“ISE Gemini”), and ISE Mercury, LLC (“ISE Mercury” and, together with ISE and ISE Gemini, the “ISE Exchanges”) by Nasdaq Execution Services, LLC (“NES”), an affiliate of both the NASDAQ Exchanges and the ISE Exchanges (the NASDAQ Exchanges, together with the ISE Exchanges, the “Affiliated Exchanges”).<sup>4</sup> On December

20, 2016, each of the NASDAQ Exchanges filed an Amendment No. 1 to its respective proposed rule change. The proposed rule changes, each as modified by Amendment No. 1 thereto, were published for comment in the **Federal Register** on December 29, 2016.<sup>5</sup> The Commission received no comments on the proposals. This order approves the proposed rule changes, as modified by their respective Amendment No. 1s.

#### II. Background

Phlx Rule 985(b)(i)(A) prohibits Phlx or any entity with which it is affiliated from, directly or indirectly, acquiring or maintaining an ownership interest in, or engaging in a business venture with, an Exchange member or an affiliate of an Exchange member in the absence of an effective filing under Section 19(b) of the Act.<sup>6</sup> Nasdaq’s and BX’s rules include similar prohibitions.<sup>7</sup> NES is a registered broker-dealer that is a member of NOM,<sup>8</sup> BX,<sup>9</sup> and Phlx,<sup>10</sup> and currently provides to members of each, optional routing services to other markets.<sup>11</sup> NES is owned by Nasdaq, Inc.,<sup>12</sup> which also owns all of the

today approving these proposed rules changes. *See* Securities Exchange Act Release Nos. 79994 (February 9, 2017); and 79995 (February 9, 2017) (“ISE Exchange Routing Orders”).

<sup>5</sup> *See* Securities Exchange Act Release Nos. 79661 (December 22, 2016), 81 FR 96100 (SR-BX-2016-068) (“BX Notice”); 79662 (December 22, 2016), 81 FR 96087 (SR-NASDAQ-2016-169) (“Nasdaq Notice”); and 79660 (December 22, 2016), 81 FR 96060 (SR-Phlx-2016-120) (“Phlx Notice”).

<sup>6</sup> 15 U.S.C. 78s(b). Phlx Rule 985 also prohibits a Phlx member from being or becoming an affiliate of Phlx, or an affiliate of an entity affiliated with Phlx, in the absence of an effective filing under Section 19(b) of the Act. *See* Phlx Rule 958(b)(i)(B).

<sup>7</sup> Pursuant to Nasdaq Rule 2160(a): “(1) Nasdaq or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in, or engage in a business venture with, a Nasdaq member or an affiliate of a Nasdaq member in the absence of an effective filing under Section 19(b) of the Act; and (2) a Nasdaq member shall not be or become an affiliate of Nasdaq, or an affiliate of an entity affiliated with Nasdaq, in the absence of an effective filing under Section 19(b) of the Act.”

Pursuant to BX Rule 2140(a): “(1) [BX] or any entity with which it is affiliated shall not, directly or indirectly, acquire or maintain an ownership interest in, or engage in a business venture with, [a BX] member or an affiliate of [a BX] member in the absence of an effective filing under Section 19(b) of the Act; and (2) [a BX] member shall not be or become an affiliate of [BX], or an affiliate of an entity affiliated with [BX], in the absence of an effective filing under Section 19(b) of the Act.”

<sup>8</sup> *See* Nasdaq Notice, *supra* note 5, at 96087.

<sup>9</sup> *See* BX Notice, *supra* note 5, at 96100.

<sup>10</sup> *See* Phlx Notice, *supra* note 5, at 96061.

<sup>11</sup> *See* Phlx Rule 1080(m)(iii); Nasdaq Options Rules, Chapter VI, Section 11(e); and BX Options Rules, Chapter VI, Section 11(e). *See also* Phlx Notice, *supra* note 5, at 96061; Nasdaq Notice, *supra* note 5, at 96087; and BX Notice, *supra* note 5, at 96100.

<sup>12</sup> *See* Securities Exchange Act Release No. 69233 (March 25, 2013), 78 FR 19352 (March 29, 2013)

Affiliated Exchanges.<sup>13</sup> Thus, NES is an affiliate of the NASDAQ Exchanges, as well as an affiliate of the ISE Exchanges. Absent an effective filing, the rules of Nasdaq, BX, and Phlx would prohibit NES from being a member of each of those Exchanges. Today, NES is a member of each of the NASDAQ Exchanges and performs certain limited activities for each, pursuant to effective filings pursuant to Section 19(b).<sup>14</sup> Among other activities, each of the NASDAQ Exchanges accepts options orders routed inbound from each of the other NASDAQ Exchanges pursuant to certain limitations and conditions.<sup>15</sup> With the current proposed rule changes, the NASDAQ Exchanges seek approval to permit NES to also route options orders inbound from the ISE Exchanges pursuant to those same limitations and conditions.<sup>16</sup>

#### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes, each as modified by Amendment No. 1,

(SR-NASDAQ-2013-028) (order approving a proposed rule change to make permanent a pilot program to permit NASDAQ to accept inbound orders routed by NES from the BX Equities market and PSX) at 19352 n.6 and accompanying text.

<sup>13</sup> *See* Securities Exchange Act Release No. 78119 (June 21, 2016), 81 FR 41611 (June 27, 2016) (SR-ISE-2016-11; SR-ISE Gemini-2016-05; SR-ISE Mercury-2016-10) (order approving a proposed rule change relating to Nasdaq, Inc.’s acquisition of ISE, ISE Gemini, and ISE Mercury).

<sup>14</sup> *See, e.g., supra* note 11; and Securities Exchange Act Release Nos. 69233, *supra* note 12; 69232 (March 25, 2013), 78 FR 19342 (March 29, 2013) (SR-BX-2013-013) (order approving a proposed rule change to make permanent a pilot program to permit BX to accept inbound orders routed by NES from PSX); 69229 (March 25, 2013), 78 FR 19337 (March 29, 2013) (SR-Phlx-2013-15) (order approving a proposed rule change to make permanent a pilot program to permit PSX to accept inbound orders routed by NES from BX); 71416 (January 28, 2014), 79 FR 6244 (February 3, 2014) (SR-Phlx-2014-05) (notice of filing and immediate effectiveness of proposed rule change to permit Phlx to receive inbound orders in options routed through NES from NOM and BX); 71420 (January 28, 2014), 79 FR 6256 (February 3, 2014) (SR-BX-2014-004) (notice of filing and immediate effectiveness of proposed rule change to permit BX to receive inbound orders in options routed through NES from NOM and Phlx); and 71418 (January 28, 2014), 79 FR 6262 (February 3, 2014) (SR-NASDAQ-2014-008) (notice of filing and immediate effectiveness of proposed rule change to permit NOM to receive inbound orders in options routed through NES from BX and Phlx).

<sup>15</sup> *See* Securities Exchange Act Release Nos. 71416, *supra* note 14; 71420, *supra* note 14; and 71418, *supra* note 14. With respect to Nasdaq, routing of options orders is permitted into NOM from BX and Phlx, into Phlx from NOM and BX, and into BX from NOM and Phlx. *See id.*

<sup>16</sup> *See* Phlx Notice, *supra* note 5, at 96062; Nasdaq Notice, *supra* note 5, at 96088; and BX Notice, *supra* note 5, at 96101. In the case of Nasdaq, Nasdaq proposes to permit NES to route options orders into NOM. *See* Nasdaq Notice, *supra* note 5, at 96087.

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

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

<sup>3</sup> NOM is a facility of Nasdaq. *See* Nasdaq Options Rules, Chapter I, Section 1(a)(28).

<sup>4</sup> The ISE Exchanges submitted related proposed rule changes that, among other things, would permit each ISE Exchange to use NES to route options orders outbound to away markets. *See* Securities Exchange Act Release Nos. 79665 (December 22, 2016), 81 FR 96092 (December 29, 2016) (SR-ISE-2016-27); 79664 (December 22, 2016), 81 FR 96136 (December 29, 2016) (SR-ISE Gemini-2016-16); and 79663 (December 22, 2016), 81 FR 96089 (December 29, 2016) (SR-ISE Mercury-2016-22). The Commission is also