

May 13, 2010

Elizabeth M. Murphy  
Secretary  
United States Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

**RE: File No. SR-Phlx-2010-048; Response to Comment Letters of Lawrence Lempert, *et. al.* and Robert Sullivan**

Dear Ms. Murphy:

NASDAQ OMX PHLX, Inc. (“PHLX”) welcomes the opportunity to respond to comment letters received concerning the above-referenced proposed rule change to establish market data fees applicable to the PHLX’s TOPO Plus Orders (“TOPO Plus”) market data product.<sup>1</sup> Two comment letters were submitted in response to this proposal: one from a group of PHLX market makers signed first by Lawrence Lempert of Bullock Trading, LP<sup>2</sup> and another from Robert Sullivan.<sup>3</sup> Both the Lempert Letter and the Sullivan Letter contain gross misstatements of fact and law. Set forth below is PHLX’s point-by-point correction of the most serious of the factual and legal inaccuracies contained in the Lempert and Sullivan Letters.

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<sup>1</sup> See Securities Exchange Act Release No. 61878 (April 8, 2010), 75 FR 20023 (April 16, 2010)(SR-Phlx-2010-48) (the “PHLX Proposal”).

<sup>2</sup> See letter dated May 3, 2010 to Mary Schapiro, Chairman, Commission, from: Bullock Trading, LP by Lawrence Lempert; Cutler Group, LP by Andy Yang; Fairview Trading Corp by Michael Waber; Keystone Trading Partners by Tim Lobach; and TSR Associates, LLC by Theodore Raven (the “Lempert Letter”). Although the caption to the Lempert Letter indicates that it addresses “Amendments to Regulation SHO, Rule 201,” PHLX believes that the Lempert Letter refers to the PHLX Proposal, Reg NMS, and Securities Exchange Act Release No. 57917 (Dec. 2, 2008) (the “NetCoalition Order,” resolving File No. SR-NYSEArca-2006-21), and responds herein based on that belief.

<sup>3</sup> See undated letter to Mary Schapiro, Chairman, Commission, from Robert Sullivan, Empire Options Corporation (the “Sullivan Letter”). The Sullivan Letter also refers to “Amendments to Regulation SHO, Rule 201,” and PHLX herein responds as set forth *supra*, note 2.

## Core Data vs. Non-Core Data

The Lempert Letter admits that the NetCoalition Order defines “core data” as “the best priced quotations and comprehensive last sale reports of all markets.” The PHLX agrees, and accordingly provides top of book and last sale data to the Options Price Reporting Authority (“OPRA”), which is transparent not only to the commentators, but indeed to the marketplace as a whole.

The Commission has established a different standard for the requirement to produce core data as opposed to non-core data.<sup>4</sup> Non-core data is anything else besides core data that an exchange produces on a voluntary basis, such as depth of market data. An exchange might determine not to produce non-core data, and is not required to do so. No exchange is required to produce such data, and there is no obligation for anyone to buy it if an exchange determines to do so.

The Lempert Letter and the Sullivan Letter both argue that somehow data that has been determined to be non-core pursuant to the NetCoalition Order is actually core data, or that at least certain non-core data that would be expedient for the commentators should be deemed core data. In this regard, the entire remaining portions of each Letter on the topic of the definition of core and non-core data amount to a crude Petition for Rulemaking that is not appropriate as a comment to the PHLX Proposal. The comments concerning their opinion of what *should* be considered core data (which has been determined under the NetCoalition Order) are irrelevant to this filing, and instead would have been appropriate and relevant as a response to the Commission’s request for comments concerning the NetCoalition Order.

Both the Lempert Letter and the Sullivan Letter come to the perplexing conclusion that PHLX “does not offer any explanation or analysis as to how the TOPO Plus product is “non-core data”<sup>5</sup> or that “NASDAQ OMX PHLX does not explain why it is non-core data.”<sup>6</sup> On the contrary, the PHLX provided an in-depth analysis of how the TOPO Plus depth of book data is non-core data because it meets the requirements of the NetCoalition Order. The Statutory Basis section of the TOPO Plus proposal stands on its own. Further, as stated in the PHLX Proposal, as with the NYSE Arca depth-of-book product, no rule requires PHLX or any other exchange to offer depth of book data, nor are vendors required to purchase or display that data.<sup>7</sup>

Both Letters argue that the complex order book and Live Auction data are core data. PHLX provides last sale data from the complex order book to OPRA as core data pursuant to the clear language contained in section 5.2(a) of the OPRA Plan. Because OPRA does not recognize complex order strategies, PHLX execution reports are for each individual option leg, marked as part of a complex order trade. For the same reason, PHLX does not provide top of the complex

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<sup>4</sup> See NetCoalition Order.

<sup>5</sup> Lempert Letter at p. 2.

<sup>6</sup> Sullivan Letter at p. 1.

<sup>7</sup> PHLX Proposal at p. 6, citing the NetCoalition Order.

order book data to OPRA because OPRA does not currently support such order types. Section 5.2(b) of the OPRA Plan also clearly explains that such information shall not be reported to the OPRA System. The Lempert Letter also contains the following statement: “Once PHLX begins to charge for TOPO Plus, broker-dealers will have no means of viewing or interacting with public orders on the PHLX complex order book.”<sup>8</sup> As previously mentioned, PHLX currently provides last sale information to OPRA, but OPRA does not currently recognize and support order book information respecting complex order strategies.

### The PHLX Proposal Is Not Unfairly Discriminatory

The proposed fees for TOPO Plus represent an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, as required pursuant to Section 6(b)(4) of the Securities Exchange Act of 1934, as amended.<sup>9</sup>

The Lempert Letter and the Sullivan Letter each allege that the proposed TOPO Plus fees are not an equitable distribution of fees.<sup>10</sup> Each Letter contains examples assuming that PHLX market makers will be required under the PHLX Proposal to pay the proposed \$4,000 monthly fee for Internal Distributors<sup>11</sup> or the proposed \$5,000 monthly fee for External Distributors<sup>12</sup> but neither Letter accounts for the PHLX’s consideration of fair and equitable distribution of fees respecting Non-Professional Subscribers<sup>13</sup> and Professional Subscribers.<sup>14</sup>

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<sup>8</sup> Lempert Letter at p. 3.

<sup>9</sup> 15 U.S.C. Section 78f(6)(b)(4).

<sup>10</sup> Lempert Letter at p. 4; Sullivan Letter at p. 1.

<sup>11</sup> An Internal Distributor is an organization that subscribes to the Exchange for the use of TOPO (the PHLX Top of Book feed) or TOPO Plus Orders, and is permitted by agreement with the Exchange to provide TOPO or TOPO Plus Orders data to internal users (i.e., users within their own organization). Under the proposal, Internal Distributors of TOPO Plus Orders would be charged a monthly fee of \$4,000 per organization. Internal Distributors of TOPO are currently charged a monthly fee of \$2,000 per organization. This fee will continue to apply to Internal Distributors that distribute the TOPO feed.

<sup>12</sup> An External Distributor is an organization that subscribes to the Exchange for the use of TOPO or TOPO Plus Orders, and is permitted by agreement with the Exchange to provide TOPO or TOPO Plus Orders data to both internal users and to external users (i.e., users outside of their own organization). External Distributors of TOPO are currently charged a monthly fee of \$2,500 per organization. This fee will continue to apply to External Distributors that distribute the TOPO feed.

<sup>13</sup> A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an “investment adviser” as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.

<sup>14</sup> A Professional Subscriber is any subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX PHLX distributor agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.

In its consideration of the equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities, PHLX established reasonable subscriber fees to be assessed on External Distributors of TOPO Plus. As stated in the PHLX Proposal, the monthly Subscriber Fee assessed to External Distributors would be \$1 per Non-Professional Subscriber and \$20 per Professional Subscriber.

The signors of the Lempert and Sullivan Letters (collectively, the “subscribers”) would be considered Internal Distributors only if they opt to receive a raw data feed from PHLX or any other vendor where they could interact with the data in its raw form. This is very similar to the way in which NASDAQ disseminates its proprietary equity information. The subscribers may also opt to receive TOPO Plus from an External Distributor. Based upon the use of TOPO Plus by the subscribers, and the manner in which External Distributors would distribute TOPO Plus to them, PHLX concludes that the subscribers are neither Internal Distributors nor External Distributors of TOPO Plus. PHLX therefore would not charge the subscribers the \$4,000 or \$5,000 monthly fees for TOPO Plus. Instead, PHLX considers the subscribers to be Professional Subscribers and intends to charge External Distributors the applicable \$20 monthly fee for each Professional Subscriber to whom they distribute TOPO Plus via a controlled terminal. PHLX reasonably believes that External Distributors might pass through the Professional Subscriber fees to the subscribers, together with whatever other fees are agreed upon between the External Distributor and the subscribers. PHLX reasonably believes that any such fees would be significantly less than the proposed fees for Internal and External Distributors.

#### TOPO Plus Does Not Preclude Market Makers From Interacting Electronically with the Limit Order Book

Both the Lempert Letter and the Sullivan Letter contain serious misrepresentations of fact that serve only to adversely affect their credibility. PHLX believes it is necessary to set the record straight in this regard.

The Lempert Letter states that “The PHLX has informed the market makers that even if they receive TOPO Plus through an External Distributor and pay the “Professional” rate to the PHLX, the market makers will still be prohibited from electronically adjusting their market quotations to interact with the single or complex order book.”<sup>15</sup> This is a misrepresentation and is simply not true. The Lempert Letter goes on to state that “[T]his policy is in effect, the PHLX instructing us not to improve our markets to give customers best execution.”<sup>16</sup> The PHLX of course has no such policy and never represented this proposition to anyone.

Similarly, and perhaps more inflammatory than the Lempert Letter’s misrepresentations of fact, the Sullivan Letter alleges, “I was told by multiple NASDAQ OMX PHLX, Inc (sic) employees that this push for charging for market data fees is coming from the Securities and

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<sup>15</sup> Lempert Letter at p. 4.

<sup>16</sup> *Id.*

Exchange Commission.”<sup>17</sup> No PHLX employee has ever made, or would ever make, that statement.

#### Live Auction

The Lempert Letter refers to the PHLX Live Auction as a mechanism intended to provide a “flash” order that would not be seen by all market participants before certain exchange members would trade against it. The above statement mischaracterizes the PHLX Complex Order Live Auction (“COLA”).<sup>18</sup>

The COLA is a price improvement mechanism for complex orders that actually begins with a notification that a COLA is about to begin. This notification is included in TOPO Plus. The notification is followed by a counting of up to 5 seconds during which PHLX participants such as the signers of the Lempert Letter may bid and/or offer on both sides of the market to improve the execution price of a “COLA-eligible order.”<sup>19</sup> PHLX encourages participation by market makers such as the signers of the Lempert and Sullivan Letters, and accordingly provides them with notification (via TOPO and TOPO Plus) and sufficient response time to participate in the price-improvement auction. The COLA has nothing to do with a “flash order.”

#### TOPO Plus Includes Pre-Market Data

The signers of the Lempert Letter admit that they are aware that pre-market data is available with the current SOF product, but that “[T]here is no mention of this data in the rule filing or whether TOPO Plus will offer this data.”<sup>20</sup>

On the contrary, in its Statement of the Terms of Substance of the Proposed Rule Change, PHLX specifically states that TOPO Plus “currently provides disseminated Exchange top-of-market data (including orders, quotes and trades), together with all information that is included in the Exchange’s Specialized Order Feed (“SOF”).”<sup>21</sup> This includes pre-market data.

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<sup>17</sup> Sullivan Letter at p.1.

<sup>18</sup> See PHLX Rule 1080.08(e).

<sup>19</sup> See PHLX Rule 1080.08(e)(iv).

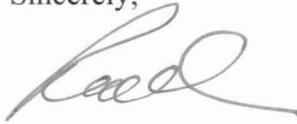
<sup>20</sup> Lempert Letter at p. 5.

<sup>21</sup> PHLX Proposal at p. 1.

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For the foregoing reasons, PHLX respectfully requests that the Commission approve the PHLX Proposal.

Sincerely,

A handwritten signature in black ink, appearing to read "Rudolph", written in a cursive style.

Richard S. Rudolph  
Assistant General Counsel  
NASDAQ OMX PHLX, Inc.

cc: Jennifer Colihan  
Sarah Albertson