

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60103; File No. SR-Phlx-2009-47)

June 11, 2009

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Order Routing Fees

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 June 5, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially 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

The Exchange proposes to adopt fees governing pricing for Phlx members using the Phlx XL II system,<sup>3</sup> for routing standardized equity and index options to away markets for execution.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

<sup>3</sup> For a complete description of Phlx XL II, see Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32). The instant proposed fees will apply only to options entered into, and routed by, the Phlx XL II system.

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 Exchange 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 purpose of the proposed rule change is to adopt fees for executions of options orders entered into the Exchange's enhanced electronic trading platform for options, Phlx XL II but routed to away markets. The Exchange proposes a routing fee based upon the cost to the Exchange of executing such orders at those markets. In order to reflect the Exchange's cost of execution at away markets, the fees will be separated as applicable, depending on the away market's fee schedule, by type of option (penny pilot, equity/non-penny pilot, ETF or HLDS/non-penny pilot, and Index) and vary depending upon whether the order is being routed for a customer, a member firm, a market maker (which includes a specialist, a Registered Options Trader, a Streaming Quote Trader ("SQT"),<sup>4</sup> and a Remote Streaming Quote Trader ("RSQT"),<sup>5</sup> or by a Floor Broker. Initially, the Phlx XL II system will only route customer

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<sup>4</sup> An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the floor of the Exchange. See Exchange Rule 1014(b)(ii)(A).

<sup>5</sup> An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit

orders.<sup>6</sup> The Table reflects that routing fees are currently not applicable to firms and market makers, since their order will not be routed by the Phlx XL II system. In the event that the Exchange determines to route firm and market maker orders, membership will be notified by an Options Trader Alert (“OTA”) of any applicable routing fees, and the Table will be updated to reflect such fees.

The Exchange proposes to pass through to Exchange members the actual transaction fees (including surcharges/license fees if applicable) assessed by away markets plus the clearing fees for the execution of orders routed from the Phlx XL II system. The Exchange has collected and organized in table format the fees to be assessed for routing to each destination exchange.<sup>7</sup>

The Exchange recently adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC (“NOS”), a member of the Exchange, as the Exchange’s exclusive order router.<sup>8</sup> The sole use of NOS by the Phlx XL II system will be to route orders in options listed and open for trading on the Phlx XL II system to destination markets. A particular destination market would charge NOS their applicable transaction fees, which would then be passed through to Phlx, and ultimately to the initiating member under this proposal. Similarly, clearing fees charged to NOS by the Options Clearing Corporation (“OCC”) would be passed through in this manner.

The fees listed in the NASDAQ OMX PHLX Table of Routing Fees (the “Table”) will be updated as necessary to reflect changes in fees on destination exchanges. The Table generally

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option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. See Exchange Rule 1014(b)(ii)(B).

<sup>6</sup> See supra note 3.

<sup>7</sup> See Exhibit 3 to the proposed rule change. See also infra note 9

<sup>8</sup> See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32).

should be accurate; however there may be instances in which a destination exchange submits a proposed rule change to amend its fee schedule on an immediately effective basis. In such a circumstance there may be a short time lag between such change to the destination market's fee schedule and a corresponding change to the Table. Accordingly, members should review the fees that were imposed on the destination market at the time an order was routed to ensure that they are aware of the actual fees that were passed through to them.

The Exchange believes that it is impractical to reflect and maintain in its fee schedule the table of fees assessed by each of the six competing away options markets. Because transaction and clearing costs are subject to frequent change on all of the options markets, the Exchange expects that maintaining an updated and accurate fee schedule would require it to file up to six changes or more each month in order to accurately reflect the changing fees for all six away markets.

Accordingly, under the current proposed rule change, the Exchange will assess pass-through transaction and clearing fees for executions on away markets but, rather than reflect the actual fees in its fee schedule, the Exchange will cross-reference a location on its primary website for members, [NasdaqTrader.com](http://NasdaqTrader.com), where it will maintain the Table, setting forth fees applicable to options executions at away markets.<sup>9</sup> The Exchange will maintain a current Table as well as an historical record of fees applicable on prior trading days in order to permit members to understand and evaluate their invoices from the Exchange.

The Exchange believes that these routing fees and the proposed approach to displaying them are competitive, fair and reasonable, and non-discriminatory in that they replicate the fees assessed by away markets executing orders routed from the Exchange. The Exchange believes

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<sup>9</sup> The Commission notes that the following link to this table is included in the proposed rule text: <http://www.nasdaqtrader.com/Micro.aspx?id=phlxpricing>.

that displaying its fees on a well-publicized and accessible web site and maintaining an historical record of fee changes will provide sufficient transparency for Exchange members that voluntarily choose to use the Phlx XL II system to route orders in standardized options.

The Exchange believes that these routing fees are inherently competitive, fair and reasonable, and non-discriminatory in that they replicate the fees assessed by away markets executing orders routed from the Phlx XL II system. As with all fees, the Exchange may adjust these routing fees in response to competitive conditions by filing a new proposed rule change.

This proposal is scheduled to become operative for option trades routed by the Phlx XL II system that settle on or after the initial date of deployment of the Phlx XL II system. The roll-out of the Phlx XL II system began on June 5, 2009. Members will be notified of the date of deployment and the commencement of the imposition of the proposed fees by way of an Options Trader Alert (“OTA”) posted on the Exchange’s web site.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act<sup>10</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>11</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Phlx is one of seven options markets in the national market system for standardized options. Joining Phlx and electing to trade options is entirely voluntary. Under these circumstances, Phlx’s fees must be competitive and low in order for Phlx to attract order flow, execute orders, and grow as a market. The various exchanges have filed these fees with the Commission and it is reasonable for Phlx to pass those fees through to its members. As such, Phlx believes that its fees are fair and reasonable and consistent with the Act.

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

<sup>11</sup> 15 U.S.C. 78f(b)(4).

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 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 either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>12</sup> and paragraph (f)(2) of Rule 19b-4<sup>13</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2009-47 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and

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<sup>12</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>13</sup> 17 CFR 240.19b-4(f)(2).

Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2009-47. 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 inspection and copying 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 will also be available for inspection and copying at the principal office of the self-regulatory organization. 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-Phlx-2009-47 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).