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March 25, 2010

VIA EMAIL and
BY OVERNIGHT MAIL

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: File Number SR-Phlx-2010-33
File Number SR-Phlx-2010-41

Dear Ms. Murphy:

NYSE Euronext, on behalf of its subsidiary NYSE Arca, Inc. ("NYSE Arca" or "Exchange") appreciates the opportunity to comment on the above referenced rule filings of NASDAQ OMX PHLX ("Phlx"). The Exchange is concerned about the negative impact on market structure competitiveness as a result of the proposed Phlx fees under the rule filings.

The first filing, SR-Phlx-2010-33 ("2010-33"), applies a fee structure known as "make/take" to four options classes. The second filing, SR-Phlx-2010-41 ("2010-41"), extends that fee structure to an additional 23 options classes.

Specifically, the fees for the 27 designated classes are:

	Customer	Directed Participant	Specialist, ROT, SQT and RSQT	Firm	Broker-Dealer
Rebate for Adding Liquidity	$0.20	$0.25	$0.23	$0.00	$0.00
Fee for Adding Liquidity	$0.00	$0.00	$0.00	$0.45	$0.45
Fee for Removing Liquidity	$0.25	$0.30	$0.32	$0.45	$0.45

Make/take pricing is typically designed to encourage improved pricing on the bid or offer by giving a credit to the participant that posted liquidity when incoming trading interest interacts with the posted trading interest. The credit arises from the transaction fees charged for executing a marketable order. In a price-time priority market structure, this rewards the party that sets the better price. However, the market structure in the classes designated by Phlx for this alternative pricing does not support the general trading incentive in which make/take pricing encourages competitive quoting.

Under the Phlx fees, the market structure maintains full Customer priority, a size pro-rata allocation for non-Customers, and guaranteed allocations for Specialists and Directed Participants. The result is that the parties that are typically the most incentivized to compete for the posting credit are not rewarded for their effort, but rather must compete for the spoils remaining after Customers and guaranteed allocation recipients are apportioned their share. In a market structure, such as Phlx's, where the competition for order flow is based on size and not for posting an improved price, "make/take" pricing does not reward those who aggressively price their trading interest to capture order flow. Rather, the proposed fees encourage certain participants to merely join the best price and actively discourage other participants from adding liquidity. Indeed, Specialists and Directed Participants, because of their privilege to "jump the line" on priority, are encouraged to wait for a substantial market to be set before joining the price. The proposed fees aggravate this predicament by offering those participants a rebate for adding liquidity, while charging otherwise competing Firms and Broker-Dealers that provide similar liquidity.

While not all "make/take" exchanges use a strict price-time structure,[1] they generally apply the pricing structure to provide substantially equal incentives to post liquidity, with uniform charges for removing trading interest. In comparison, Phlx's pricing does not seek to encourage competitive quoting or posting of orders. Instead, the Phlx proposal actively discourages Firms and Broker-Dealers from providing liquidity at all, not only by not providing any posting credit but by charging them a fairly high rate for posting – effectively a

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[1] NYSE Arca uses a modified price time model in which Lead Market Makers ("LMMs") receive a guaranteed allocation in return for a greater quoting obligation. Modified price time grants priority to Customers but only if they are ahead of the LMM in time sequence.

"charge/charge" or "take/take" fee scheme.[2] This disincentive for non-market maker Broker-Dealers is active discouragement of any competition that might interfere with the de-facto private market for market makers. This anti-competitive fee for posting, when coupled with the size pro-rata allocation methodology, provides an atmosphere in which a Specialist or Directed Participant may garner more than the 40% guaranteed allocation because of a lack of competitive size. The Phlx rationale for providing rebates is "...to promote and encourage liquidity…" yet Phlx is actually discouraging the posting of liquidity by implementing its "charge/charge" or "take/take" pricing on Firms and Broker-Dealers.[3]

The combination of market structure and disparate pricing in the Phlx fee structure results in the creation of a private market for Customers and Market Makers at the expense of a fair and orderly market for all other market participants. Such a structure may in fact be contra to the common remedial sanction undertaking obligation of NYSE ARCA and Phlx arising from the September 2000 Commission findings which include " ...adopt(ing) new…rules…which substantially enhance incentives to quote competitively and substantially reduce disincentives for market participants to act competitively…"[4]. The Exchange understands that a size pro rata market with Customer priority and allocation enhancements for Specialists and Directed Participants has been demonstrated to be very competitive for all market participants. However, the application of a "make/take" pricing mechanism within such a structure, with disparate pricing for privileged participants as described above, negatively impacts competition and actively discourages market participants from posting or interacting with liquidity.

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2 In 2010-33, Phlx set an adding liquidity fee of $0.35 per contract for Firms, and $0.45 per contract for Broker-Dealers. In 2010-41, Phlx raised the Firm adding liquidity fee to $0.45 per contract, matching the Broker-Dealer rate.

3 Phlx further actively discourages competition from Firms and Broker-Dealers by assessing charges for removing liquidity when a Firm or Broker-Dealer participates in an electronic auction that is free to all other market participants.

4 *See* Exchange Act Release No. 43269, Administrative Proceeding File No. 3-10282, at IV.B.h(i).

For the foregoing reasons, NYSE Arca urges the Commission to abrogate SR-Phlx-2010-33 and SR-Phlx-2010-41.

Sincerely,

Janet McKissane

cc: Elizabeth King
Heather Seidel