

SECURITIES AND EXCHANGE COMMISSION  
(Release No.34-60578; File No. SR-Phlx-2009-72)

August 27, 2009

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to the Option Floor Broker Subsidy and Other Clarifying Changes to the Fee Schedule

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,<sup>1</sup> notice is hereby given that on August 25, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or the “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 prepared by the Phlx. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the calculation for the Options Floor Broker Subsidy with respect to waiver of transaction fees for firm facilitation transactions.

Additionally, the Exchange proposes to make other clarifying changes to the fee schedule.

While changes to the Exchange’s fee schedule pursuant to this proposal are effective upon filing, the Exchange has designated this proposal to be effective for trades settling on or after September 1, 2009.

The text of the proposed rule change is available on the Exchange’s web site 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).

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

In its filing with the Commission, Phlx 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 Phlx 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 attract additional order flow to the Exchange. The Exchange proposes to modify the Options Floor Broker Subsidy calculation. The Exchange currently pays an Options Floor Broker Subsidy to member organizations with Exchange registered floor brokers for eligible contracts that are entered into the Exchange's Options Floor Broker Management System ("FBMS").<sup>2</sup> To qualify for the per contract subsidy, a member organization with Exchange registered floor brokers must have: (1) more than an average of 100,000 executed contracts per day in the applicable month; and (2) at least 40,000 executed contracts or more per day for at

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<sup>2</sup> FBMS is designed to enable floor brokers and/or their employees to enter, route, and report transactions stemming from options orders received on the Exchange. FBMS also is designed to establish an electronic audit trail for options orders represented and executed by floor brokers on the Exchange. See Exchange Rule 1080, commentary .06.

least eight trading days during that same month.<sup>3</sup> Only the floor broker volume from orders entered into FBMS and subsequently executed on the Exchange would be counted. The 100,000 contract and 40,000 contract thresholds, as described above, would be calculated per member organization floor brokerage unit. In the event that two or more member organizations with Exchange registered floor brokers each entered one side of a transaction into FBMS, then the executed contracts would be divided among each qualifying member organization that participates in that transaction. In order to be eligible for the Options Floor Broker Subsidy, the member organization must have an average daily volume in a particular calendar month as follows:

Per Contract Average Daily Volume Subsidy Payment:

Tier I	Tier II	Tier III
100,001 to 200,000	200,001 to 300,000	300,001 and greater
\$0.04 per contract	\$0.05 per contract	\$0.06 per contract

Currently, the following types of transactions apply to calculating the Options Floor Broker Subsidy:

- Customer-to-customer executions will count towards reaching the 100,000 contract and 40,000 contract thresholds, but a per contract subsidy will not be paid on any customer-to-customer executions.

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<sup>3</sup> For purposes of calculating the 100,000 and 40,000 thresholds, customer-to-customer transactions, customer-to-non-customer transactions, and non-customer-to-non-customer transactions would be included.

- Orders entered through FBMS but executed away through Linkage, as well as dividend, merger and short stock interest strategies will not count towards the 100,000 contract or the 40,000 contract thresholds nor will a per contract subsidy be paid on these transactions.
- Only the largest component of a Complex Order (i.e., the component that includes the greatest number of contracts) will count towards the 100,000 contract and the 40,000 contract thresholds. The Options Floor Broker Subsidy does not apply to any contracts that are executed as part of a Complex Order.

For the purposes of calculating the Options Floor Broker Subsidy, the Exchange proposes to treat firm facilitation transactions, executed pursuant to Exchange Rule 1064<sup>4</sup>, in the same manner as fees are assessed for customer-to-customer executions. The

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<sup>4</sup> A Floor Broker holding an options order for a public customer and a contraside order may cross such orders in accordance with paragraph (a) above or may execute such orders as a facilitation cross in the following manner: (i) The Floor Broker or his employees must enter the appropriate notation onto the Options Floor Broker Management System for the public customer's order, together with all of the terms of the order, including any contingency involving other options or the underlying or related securities. (ii) The Floor Broker shall request markets for the execution of all options components of the order. After providing an opportunity for such markets to be made, the Floor Broker shall announce that he holds an order subject to facilitation and shall bid (or offer) in between the market for each options component and disclose all terms and conditions of the order including all securities which are components of the order. (iii) After all market participants in the crowd are given a reasonable opportunity to accept all terms and conditions made on behalf of the public customer whose order is subject to facilitation, the Floor Broker may immediately thereafter cross all or any remaining part of such order and the facilitation order at each customer's bid or offer by announcing by public outcry that he is crossing and by stating the quantity and price(s). Once a Floor Broker has announced an order as subject to facilitation and has established a bid (or offer) in between the market for the

Exchange believes that this amendment to the Options Floor Broker subsidy calculation is consistent with the recent waiver of the Firm Proprietary Options Transaction Charge on firm facilitation transactions.<sup>5</sup> The volume for firm facilitation transactions would count toward reaching the 100,000 and 40,000 contract thresholds, but a per contract subsidy will not be paid on any firm facilitation transaction. A facilitation occurs when a floor broker holds an options order for a public customer and a contra-side order for the same option series and, after providing an opportunity for all persons in the trading crowd to participate in the transaction, executes both orders as a facilitation cross.<sup>6</sup>

The Exchange also proposes other clarifying technical amendments to the fee schedule. The Exchange recently updated the fee schedule<sup>7</sup> and amended certain footnotes in the fee schedule and replaced them with endnotes. It was previously noted in the fee schedule that payment for order flow fees would be assessed on transactions resulting from customer orders and are available to be disbursed by the Exchange according to the instructions of the specialist units/specialists or Directed ROTs to order flow providers who are members or member organizations, who submit, as agent, customer orders to the Exchange or non-members or non-member organizations who

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option(s) to be facilitated, the order cannot be broken up by a subsequent superior bid or offer for just one component to the facilitated order. See Exchange Rule 1064(b).

<sup>5</sup> See Securities Exchange Act Release No. 60477 (August 11, 2009), 74 FR 41777 (August 18, 2009) (SR-Phlx-2009-67).

<sup>6</sup> See Exchange Rule 1064.

<sup>7</sup> See Securities Exchange Act Release No. 59402 (February 13, 2009), 74 FR 8134 (February 23, 2009) (SR-Phlx-2009-08) (amending and reformatting the existing NASDAQ OMX PHLX Fee Schedule).

submit, as agent, customer orders to the Exchange through a member or member organization who is acting as agent for those customer orders. This language was inadvertently removed from the previous fee schedule when the fee schedule was reformatted<sup>8</sup>, however, payment for order flow fees have and continue to be assessed on transactions resulting from customer orders.<sup>9</sup> The Exchange proposes adding the following language back into the fee schedule to further clarify the payment for order flow fees: “Payment for order flow fees will be assessed on transactions resulting from customer orders.” Also, for purposes of consistency, the Exchange proposes amending all references to Phlx in the fee schedule to be “PHLX” and adding appropriate trademark references.

## 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. Pursuant to this proposal, all member organizations registered as floor brokers are offered the continued opportunity to receive a subsidy. By

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<sup>8</sup> See Securities Exchange Act Release No. 59402 (February 13, 2009), 74 FR 8134 (February 23, 2009) (SR-Phlx-2009-08).

<sup>9</sup> The program took effect on July 1, 2005. See e.g., Securities Exchange Act Release Nos.; 57851 (May 22, 2008), 73 FR 31177 (May 30, 2008) (SR-Phlx-2008-38); 55891 (June 11, 2007), 72 FR 333271 (June 15, 2007) (SR-Phlx-2007-39); 53754 (May 3, 2006), 71 FR 27301 (May 10, 2006) (SR-Phlx-2006-25); 53078 (January 9, 2006), 71 FR 2289 (January 13, 2006) (SR-Phlx-2005-88); 52568 (October 6, 2005), 70 FR 60120 (October 14, 2005) (SR-Phlx-2005-58); and 52114 (July 22, 2005), 70 FR 44138 (August 1, 2005) (SR-Phlx-2005-44).

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

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

allowing for a subsidy, the Exchange believes that floor brokers will be encouraged to send additional orders to the Exchange for execution. The Exchange also proposes a few technical changes to clarify the language in the fee schedule.

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

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>12</sup> and subparagraph (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.

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

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

#### 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-2009-72 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-Phlx-2009-72. 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 also will be available for inspection and copying at the principal office of Phlx. 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-2009-72 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).