

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60784; File No. SR-Phlx-2009-69)

October 2, 2009

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Prohibit Options Specialist Commission Charges

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> notice is hereby given that on October 1, 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 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 Rule 1014, Commentary .10 to establish that options specialists on the Exchange are prohibited from charging commissions.

The text of the proposed rule change is available on the Exchange’s Website at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, 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.

## 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 eliminate arbitrary and potentially excessive costs for trading options on the Exchange. The Exchange believes that this prohibition should provide clarity to member organizations and options investors on this topic by stating the current position of the Exchange. Specifically, the Exchange proposes to adopt a rule prohibiting specialist commission charges. In effect, the rules prohibit the specialist<sup>3</sup> from charging a commission for any trade in which he participated, whether acting as agent or principal. In addition, the rules prohibit a specialist from charging a commission or fee for the handling, execution or processing of an order delivered through the Exchange's automated trading system, Phlx XL II,<sup>4</sup> whether the specialist is acting as principal or agent for the order. The agency responsibilities of a specialist have virtually been eliminated, as the Exchange's trading systems

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<sup>3</sup> The term "specialist" is used interchangeably with "specialist unit."

<sup>4</sup> See Rule 1080.

have become increasingly automated, particularly with the completed roll-out of Phlx XL II, the Exchange's new, enhanced options trading system.<sup>5</sup>

The Exchange's By-Laws give broad authority for the Exchange to impose and regulate fees.<sup>6</sup> Given market developments and changes in market structure, the Exchange believes that it is inappropriate for specialists to be charging commissions and fees; specialists occupy an important status in the Exchange's options marketplace and the Exchange believes that it is not good market practice for specialists to charge commissions in connection with specialist functions. The Exchange feels that it is necessary to file this proposed rule change to eliminate any ambiguity with respect to its position on the topic. Adoption of this rule should not be interpreted to mean that any specialist fee or commission charged before the adoption was valid or permitted.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>8</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, because specialist commissions increase the cost of doing business on the Exchange, which, in turn, weakens the Exchange's competitive position and potentially increase the cost of options trading for investors. For these same reasons, the Exchange also believes that the proposed rule change is consistent with Section 11(A)(a)(1)(C)

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<sup>5</sup> See e.g., Rule 1080(m), which covers the Exchange's routing of orders to other markets, which was previously done by specialists.

<sup>6</sup> See Exchange By-Law Article XIV, Section 14-1(a) and Article XII, Section 12-6(b).

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

of the Act,<sup>9</sup> which states that it is in the public interest and appropriate for the protection of investors and the maintenance of fair and orderly markets to assure, among other things, economically efficient execution of securities transactions, and fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets.

In addition, the Exchange believes that the proposal is consistent with Section 6(e)(1) of the Act,<sup>10</sup> because it is not designed to permit unfair discrimination between customers, issuers, brokers and dealers, or to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members. Section 6(e) of the Act<sup>11</sup> was adopted by Congress in 1975 to statutorily prohibit the fixed minimum commission rate system. The fixed minimum commission rate system allowed exchanges to set minimum commission rates that their members had to charge their customers, but allowed members to charge more. The Exchange's proposal, by contrast, does not establish a minimum commission rate, but instead prohibits the Exchange's specialists from charging a commission for handling an order, as part of their responsibilities as a specialist. Accordingly, the Exchange does not believe that this proposed rule constitutes fixing commissions, allowances, discounts, or other fees for purposes of Section 6(e)(1) of the Act.<sup>12</sup> Indeed, the Commission has previously noted that limits on fees that specialists may charge apply only to members who choose to be specialists, and that, by

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<sup>9</sup> 15 U.S.C. 78K-1(a)(1)(C).

<sup>10</sup> 15 U.S.C. 78f(e)(1).

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

<sup>12</sup> 15 U.S.C. 78f(e)(1).

limiting fees, an exchange is merely imposing a condition, which is consistent with the Act, on a member's appointment as a specialist.<sup>13</sup>

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

Pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4(f)(6)<sup>15</sup> thereunder, the Exchange has designated this proposal as one that effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement. Furthermore, a proposed rule change filed pursuant to

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<sup>13</sup> See text preceding note 27 in Securities Exchange Act Release No. 55913 (June 15, 2007), 72 FR 34323 (June 21, 2007) (SR-Amex-2007-13).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(6).

Rule 19b-4(f)(6) under the Act<sup>16</sup> normally does not become operative for 30 days after the date of its filing.

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-2009-69 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-2009-69. 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

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<sup>16</sup> 17 CFR 240.19b-4(f)(6).

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 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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-2009-69 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>17</sup>

Florence E. Harmon  
Deputy Secretary

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