

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-63780; File No. SR-Phlx-2011-07)

January 26, 2011

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Firm Related Equity Option Cap, Active SQF Port Fees and Other Membership Fees

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 January 14, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 amend the Exchange's Fee Schedule to: (i) allow Firms to cap their equity option transaction charges, per month, when such Firms are trading in their own proprietary account; (ii) correct a typographical error related to the Active Specialized Quote Feed ("SQF") Port Fee and also extended the current \$40,000 per month cap from March 31, 2011 to November 30, 2011; (iii) clarify the Transfer of Affiliation Fee applies to member organizations; (iv) clarify when an Initiation Fee is assessed; (v) remove a reference to Application Fee in the Fee Schedule; and (vi) remove a note associated with the Options Regulatory Fee which is no longer necessary.

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

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

While changes to the Exchange's Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated this proposal to be operative on January 17, 2011. The text of the proposed rule change is available on the Exchange's website at <http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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 amend the types of equity transaction charges that would count toward the Firm Related Equity Option Cap. The Exchange believes that this amendment would encourage organizations that are not members to become members by further reducing fees. The Exchange is also proposing to extend the timeframe for members to cap their Active SQF Port Fees in order that members will have additional time to transition from SQF 5.0 to SQF 6.0. Finally, the Exchange is proposing to make certain clarifying amendments to the text of the Fee Schedule to more accurately reflect when certain fees would be assessed on members.

### Firm Related Equity Option Cap

The Exchange currently caps Firms at \$75,000 (“Firm Related Equity Option Cap”) for equity options transactions charges, in the aggregate for one billing month per member organization, except for orders of joint back-office (“JBO”) participants.<sup>3</sup> The Exchange is proposing to amend the application of the Firm Related Equity Option Cap to state that the \$75,000 Firm Related Equity Option Cap would apply to Firm equity option transaction charges, in the aggregate for one billing month per member organization, when such members are trading in their own proprietary account.<sup>4</sup> The Firm Related Equity Option Cap would not apply to orders where a member is acting as agent on behalf of a non-member. The Firm Related Equity Options Cap would apply to trades in which a member acts as agent on behalf of another member, provided those orders are not commingled with orders from a non-member.

Members and member organizations would be required to continue to notify the Exchange, in writing, of all accounts, which under this proposal are not executed for their own proprietary account. The purpose of this provision would be to enable the Exchange to accurately monitor which executions are subject to the Firm Related Equity Option Cap. Furthermore, the Exchange proposes to specify that it would not make adjustments to billing invoices where the member/member organization commingles transactions that

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<sup>3</sup> A JBO participant is a member, member organization or non-member organization that maintains a JBO arrangement with a clearing broker-dealer (“JBO Broker”) subject to the requirements of Regulation T Section 220.7 of the Federal Reserve System. See also Exchange Rule 703.

<sup>4</sup> The Firm equity options transaction charges are waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members are trading in their own proprietary account.

are not for their own proprietary account, and thus not subject to the Firm Related Equity Option Cap, with transactions for accounts which are proprietary.<sup>5</sup>

#### Active SQF Port Fee

The Exchange recently amended the Active SQF Port<sup>6</sup> Fee to establish a tiered schedule of fees.<sup>7</sup> In that rule change, the Exchange placed a \$40,000 per month cap (“Cap”) on Active SQF Port Fees from January 3, 2011 through March 31, 2011. In that rule change, the Exchange noted that it believed that member organizations will utilize less SQF 6.0 ports than SQF 5.0 ports<sup>8</sup> and that all member organizations should have transitioned to SQF 6.0 by March 31, 2011.

The Exchange now believes that member organizations would require additional time to properly transition to SQF 6.0 ports and proposes extending the applicability of the Cap until November 30, 2011. On December 1, 2011, there will no longer be a Cap

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<sup>5</sup> In the initial filing, the Exchange stated that “[f]urthermore, the Exchange proposes to specify that it would not make adjustments to billing invoices where the member/member organization commingles transactions that are not for their own proprietary account, and thus not subject to the Firm Related Equity Option Cap, with transactions for accounts which are non-proprietary.” The Exchange requested the removal of the letters “non-” before the word “proprietary” because it was incorrect. See Email from Angela S. Dunn, Assistant General Counsel, Phlx, dated January 26, 2011.

<sup>6</sup> Active SQF ports refer to ports that receive inbound quotes at any time within that month. SQF is an interface that enables specialists, Streaming Quote Traders (“SQTs”) and Remote Streaming Quote Traders (“RSQTs”) to connect and send quotes into Phlx XL.

<sup>7</sup> See Securities Exchange Act Release No. 63619 (December 29, 2010), 76 FR 614 (January 5, 2011) (SR-Phlx-2010-181).

<sup>8</sup> The Exchange released SQF 6.0 on October 11, 2010. The Exchange anticipates that member organizations will utilize both SQF 5.0 and SQF 6.0 for a period of time. See Securities Exchange Act Release No. 63034 (October 4, 2010), 75 FR 62441 (October 8, 2010) (SR-Phlx-2010-124).

in effect for the Active SQF Port Fee. The purpose of the Cap is to ensure member organizations are not assessed fees in excess of the Active SQF Port Fees

Additionally, the Exchange proposes to correct a typographical error within the text of the Fee Schedule for the Active SQF Port Fee. When the Exchange filed to create the tiered schedule of fees for the Active SQF Port Fees the Exchange incorrectly noted that there would be a tier for 19-40 Active SQF Ports and another tier that would be for 40 and over. The last tier should be “41 and over” since 40 Active SQF Ports would be assessed fees in the third tier. The Exchange proposes renaming the final tier “41 and over” and assessing that tier for the 41<sup>st</sup> Active SQF Port and greater than 41 ports.

#### Transfer of Affiliation

The Exchange is proposing to amend the Transfer of Affiliation Fee which was recently added to the Fee Schedule<sup>9</sup> to clarify that the \$350 Transfer of Affiliation Fee would be assessed on a permit holder who applies to transfer affiliation from one member organization to another member organization. The text currently states from one member to another member, however the transfer would take place between member organizations and the Exchange is proposing to clarify its Fee Schedule to accurately reflect the transfer. The Exchange is also proposing minor corrections to the Transfer of Affiliation Fee text to simplify the text. The Exchange therefore proposes the current text for the Transfer of Affiliation Fee be replaced with the following text, “The Exchange will not assess the Initiation Fee on a permit holder who applies to transfer affiliation

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<sup>9</sup> See Securities Exchange Act Release No. 63569 (December 17, 2010), 75 FR 81323 (December 27, 2010) (SR-Phlx-2010-178).

from one member organization to another member organization if the permit holder continuously held his or her permit without any lapse in membership.”<sup>10</sup>

### Initiation Fee

The Exchange is proposing to clarify the rule text of the Initiation Fee, as well as the applicability of that fee.

First, the Exchange proposes to clarify that the Initiation Fee is imposed on a new member upon the issuance of a permit. The current text of the Fee Schedule states that an “Initiation Fee is imposed on a member upon election...” This language refers to a former process at the Exchange whereby the former Admissions Committee would review an application for membership and grant an election to membership, which would in turn trigger an Initiation Fee to be assessed upon a member.

The Exchange is proposing to clarify the text of this fee by instead stating that the Initiation Fee would be imposed on “...a new member upon the issuance of a permit... notwithstanding the fact that the new member may have been a former permit holder.” This language would not change the applicability of this fee, but only reflect the current practice of admitting members and the actual trigger for the fee today. Today the Exchange assesses the Initiation Fee on each new member. This would include new members that formerly held a Series A-1 permit. The Exchange does not propose to amend the current applicability of the Initiation Fee, but rather the Exchange desires to merely clarify for members the applicability of the fee.

### Application Fee

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<sup>10</sup> The Exchange is not proposing to amend the \$350 fee rate.

The Exchange is also seeking to clarify the applicability of the Application Fee with respect to PSX Participants. The Fee Schedule contains a note which states that,

Applicants that apply for membership solely to participate in the NASDAQ OMX PSX equities market are not assessed a Permit Fee, Application Fee, Initiation Fee, or Account Fee. Should such approved member or member organization subsequently elect to engage in business on Phlx XL II, the Exchange's options platform, the monthly Permit Fee, Application Fee, Initiation Fee and Account Fee will apply.

The Exchange is proposing to instead state:

Applicants that apply for membership solely to participate in the NASDAQ OMX PSX equities market are not assessed a Permit Fee, Application Fee, Initiation Fee, or Account Fee. Should such approved member or member organization subsequently elect to engage in business on Phlx XL II, the Exchange's options platform, the monthly Permit Fee, Initiation Fee and Account Fee will apply.

Since an Application Fee only applies to new members upon the issuance of a permit, a PSX Participant that subsequently elects to engage in options business would not require a new permit because that member would already possess a Series A-1 permit.<sup>11</sup>

Therefore, the Application Fee would never be assessed in that scenario.<sup>12</sup> The Exchange is proposing to correct this oversight by removing that language in the note related to Initiation Fee.

#### Options Regulatory Fee

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<sup>11</sup> The Exchange included language in the initial filing stating that it "was noted above" that Application Fees only apply to new member upon the issuance of a new permit. The Exchange requested the removal of the "as noted above" language because it was incorrect. See Email from Angela S. Dunn, Assistant General Counsel, Phlx, dated January 26, 2011.

<sup>12</sup> See Securities Exchange Act Release No. 61863 (April 7, 2010), 75 FR 20021 (April 16, 2010) (SR-Phlx-2010-54). In this rule change, the Exchange noted "[a]n Exchange member approved to participate in PSX would not be assessed an application fee should it subsequently determine to participate in the Exchange's options market, but would be charged the one-time initiation fee and would thereafter be charged the monthly account fee and permit fee."

The Exchange proposes to remove text in the Fee Schedule related to the Options Regulatory Fee, which is no longer necessary. The Exchange proposes removing the following language in the Fee Schedule, “The Exchange will continue to assess \$.0030 until January 3, 2011 at which time the new rate of \$.0035 will be assessed.” The Exchange has already commenced assessing the new rate, therefore this text is no longer necessary and the Exchange proposes deleting this text.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>14</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities. The Exchange believes that its proposal to amend the Firm Related Equity Option Cap to apply to members trading in their own proprietary account is reasonable because it would allow the Exchange to reduce costs for more member organizations. The Exchange believes that the proposal is equitable because member organizations that are JBOs could be subject to the Firm Related Equity Option Cap, as are other members, as long as the JBO trades were for their own proprietary account. Additionally, the proposed change would encourage JBOs that are not members to seek to become member organizations to further reduce their transaction fees.

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<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4).

The proposed modification to the Firm Related Equity Option Cap is similar to other fees assessed by the Exchange. Specifically, the Firm equity options transaction charges are waived for members executing facilitation orders<sup>15</sup> pursuant to Exchange Rule 1064 when such members are trading in their own proprietary account.<sup>16</sup> Additionally, dividend, merger and short stock interest strategies are capped at \$25,000 per member organization per month when such members are trading in their own proprietary accounts.<sup>17</sup>

The Exchange operates in a highly competitive market in which sophisticated and knowledgeable market participants can readily send orders to buy and sell options to competing venues if they deem fee levels at a particular venue to be excessive. The Exchange believes that the proposed modification to the Firm Related Equity Option Cap is necessary to remain competitive with fees charged by other venues and therefore continues to be reasonable and equitably allocated to those member organizations that opt to direct orders to the Exchange rather than competing venues.

The Exchange believes that its proposal to expand the applicability of the Cap for Active SQF Port Fees is both reasonable and equitable because it would allow members additional time to transition from SQF 5.0 to SQF 6.0.

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<sup>15</sup> 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. See Exchange Rule 1064.

<sup>16</sup> See Securities Exchange Act Release No. 60477 (August 11, 2009), 74 FR 41777 (August 18, 2009) (SR-Phlx-2009-67).

<sup>17</sup> See Securities Exchange Act Release Nos. 61115 (December 4, 2009), 74 FR 65571 (December 10, 2009) (SR-Phlx-2009-97) and 63712 (January 12, 2011) (SR-Phlx-2011-01).

The Exchange believes that its various proposals to amend the text of the Fee Schedule to clarify the applicability of certain fees, amend typographical errors and remove irrelevant text is both reasonable and equitable because members would benefit from clear guidance in the rule text describing the manner in which the Exchange would assess fees.

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>18</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2011-07 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-2011-07. 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 website

(<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 website viewing and printing in the Commission's Public Reference Room. Copies of the 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-2011-07 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>19</sup>

Elizabeth M. Murphy  
Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).