

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66668; File No. SR-Phlx-2012-35)

March 28, 2012

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Equity Options Fees and Singly Listed Option Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that, on March 16, 2012, 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: (i) Section II<sup>3</sup> of the Fee Schedule entitled “Equity Options Fees” to assess Professionals an Options Surcharge in certain Multiply Listed Options; (ii) amend Section III<sup>4</sup> of the Fee Schedule entitled “Singly Listed Options” to specify certain options that would be subject to the fees in this section; and (iii) amend the title of the Fee Schedule.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on April 2, 2012.

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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> Section II of the Fee Schedule includes options overlying equities, ETFs, ETNs, indexes and HOLDRs which are Multiply Listed.

<sup>4</sup> Section III of the Fee Schedule includes options overlying equities, ETFs, ETNs, indexes and HOLDRs which are not listed on another exchange.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, 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 Exchange proposes to amend Section II of the Fee Schedule to assess Professionals an Options Surcharge for transactions in RUT,<sup>5</sup> MNX,<sup>6</sup> NDX<sup>7</sup> and BKX.<sup>8</sup> The Exchange believes that these surcharges will assist the Exchange in remaining competitive in these options. The Exchange also proposes to amend Section III of the Fee Schedule to specify that the following options: PHLX Semiconductor Sector<sup>SM</sup> (SOX<sup>SM</sup>), PHLX Housing Sector<sup>TM</sup> (HGX<sup>SM</sup>) and PHLX Oil Service Sector<sup>SM</sup> (OSX<sup>SM</sup>) are subject to the Singly Listed Options Transaction Charge even though these options will no longer be Singly Listed. These above-

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<sup>5</sup> RUT represents the options on the Russell 2000® Index (the "Full Value Russell Index" or "RUT").

<sup>6</sup> MNX represents options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX ("MNX").

<sup>7</sup> NDX represents options on the Nasdaq 100 Index<sup>7</sup> traded under the symbol NDX ("NDX").

<sup>8</sup> BKX represents the KBW Bank Index.

referenced options are proprietary indexes. These options will be listed on the NASDAQ Options Market LLC (“NOM”) commencing on April 2, 2012. The Exchange seeks to continue to recoup fees associated with maintaining these proprietary indexes. The Exchange is also proposing to amend the title of the Fee Schedule to more specifically describe the document.

Section II Amendments

The Exchange currently assesses an Options Surcharge for transactions in RUT, MNX and NDX of \$.15 per contract for Market Makers,<sup>9</sup> Broker-Dealers and Firms.<sup>10</sup> The Exchange also currently assesses an Options Surcharge for transactions in BKX of \$.10 per contract for Market Makers, Broker-Dealers and Firms.<sup>11</sup> The Exchange is proposing to assess Professionals an Options Surcharge for transactions in RUT, MNX and NDX of \$.15 per contract and an Options Surcharge for transactions in BKX of \$.10 per contract. Customers will continue not to be assessed an Options Surcharge in RUT, MNX, NDX and BKX.

Section III Amendments

Currently, SOX, HGX and OSX are Singly Listed Options subject to the following fees in Section III of the Fee Schedule:

	<b>Customer</b>	<b>Professional</b>	<b>Market Maker</b>	<b>Firm</b>	<b>Broker-Dealer</b>
<b>Options Transaction Charge</b>	\$0.35	\$0.45	\$0.35	\$0.45	\$0.45

<sup>9</sup> The term “Market Maker” is utilized herein to describe fees and rebates applicable to Specialists, Registered Options Traders, Streaming Quote Traders and Remote Streaming Quote Traders.

<sup>10</sup> Currently, Professionals are not assessed an Options Surcharge for transactions in RUT, MNX or NDX.

<sup>11</sup> Currently, Professionals are not assessed an Options Surcharge for transactions in BKX.

On April 2, 2012, NOM will list SOX, HGX and OSX and therefore these options will become Multiply Listed. The Exchange proposes to continue to assess SOX, HGX and OSX the Singly Listed Options Transaction Charges in Section III by specifying that these index options will be subject to Section III fees, even though they will no longer be Singly Listed. The Exchange also proposes to indicate in Section II of the Fee Schedule that SOX, HGX and OSX would be subject to the fees in Section III.

#### Other Amendments

The Exchange is also proposing to amend the title of the “Fee Schedule” to “Pricing Schedule” to more specifically describe this document.

#### 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>12</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>13</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’s proposal to assess Professionals a \$.15 per contract Options Surcharge for transactions in RUT, MNX and NDX and a \$.10 per contract Options Surcharge for transactions in BKX is reasonable because Professionals would be assessed a fee that is less favorable than a Customer but equivalent to all other market participants because it has been established that Professionals have access to more information than a Customer. It can be argued that Professionals have the same technological and informational advantages as broker-dealers trading for their own account. The Exchange believes that Professionals, who are considered sophisticated algorithmic traders, utilize the advantaged Customer pricing they receive to

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

<sup>13</sup> 15 U.S.C. 78f(b)(4).

effectively compete with Market Makers and Broker-Dealers<sup>14</sup> without the obligations of either. Also, the Exchange believes that unlike Customers, Professionals are able to shoulder the burden of fees as effectively as other market participants.

The Exchange's proposal to assess Professionals a \$.15 per contract Options Surcharge for transactions in RUT, MNX and NDX and a \$.10 per contract Options Surcharge for transactions in BKK is equitable and not unfairly discriminatory because all market participants, except for Customers, would be uniformly assessed the Options Surcharge fees for RUT, MNX, NDX and BKK, respectively. A lower Customer fee benefits all market participants by incentivizing market participants to transact a greater number of Customer orders, which results in increased liquidity. Additionally, today Professionals are assessed a higher fee as compared to

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<sup>14</sup> Broker-dealers pay registration and membership fees in self-regulatory organizations ("SRO") and incur costs to comply and assure that their associated persons comply with the Act and SRO rules.

Customers in both Penny Pilot Options<sup>15</sup> and non-Penny Pilot Options.<sup>16</sup>

The Exchange's proposal to continue to assess SOX, HGX and OSX the fees in Section III for Singly Listed Options is reasonable because the Exchange is seeking to continue to recoup the operation and development costs associated with these proprietary indexes.<sup>17</sup>

The Exchange believes that its proposal to continue to assess SOX, HGX and OSX the fees in Section III for Singly Listed Options is equitable and not unfairly discriminatory because all market participants would be assessed the Singly Listed Options Transaction Charges for transacting options on these indexes instead of the Options Transaction Charges in Section II.<sup>18</sup>

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<sup>15</sup> The Penny Pilot was established in January 2007; and in October 2009, it was expanded and extended through June 30, 2012. See Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006-74) (notice of filing and approval order establishing Penny Pilot); 60873 (October 23, 2009), 74 FR 56675 (November 2, 2009) (SR-Phlx-2009-91) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60966 (November 9, 2009), 74 FR 59331 (November 17, 2009) (SR-Phlx-2009-94) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61454 (February 1, 2010), 75 FR 6233 (February 8, 2010) (SR-Phlx-2010-12) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62028 (May 4, 2010), 75 FR 25890 (May 10, 2010) (SR-Phlx-2010-65) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62616 (July 30, 2010), 75 FR 47664 (August 6, 2010) (SR-Phlx-2010-103) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 63395 (November 30, 2010), 75 FR 76062 (December 7, 2010) (SR-Phlx-2010-167) (notice of filing and immediate effectiveness extending the Penny Pilot); and 65976 (December 15, 2011), 76 FR 79247 (December 21, 2011) (SR-Phlx-2011-172) (notice of filing and immediate effectiveness extending the Penny Pilot). See also Exchange Rule 1034.

<sup>16</sup> Customers are not assessed an Options Transaction Charge for either Penny Pilot Options or non-Penny Pilot Options while Professionals are assessed \$.20 per contract for both Penny and non-Penny Pilot Options.

<sup>17</sup> The Exchange continues to incur costs for maintaining these proprietary indexes including marketing expenses.

<sup>18</sup> The Options Transaction Charges for non-Penny Multiply Listed Options are as follows: Customers pays \$.00 per contract, a Professional pays \$.20 per contract, a Market maker pays \$.23 per contract for electronic transactions and \$.25 per contract for non-electronic transactions, a Broker-Dealer pays \$.50 per contract for electronic transactions and \$.25 per contract for non-electronic transactions and a Firm pays \$.40 per contract for

Specifically, all market participants would be assessed the higher fees in Section III, as compared to the fees in Section II, with the exception of a Broker-Dealer electronically transacting options on these indexes.<sup>19</sup> The Exchange has previously stated that it incurs higher costs for Singly Listed Options as compared to Multiply Listed Options.<sup>20</sup> The Chicago Board Options Exchange, Incorporated (“CBOE”) noted in a comment letter dated June 21, 2010 that CBOE relies upon fees to, among other things, generate returns on its investments for its own popular proprietary products (such as The CBOE Volatility Index<sup>®</sup> (“VIX<sup>®</sup>”) Options).<sup>21</sup> In addition, the Exchange believes that the proposed fees are reasonable, equitable and not unfairly discriminatory because the fees are consistent with price differentiation that exists today at all option exchanges. For example, CBOE assesses different rates for certain proprietary indexes as compared to other index products transacted at CBOE. VIX options and The S&P 500<sup>®</sup> Index options (“SPX<sup>SM</sup>”) are assessed different fees than other indexes.<sup>22</sup>

The Exchange believes that its proposal to rename the “Fee Schedule” as the “Pricing Schedule” is reasonable, equitable and not unfairly discriminatory because the Exchange believes that the changing the title to “Pricing Schedule” more specifically describes the fees, rebates and other charges reflected in the document termed “Fee Schedule.”

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electronic transactions and \$.25 per contract for non-electronic transactions. See Section II of the Fee Schedule.

<sup>19</sup> The Broker-Dealer non-Penny options transaction charge for a Multiply Listed Option is \$.50 per contract as compared to the Broker-Dealer fee of \$0.45 per contract for Singly Listed Options.

<sup>20</sup> See Securities Exchange Release Act No. 64096 (March 18, 2011), 76 FR 16646 (March 24, 2011) (SR-Phlx-2011-34).

<sup>21</sup> See CBOE’s Comment Letter dated June 21, 2010 to the Proposed Amendments to Rule 610 of Regulation NMS, File No. S7-09-10. CBOE further noted that options exchanges expend considerable resources on research and development related to new product offerings and options exchanges incur large licensing costs for many products.

<sup>22</sup> See CBOE’s Fees Schedule.

The Exchange operates in a highly competitive market, comprised of nine exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Accordingly, the fees that are assessed by the Exchange must remain competitive with fees charged by other venues and therefore must continue to be reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than competing venues.

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>23</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.

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<sup>23</sup> 15 U.S.C. 78s(b)(3)(A)(ii).



#### 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-2012-35 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-2012-35. 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, 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 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-2012-35 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>24</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>24</sup> 17 CFR 200.30-3(a)(12).