

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59841; File No. SR-Phlx-2009-38)

April 29, 2009

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Payment for Order Flow

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on April 23, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or the “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. Phlx filed the proposal pursuant to Section 19(b)(3)(A)³ of the Act and Rule 19b-4(f)(2)⁴ thereunder. 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 make permanent its payment for order flow pilot program (“Pilot”), which is currently in effect until May 27, 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ 17 CFR 240.19b-4(f)(2).

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 parts 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 making permanent the Exchange's payment for order flow program ("Pilot") is to remain competitive with other options exchanges that administer payment for order flow programs.⁵ The Pilot is currently set to expire on May 27, 2009. The Exchange seeks to make the Pilot permanent because the Directed Order Flow Program is now permanent. The Directed Order Flow program was set to expire on May 27, 2008, when the Exchange filed to make that program permanent.⁶ The Pilot was also set to expire on May 27, 2008, when the Exchange filed to extend the Pilot for an additional year.⁷ At this time, the Exchange proposes to make the Pilot permanent because of the permanent status of the Directed Order Flow Program.

⁵ See e.g., Securities Exchange Act Release Nos. 57094 (January 3, 2008), 73 FR 1653 (January 9, 2008) (SR-CBOE-2007-154); 55895 (June 11, 2007), 72 FR 33549 (June 18, 2007) (SR-ISE-2007-38); 55328 (February 21, 2007), 72 FR 9050 (February 28, 2007) (SR-Amex-2007-16); and 53341 (February 21, 2006), 71 FR 10085 (February 28, 2006) (SR-Amex-2006-15).

⁶ See Securities Exchange Act Release No. 57844 (May 21, 2008), 73 FR 30988 (May 29, 2008) (SR-Phlx-2008-39).

⁷ See Securities Exchange Act Release No. 57851 (May 22, 2008), 73 FR 31177 (May 20, 2008) (SR-Phlx-2008-38).

The Pilot has been in effect for several years.⁸

Currently, the following payment for order flow fees are in effect at the Exchange:⁹ (1) equity options (other than those equity options that trade as part of the Exchange's Penny Pilot Program);¹⁰ and options on: (i) the Russell 2000® Index¹¹ traded under the symbol RUT; (ii) the one-tenth value Russell 2000® Index traded under the symbol RMN; (iii) the full value of the Nasdaq 100 Index¹² traded under the symbol NDX; (iv) and the one-tenth value of the Nasdaq

⁸ The program took effect on July 1, 2005. See e.g., Securities Exchange Act Release Nos. 52114 (July 22, 2005), 70 FR 44138 (August 1, 2005) (SR-Phlx-2005-44); 57851 (May 22, 2008), 73 FR 31177 (May 20, 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); and 52568 (October 6, 2005), 70 FR 60120 (October 14, 2005) (SR-Phlx-2005-58).

⁹ See e.g., Securities Exchange Act Release Nos. 53841 (May 19, 2006), 71 FR 30461 (May 26, 2006) (SR-Phlx-2006-33); 54297 (August 9, 2006), 71 FR 47280 (August 16, 2006) (SR-Phlx-2006-47); 54485 (September 22, 2006), 71 FR 57017 (September 28, 2006) (SR-Phlx-2006-56); 55290 (February 13, 2007), 72 FR 8051 (February 22, 2007) (SR-Phlx-2007-05); 55473 (March 14, 2007), 72 FR 13338 (March 21, 2007) (SR-Phlx-2007-12); 55891 (June 11, 2007), 72 FR 33271 (June 15, 2007) (SR-Phlx-2007-39); 58049 (June 27, 2008); and 73 FR 38286 (July 3, 2008)(SR-Phlx-2008-46).

¹⁰ The current Penny Pilot Program, in effect through June 3, 2009, permits certain options series to be quoted and traded in increments of \$0.01. See Securities Exchange Act Release No. 59631 (March 26, 2009), 74 FR 15022 (April 2, 2009) (SR-Phlx-2009-25).

¹¹ Russell 2000® is a trademark and service mark of the Frank Russell Company, used under license. Neither Frank Russell Company's publication of the Russell Indexes nor its licensing of its trademarks for use in connection with securities or other financial products derived from a Russell Index in any way suggests or implies a representation or opinion by Frank Russell Company as to the attractiveness of investment in any securities or other financial products based upon or derived from any Russell Index. Frank Russell Company is not the issuer of any such securities or other financial products and makes no express or implied warranties of merchantability or fitness for any particular purpose with respect to any Russell Index or any data included or reflected therein, nor as to results to be obtained by any person or any entity from the use of the Russell Index or any data included or reflected therein.

¹² NASDAQ(R), NASDAQ-100(R) and NASDAQ-100 Index(R) are registered trademarks of The NASDAQ OMX Group, Inc. (which with its affiliates are the "Corporations") and are licensed for use by NASDAQ OMX PHLX, Inc. in connection with the trading of

100 Index traded under the symbol MNX, are all assessed \$0.70 per contract; and (2) equity options that trade as part of the Exchange's Penny Pilot Program are assessed \$0.25 per contract. Trades resulting from either Directed or non-Directed Orders¹³ that are delivered electronically and executed on the Exchange are assessed a payment for order flow fee,¹⁴ while non-electronically-delivered orders (i.e. represented by a floor broker) are not assessed a payment for order flow fee.¹⁵ Additionally, payment for order flow fees are not assessed on transactions executed on the Exchange that correspond with an outbound Linkage Principal Acting as Agent ("P/A") order.¹⁶

options products based on the NASDAQ-100 Index(R). The options products have not been passed on by the Corporations as to their legality or suitability. The options products are not issued, endorsed, sold, or promoted by the Corporations. The Corporations make no warranties and bear no liability with respect to the options products.

¹³ The term "Directed Order" means any customer order to buy or sell which has been directed to a particular specialist, Remote Streaming Quote Trader or Streaming Quote Trader by an Order Flow Provider. See Exchange Rule 1080(l).

¹⁴ Specialists and Directed ROTs who participate in the Exchange's payment for order flow program are assessed a payment for order flow fee, in addition to ROTs. Therefore, the payment for order flow fee is assessed, in effect, on equity option transactions between a customer and an ROT, a customer and a Directed ROT, or a customer and a specialist.

¹⁵ Electronically-delivered orders do not include orders delivered through the Floor Broker Management System pursuant to Exchange Rule 1063.

¹⁶ See Securities Exchange Act Release No. 57313 (February 12, 2008), 73 FR 9398 (February 20, 2008) (SR-Phlx-2008-10).

The Exchange's Directed Order Flow Program¹⁷ enables Exchange specialists, Streaming Quote Traders ("SQTs")¹⁸ and Remote Streaming Quote Traders ("RSQTs")¹⁹ assigned in option trading on Phlx XL²⁰ to receive Directed Orders in accordance with the provisions of Exchange Rule 1080(1). When a Directed Order is received from a member or member organization ("Order Flow Provider" or "OFP"), the specialist, SQT or RSQT to whom the order is directed (the "Directed Participant") would be assessed a payment for order flow fee if the Directed Order is from a Customer. Pursuant to Rule 1080(1), OFPs must transmit Directed Orders to a particular specialist, SQT or RSQT through AUTOM.²¹ If the Exchange's disseminated best bid or offer is at the National Best Bid or Offer when the Directed Order is received, the Directed Order is automatically executed on Phlx XL and allocated to the orders

¹⁷ See Securities Exchange Act Release Nos. 51759 (May 27, 2005), 70 FR 32860 (June 6, 2005) (SR-Phlx-2004-91); 53870 (May 25, 2006), 71 FR 31251 (June 1, 2006)(SR-Phlx-2006-27); 55803 (May 23, 2007), 72 FR 30413 (May 31, 2007)(SR-Phlx-2007-37); and 57844 (May 21, 2008), 73 FR 30988 (May 29, 2008)(SR-Phlx-2008-39).

¹⁸ An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. *See* Exchange Rule 1014(b)(ii)(A).

¹⁹ An RSQT is a participant in the Exchange's electronic trading system, Phlx XL who has received permission from the Exchange to trade in options for his own account, and to generate and submit option quotations electronically from off the floor of the Exchange through AUTOM in eligible options to which such RSQT has been assigned. *See* Exchange Rule 1014(b)(ii)(B).

²⁰ Phlx XL is the Exchange's electronic options trading platform.

²¹ AUTOM is the Exchange's electronic order delivery, routing, execution and reporting system, which provides for the automatic entry and routing of equity option and index option orders to the Exchange trading floor. Orders delivered through AUTOM may be executed manually, or certain orders are eligible for AUTOM's automatic execution features, AUTO-X, Book Sweep and Book Match. Equity option and index option specialists are required by the Exchange to participate in AUTOM and its features and enhancements. Option orders entered by Exchange members into AUTOM are routed to the appropriate specialist unit on the Exchange trading floor. AUTOM is today more commonly referred to as Phlx XL. See Exchange Rule 1080.

and quotes represented in the Exchange's quotation. A Directed Specialist, SQT or RSQT will receive a participation allocation pursuant to Rule 1014(g)(viii) if the Directed Specialist, SQT or RSQT was quoting at the NBBO at the time that the Directed Order was received. Otherwise, the automatic execution will be allocated to those quotations and orders at the NBBO pursuant to Rule 1014(g)(vii). When the Exchange is not quoting at the NBBO, the Directed Order will be manually handled by the specialist in accordance with the Exchange's rules. The Exchange's Directed Order Flow Pilot Program became permanent in 2008.²²

In light of the Exchange's proposal to make the Pilot permanent, the Exchange also proposes to amend endnote 30 of the Exchange's fee schedule to remove the following language: "[t]he payment for order flow fees will remain in effect as a pilot program that is scheduled to expire on May 27, 2009." The Exchange is not making any other changes to the Pilot at this time.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act,²³ in general, and furthers the objectives of Section 6(b)(4) of the Act²⁴ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. In particular, the Exchange believes that continuing the payment for order flow program and making it permanent should allow the Exchange to remain competitive.

²² See Securities Exchange Act Release No. 57844 (May 21, 2008), 73 FR 30988 (May 29, 2008) (SR-Phlx-2009-39) (permanent approval of the Exchange's Directed Order Program).

²³ 15 U.S.C. 78f(b).

²⁴ 15 U.S.C. 78f(b)(4).

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 that is 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 Act²⁵ and paragraph (f)(2) of Rule 19b-4²⁶ 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.

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. Please include File Number SR-Phlx-2009-38 on the subject line.

²⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁶ 17 CFR 240.19b-4(f)(2).

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-2009-38. 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 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-2009-38 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.²⁷

Elizabeth M. Murphy
Secretary

²⁷ 17 CFR 200.30-3(a)(12).