

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62140; File No. SR-Phlx-2010-69)

May 20, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Applicability of Fees

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 30, 2010, 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. Phlx has designated this proposal as one establishing or changing a member due, fee, or other charge imposed under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposal effective upon filing with the Commission. 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 its Fee Schedule by adding language at the beginning of the Fee Schedule to describe with more specificity the applicability of fees to transactions. It is also making certain additional wording changes to the Fee Schedule for purposes of clarity and to conform the Fee Schedule to the Exchange’s current billing practices.

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, at the principal office of the Exchange, at the Commission’s Public Reference Room, and on the Commission’s Web site at www.sec.gov.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

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 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 currently charges its members certain transaction-related fees for options trades. These fees are assessed at differing rates that depend on the option contract and on the characteristics of the particular trade. Category I of the Fee Schedule sets forth fees assessed in connection with rebates for adding and fees for removing liquidity in certain specific option contracts identified in the first bullet point of Category I.⁵ Category II identifies fees assessed with respect to transactions in the other equity options traded on the Exchange as well as ETFs, HOLDRS, RUT, RMN, MNX and NDX (together, these Category II fees are the “Equity Options Fees”). Categories III and IV set forth fees assessed with respect to transactions in the Exchange’s sector index options and U.S. dollar-settled foreign currency options, respectively.

The six subcategories of transaction fees within Category I, the rebates for adding and fees for removing liquidity are (1) Customer, (2) Directed Participant, (3) Specialist, ROT, SQT and RSQT, (4) Firm, (5) Professional and (6) Broker-Dealer. Within Category II, there are five fee subcategories, identified as (1) Customer Executions, (2) Professional (3) Registered Options

⁵ Category I also sets forth certain rebates for adding liquidity. The rebates apply as set forth within the various subcategories that also apply to fees within Category I.

Traders (on-floor) and Specialists, (4) Firm, and (5) Broker-Dealer. Categories III and IV each contain the following six subcategories: (1) Customer Executions, (2) Professional (3) Registered Options Traders (on-floor), (4) Specialist, (5) Firm, and (6) Broker-Dealer.

As a preliminary matter, the Exchange is deleting the word “Executions” from the caption of the “Customer Executions” subcategory within Categories II, III and IV of the Fee Schedule as unnecessary and potentially confusing. Hereafter, this proposed rule change will refer to the “Customer Executions” subcategories as simply the “Customer” subcategories. Similarly, the Exchange is proposing to delete references to the term “Firm Proprietary” wherever they appear in Categories II, III and IV. Currently, the Fee Schedule uses the terms “Firm” and “Firm Proprietary” to refer to the same types of transactions. The Exchange is proposing to delete the words “Firm Proprietary” and instead use the term “Firm” consistently in the Fee Schedule. A conforming change is also made to endnote 5.

The Exchange proposes to add language to the beginning of the Fee Schedule in a preface immediately preceding Category I to address the applicability of its fees to certain transactions. The Exchange is proposing to add this text to the Fee Schedule to clarify the below terms for purposes of assessing fees.

The term “Customer” applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of broker or dealer or for the account of a “Professional” (as that term is defined in Rule 1000(b)(14)).⁶

⁶ Rule 1000(b)(14) provides in relevant part: “The term “professional” means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).”

The term “Directed Participant” applies to transactions for the account of a Specialist⁷, Streaming Quote Trader⁸ (an “SQT”) or Remote Streaming Quote Trader⁹ (an “RSQT”) resulting from a Customer order that is (1) directed to it by an order flow provider¹⁰, and (2) executed by it electronically on Phlx XL II.¹¹

The term “Specialist, ROT, SQT and RSQT” applies to transactions for the accounts of Specialists, Registered Option Traders¹² (“ROTs”), Streaming Quote Traders, and Remote Streaming Quote Traders, unless the Directed Participant transaction fee applies.

The term “Firm” applies to any transaction that is identified by a member or member organization for clearing in the Firm range at OCC. For purposes of clarity, these trades are received by the Exchange with an origin type of “F” and are billed the Firm rate.

The term “Professional” applies to transactions for the accounts of Professionals (as defined in Exchange Rule 1000(b)(14)).

⁷ A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a).

⁸ A Streaming Quote Trader is defined in Exchange Rule 1014(b)(ii)(A) as an ROT who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such SQT is assigned.

⁹ A Remote Streaming Quote Trader is defined Exchange Rule in 1014(b)(ii)(B) as an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned.

¹⁰ An Order Flow Provider is defined in Exchange Rule 1080(1)(1)(B) as “any member or member organization that submits, as agent, customer orders to the Exchange.”

¹¹ A ROT includes a SQT, a RSQT and a Non-SQT, which by definition is neither a SQT nor a RSQT. See Exchange Rule 1014 (b)(i) and (ii).

¹² A Registered Option Trader is defined in Exchange Rule 1014(b) as a regular member or a foreign currency options participant of the Exchange located on the trading floor who has received permission from the Exchange to trade in options for his own account.

The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. Thus, for example, “Broker-Dealer” transaction fees do not apply to rebates and fees for adding and removing liquidity which are subject to “Customer”, “Directed Participant”, “Specialist, ROT, SQT and RSQT”, “Firm”, or “Professional” transaction fees. For example, the Broker-Dealer fee would be applicable to transactions by away market makers or broker dealers clearing in the customer range.

The Fee Schedule currently refers to “Registered Options Traders (on floor) and Specialists” in Category II, the equity option fees. These fees, which are referred to as “Registered Options Traders (on floor) and Specialists”, apply only to transactions for the accounts of ROTs and Specialists. Likewise the Fee Schedule refers to “Registered Options Traders (on-floor)” in Categories III and IV, sector index options and U.S. dollar-settled options. These fees, which are referred to as “Registered Options Traders (on-floor)”, apply only to transactions for the accounts of ROTs. Finally the Fee Schedule refers to “Specialist” in Categories III and IV, sector index options and U.S. dollar-settled options. These fees, which are referred to as “Specialist”, apply only to transactions for the accounts of Specialists. The Exchange proposes to replace these three fee terms with the broader term “Specialist, ROT, SQT and RSQT” for clarity. The Exchange defines a ROT as a SQT, a RSQT and a non-SQT. The Exchange is proposing to change the title of certain fees for ease of reference. This category is the Exchange’s market maker category and will not impact the fees as Specialists, ROTs, SQTs and RSQTs are charged the same rate.

The Exchange is deleting the second bullet point under Category I as unnecessary and duplicative of language in the new Preface. Clarifying changes are made to the seventh and eight bullet points in Category I, the rebates for adding and fees for removing liquidity.¹³

Endnote (C) is proposed to be amended to more clearly identify the transaction charges that are subject to the cap described in that endnote. No change in meaning is intended.

Additionally, the Exchange proposes to delete endnote (15) from the Fee Schedule. Currently, endnote (15) states that the Broker-Dealer “charge applies to members for transactions, received from other than the floor of the Exchange for any account (i) in which the holder of beneficial interest is a member or non-member broker-dealer or (ii) in which the holder of beneficial interest is a person associated with or employed by a member or non-member broker-dealer. This includes transactions for the account of an ROT entered from off the floor. The Exchange proposes to delete endnote (15) and instead clarify what fees will be assessed to a broker-dealer utilizing the proposed new term “Broker-Dealer” as set forth in the preface. The Exchange will continue to assess members as defined in (i) and (ii) of current endnote (15) fees applicable to a broker-dealer.¹⁴

¹³ In addition, the current Fee Schedule states that “Customer, Professional, Directed Participant and Specialist, ROT, SQT and RSQT fees for removing liquidity will not apply to transactions resulting from electronic auctions. Electronic auctions include, without limitation, the Complex Order Live Auction (“COLA”), and Quote and Market Exhaust auctions. Firm and Broker-Dealer fees for removing liquidity will, however apply to transactions resulting from electronic auctions.” The Exchange proposes to make clear that a Specialist, ROT, SQT and RSQT do not receive a rebate for adding liquidity in an electronic auction. The Exchange proposes to file a separate 19b-4 to that effect shortly. See E-mail from Angela S. Dunn, Assistant General Counsel, Phlx, to Johnna B. Dumler, Special Counsel, Commission, and Andrew Madar, Special Counsel, Commission, dated May 17, 2010. The exchange also requested that paragraph 17 of the 19b-4 and exhibit 1 to the 19b-4 be deleted because it was inadvertently included in the filing and was not applicable. See id.

¹⁴ Id.

With respect to the last sentence of endnote (15), the Exchange notes that ROTs entering into transactions from off-floor include RSQTs because RSQTs are a subset of ROTs by definition.¹⁵ The Exchange proposes to assess transactions for the account of a ROT entered from off-floor the fees applicable to Specialists, ROTs, SQTs and RSQTs, as to the rebates and fees for adding and removing liquidity. With respect to the equity options, RSQTs are currently assessed at the “Registered Options Traders (on-floor) and Specialists” rate. With respect to sector index options and U.S. dollar-settled index options, RSQTs are currently assessed at the “Registered Options Traders (on-floor)” rate. These fee subcategories apply to ROTs generally, regardless of whether they are RSQTs and therefore are streaming quotes from off the trading floor. An off-floor ROT will be assessed fees applicable to the newly termed Specialist, ROT, SQT and RSQT category as opposed to the broker dealer category as is currently stated in endnote (15). The elimination of endnote (15) and adoption of the language explaining how a Specialist, ROT, SQT and RSQT are billed will conform the text of the Fee Schedule to the current billing practice.

Additionally, the Exchange proposes to amend endnote 5. The proposed language discussed above to be added as a preface to the Fee Schedule will supersede the first sentence of endnote 5, which will therefore be deleted. The Exchange is also amending endnote 5 to replace current references to “Firm Proprietary Options Transaction Charge” with references to “Firm equity options charges”. This change will not result in new or changed fees but is intended only to simplify the fee schedule by eliminating inconsistent references to the same fee.

¹⁵ A ROT includes a SQT, a RSQT and a Non-SQT, which by definition is neither a SQT or a RSQT. See Exchange Rule 1014 (b)(i) and (ii).

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹⁶ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁷ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and because it clarifies the applicability of various Exchange fees, to the benefit of market participants. Specifically, the Exchange believes that the added preface will provide its members guidance in understanding how the Exchange assesses fees.

The Exchange is amending its assessment of fees to broker dealer transactions. Specifically, the Exchange believes that it is reasonable to assess off-floor ROTs in the newly termed Specialist, ROT, SQT, RSQT category because the Exchange is proposing to assess all ROTs, on-floor and off-floor, the same rate. The Exchange believes that it is equitable to assess all Specialists, ROTs, SQT and RSQTs the same rate.

Finally, the Exchange has made clarifying amendments to its terminology throughout the Fee Schedule to eliminate extraneous terms and outdated language. The Exchange believes that these amendments should simplify the Fee Schedule to the benefit of its members.

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.

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4).

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 Act¹⁸ and paragraph (f)(2) of Rule 19b-4¹⁹ 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-2010-69 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2010-69. 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

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁹ 17 CFR 240.19b-4(f)(2).

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 Web site 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 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 publicly available. All submissions should refer to File Number SR-Phlx-2010-69 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.²⁰

Florence E. Harmon
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).