

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63569; File No. SR-Phlx-2010-178)

December 17, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fee Schedule

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 December 15, 2010, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. Phlx has filed the proposal pursuant to Section 19(b)(3)(A) 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 the Substance of the Proposed Rule Change

The Exchange proposes to eliminate the Examinations Fee, amend the Exchange’s Permit Fees and Application Fee and create a Transfer of Affiliation Fee. The Exchange also proposes to make other technical non-substantive amendments to the proposal to update the Fee Schedule by removing obsolete language and adding clarifying language.

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 3, 2011, except

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).

for the Lapsed Application Fee which the Exchange proposes to be operative on the approval of proposed rule change SR-Phlx-2010-148.⁵

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 eliminate the Exchange's Examination Fee, amend the Permit Fee and Application Fee and propose a new Transfer of Affiliation Fee.

Examinations Fee

The Exchange is proposing to eliminate the Examinations Fee. The Exchange believes that the Examinations Fee is no longer necessary because the number of off-floor traders for which the Exchange is the Designated Examining Authority ("DEA") has declined to under ten member organizations with a limited number of off-floor trades. Also, the Exchange believes that members should bear the burden of certain Exchange expenses associated with membership

⁵ See Securities Exchange Act Release No. 63318 (November 16, 2010), 75 FR 71155 (November 22, 2010) (SR-Phlx-2010-148).

equally. The Exchange proposes to amend its Permit Fees, as described below, to differentiate between members who transact business at the Exchange and those members who do not transact business at the Exchange. Members who transact business at the Exchange pay transaction fees and other types of fees, as compared to members who do not transact business at the Exchange and do not pay such fees but still incur costs for the Exchange related to membership. The Exchange believes that eliminating the Examinations Fee and creating the proposed Permit Fees spreads Exchange costs equally among members.

Currently, the Exchange assesses an Examinations Fee based on a tiered schedule. The fee is applicable to member organizations for which the Exchange is the DEA.⁶ The Exchange assesses the monthly Examinations Fee as follows: \$2,100 is assessed to a member organization that has from 0-10 off-floor traders; \$2,600 is assessed to a member organization that has from 11-50 off-floor traders; \$5,000 is assessed to a member organization that has from 51-200 off-floor traders; and \$12,500 is assessed to a member organization that has over 200 off-floor traders.

Permit Fees

The Exchange is proposing to amend its current Permit Fee which is \$1,000 per month. The Exchange proposes to amend this Permit Fee by instead assessing two different Permit Fees based on whether a member is transacting business on the Exchange.

The Exchange proposes to assess members who are transacting business on the Exchange a Permit Fee of \$1,100 per month. The Exchange proposes to assess members who are not transacting business on the Exchange a Permit Fee of \$7,500 per month. A member or member

⁶ Member Organizations operating through one or more Exchange markets that are able to demonstrate that 25% or more of its revenue, as reflected in the most recently submitted FOCUS Report or transactions as reflected on its purchased and sales blotter, are derived from securities transactions on the Exchange are exempt from the Examinations Fee.

organization would not be assessed the \$7,500 Permit Fee for not transacting business on the Exchange if that member is either: (i) solely a PSX Participant⁷ or (ii) engaged in any options business at the Exchange in a particular month. That member would instead be assessed the \$1,100 monthly Permit Fee. In addition, a member or member organization that sponsors an options participant⁸ would pay an additional Permit Fee for each sponsored options participant.

The Exchange is proposing to increase the current Permit Fee, the addition of a Permit Fee for members not transacting business and a fee for sponsored participants to recoup costs associated with the administration of its members.

Application Fee

The Exchange is proposing to amend its Application Fee to add another Application Fee for Lapsed Applications. The title of the new fee will be “Application Fee for Lapsed Applications” and the Exchange would assess \$350 to submit the application after a lapse. The Application Fee for Lapsed Applications is the same as the current Application Fee.⁹ The fee is proposed to recoup administrative expenses incurred by the Exchange to review new applications for membership.

⁷ 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. See Securities Exchange Act Release No. 61863 (April 7, 2010), 75 FR 20021 (April 16, 2010) (SR-Phlx-2010-54).

⁸ See Exchange Rule 1094 titled Sponsored Participants. A Sponsored Participant may obtain authorized access to the Exchange only if such access is authorized in advance by one or more Sponsoring Member Organizations. Sponsored Participants must enter into and maintain participant agreements with one or more Sponsoring Member Organizations establishing a proper relationship(s) and account(s) through which the Sponsored Participant may trade on the Exchange.

⁹ Application Fees are used to help offset Exchange clerical and administrative expenditures related to application processing including, but not limited to, regulatory background checks, registration and fingerprint card processing.

Pursuant to Exchange Rule 900.2, applicants desiring membership in the Exchange are required to submit information in a form prescribed by the Membership Department. The Exchange recently proposed to amend its rules to require persons seeking membership to the Exchange to provide all information and subsequent requests from the Membership Department for information within a 90 calendar day period, otherwise the application lapses.¹⁰ If an application lapses, the applicant would be required to resubmit a new application.¹¹ The Exchange would not refund the fee associated with submitting an application and the applicant would be required to pay a new fee to resubmit the application.

Applicants that apply for membership solely to participate in the NASDAQ OMX PSX equities market today are not assessed a Permit Fee, Application Fee, Initiation Fee, or Account Fee.¹² The Exchange would not assess the Application Fee for Lapsed Applications because the Application Fee is currently waived.

The Exchange also proposes to amend the manner in which the Application and Initiation Fees are assessed. Currently, the Application Fee is charged only upon the first such approval of an applicant and is non-recurring; however, a lapse for 6 months or more necessitates the payment of an Application Fee for reapplication.¹³ For example, if a member ceases to be a member on January 1st and applies on or after July 1st of that year to once again become a member, an Application Fee is charged to that applicant.

¹⁰ See Securities Exchange Act Release No. 63318 (November 16, 2010), 75 FR 71155 (November 22, 2010) (SR-Phlx-2010-148).

¹¹ The purpose of the new application would be to update all information to provide the Membership Department current information on which to base a decision to accept the applicant for membership.

¹² See Securities Exchange Act Release No. 61863 (April 7, 2010), 75 FR 20021 (April 16, 2010) (SR-Phlx-2010-54).

¹³ See Securities Exchange Act Release No. 47148 (January 9, 2003), 68 FR 2614 (January 17, 2003) (SR-Phlx-2002-79).

The Exchange proposes to discontinue this practice of allowing a former member to reapply without being assessed an Application Fee so long as the former member reapplies for membership with the Exchange within 6 months of terminating membership. The Exchange proposes to assess the Application Fee each time an applicant applies for membership, notwithstanding the fact that the applicant may have previously been a member of the Exchange.¹⁴

The Exchange is required to examine each applicant and perform all the necessary diligence for reviewing an applicant for membership.¹⁵ The ability to assess the Application Fee on former members who have a lapse in their membership would allow the Exchange to recoup administrative expenses incurred by the Exchange to determine if the lapsed member still meets all the membership requirements.

Transfer of Affiliation Fee

The Exchange proposes to create a \$350 fee titled a “Transfer of Affiliation Fee.” The Exchange would assess this fee on permit holders who apply to transfer their affiliation from one Exchange member to another Exchange member, so long as there is no lapse in membership status.

The Exchange has received requests from permit holders to affiliate with a different member organization. Today, the Exchange is required to assess an Application Fee¹⁶ on

¹⁴ An Initiation Fee would also be assessed. See footnote 16.

¹⁵ See Exchange Rule 908(b) which states, “A Series A-1 permit shall only be issued to an individual or to a corporation meeting the requirements of Section 12-4 of the By-Laws, who meets the eligibility and application requirements set forth in Article XII of the By-Laws and in these rules, including, without limitation, Rule 972....”

¹⁶ The Initiation Fee is \$1,500 and is assessed upon the issuance of a permit. The initiation fee is payable by a non-member upon election to membership and is non-recurring unless there is a lapse in membership and the former member subsequently applies for

applicants for membership, unless the member reapplies within 6 months. The Exchange is proposing to eliminate the ability of a permit holder to lapse an application for 6 months as mentioned herein.

The Exchange is also proposing to treat permit holders who apply to transfer his or her affiliation from one member to another member as a transfer instead of as a new applicant, so long as the membership is continuous (permit was continuously held by the permit holder). Pursuant to Exchange Rule 908(b), no individual shall hold more than a single Series A-1 permit. A permit holder who desires to transfer his or her affiliation to a different member is required today to cancel their current permit and apply for another permit and incur an Application Fee¹⁷ and an Initiation Fee¹⁸. In this scenario, the Membership Department would not be required to perform the same diligence that would be necessary for a permit holder whose membership lapsed for any period of time. The Membership Department would be required to issue another permit and cancel the current permit and amend the affiliation in its records.

The Exchange proposes to assess a Transfer of Affiliation Fee of \$350¹⁹ and waive the Initiation Fee of \$1,500 because the administrative time and clerical expenditures are substantially less for this type of request as compared to a new applicant or a former permit holder who left the Exchange, canceled his or her permit and is seeking to become a permit holder once again. The Exchange is proposing to assess only a Transfer of Affiliation Fee and waive the Initiation Fee because the Transfer Fee alone should allow the Exchange to recoup the

admission. See Securities Exchange Act Release No. 20651 (February 23, 1984), 49 FR 6817(SR-Phlx-84-2).

¹⁷ The Application Fee would not apply today if a lapse in membership was not more than 6 months. The Exchange is proposing to eliminate this treatment with this proposal.

¹⁸ See footnote 16.

¹⁹ This is the same amount that is currently assessed for an Application Fee.

costs of affiliating a current Exchange permit holder with a different member and issuing a new permit.

Technical Amendments

The Exchange is proposing to delete the language in Section III concerning Sector Index Options, related to the incentive program for Options Overlying QNET. This \$.20 per contract transaction promotional pricing will expire on December 31, 2010,²⁰ and the Exchange would instead assess members the applicable sector index options transaction charges, by market participant, on January 3, 2011.²¹ For example, for transactions in QNET sector index options, a customer would no longer be assessed the \$.20 per contract on trade date January 3, 2011, but instead would be assessed the option transaction charge, which is \$.44 per contract.²² The Exchange proposes to remove this text which will be obsolete on January 3, 2011.²³

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act²⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act²⁵ 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 eliminating the Examinations Fee is reasonable because the fee is no longer necessary with the decline in off-floor traders and because the Permit Fee, as

²⁰ See SR-Phlx-2010-177 (a proposal to expand the Sector Index Options promotional pricing for options overlying QNET to December 31, 2010).

²¹ See SR-Phlx-2010-177.

²² See SR-Phlx-2010-177.

²³ See SR-Phlx-2010-177.

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(4).

proposed, would assist the Exchange is equally distributing costs associated with membership. The Exchange believes that eliminating the Examinations Fee is equitable because the Exchange would not assess such a fee on any member organization for which it is the DEA.

The Exchange believes that increasing the current Permit Fee and adding a new category of fees for members not transacting business on the Exchange is reasonable. Member organizations that are not active at the Exchange receive the same benefits as members who are actively transacting business at the Exchange. The members who are transacting business at the Exchange are assessed other fees for conducting business while members not transacting business at the Exchange and maintaining a membership are not incurring such fees. The Exchange also believes that the distinction in fees is equitable because it is similar to fees assessed by the International Securities Exchange LLC (“ISE”), which distinguish between active and inactive memberships.²⁶

The Exchange also believes that the additional Permit Fee assessed on members/member organizations for each sponsored participant is reasonable because the member is benefitting from the additional access that is granted to the sponsored participant from the permit. The fee is equitable because it is similar to fees assessed by C2 Options Exchange, Incorporated (“C2”) and the Chicago Board Options Exchange, Incorporated (“CBOE”).²⁷

The Exchange expends resources in processing applications for members. The determination to admit a person for membership in the Exchange is contingent on the

²⁶ See Securities Exchange Act Release No. 45816 (April 24, 2002), 67 FR 30406 (May 6, 2002) (SR-ISE-2002-11) (a rule change that distinguishes pricing for competitive market makers (“CMM”) who actively trade as compared to CMMs who do not actively trade on ISE.) See also primary market maker fees (active and inactive) on ISE’s Schedule of Fees.

²⁷ See Securities Exchange Act Release No. 63175 (October 25, 2010), 75 FR 66813 (October 29, 2010) (SR-C2-2010-006) (a rule change to impose sponsored user fees). See also CBOE’s Fees Schedule at sponsored access fees.

information provided in the application. After a 90 day calendar period has elapsed, the information provided by the applicant is stale and no longer a reasonable basis for the Exchange to make a determination on admitting a person for membership. The Membership Department expends a considerable amount of resources requesting updates from members and researching information to make a reasonable determination when an application is outdated. Similarly, the Exchange is proposing to eliminate the waiver for members who lapse for less than 6 months for similar reasons involving costs and resources.

The Exchange believes that imposing a Transfer of Affiliation Fee on members desiring to transfer their affiliation and waiving the Initiation Fee is reasonable because the Exchange is proposing to only apply such a fee to members who have no lapse in their membership. Additionally, the Exchange believes that waiving the Initiation Fee is equitable because there is less administrative cost associated with transferring an affiliation as compared to a new application.

Finally, the Exchange believes the proposed technical amendments to remove obsolete language will avoid confusion for 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 that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments Regarding 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 Act²⁸ and subparagraph (f)(2) of Rule 19b-4 thereunder²⁹ because it establishes or changes a due, fee, or other charge applicable only to a member imposed by the self-regulatory organization. Accordingly, the proposal is effective upon Commission receipt of the filing. 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.

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-2010-178 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-2010-178. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

²⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁹ 17 CFR 240.19b-4(f)(2).

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 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-2010-178 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.³⁰

Florence E. Harmon
Deputy Secretary

³⁰ 17 CFR 200.30-3(a)(12).