

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60046; File No. SR-Phlx-2009-44)

June 4, 2009

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

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 June 1, 2009, NASDAQ OMX PHLX, Inc. ("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: (i) increase the Cancellation Fee from \$1.10 per order to \$2.10 per order; (ii) modify the Cancellation Fee by limiting its applicability to cancelled AUTOM-delivered customer orders instead of all cancelled AUTOM-delivered orders; and (iii) specify the types of order activity that are exempt from the Cancellation Fee. The Exchange also proposes to amend an endnote to reflect recently approved Exchange By-Laws and a Rule.

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.

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 Cancellation Fee to assist the Exchange in recouping costs associated with a large number of order cancellations. Specifically, the costs arise from increased bandwidth and capacity concerns related to increased message traffic.

The Exchange proposes to increase the Cancellation Fee from \$1.10 per order for each cancelled AUTOM-delivered³ order in excess of the number of orders executed on the Exchange by a member organization in a given month to \$2.10 per order. The Exchange believes this increase will cover costs to the Exchange associated with system congestion resulting from a rising number of cancellation orders.

³ 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. See Exchange Rule 1080. See also proposed rule change SR-Phlx-2009-32 which proposes to amend Rule 1080 to state, "AUTOM and AUTO-X were replaced by the Phlx XL System, such that references to both terms refer to Phlx XL." Therefore, in light of proposed rule change SR-Phlx-2009-32, references throughout this rule filing to AUTOM-delivered orders would be referenced as electronically delivered orders upon the approval of SR-Phlx-2009-32.

Currently, the Exchange assesses a Cancellation Fee of \$ 1.10 per order on member organizations for each cancelled AUTOM-delivered order in excess of the number of orders executed on the Exchange by that member organization in a given month. The Exchange calculates the Cancellation Fee by aggregating all orders and cancels received by the Exchange and totaling those orders by member organization. At least 500 cancellations must be made in a given month by a member organization in order for a member organization to be assessed the Cancellation Fee. The Cancellation Fee is not assessed in a month in which fewer than 500 AUTOM-delivered orders are cancelled. Simple cancels and cancel-replacement orders are the types of orders that are counted when calculating the number of AUTOM-delivered orders.⁴ Also, pre-market cancellations⁵ are not included in the calculation of the Cancellation Fee as well as Complex Orders⁶ that are submitted electronically.

The Exchange proposes to modify the Cancellation Fee to limit its applicability to cancelled AUTOM-delivered customer⁷ orders instead of all cancelled AUTOM-delivered orders. This proposal would assess the \$2.10 proposed Cancellation Fee on

⁴ A cancel-replacement order is a contingency order consisting of two or more parts which require the immediate cancellation of a previously received order prior to the replacement of a new order with new terms and conditions. If the previously placed order is already filled partially or in its entirety the replacement order is automatically canceled or reduced by such number. See Exchange Rule 1066(c)(7).

⁵ See Securities Exchange Act Release Nos. 53226 (February 3, 2006), 71 FR 7602 (February 13, 2006)(SR-Phlx-2005-92); and 53670 (April 18, 2006), 71 FR 21087 (April 24, 2006) (SR-Phlx-2006-21).

⁶ A Complex Order is composed of two or more option components and is priced as a single order (a "Complex Order Strategy") on a net debit or net credit basis.

⁷ See e.g. Exchange Rule 1080(b)(i)(A) "...is any order entered on behalf of a public customer, and does not include any order entered for the account of a

cancelled customer orders that are in excess of the number of customer orders executed on the Exchange by a member organization in a given month. The Exchange believes that by modifying the cancellation calculation to customer orders, the Exchange would be able to fairly allocate costs among members according to system use.

The Exchange also proposes to amend the types of order activity that are exempt from the Cancellation Fee. As previously stated, currently the Cancellation Fee is not assessed in a month in which fewer than 500 AUTOM-delivered orders are cancelled; only simple cancels and cancel-replacement orders are the types of orders that are counted when calculating the number of AUTOM-delivered orders. Also, currently pre-market cancellations and Complex Orders that are submitted electronically are not included in the calculation of the Cancellation Fee.

The Exchange proposes to continue to exempt fewer than 500 AUTOM-delivered orders that are cancelled, but proposes to amend that provision to state that it will exempt fewer than 500 AUTOM-delivered customer orders that are cancelled in a month. Additionally, the Exchange proposes to exempt unfilled Immediate-or-Cancel⁸ customer orders and cancelled customer orders that improved the Exchange's prevailing bid or offer (PBBO) market at the time the customer orders were received by the Exchange. The Exchange believes that these types of order activity should be exempt from the Cancellation Fee because the activity does not contribute excessively to system congestion. The pre-market cancellations and Complex Orders that are submitted electronically will continue to not be included in the calculation of the Cancellation Fee.

broker-dealer, or any account in which a broker-dealer or an associated person of a broker-dealer has any direct or indirect interest.”

As previously stated, the Exchange currently exempts these types of order activities. However, the Exchange proposes to specifically mention the pre-market cancellation exemption in the Fee Schedule by noting that pre-market cancellations are exempt.⁹ The Exchange inadvertently excluded such language from the Fee Schedule in the past and believes that the addition of such language will clarify the Fee Schedule. Similarly, the Exchange still believes that the pre-market cancellation and Complex Order activity do not excessively contribute to increased order flow traffic.

Finally, the Exchange proposes to amend endnote 70 to reflect the recently approved changes to proposed rules SR-Phlx-2009-23¹⁰ and SR-Phlx-2009-17,¹¹ which amended Exchange By-Law Article VI, Sections 11-1 and 11-3 and Exchange Rule 960.9 to rename certain standing committees and eliminate reference to a Hearing Officer. These proposed amendments to endnote 70 will conform the endnote to the Exchange's current By-Laws and Rules.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act¹² in general, and furthers the objectives of Section 6(b)(4) of the Act¹³ in particular, in that it is an equitable allocation of reasonable fees and other

⁸ An Immediate-or-Cancel (IOC) order is a limit order that is to be executed in whole or in part upon receipt. Any portion not so executed shall be cancelled.

⁹ The Complex Order exemption is currently specified in the Fee Schedule.

¹⁰ See Securities Exchange Act Release No. 59924 (May 14, 2009), 74 FR 23759 (May 20, 2009) (SR-Phlx-2009-23).

¹¹ See Securities Exchange Act Release No. 59794 (April 20, 2009), 74 FR 18761 (April 24, 2009) (SR-Phlx-2009-17).

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4).

charges among Exchange members. The Exchange believes that the proposed amendments to the Cancellation Fee will continue to fairly allocate costs among members according to system use as well as ease system congestion.

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 Act¹⁴ and paragraph (f)(2) of Rule 19b-4¹⁵ 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:

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁵ 17 CFR 240.19b-4(f)(2).

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-2009-44 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-2009-44. 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 am and 3:00 pm. 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-2009-44 and should be submitted on or before [insert date 21 days after publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).