

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60461; File No. SR-Phlx-2009-66)

August 7, 2009

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

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on July 31, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 the NASDAQ OMX PHLX Fee Schedule to adopt, on a pilot basis, a waiver of the Phlx XL II Options Routing Pass-Through Fees for customer orders that are routed by the Exchange’s enhanced electronic trading platform for options, Phlx XL II to away markets for execution.

The proposed fee waiver pilot would apply to transactions settling on or after July 1, 2009, and extend through December 31, 2009.

The text of the proposed rule change is available on the Exchange’s Website 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 15 U.S.C. 78a.

³ 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 NASDAQ OMX PHLX Fee Schedule to adopt, on a pilot basis, a waiver of the Phlx XL II Options Routing Pass-Through Fee (the "fee").⁴ The Exchange recently adopted the fee for executions of options orders entered into the Phlx XL II system that are routed to away markets.⁵ The Exchange now proposes to waive the fee entirely for Phlx members and member organizations using the Phlx XL II system for routing standardized equity and index options to away markets for execution. The pilot would apply to transactions settling on or after July 1, 2009, and extend through December 31, 2009.

In the filing that adopted the fee, the Exchange stated its belief that these routing fees are inherently competitive, fair and reasonable, and non-discriminatory in that they replicate the fees assessed by away markets executing orders routed from the Phlx XL II system. As with all fees,

⁴ See e-mail from Richard S. Rudolph, Assistant General Counsel, NASDAQ OMX, to Christopher Chow, Special Counsel, Commission, dated August 5, 2009.

⁵ See Securities Exchange Act Release No. 60103 (June 11, 2009), 74 FR 29252 (June 19, 2009) (SR-Phlx 2009-47).

the Exchange may adjust these routing fees in response to competitive conditions by filing a new proposed rule change. This proposal represents such a response.

Competitive Conditions

The routing fee applies today when the Phlx XL II system receives an order and there is a better bid or offer on an away market that the system can access for the execution of such order. The order is routed via Nasdaq Options Services LLC (“NOS”), a member of the Exchange, as the Exchange’s exclusive order router. The sole use of NOS by the Phlx XL II system is to route orders in options listed and open for trading on the Phlx XL II system to destination markets. A particular destination market would charge NOS their applicable transaction fees, which are then passed through to Phlx, and ultimately to the initiating member. Similarly, clearing fees charged to NOS by the Options Clearing Corporation (“OCC”) are passed through in this manner.

The Exchange is aware of at least one competing U.S options exchange that does not pass through away market transaction and routing fees to the originating member. The Exchange believes that, absent a waiver of its current fee, it could lose valuable option order flow, due to the fact that a competing exchange currently does not charge such a fee.

The competition among the seven U.S options exchanges to attract order flow from market participants is fierce. In order to maintain its share of trading volume, the Exchange must be competitive in setting its fees for all services provided, including routing of options to better-priced away markets. In fact, the market participants that will pay routing pass-through fees often will be the same market participants from whom the Exchange must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer order flow. Given the portability of order flow from one exchange to another, an exchange that would charge routing fees, while at least one other competing market does not,

would risk alienating many of the same market participants on whose orders it depends for competitive survival.

The Exchange believes therefore that the proposed waiver of the fee is competitive, fair and reasonable, and non-discriminatory in that such waiver replicates the practice of at least one competing options exchange respecting routing pass-through fees.

Applicability of Fee Waiver

The proposal would apply on a pilot basis for transactions settling on or after July 1, 2009, and extending through December 31, 2009, at which time the pilot would expire. The purpose of the pilot is to give the Exchange the opportunity to review and analyze its competitive position and market share to determine the effectiveness of the fee waiver.

The proposed waiver would apply to transactions that have taken place during the month of July, 2009. As of the filing of this proposal, the Exchange's billing cycle for July, 2009 is not complete, and pass-through routing fees that would ordinarily be charged may still be waived before the July billing cycle expires. Therefore, the exchange believes that it is fair, reasonable and non-discriminatory to apply the fee waiver to transactions settling on or after July 1, 2009, and extending through the proposed December 31, 2009 pilot expiration.

Members will be notified of the fee waiver by way of an Options Trader Alert ("OTA") posted on the Exchange's web site.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act⁶ in general, and furthers the objectives of Section 6(b)(4) of the Act⁷ in particular, in that it is an equitable allocation of reasonable fees and other charges among

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4).

Exchange members. The Phlx is one of seven options markets in the national market system for standardized options. Joining Phlx and electing to trade options is entirely voluntary. Under these circumstances, Phlx's fees must be competitive and low in order for Phlx to attract order flow, execute orders, and grow as a market. At least one competing market does not charge these fees and it is reasonable for Phlx to waive its pass-through routing fees as described above. As such, Phlx believes that its fees are fair and reasonable and consistent with the Act.

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 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 Act⁸ and paragraph (f)(2) of Rule 19b-4⁹ 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:

⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

⁹ 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-2009-66 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2009-66. 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 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 available publicly. All submissions should refer to File Number SR-Phlx-2009-66 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.¹⁰

Florence E. Harmon
Deputy Secretary

¹⁰ 17 CFR 200.30-3(a)(12).