

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60853; File No. SR-Phlx-2009-89)

October 21, 2009

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Retroactively Waiving 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 October 13, 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 retroactively waive the Cancellation Fee for the months of August and September 2009 and issue a rebate to member organizations for Cancellation Fees that were assessed in those months.

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 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 rebate monies previously assessed for the Cancellation Fee in August and September 2009 to all member organizations. During the months of August and September 2009, member organizations were assessed \$2.10 per order for each cancelled electronically-delivered³ order in excess of the number of orders executed on the Exchange by a member organization in a given month.⁴ The Exchange calculates the Cancellation Fee by aggregating all orders and cancels received by the Exchange and totaling those orders by member organization. The Exchange aggregates and counts as one executed customer⁵ option order all customer orders from

³ See Exchange Rule 1080.

⁴ See Securities Exchange Act Release No. 60046 (June 4, 2009), 74 FR 28083 (June 12, 2009) (SR-Phlx-2009-44) (assessing \$2.10 per order for each cancelled electronically-delivered order and limit the applicability of the Cancellation Fee to cancelled electronically delivered customer orders.)

⁵ See e.g. Exchange Rule 1080(b)(i)(A) which defines customer order as [sic] "...is any order entered on behalf of a public customer, and does not include any order entered for the account of a broker-dealer, or any account in which a broker-dealer or an associated person of a broker-dealer has any direct or indirect interest."

the same member organization that are executed in the same series on the same side of the market at the same price within a 300 second period.⁶ The following order activity is exempt from the Cancellation Fee: (i) pre-market cancellations;⁷ (ii) Complex Orders⁸ that are submitted electronically; (iii) unfilled Immediate-or-Cancel⁹ customer orders; and (iv) 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 assessed the applicable Cancellation Fee of \$2.10 per order on member organizations, as specified above, during the months of August and September

⁶ See Securities Exchange Act Release No. 60188 (June 29, 2009), 74 FR 32986 (July 9, 2009) (SR-Phlx-2009-48) (aggregating options orders within a specified time period for the purpose of assessing the Cancellation Fee). 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 electronically-delivered orders are cancelled. Simple cancels and cancel-replacement orders are the types of orders that are counted when calculating the number of electronically-delivered orders. (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). Also, pre-market cancellations are not included in the calculation of the Cancellation Fee as well as Complex Orders that are submitted electronically. 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).

⁷ 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). See also Securities Exchange Act Release No. 60046 (June 4, 2009), 74 FR 28083 (June 12, 2009) (SR-Phlx-2009-44).

⁸ 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.

⁹ 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.

2009. Exchange members have experienced various issues related to the Cancellation Fee including staffing issues, delays in implementation of certain Exchange reports which notify members of cancellations, and other communication issues. The Exchange previously waived its Cancellation Fee for July 2009 because it became aware of member confusion with the calculation of the fee.¹⁰ The Exchange explained the Cancellation Fee to member organizations¹¹ at that time and suggested member organizations subscribe to receive the daily cancellation report in order to properly track their cancellation activity for a given month. The Exchange more recently became aware of issues related to the receipt and contents of the daily cancel reports which the Exchange believes may have created confusion among certain member organizations as to the number of cancels that existed in a given month. The Exchange has once again reached out to its members to rectify existing issues with the daily cancel report and to determine if the reports properly reflected the information necessary for the firms to determine the number of cancels in a given month. Additionally, the Exchange will issue an Options Trader Alert to further clarify the tools available to member organizations to notify them of the cancellations and clarify that the Cancellation Fee will be applicable as of October 1, 2009. The Exchange believes that member organizations have been adequately educated as to the Exchange's current Cancellation Fee and its applicability for future assessments.

¹⁰ See Securities Exchange Act Release No. 60606 (September 1, 2009), 74 FR 46264 (September 8, 2009) (SR-Phlx-2009-76).

¹¹ NASDAQ OMX PHLX staff contacted all member organizations who were assessed a Cancellation Fee in July 2009 concerning the applicability and calculation of this fee prior to August 1, 2009. Additionally, the Exchange produces a daily cancellation fee reconciliation report as a tool for member organizations to monitor their cancel volume and potential charges.

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 charges among Exchange members. The Exchange believes that the proposal to retroactively waive the Cancellation Fee for the months of August and September 2009 and issue a rebate to all member organizations for fees previously assessed in August and September 2009 is fair and equitable in that the waiver will apply to all member organizations. The Exchange believes that it has educated its members as to the applicability of the current Cancellation Fee and any implementation issues have been addressed and remedied for future assessment of this fee.

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 proposed rule change establishes or changes a due, fee, or other charge applicable only to a member pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁴ and

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

Rule 19b-4(f)(2)¹⁵ thereunder. Accordingly, the proposal will take effect upon filing with the Commission. 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-2009-89 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-2009-89. 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

¹⁵ 17 CFR 240.19b-4(f)(2).

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, N.E., 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-2009-89 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.¹⁶

Florence E. Harmon
Deputy Secretary

¹⁶ 17 CFR 200.30-3(a)(12).