

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61480; File No. SR-Phlx-2010-14)

February 3, 2010

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Transaction Fees and Rebates for Options

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 January 26, 2010, 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 amend the Exchange’s Fee Schedule by adopting, on a pilot basis, per contract transaction fees for options overlying the PowerShares QQQ Trust (“QQQQ”)®; Ishares Russell 2000 (“IWM”) and Citigroup Inc. (“C”). The fees would apply to: (i) transaction sides that remove liquidity from the Exchange’s disseminated market, and (ii) Firm and broker-dealer quotes and orders that are included in the Exchange’s disseminated market.

Additionally, the Exchange proposes to offer a transaction rebate to certain liquidity providers, as described more fully below.

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 for trades settling on or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

after February 1, 2010. The proposed changes to the fee schedule will be effective on a pilot basis, scheduled to expire March 2, 2010.

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, at the Commission's Public Reference Room, and on the Commission's Web site at www.sec.gov.

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 increase liquidity and to attract order flow in QQQQ, IWM and C options on the Exchange.

Transaction Charges for Removing Liquidity

The Exchange proposes to assess a per-contract transaction charge in QQQQ, IWM and C options on six different categories of market participants that submit orders and/or quotes that remove, or "take," liquidity from the Exchange. The per-contract transaction charge would depend on the category of market participant submitting an order or quote to the Exchange that removes liquidity.

The proposed amendments to the Exchange's Fee Schedule would break down market participants by the following six categories: (i) specialists, Registered Options Traders ("ROTs")³ that do not submit electronic quotations ("Non-Streaming ROTs"),⁴ Streaming Quote Traders ("SQTs"),⁵ and Remote Streaming Quote Traders ("RSQTs"),⁶ (ii) customers that submit orders that are not Directed Orders⁷ ("Non-Directed Customers"); (iii) customers that submit Directed Orders ("Directed Customers");⁸ (iv) specialists, SQTs and RSQTs that receive Directed Orders ("Directed Participants" or "Directed Specialists, RSQTs, or SQTs")⁹; (v) Firms; and (vi) broker-dealers.

³ An ROT is 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.

⁴ In addition to the fees for QQQQ, IWN and C options, Non-Streaming ROTs will be assessed the fees applicable to Standard and Poor's Depository Receipts/SPDRs ("SPY"). See SR-Phlx-2009-116.

⁵ An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. See Exchange Rule 1014(b)(ii)(A).

⁶ An RSQT is 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. An RSQT may only submit such quotations electronically from off the floor of the Exchange. See Exchange Rule 1014(b)(ii)(B).

⁷ "Directed Order" means any customer order (other than a stop or stop-limit order as defined in Rule 1066) to buy or sell which has been directed to a particular specialist, RSQT, or SQT by an Order Flow Provider, as defined below. To qualify as a Directed Order, an order must be delivered to the Exchange via AUTOM.

⁸ For the purposes of this fee, a Directed Customer is an order from a customer directed to a Directed Participant for execution. A Directed Participant is a Specialist, SQT, or RSQT that executes an order directed to it for execution.

⁹ See Exchange Rule 1080(l), "...The term 'Directed Specialist, RSQT, or SQT' means a specialist, RSQT, or SQT that receives a Directed Order." A Directed Participant has a higher quoting requirement as compared with a specialist, SQT or RSQT who is not acting as a Directed Participant. See Exchange Rule 1014.

The per-contract transaction charges to be assessed on participants who submit proprietary quotes and/or orders that remove liquidity in QQQQ, IWM and C options from the Exchange in QQQQ, IWM and C options are, by category:

| <u>Category</u> | <u>Charge</u> |
|-----------------------------------|----------------------------|
| Specialist, ROT, SQT, RSQT | \$0.40 per contract |
| Non-Directed Customer | \$0.40 per contract |
| Directed Customer | \$0.25 per contract |
| Directed Participants | \$0.30 per contract |
| Firms | \$0.45 per contract |
| Broker-Dealers | \$0.45 per contract |

Transaction Charges for Adding Liquidity

The Exchange proposes to assess a transaction charge of \$0.35 per contract to Firms and \$0.45 per contract to broker-dealers.

Rebates

In order to promote and encourage liquidity in QQQQ, IWM and C options, the Exchange proposes to amend its fee schedule to include a per-contract rebate relating to transaction charges for orders or quotations that add liquidity in QQQQ, IWM and C options. The amount of the rebate would depend on the category of participant whose order or quote was executed as part of the PHLX Best Bid and Offer. Specifically, the per-contract rebates are, by category:

| <u>Category</u> | <u>Rebate</u> |
|-----------------------------------|----------------------------|
| Specialist, ROT, SQT, RSQT | \$0.20 per contract |
| Non-Directed Customer | \$0.05 per contract |
| Directed Customer | \$0.20 per contract |
| Directed Participants | \$0.25 per contract |
| Firms | N/A |
| Broker-Dealers | N/A |

Applicability of Other Fees

- The \$900,000 monthly cap that is currently applicable to ROTs and specialists transacting equity options will not be applicable to the fees described herein.¹⁰
- The \$85,000 Firm Related Equity Option Cap will not be applicable to the fees described herein.¹¹
- The Exchange pays a per-contract Market Access Provider (“MAP”) Subsidy to any Exchange member organization that qualifies as an Eligible MAP.¹² The MAP Subsidy will not apply to electronic transactions in QQQQ, IWM and C.¹³
- Payment for Order Flow fees¹⁴ will not be collected on transactions in QQQQ, IWM and C options.
- All electronic auctions will be free to Non-Directed Customers, Directed Customers, Directed Participants, Specialists, SQTs and RSQTs.¹⁵ Electronic auctions include, without limitation, the Complex Order Live Auction (“COLA”),¹⁶ and Quote and Market Exhaust auctions.¹⁷ Firms and broker-dealers will be assessed the appropriate charge for removing liquidity.

¹⁰ See proposed rule change SR-Phlx-2009-104.

¹¹ See Securities Exchange Act Release No. 61337 (January 12, 2010), 75 FR 2905 (January 19, 2010) (SR-Phlx-2009-104.)

¹² An “Eligible MAP” is defined in the Exchange’s Fee Schedule in the Market Access Provider Subsidy.

¹³ See Securities Exchange Act Release No. 59537 (March 9, 2009), 74 FR 11151 (March 16, 2009) (SR-Phlx-2009-19).

¹⁴ See Securities Exchange Act Release No. 59841 (April 29, 2009), 74 FR 21035 (May 6, 2009) (SR-Phlx-2009-38).

¹⁵ With respect to electronic auctions, it is systemically difficult to determine which participant(s) would qualify for a rebate, therefore the Exchange has determined not to apply the rebate to transactions resulting from electronic auctions.

¹⁶ COLA is the automated Complex Order Live Auction process. A COLA may take place upon identification of the existence of a COLA-eligible order either: (1) following a COOP, or (2) during normal trading if the Phlx XL system receives a Complex Order that improves the cPBBO. See Exchange Rule 1080.

¹⁷ Market Exhaust occurs when there are no Phlx XL II participant (specialist, SQT or RSQT) quotations in the Exchange's disseminated market for a particular series and an initiating order in the series is received. In such a circumstance, the Phlx XL II system, using Market Exhaust, will initiate a Market Exhaust auction for the initiating order. Under Market Exhaust, any order volume that is routed to away markets will be marked as an Intermarket Sweep Order or “ISO.” See Exchange Rule 1082.

- The fees described herein will not apply to contracts executed during the Exchange’s opening process.¹⁸ Firms and broker-dealers will be assessed the appropriate charge for removing liquidity.
- The Exchange pays an Options Floor Broker Subsidy to member organizations with Exchange registered Floor Brokers for eligible contracts that are entered into the Exchange's Options Floor Broker Management System. The Options Floor Broker Subsidy will be applicable to the transactions described herein.¹⁹
- The Exchange assesses a Cancellation Fee of \$2.10 per order on member organizations for each cancelled electronically delivered customer order in excess of the number of customer orders executed on the Exchange by that member organization in a given month.²⁰ The Cancellation Fee will continue to apply.
- Transaction fees for Linkage “P” and “P/A” Orders would be applicable to the transaction listed herein.²¹
- Regular Equity Option transaction fees will apply to Complex Orders that are electronically executed against a contra-side order with the same Complex Order Strategy.
- Single contra-side orders that are executed against the individual components of Complex Orders will be charged under the proposed Fee Schedule. The individual components of such a Complex Order will not be charged.
- QQQQ, IWM and C transactions executed via open outcry will be subject to the standard equity options fee schedule. However, if one side of the transaction is executed using the Options Floor Broker Management System²² and any other side of the trade was the result of an

¹⁸ See Exchange Rule 1017.

¹⁹ See Securities Exchange Act Release No. 60578 (August 27, 2009), 74 FR 45666 (September 3, 2009) (SR-Phlx-2009-72).

²⁰ See Securities Exchange Act Release No. 60188 (June 29, 2009), 74 FR 32986 (July 9, 2009) (SR-Phlx-2009-48).

²¹ See Securities Exchange Act Release No. 60210 (July 1, 2009), 74 FR 32989 (July 9, 2009) (SR-Phlx-2009-53). This pilot is scheduled to expire on July 31, 2010. The Exchange understands that certain exchanges continue to utilize Linkage to send P/A Orders.

²² The Options Floor Broker Management System (“FBMS”) is a component of the Exchange’s system designed to enable Floor Brokers and/or their employees to enter, route and report transactions stemming from options orders received on the Exchange. The Options Floor Broker Management System also is designed to establish an electronic audit trail for options orders represented and executed by Floor Brokers on the Exchange, such that the audit trail provides an accurate, time-sequenced record of electronic and other orders, quotations and transactions on the Exchange, beginning with the receipt of an order by the Exchange, and further documenting the life of the order through the

electronically submitted order or a quote, then the fees proposed herein will apply to the FBMS contracts and contracts that are executed electronically all sides of the transaction.

The Effect of Current Fees Applicable to SPY

The proposed fees for options overlying QQQQ, IWM and C currently apply to options overlying SPY.²³ The Exchange began charging the same fees for SPY beginning with trades settling on or after January 4, 2010 on a pilot basis, scheduled to expire March 2, 2009 (the “pilot”). As stated above, the proposed fees for QQQQ, IWM and C options will be made part of the pilot.

Prior to the implementation of the pilot respecting SPY options, the percentage of customer orders in SPY options executed on the Exchange that were Directed Customer orders was 83.6%. Since the implementation of the pilot in SPY options, 93.8% are now Directed Customer orders. This change suggests that charging different rates for Directed and Non-Directed Customer orders creates an incentive for member organizations to direct customer order flow to an Exchange specialist, SQT or RSQT. The economic benefit of directing order flow to Exchange specialists, SQTs and RSQTs, coupled with the incentive based pricing for providing liquidity, have resulted in narrower spreads and increased size in the Exchange’s disseminated market in SPY options. Furthermore, the Exchange’s disseminated size in SPY options represents a higher percentage of the National Best Bid /Offer (“NBBO”) in SPY options since the implementation of the pilot. Because of this, the Exchange has routed fewer customer orders to away markets, thereby providing customers with faster and more efficient executions at the

process of execution, partial execution, or cancellation of that order. AUTOM is the Exchange's electronic order delivery and reporting system, which provides for the automatic entry and routing of Exchange-listed equity options, index options and U.S. dollar-settled foreign currency options orders to the Exchange trading floor. See Exchange Rule 1080, Commentary .06.

²³

See SR-Phlx-2009-116.

NBBO on the Exchange, and reducing the number of instances in which the liquidity disseminated by away markets might be executed before such routed orders arrive.

The Exchange expects that this pricing model will affect its markets for options overlying QQQQ, IWM and C in the same way it has affected its markets for SPY options. The economic incentives to direct orders to Exchange Directed Participants, and the concomitant narrowed spreads, increased liquidity, more frequent NBBO pricing, and overall market efficiencies experienced by the Exchange in SPY options should also be realized in QQQQ, IWM and C options. The proposal benefits customers, the investing public and the options markets on the Exchange in particular, and on the options markets as a whole.

The Exchange is also proposing to make a minor modification to the Fee Schedule to remove all plural references in the categories.

The proposed changes to the fee schedule will be effective for transactions settling on or after February 1, 2010, and will be effective for a pilot period scheduled to expire March 2, 2010.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees 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. The impact of the amendments upon the net fees paid by a particular market participant will depend on a number of variables, including its monthly volumes, the order types it uses, and the prices of its quotes and orders (i.e., its propensity to add or remove liquidity).

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(4).

Specifically, the Exchange believes that its proposal to charge a different fee and to pay a different rebate for Non-Directed Customers relative to Directed Customers is an equitable allocation of reasonable fees and other charges among Exchange members, and is consistent with the current fee schedule and industry fee assessments of member firms that allow for different rates to be charged for different order types originated by dissimilarly classified market participants.²⁶

The Exchange notes that orders routed to the Exchange as Principal Acting as Agent Orders (“P/A Orders”)²⁷ via the Intermarket Option Linkage (“Linkage”) under the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (the “Plan”) accounted for most of the Non-Directed order flow the Exchange received in the symbols affected under the instant proposal. The participating U.S. options exchanges determined to withdraw from the Plan and, on June 17, 2008, the Exchange filed an executed copy of the Options Order Protection and Locked/Crossed Market Plan (“New Plan”), joining all other approved options markets in adopting the New Plan. The concept of P/A orders routed through a central Linkage “hub” does not exist under the New Plan. P/A Orders were routed to remove liquidity from the Exchange under the Plan; orders routed from away markets to remove liquidity are now routed directly to the Exchange, in large part as Non-Directed Customer orders. The Exchange assessed transaction fees applicable to the execution of P/A Orders, but did not assess transaction fees on customer orders sent to the Exchange outside the Linkage. The Exchange also charged different

²⁶ NYSE Amex currently charges different rates to different market participants in assessing its firm facilitation fee. See Securities Exchange Act Release No. 60378 (July 23, 2009), 74 FR 38245 (July 31, 2009) (SR-NYSEAmex-2009-38).

²⁷ A P/A order is an order for the principal account of a specialist (or equivalent entity on another participant exchange that is authorized to represent public customer orders), reflecting the terms of a related unexecuted Public Customer order for which the specialist is acting as agent.

per-contract transaction fees for P/A Orders and Principal Orders (“P Orders”)²⁸ sent to remove liquidity from the Exchange. The Exchange charged \$0.45 per option contract for P Orders sent to the Exchange and \$.30 per contract for P/A Orders,²⁹ while charging nothing for customer orders submitted to the Exchange outside the Linkage. The Exchange believes that Non-Directed Customers now “stand in the shoes” of what were previously P/A Orders, and the proposed transaction charges applicable to Non-Directed Customers are similar to the charges that applied to P/A Orders. Thus, these proposed fees are not unfairly discriminatory relative to the proposed fees for Directed Customers, based upon the precedent of charging for P/A Orders but not for customer orders sent outside the Linkage.

Order flow providers that control customer order flow and route customer orders to exchanges are responsible to obtain the best pricing available for their customers. An order flow provider has the ability to enter into arrangements whereby they may receive consideration for directing the customer order to a specific market maker (specialists, SQTs and/or RSQTs). Under the proposal, a Directed Customer would be charged a lower per-contract transaction fee, and would receive a higher rebate, based on such an arrangement.

The Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular exchange to be excessive or unfair. The Exchange believes that the fees it charges for options overlying QQQQ, IWM and C remain competitive with fees charged by other venues, provides incentives

²⁸ A Principal Order is an order for the principal account of an Eligible Market Maker and is not a P/A Order.

²⁹ See Securities Exchange Act Release No. 60210 (July 1, 2009), 74 FR 32989 (July 9, 2009) (SR-Phlx-2009-53).

that improve execution quality and therefore continue to be reasonable and equitably allocated to those members that opt to send order flow to the Exchange rather alternative options exchanges.

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 Act³⁰ and paragraph (f)(2) of Rule 19b-4³¹ 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-2010-14 on the subject line.

³⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

³¹ 17 CFR 240.19b-4(f)(2).

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-2010-14. 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 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 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-2010-14 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.³²

Florence E. Harmon
Deputy Secretary

³² 17 CFR 200.30-3(a)(12).