

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63985; File No. SR-Phlx-2011-23)

February 28, 2011

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Clarifying Changes to Rules 607 and 3202 Concerning the Application and Collection of the Covered Sale 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 February 16, 2011, NASDAQ OMX PHLX LLC ("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 make clarifying changes to Rules 607 and 3202 concerning the application and collection of the Covered Sale Fee.

The text of the proposed rule change is available on the Exchange's Website at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, at the principal office of the Exchange, on the Commission's website at www.sec.gov, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 make clarifying changes to Rules 607 and 3202 concerning the application and collection of the Covered Sale Fee. In light of the varying means by which a Covered Sale Fee is incurred by members, as described below, the Exchange believes that a more detailed description of the circumstances that trigger the Covered Sale Fee is warranted. Accordingly, the new rule language proposed by the Exchange expressly discusses covered sales in both equity and option securities. In addition, the proposed new rule language includes a description of sell orders entered into the Exchange transaction execution systems that result in a covered sale on another exchange, expressly discussing the fee incurred by the Exchange and the application of the Covered Sale Fee in such circumstances.

PHLX Rule 607

The Exchange is proposing amendments to Rule 607 to make clear the circumstances that trigger application of the Covered Sale Fee, and to make other clarifying changes. Initially, the Exchange is proposing to enumerate all paragraphs in Rule 607 for clarity. Furthermore, the Exchange proposes to amend paragraph two by removing the reference to Rule 185(g), the former equities platform rule regarding the Exchange's Routing Facility; and insert Rule 1080(m)(iii), the current options platform rule regarding the Exchange's Routing Facility. This amendment is predicated on the fact that upon the implementation of the Exchange's current

equities platform, NASDAQ OMX PSX³, only options transactions may be routed to other markets for executions.

Rule 607 permits the Exchange to collect a fee from its members for sales of securities with respect to which the Exchange is obligated to pay a fee to the SEC pursuant to Section 31 of the Act⁴ and Rule 31, thereunder.⁵ Each national securities exchange and association is required to calculate the aggregate dollar amount of “covered sales” occurring on the exchange or through a member of the national securities association and to pay fees based on those covered sales to the Commission (“Section 31 fees”). A covered sale is a “sale of a security, other than an exempt sale or a sale of a security future, occurring on a national securities exchange or by or through any member of a national securities association otherwise than on a national securities exchange.”⁶ Pursuant to Rule 607 the Exchange assesses a member the Covered Sale Fee for an executed sell order entered into the Exchange’s transaction execution systems that results in a covered sale. The Covered Sale Fee defrays the cost of the Section 31 fee triggered by the covered sale. In this regard, the Covered Sale Fee assessed a member is equal to the Section 31 fee assessed by the Commission for the covered sale. Further, the Exchange adjusts the Covered Sale Fee in lock step with changes to the Section 31 fee made by the Commission.⁷ Assessing a sales fee is common practice among the national securities exchanges and associations.⁸

³ See Exchange Rules 3000-3407.

⁴ 15 U.S.C. 78ee.

⁵ 17 CFR 240.31.

⁶ 17 CFR 240.31(a)(6).

⁷ The Exchange issues Regulatory Alerts to provide members with notice of Covered Sale Fee changes. See e.g., <http://www.nasdaqtrader.com/TraderNews.aspx?id=ERA2011-01>.

⁸ See e.g., CBOE Fees Schedule (January 3, 2011), Item 6 “Sales Value Fee,” ISE Rule 212, NYSE Rule 440H, and NYSE Amex Rule 393.

As noted above, the Covered Sale Fee defrays the cost of the Section 31 fee. The Covered Sale Fee is triggered by the fulfillment of a members [sic] sell order in equity or options securities entered into the Exchange transaction execution systems that results in a covered sale. If the member's sell order is fulfilled on the Exchange's equity or options trading markets, the Exchange incurs a Section 31 fee obligation. Sell orders in options securities entered into the Exchange transaction execution system that are routed to another market for execution, however, does [sic] not result in a covered sale on the Exchange. Execution of such routed orders is facilitated by the Exchange's routing broker,⁹ which acts as the selling member for a routed order on the away market on behalf of the Exchange member. Such routed sell orders result in a covered sale on the away market, which incurs a Section 31 fee obligation. Like the Exchange, the away market assesses a sales fee on the member that entered the sell order, in this case Nasdaq Options Services LLC,¹⁰ to defray the cost of the Section 31 fee obligation. In turn, the Exchange assesses its member, the original selling party, a Covered Sale Fee pursuant to Rule 607 to defray the cost of the Section 31 fee passed on by the away exchange pursuant to its sales fee. As such, the Exchange's Covered Sale Fee offsets the sales fee it is assessed by the away market, the result of which is to place the parties involved in the transaction in the same position as if the covered sale had occurred on the Exchange.

Additionally, the Exchange is updating its rules to indicate that the Covered Sale fee is collected by "designated clearing agency," which is defined by rule promulgated under the Act as a "clearing agency registered under section 17A of the Act...that clears and settles covered

⁹ Nasdaq Options Services LLC is the Exchange's routing broker for option securities. See PHLX Options Rule 1080(m)(iii).

¹⁰ See e-mail from Arlinda Clark, Assistant General Counsel, Phlx, to Jennifer Dodd, Special Counsel, Office of Market Supervision, Division of Trading and Markets, Commission, dated February 22, 2011 (requesting corrections to this sentence).

sales or covered round turn transactions.”¹¹ The Exchange employs the National Security Clearing Corporation to collect the Covered Sale Fee from members arising from their covered sales in equity securities. Covered Sale Fees arising from options covered sales, however, are collected from members by the Options Clearing Corporation, another designated clearing agency that clears option securities.¹² The Exchange believes such amendment will more accurately reflect all parts the Exchange employs to collect the Covered Sale Fee from its members.

PHLX Rule 3202

The Exchange also proposes to amend its equity rules to clarify application and collection of the Covered Sale Fee. PHLX Rule 3202 sets forth that certain rules of the Exchange are applicable to market participants trading on the Exchange’s equity trading platform. PHLX Rule 607 is cross referenced within Rule 3202, however Rule 3202 only references the first paragraph of Rule 607. For clarification, Rule 3202 will be amended to indicate that Rule 607 will be referenced in its entirety. Such amendment serves to describe the full process for collection of the Covered Sale Fee regarding equity transactions.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act¹³ in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or

¹¹ 17 CFR 240.31(a)(9).

¹² In addition to clearing transactions in options, the Options Clearing Corporation also clears security futures. See <http://www.optionsclearing.com>.

¹³ 15 U.S.C. 78f(b)(4).

dealers. The proposed clarifying language does not change the application and assessment of the Covered Sale Fee under the rule, but rather provides greater detail on the transactions that trigger the fee. The Exchange applies Rule 607 uniformly to all members' sell orders entered into the Exchange's transaction execution systems resulting in covered sales.

The Exchange also believes the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁴ in general and with Section 6(b)(5) of the Act,¹⁵ in particular, which requires that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest. The Exchange believes that the proposed rule change is consistent with these requirements because the proposed amended rule text provides members with more detail regarding the circumstances under which the Exchange assesses a Covered Sale Fee. As such, the proposed changes will help avoid member confusion and foster better understanding of the application of the rule. Accordingly, the Exchange believes the proposed rule change will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

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.

¹⁴ 15 U.S.C. 78f.

¹⁵ 15 U.S.C. 78f(b)(5).

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

Because the foregoing proposed rule change establishes or changes a due, fee or other charge applicable only to a member, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁶ and Rule 19b-4(f)(2) thereunder.¹⁷

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(2).

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-2011-23 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-2011-23. 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 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-2011-23 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.¹⁸

Cathy H. Ahn
Deputy Secretary

¹⁸ 17 CFR 200.30-3(a)(12).