

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-61154; File Number SR-ISE-2009-105; Release No. 34-6133;
File Number SR-PHLX-2009-100; Release No. SR-BX-2010-001

Dear Ms. Murphy:

TD AMERITRADE, Inc.¹ (“TD Ameritrade”) and thinkorswim, Inc. (“thinkorswim,” and, collectively with TD Ameritrade, “the Firms”) appreciate the opportunity to comment on the above-referenced proposals relating to the application of an Options Regulatory fee (the “Rules”). The Firms believe that the Rules as proposed violates Section 6(b) of the Act² and creates a conflicting profit structure that allows the exchanges to assess arbitrary charges among non-member organizations in order to enhance the exchanges revenue as publicly traded companies to the detriment of individual investors. The Firms therefore respectfully request the Securities and Exchange Commission (“Commission”) abrogate the proposals.

The ORF is not Equitable, not Reasonable and Fails to Comply with Section 6(b)(4) of the Exchange Act

Section 6(b)(4) of the Securities Exchange Act of 1934 requires that “[t]he rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” The Rules clearly do not represent an “equitable” allocation among members using “[the exchange’s] facilities,” when they apply to transactions that do not occur on such facilities.

In fact, the fees as proposed by the Rules represent a revenue boon for the publicly traded exchange as it will allow for the collection of charges for options transactions regardless of the

¹ TD Ameritrade is a wholly-owned broker-dealer subsidiary of TD AMERITRADE Holding Corporation (“TD Ameritrade Holding”). TD Ameritrade Holding has a 34-year history of providing financial services to self-directed investors. TD Ameritrade Holding’s wholly owned broker-dealer subsidiary, TD Ameritrade serves an investor base comprised of over 5.2 million funded client accounts with approximately \$302 billion in assets. On June 11, 2009, TD AMERITRADE Holding Corporation (NASDAQ: AMTD), the parent of TD Ameritrade acquired thinkorswim Group, Inc., the parent of thinkorswim. thinkorswim, founded in 1999 and headquartered in Chicago, is a registered broker-dealer based in Chicago, Illinois that conducts an online brokerage operation, including securities, futures and forex.

² 15 U.S.C. 78f(b)

exchange on which the transactions occur³. As proposed the exchange would receive compensation even if the exchange were not to execute a single options contract. The exchanges believe that charging the Options Regulatory Fee (“ORF”) across markets will avoid having members direct their trades to other markets in order to avoid the fee and thereby avoid paying for their fair share of regulation. The proposal, however, fails to describe how the “fair share” is calculated and neglects to describe how a member could circumvent their regulatory obligation. The Firms believe that the proposals as a result are arbitrary and excessive when considered in conjunction with all ORF proposals. Moreover by Nasdaq OMX PHLX’s own admission, it recognizes that its own fee filing is inappropriate and should be abrogated⁴. We concur with Nasdaq OMX PHLX’s earlier view that these filings require careful Commission analysis and should be abrogated.

The Firms note that the CBOE recently introduced an ORF fee administered across all order types⁵. As the Firms previously commented⁶, the application of market-wide transaction fees could be instituted by other exchanges and as evidenced by the Rule proposals, this is now the case. The Firms note that by approving the Rules, the Commission is establishing a precedent that will permit any options exchange to charge a member or non member firm for the same transaction multiple times regardless of the business or regulatory functions of that exchange. The Firms note that in addition to the CBOE, several exchanges are following suit with ORF fees thus means that every customer option transaction will be taxed⁷ several times for the same transaction. In this way even if the cost of regulation covered the transaction by one exchange, other exchanges would derive pure profit through the institution of such fees. It is no wonder then why Nasdaq OMX PHLX who previously abhorred the CBOE filing now sees this is a tremendous revenue generating opportunity for their publicly traded company and is attempting to embrace it.

The exchanges attempt to justify the Rules by noting that FINRA was permitted to charge the Trading Activity Fee⁸. As previously cited, the Firms again note that the Commission’s approval order of the FINRA TAF was explicit in its recognition of FINRA’s broad responsibilities with respect to its member’s activities, which is not the case in the Rules. Further, the Rules cite the CBOE’s ORF as precedent for allowing the Rules to be approved, however the arguments fail to recognize the fact that the CBOE was chosen as the plan administrator for the Options Regulatory Surveillance Authority Plan “ORSA” across all options exchanges⁹. As the Firms previously noted, the approval of CBOE’s proposal now highlights the market structure and competitive issues that must be addressed prior to any further approval of ORF fees.

³ SR-PHLX-2009-100 at 9; See SR-ISE-2009-105 at 3; See SR-BX-2010-001

⁴ Nasdaq OMX comments on SR-CBOE-2008-15 (November 17, 2008)

⁵ SEC Release No. 34-58817; SR-CBOE-2008-105

⁶ Thinkorswim comments on SR-CBOE-2008-105 (December 3, 2008)

⁷ SR-PHLX-2009-100; SR-ISE-2009-105; BOX Informational Circular IC-2010-001

⁸ See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003)

⁹ See Securities Exchange Act Release No. 34-53940; File No. 4-516

Ms. Elizabeth Murphy
January 7, 2010

The solution is clear

The Firms do believe that surveillance and regulatory oversight are a necessary component of our market system to ensure fairness to all, however, a fee that when combined with all the filings approaches two (2) cents per contract appears excessive. The Firms believe rather than individual Rule proposals by a particular options exchange, that the Options Clearing Corporation (“OCC”) is best suited to administer and allocate the fee based on a “pro-rata” allocation of activity from each exchange. The Firms note that the OCC is currently assigned to administer the CBOE ORF fee and thus already represents a mechanism to administer the ORF in a comprehensive fashion across the many options exchanges. The Firms note that in this way a particular exchange is not allowed an opportunity to create a revenue mechanism as a for profit exchange without any transactional volume.

The Firms note that if approved, these are costs will end up being borne by the individual investor for and pocketed by publicly traded exchanges. Therefore, the Firms respectfully request that the Commission summarily abrogate the rules as proposed and filed pursuant to Section 19(b) (2) as they serve to harm the interests of the public.

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TD Ameritrade and thinkorswim appreciate the opportunity to comment. Please feel free to contact me if you have any questions regarding our comments.

Respectfully Submitted,

/S/

Christopher Nagy
Managing Director Order Routing Strategy
TD AMERITRADE, Inc.
thinkorswim Group Inc.

CC: Robert W. Cook, Division of Trading and Markets
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