

January 11, 2010

Elizabeth Murphy,
Secretary
U.S. Securities and Exchange Commission
100 F. Street, NE
Washington, D.C. 20549 - 1090

**Re: File No. SR-PHLX-2009-100 - Proposed Rule Change to Eliminate
Registration Fees and Institute an Options Regulatory Fee**

Dear Ms. Murphy:

optionsXpress, Inc. ("optionsXpress") is a registered Broker-Dealer and Futures Commission Merchant that provides an online trading platform and execution services to self-directed retail investors and clearing services for domestic equity and options transactions. optionsXpress is a member of all major Securities Exchanges, Associations and Commodity and Futures Exchanges. optionsXpress' Designated Examining Authority is the Chicago Board Options Exchange, Incorporated ("CBOE" or the "Exchange"). optionsXpress' clients include retail individuals and entities that place self-directed orders for their individual, joint, IRA, and corporate accounts.

optionsXpress appreciates the opportunity to respond to the above-referenced filing. The NASDAQ OMX PHLX, Inc. ("PHLX") proposes to amend its Fees Schedule to eliminate the Registered Representative/ Member Exchange/ Off-Floor Registration Trader Fee of \$55.00, the initial registration fee of \$55.00, the transfer fee of \$55.00 and the termination fee of \$30.00 ("Registration Fees") paid by member firms and instead, will assess a new Options Regulatory Fee ("ORF") on each option contract executed by the member and cleared by The Options Clearing Corp. ("OCC") in the customer range ("Proposal").¹ Contrary to the CBOE, which sought to replace lost revenue resulting from the elimination of Registered Representative Fees, the introduction of the new ORF may result in incremental revenue gains for the PHLX at the detriment of retail customers. The PHLX's proposed rate of \$0.0035 per contract with a \$0.01 minimum in comparison to the CBOE's \$0.004 per contract appears inequitable given the robust

¹ SEC Release No. 34-61133, File No SR-PHLX-2009-100 (December 9, 2009) ("Proposal").

regulatory program of the CBOE relative to that of the PHLX. The Proposal operates as a means by which a for-profit exchange may tax the retail investors. The Proposal became effective pursuant to Section 19(b)(3)(A)(ii) of the Securities Exchange Act of 1934 (“Exchange Act”)² and paragraph (f)(2) of Rule 19b-4³ thereunder.

optionsXpress respectfully requests that the Securities Exchange Commission (“SEC” or “Commission”) abrogate the above-referenced filing pursuant to its authority under the Exchange Act, since the Proposal fails to satisfy the equitable allocation standards of Section 6(b)(4) of the Exchange Act, and for the additional reasons set forth below.⁴

1. The ORF is applied inequitably solely to customer-range transactions

The PHLX proposes that a \$.0035 per contract ORF would be assessed to each member for all options transactions executed by the member and cleared by OCC in the customer range (excluding Options Intermarket Linkage Plan P/A Orders) regardless of whether the transactions took place on the PHLX. There is a minimum once cent charge per trade. Transactions in the firm range would not be subject to the ORF. Imposing the ORF solely on customer range transactions to replace the Registration Fee revenue paid by firms in order to fund the PHLX regulatory pool that regulates all firms is not justifiable. Assessing this fee to customer range accounts only seems to stray from the chief role of regulators, which is to protect investors and maintain a fair marketplace.

² 15 U.S.C. 78s(b)(3)(A)(ii).

³ 17 CFR 240.19b-4(f)(2).

⁴ Section 6(e)(2) grants the Commission the authority to “abrogate any exchange rule which imposes a schedule or fixes rates of . . . fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this chapter.” 15 U.S.C. 78f(e)(2). Section 6(b)(4) of the Exchange Act requires the equitable allocation of fees among members and the retail investors using the Exchange’s facilities: “The 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.” 15 U.S.C. 78f(b)(4).

A. There is no justifiable nexus between solely customer range transactions on the PHLX and the regulatory costs that the ORF seeks to recoup.

Section 6(b)(4) of the Act requires the equitable allocation of reasonable dues, fees and other charges among members, issuers and other persons, including retail customers, using the Exchange. Contrary to the CBOE, which sought to replace lost revenue, the introduction of the new ORF may result in incremental revenue gains for the PHLX at the detriment of retail customers without any justifiable nexus to the actual regulatory costs that the PHLX would recoup through the ORF and how those costs are tied to customer range transactions.

B. The Proposal lacks support to show that the fees are reasonable in light of the “regulatory costs” that the ORF seeks to recoup

Without any cost data or economic analysis supporting the Proposal, the effect of the ORF exceeds, not solely recoups customer-generated “regulatory costs” of the Exchange lost due to an elimination of the licensing fee paid for registered representatives of PHLX member firms.⁵ In its Concept Release Concerning Self-Regulation, the Commission stated that regulatory fees should be “reasonably designed to recover the [SRO’s] costs related to regulation and oversight of its members.”⁶ Together with the ORF applied by the ISE, NASDAQ OMX BX, Inc. and CBOE, these options regulatory fees cost approximately \$0.014 per contract – and that does not consider the per contract minimum fee.

The Proposal purports to be reasonable because it will raise revenue related to the amount of customer options business conducted by members, and, thus, the amount of Exchange regulatory services these members will require. What this means is that traditional brokerage

⁵ Letter from Patrick Fay, Senior Vice President, Member and Regulatory Services, Chicago Board Options Exchange, to Elizabeth Murphy, Secretary, SEC, dated January 5, 2010 (noting the CBOE’s “concerns with any effort to implement an ORF involve whether the specific ORF rate and resulting level of revenue collected by an SRO is appropriate given the SRO’s real regulatory costs.”)

⁶ Concept Release Concerning Self-Regulation, SEC Release No. 34-50700 (Nov. 18, 2004) (citing 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003)).

firms and market makers will pay less while retail customers absorb the cost. Ultimately, the PHLX's Proposal fails to equitably allocate the ORF among those using its facilities.

The fee operates as a tax inequitably imposed on retail customers for regulation that serves customer business, traditional brokerage firms and market makers alike. Fees charged on retail customer option trading will ultimately be used to fund the PHLX's regulatory program, which is designed to regulate market makers, and proprietary and retail firms. The PHLX has provided no evidence to support their allocation of a higher burden on online and discount firms in comparison to its other members. The PHLX should be required to explain the nexus between the ORF and the regulatory duties that the ORF is funding contrary to the CBOE's ORF, which simply recoups the Registered Representative Fees previously received by the CBOE. The PHLX's proposal fails to address the amount that the Registration Fees generated and how that amount compares to the ORF that the PHLX will receive.

Further, the PHLX should be required to provide a cost analysis detailing how and why its regulatory obligations paid for by the ORF apply only to customer range transactions and not firm range transactions.

C. There is no justifiable nexus between solely customer range transactions on other exchanges and the regulatory activities of the PHLX.

In its Concept Release Concerning Self-Regulation, the Commission noted that it would not approve a regulatory fee that "has little or no nexus to the regulatory tasks performed by the SRO."⁷ However, the Proposal seeks to impose the ORF on "all transaction executed by a member, even if such transactions do not take place on the Exchange."⁸ This approach fails to protect and serve the best interests of retail investors, and instead seeks to subsidize PHLX member firm regulatory activity through forced taxation of retail, customer range transactions occurring on other markets. Rather than an exchange fee, the ORF more closely mirrors a

⁷ *Id.* at n.207 (citing Trading Activity Fee Approval Order, SEC Release No. 34-47946 (May 30, 2003)).

⁸ File No. SR-NASD-2008-105.

federal mandate, tax, or appropriation bill across state lines. Such a scope is overbroad and promotes taxation of retail customers trading options on exchanges having no nexus to the PHLX.

We understand that the market is changing, and as an industry we need to consider that. However, all firms and all persons engaged in the marketplace should bear the burden of those costs equally. Alternatively, if truly driven by the Intermarket Surveillance Group (“ISG”), and ISG provides an essential market surveillance function, then perhaps the SEC is best suited to analyze and propose the appropriate fee across the marketplace rather than on an exchange-by-exchange basis. Should the Commission permit another options exchange to charge a market-wide transaction fee, it will necessitate that the other options exchanges institute similar fees to avoid a competitive disadvantage in regulatory programs. In its comment letter responding to the CBOE’s ORF proposal, optionsXpress raised concern that the seven exchanges offering options trading would soon seek their own fees to recoup “regulatory costs” which could result in significant fees for retail investors trading options.⁹ The PHLX’s Proposal makes clear that that is exactly what is happening.

We encourage the Commission to work with the PHLX and all other exchanges to ensure that any new fees imposed on options trading are tied to the regulatory costs these exchanges will seek to recoup, are evenly applied, and not so burdensome as to discourage retail investors trading options – a \$0.014 per contract fee (to date) does not achieve such an objective.

D. The Proposal disadvantages retail customers.

Exchange rules should not be “designed to permit unfair discrimination between customers, issuers, brokers or dealers.”¹⁰ Doing so harms the very public interest and investors that Section 6 was designed to protect.

⁹ Letter from Hillary Victor, Associate General Counsel, optionsXpress Holdings, Inc., to Florence Harmon, Acting Secretary, SEC, dated November 13, 2008.

¹⁰ 15 U.S.C. 78f(b)(5).

Section 6(b)(5) of the Exchange Act makes clear that the rules of the Exchange are designated to “remove impediments” to “a free and open market.” The ORF simply places an undue financial impediment on retail customers seeking equal access to the options marketplace. A tax on retail customers entering the options markets could likely drive marginal investors away from trading options, thereby inhibiting the marketplace. This harms competition.

optionsXpress is concerned that imposing a per-contract fee on contracts traded in the customer range will result in a decreased number of retail customers trading options as a means to diversify their portfolios at a time of extreme market volatility in which the self-directed retail investor has realized the benefit of using derivatives as a hedge for their investment portfolio.¹¹ The Proposal makes option trading more expensive for customer range investors seeking equal access to the option markets.¹²

The volume in the options markets is driven primarily by traditional firms and firm range traders, not customer range investors at online brokerages. Retail investors should not be treated differently from their institutional counterparts trading the same products in a different range. An equal access and benefit culture is essential to fuel a free market. Providing a fee advantage to those trading in the firm range, while disadvantaging retail customers, does not promote such a culture. Equal access and a level playing field among retail and institutional investors is critical to maintaining and developing a thriving options market that is open to, and encouraging of, the retail options investor. The Proposal seeks to tax the investors least using the Exchange, who are also least likely to organize and object to the ORF through a unified voice. optionsXpress objects to the ORF for itself and its retail investors.

II. Conclusion

optionsXpress objects to the ORF for itself and its retail investors who don't have a unified voice to object and will ultimately pay the ORF. While optionsXpress supports industry efforts to

¹¹ Between December, 2007 and October, 2008, optionsXpress' customer assets have decreased less than the market average (S&P 500 and NASDAQ).

¹² See Proposal at footnote 8.

propose a new fee, such a fee must be transparent, uniform, operationally feasible and equitably allocated among those users that the regulatory costs serve.

optionsXpress respectfully requests that the SEC critically examine the Proposal and the proposed options regulatory fees to be charged by the CBOE, ISE and NASDAQ OMX BX, INC. and coordinate a reasonable plan together with the OCC to institute a reasonable fee schedule that would enable the multiple options exchanges to recoup solely the actual costs of regulation of the options markets while consolidating the duplicative regulatory efforts of these exchanges. In addition, options regulatory fees should be equitably imposed across all transactions and not solely on customer range transactions.

For the reasons set forth above, optionsXpress urges the Commission to abrogate the Proposal in its current form as an initial step towards achieving a reasonable and equitable options regulatory fee to recoup regulatory costs among multiple options exchanges. Duplicative fees paid solely by retail investors without any justifiable nexus to actual regulatory cost impose an inequitable financial burden on customer range retail options traders. optionsXpress respectfully submits that if the ORF only applies to accounts in the customer range, the rule unfairly disadvantages retail customers while benefitting firm traders and large institutions – particularly given the number of exchanges that are implementing such a fee. The Commission must protect the retail investing public from inequitable fees that impede competition, create inefficiency, and permit unfair discrimination among investors.

optionsXpress appreciates the opportunity to comment on the PHLX Proposed Rule. If you have any questions or need further clarification of the concerns raised herein, please do not hesitate to contact the undersigned. It is our hope that the PHLX will respond affirmatively to this petition so that a uniform standard can be communicated to the industry while serving the investors who the industry seeks to protect.

Respectfully,



Peter Bottini, EVP Trading and Customer Service, optionsXpress, Inc.
and

Hillary Victor, Associate General Counsel, optionsXpress Holdings, Inc.