

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61133; File No. SR-Phlx-2009-100)

December 9, 2009

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to an Options Regulatory 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 December 7, 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 eliminate its Registered Representative/Member Exchange/Off-Floor Trader Registration Fee and establish an Options Regulatory Fee.

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 after January 1, 2010, at which point the Registered Representative/Member Exchange/Off-Floor Trader Registration Fee would be eliminated.

The text of the proposed rule change is available on the Exchange’s Web site at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, on the Commission’s Web site at <http://www.sec.gov>, 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 Exchange proposes to eliminate its 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"). The Exchange proposes to establish an Options Regulatory Fee ("ORF") of \$.0035 per contract to each member for all options transactions executed or cleared by the member that are cleared by The Options Clearing Corporation ("OCC") in the customer range, excluding Options Intermarket Linkage Plan ("Linkage") P/A Orders.³

Registration Fees as well as other regulatory fees collected by the Exchange are intended to cover a portion of the cost of the Exchange's regulatory programs.⁴ Today options exchanges,

³ The Exchange understands that certain Exchanges continue to utilize Linkage to send P/A Orders. Linkage may be discontinued by the operative date.

⁴ In addition to Registration Fees, the Exchange derives revenue associated with its regulatory programs from its Examinations Fee. This fee is applicable to member/participant organizations for which the Exchange is the Designated Examining Authority ("DEA"). The Fee is a tiered fee and certain organizations are exempted from the fee. See Exchange's Fee Schedule.

regardless of size, charge similar registered representative fees or an ORF similar to the proposal herein. Currently, Exchange rules require that every qualified Registered Representative⁵ of a member or participant organization must be registered with and approved by the Exchange.⁶ The Member Exchange category refers to Exchange permit holders.⁷

The Exchange believes that Registration Fees are no longer the best manner to assess regulatory fees because more than 60% of the Exchange's Registration Fees are paid by five member organizations. Further to the point, today there are more Internet and discount brokerage firms with few registered persons that pay little in Registration Fees and fewer traditional brokerage firms with many registered persons. The regulatory effort the Exchange expends to review the transactions of each type of firm is not commensurate with the number of registered persons that each firm employs. In addition, due to the manner in which Registration Fees are charged, it is possible for a member firm to restructure its business to avoid paying these fees altogether. A firm can avoid Registration Fees by terminating its Exchange membership and sending its business to the Exchange through another member firm, even an affiliated firm that has significantly fewer registered persons. If member firms terminated their memberships to

⁵ Registered Representative categories include registered options principals, general securities representatives, general securities sales supervisors and United Kingdom limited general securities registered representatives but do not include "off-floor" traders. See Exchange Rule 604(e). See also Exchange Rule 604(a) and (d).

⁶ See Exchange Rule 604. Every person who is compensated directly or indirectly by a member or participant organization for which the Exchange is the DEA, or any other associated person of such member or participant organization, and who executes, makes trading decisions with respect to, or otherwise engages in proprietary or agency trading of securities, including, but not limited to, equities, preferred securities, convertible debt securities or options off the floor of the Exchange ("off-floor traders"), must successfully complete the Series 7 General Securities Registered Representative Examination.

⁷ See Exchange Rule 600.

avoid Registration Fees, the Exchange would suffer the loss of a major source of funding for its regulatory programs.

The Exchange proposes to eliminate Registration Fees and replace them with a transaction-based ORF. The ORF would be \$.0035 per contract and would be assessed by the Exchange to each member for all options transactions executed or cleared by the member that are cleared by The Options Clearing Corporation ("OCC") in the customer range (i.e., that clear in the customer account of the member's clearing firm at OCC), excluding P/A Orders as defined in the Options Intermarket Linkage Plan ("Linkage").⁸ The ORF would be imposed upon all such transactions executed by a member, even if such transactions do not take place on the Exchange.⁹ The ORF also includes options transactions that are not executed by an Exchange member but are ultimately cleared by an Exchange member. Thus the Exchange would charge a member \$.0035 per contract for all options transactions executed or cleared by the member that are cleared by OCC in the customer range, excluding Linkage P/A Orders, regardless of the marketplace of execution. In the case where one member both executes a transaction and clears the transaction, the ORF would be assessed to the member only once on the execution. In the case where one member executes a transaction and a different member clears the transaction, the ORF would be assessed only to the member who executes the transaction and would not be assessed to the

⁸ See Securities Exchange Act Release Nos. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (National Market System Plan Relating to Options Order Protection and Locked/Crossed Markets).

⁹ The ORF would apply to all "C" account origin code orders executed by a member on the Exchange. Exchange rules require each member to record the appropriate account origin code on all orders at the time of entry in order to allow the Exchange to properly prioritize and route orders and assess transaction fees pursuant to the rules of the Exchange and report resulting transactions to the OCC. See Exchange Rule 1063, Responsibilities of Floor Brokers, and Options Floor Procedure Advice F-4, Orders Executed as Spreads, Straddles, Combinations or Synthetics and Other Order Ticket Marking Requirements. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

member who clears the transaction. In the case where a non-member executes a transaction and a member clears the transaction, the ORF would be assessed to the member who clears the transaction.

The ORF would not be charged for member options transactions because members incur the costs of owning memberships and through their memberships are charged transaction fees, dues and other fees that are not applicable to non-members.¹⁰ The dues and fees paid by members go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation. Thus, the Exchange believes members are already paying their fair share of the costs of regulation.¹¹ Moreover, because the ORF would replace Registration Fees, which relate to a member's customer business, the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to its members' activities, supports applying the ORF to transactions cleared but not executed by a member. The Exchange's regulatory responsibilities are the same regardless of whether a member executes a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activity, including performing surveillance for position limit violations, manipulation, frontrunning contrary exercise advice violations and insider trading.¹²

¹⁰ For example, non-broker-dealer customers generally are not charged transaction fees to trade equity options on the Exchange.

¹¹ If the Exchange changes its method of funding regulation or if circumstances otherwise change in the future, the Exchange may decide to impose the ORF or a separate regulatory fee on members if the Exchange deems it advisable. In the event that the Exchange does decide to impose such a fee, that fee would be filed with the Commission pursuant to Section 19 of the Act.

¹² The Exchange also participates in The Options Regulatory Surveillance Authority ("ORSA")¹² national market system plan and in doing so shares information and coordinates with other exchanges designed to detect the unlawful use of undisclosed material information in the trading of securities options. ORSA is a national market

The ORF is collected indirectly from members through their clearing firms by OCC on behalf of the Exchange. There is a minimum one-cent charge per trade. The Exchange expects that member firms will pass-through the ORF to their customers in the same manner that firms pass-through to their customers the fees charged by SROs to help the SROs meet their obligation under Section 31 of the Exchange Act.

The ORF is designed to recover a portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees, will cover a material portion, but not all, of the Exchange's regulatory costs. The total amount of regulatory fees collected by the Exchange is less than the regulatory costs incurred by the Exchange on an annual basis. Registration Fees make up the largest part of the Exchange's total regulatory fee revenue. The Exchange collects other regulatory revenues from DEA Fees.¹³ The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have been

system comprised of several self-regulatory organizations whose functions and objectives include the joint development, administration, operation and maintenance of systems and facilities utilized in the regulation, surveillance, investigation and detection of the unlawful use of undisclosed material information in the trading of securities options. The Exchange compensates ORSA for the Exchange's portion of the cost to perform insider trading surveillance on behalf of the Exchange. The ORF will cover the costs associated with the Exchange's arrangement with ORSA.

¹³ The Exchange assesses the Examinations Fee to each firm for which the SEC has designated the Exchange to be the DEA pursuant to SEC Rule 17d-1. The Examinations Fee is intended to reimburse the Exchange for its costs associated with examining member firms and is generally the same throughout the SRO community. The Examination Fee is based on the number of off-floor traders in the same member organization.

allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of options sales practice regulation.

The ORF is designed to generate revenue that, when combined with all of the Exchange's other regulatory fees, will approximate the Exchange's regulatory costs. The Exchange would monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange expects to monitor regulatory costs and revenues at a minimum on an annual basis. If the Exchange determines regulatory revenues would exceed regulatory costs, the Exchange would adjust the ORF by submitting a fee change filing to the Commission. The Exchange notifies members of adjustments to the ORF via an Options Trader Alert (“OTA”).

The Exchange believes the proposed ORF is equitably allocated because it would be charged to all members on all their customer options business (as defined above). The Exchange believes the proposed ORF is 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 those members will require, instead of how many registered persons a particular member firm employs.¹⁴

The Exchange believes it is reasonable and appropriate for the Exchange to charge the ORF for options transactions regardless of the exchange on which the transactions occur. The Exchange has a statutory obligation to enforce compliance by its members and their associated persons with the Act and the rules of the Exchange and to surveil for other manipulative conduct by market participants (including non-members) trading on the Exchange. The Exchange cannot effectively surveil for such conduct without looking at and evaluating activity across all options

¹⁴ The Exchange expects that implementation of the proposed ORF will result generally in many traditional brokerage firms paying less regulatory fees while Internet and discount brokerage firms will pay more.

markets. Many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such as surveillance for position limit violations, manipulation, frontrunning, contrary exercise advice violations and locked/crossed markets in connection with the Linkage.¹⁵ The Exchange, along with other options exchanges are required to populate a consolidated options audit trail ("COATS") system in order to surveil member activities across markets.¹⁶

In addition to its own surveillance programs, the Exchange works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG") the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses.¹⁷

The Exchange believes that charging the ORF across markets will avoid having members direct their trades to other markets in order to avoid the fee and to thereby avoid paying for their fair share of regulation. If the ORF did not apply to activity across markets, then members would send their orders to the least cost, least regulated exchange. Other exchanges would, of

¹⁵ The Exchange and other options SROs are parties to a 17d-2 agreement allocating among the SROs regulatory responsibilities relating to compliance by their common members with rules for expiring exercise declarations, position limits, OCC trade adjustments, and Large Option Position Report reviews. See Securities Exchange Act Release No. 56941 (December 11, 2007), 72 FR 71723 (December 18, 2007).

¹⁶ COATS effectively enhances intermarket options surveillance by enabling the options exchanges to reconstruct markets promptly, effectively surveil them and enforce order handling, firm quote, trade reporting and other rules.

¹⁷ ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

course, be free to impose a similar fee on their member's activity, including the activity of Exchange members.

Finally, there is established precedent for an SRO charging a fee across markets, namely, FINRA's Trading Activity Fee¹⁸ and the Chicago Board of Options Exchange, Inc.'s ("CBOE") ORF¹⁹. While the Exchange does not have all of the same regulatory responsibilities as FINRA, the Exchange believes that like the CBOE, its broad regulatory responsibilities with respect to its members' activities, irrespective of where their transactions take place, supports a regulatory fee applicable to transactions on other markets. Unlike the TAF, the ORF would apply only to a member's customer options transactions.

Currently, the Exchange is in negotiations with FINRA to render regulatory services which are currently performed by the Exchange. The Exchange anticipates continuing to provide on-floor surveillance options review and data storage.²⁰

The Exchange has designated this proposal to be operative for trades settling on or after January 1, 2010.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act,²¹ in general, and furthers the objectives of Section 6(b)(4) of the Act,²² in

¹⁸ See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003) (SR-NASD-2002-148).

¹⁹ See Securities Exchange Act Release Nos. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2009) (SR-CBOE-2008-105).

²⁰ The costs that are currently identified by the Exchange as related to the regulatory program should approximate the costs that would in the future be paid to FINRA should a Regulatory Services Agreement be executed. The Exchange anticipates that it would pay a flat rate to FINRA for its services.

²¹ 15 U.S.C. 78f(b).

²² 15 U.S.C. 78f(b)(4).

particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that the ORF is objectively allocated to Exchange members because it would be charged to all members on all of their transactions that clear as customer at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing higher fees to those member firms that require more Exchange regulatory services based on the amount of customer options business they conduct.

The Exchange believes the initial level of the fee is reasonable because it relates to the recovery of the costs of supervising and regulating members and market activity. Accounting for recent trends in the industry, the fee is expected to approximate the Exchange's revenue from the Registration Fees. The Commission has addressed the funding of an SRO's regulatory operations in the Concept Release Concerning Self-Regulation²³ and the release on the Fair Administration and Governance of Self-Regulatory Organizations.²⁴ In the Concept Release, the Commission states that: "Given the inherent tension between an SRO's role as a business and as a regulator, there undoubtedly is a temptation for an SRO to fund the business side of its operations at the expense of regulation."²⁵ In order to address this potential conflict, the Commission proposed in the Governance Release rules that would require an SRO to direct monies collected from regulatory fees, fines, or penalties exclusively to fund the regulatory operations and other programs of the SRO related to its regulatory

²³ See Securities Exchange Act Release No. 50700 (November 18, 2004), 69 FR 71256 (December 8, 2004) ("Concept Release").

²⁴ See Securities Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71126 (December 8, 2004) ("Governance Release").

²⁵ Concept Release at 71268.

responsibilities.²⁶ The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will approximate the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side.

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 that is 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 Act²⁷ and paragraph (f)(2) of Rule 19b-4²⁸ 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:

²⁶ Governance Release at 71142.

²⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁸ 17 CFR 240.19b-4(f)(2).

- 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-2009-100 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-2009-100. 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 am and 3:00 pm. 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 No. SR-Phlx-2009-100 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Florence E. Harmon
Deputy Secretary

²⁹ 17 CFR 200.30-3(a)(12).