

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61374; File No. SR-Phlx-2010-01)

January 19, 2010

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 31, 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 to [sic] adopt fees governing pricing for Exchange members using the Phlx XL II system,<sup>3</sup> for routing standardized equity and index options to away markets for execution. These fees would replace the current Options Routing Pass-Through Fees, which the Exchange proposes to eliminate.

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 effective for trades settling on or after January 4, 2010.

---

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> For a complete description of Phlx XL II, see Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32). The instant proposed fees will apply only to options entered into, and routed by, the Phlx XL II system.

The text of the proposed rule change is available on the Exchange's Web site at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, at the principal office of the Exchange, 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 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 recoup costs that the Exchange incurs for routing and executing orders in equity and index options to certain better-priced away markets.

In May, 2009, the Exchange adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC ("NOS"), a member of the Exchange, as the Exchange's exclusive order router.<sup>4</sup> NOS is utilized by the Phlx XL II system solely to route orders in options listed and open for trading on the Phlx XL II system to destination markets.

Currently, the Exchange's Fee Schedule includes fees for executions of options orders entered into the Exchange's enhanced electronic trading platform for options, Phlx XL II, that are routed by NOS to away markets ("Phlx XL II Options Routing Pass-Through Fees"). The fees are dependent on: (i) the away market's fee schedule, and (ii) the type of option (options

---

<sup>4</sup> See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32).

traded in increments of \$0.01 (“penny options”), equity, index, ETF or HLDRS options). The Phlx XL II Options Routing Pass-Through Fees currently are not applicable to firms and market makers because their orders are not routed by Phlx XL II. The Exchange passes through the actual transaction fees to Exchange members (including surcharges and license fees, if applicable) which are assessed by away markets plus the clearing fees for the execution of orders routed from the Phlx XL II system.<sup>5</sup> In August, 2009, the Exchange determined to waive these routing fees on a pilot basis.<sup>6</sup> The pilot expires on December 31, 2009.<sup>7</sup>

The Exchange proposes to eliminate entirely all current Phlx XL II Options Routing Pass-Through Fees and replace those fees with a Routing Fee of \$0.50 per contract side for orders routed to NYSE Arca, Inc. (“NYSEArca”) in penny options for execution. There will be no routing fees for orders routed to away markets other than NYSEArca in penny options. Also, there will be no cost for executing orders at away markets in non-penny classes.

The Exchange’s total cost of routing penny options to NYSE Arca is significantly higher than the cost of routing penny options to the other five U.S. options markets. Based on its review of statistical and financial data, the Exchange believes that it regularly incurs the vast majority of its total monthly transaction and clearing costs in several symbols that are routed from the Exchange to NYSEArca. The Exchange further believes that some order flow providers, rather than sending orders directly to NYSE Arca for execution, route orders to the Exchange when it is not the National Best Bid/Offer (“NBBO”) so that the Exchange will route

---

<sup>5</sup> See PHLX XL II Options Routing Pass-Through Fee located at: <http://www.nasdaqtrader.com/Micro.aspx?id=phlxpricing>.

<sup>6</sup> See Securities Exchange Act Release No. 60461 (August 7, 2009), 74 FR 41472 (August 17, 2009) (SR-Phlx-2009-66).

<sup>7</sup> The pilot applies to transactions settling on or after July 1, 2009 and extended through December 31, 2009. The Exchange does not plan to renew this pilot.

their orders to NYSE Arca. In such a situation, the Exchange incurs the cost of such routing, whereas the initiating order flow provider would incur the cost if it sent the order directly. Accordingly, the Exchange is proposing this fee to recoup transaction and clearing costs that it incurs in situations where orders in penny options are sent to the Exchange when it is not the NBBO, and those orders are routed by the Exchange to NYSEArca. The Exchange believes that the routing fees proposed will enable the Exchange to recover these costs.

This proposal would assess members and member organizations a Routing Fee of \$0.50 per contract side for orders in penny options that are routed through NOS and executed at NYSEArca. The Exchange believes that its proposal will allow the Exchange to recover costs it incurs as a result of routing option orders to NYSEArca.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act<sup>8</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>9</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members because all members and member organizations would be assessed the same fee for penny options routed to and executed on NYSEArca. Further, the Exchange's proposal to eliminate the current Phlx XL II Options Routing Pass-Through Fees and instead assess the \$0.50 Routing Fee for orders routed to NYSEArca would assist the Exchange in recouping costs incurred in executing orders for its members in penny classes at NYSEArca. The Exchange believes that this fee would enable it to recoup the majority of costs associated with routing customer orders on behalf of its members.

---

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

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.

As an initial matter, all members of the Exchange will be subject to the same fee for routing customer orders to NYSE Arca for execution.

The Exchange's system will continue to route customer orders to better-priced away markets, including NYSEArca.<sup>10</sup> The proposed fees are intended to recoup the unusually high cost of such routing, and will not have the effect of burdening competition. Currently, when the Exchange properly routes customer orders to NYSEArca, the burden falls on the Exchange to pay the high transaction and clearing costs associated therewith, while its competitor benefits wholly from the Exchange ensuring that it will not trade through its competitors' markets. As stated above, the costs associated with routing customer orders to NYSEArca for execution are burdensome. The proposed fee change is intended to remove that burden from the Exchange, will not have any effect at all on the Exchange's system in properly routing customer orders to all markets disseminating the NBBO, including NYSEArca, and thus is not unfairly discriminatory.

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.

---

<sup>10</sup> For a detailed description of the Exchange's Phlx XL II system, see Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009)(SR-Phlx-2009-32).

### 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 Act<sup>11</sup> and paragraph (f)(2) of Rule 19b-4<sup>12</sup> 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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2010-01 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-2010-01. 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

---

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

of the submission,<sup>13</sup> 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 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-2010-01 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.<sup>14</sup>

Florence E. Harmon  
Deputy Secretary

---

<sup>13</sup> The text of the proposed rule change is available on the Commission's Web site at [www.sec.gov](http://www.sec.gov).

<sup>14</sup> 17 CFR 200.30-3(a)(12).