

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62069; File No. SR-Phlx-2010-66)

May 10, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Equity Option 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 April 30, 2010, NASDAQ OMX PHLX, Inc. (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“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 amend the Exchange’s Fee Schedule applicable to equity options fees by: (i) adopting an options transaction charge and options surcharge for non-electronically delivered orders for options transactions by Registered Options Traders (on-floor) and Specialists; (ii) amending the current options transaction charge for Registered Options Traders (on-floor) and Specialists and applying that charge and the options surcharge to electronically delivered orders; and (iii) creating an options transaction charge for option orders

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

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

in the penny pilot program (“Penny Pilot”)<sup>3</sup> that are electronically delivered. The Exchange also proposes making a technical clarification. The text of the proposed rule change is available on Phlx’s Web site at [www.nasdaqtrader.com](http://www.nasdaqtrader.com), on the Commission’s Web site at [www.sec.gov](http://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 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 amend Category II of the Fee Schedule, Equity Option Fees, to create separate fees for electronically delivered versus non-electronically delivered orders of Registered Options Traders (on-floor) and Specialists. A transaction

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<sup>3</sup> The Penny Pilot was established in January 2007; and in October 2009, it was expanded and extended through December 31, 2010. See Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006-74) (approval order establishing Penny Pilot); 60873 (October 23, 2009), 74 FR 56675 (November 2, 2009) (SR-Phlx-2009-91) (expanding and extending Penny Pilot); 60966 (November 9, 2009), 74 FR 59331 (November 17, 2009) (SR-Phlx-2009-94) (adding seventy-five classes to Penny Pilot); and 61454 (February 1, 2010), 75 FR 6233 (February 8, 2010) (SR-Phlx-2010-12) (adding seventy-five options classes to the Penny Pilot). See also Exchange Rule 1034.

resulting from an order that was electronically delivered<sup>4</sup> utilizes Phlx XL II.<sup>5</sup> A transaction resulting from an order that is non-electronically-delivered is represented on the trading floor by a floor broker.<sup>6</sup> All orders will be either electronically or non-electronically delivered.

The Exchange currently categorizes its broker-dealer fees by electronically and non-electronically delivered orders.<sup>7</sup> The Exchange proposes to create these new fee categories for Registered Options Traders and Specialists orders. The Exchange is creating these new fee categories in further recognition of the distinction between the floor order entry model and the electronic model and also in response to competition along the same lines.

#### Electronically Delivered

The Exchange is proposing to adopt fees for electronically delivered orders. The Exchange proposes to amend its current equity options fees to Registered Options Traders (on-floor) and Specialists by titling those fees as “Electronically Delivered.”

The Exchange currently assesses two types of equity options transaction charges on Registered Options Traders (on-floor) and Specialists: (i) a \$.22 per contract options transaction charge; and (ii) a \$.15 per contract options surcharge for executions in options on the Russell 2000® Index (the "Full Value Russell Index" or “RUT”), options on the one-tenth value Russell

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<sup>4</sup> Electronically delivered orders do not include orders delivered through the Floor Broker Management System.

<sup>5</sup> See Exchange Rules 1014 and 1080.

<sup>6</sup> See Exchange Rule 1063.

<sup>7</sup> Specifically, broker-dealers are assessed an options transaction charge of \$.45 per contract fee [sic] for electronically delivered orders and an options transaction charge of \$.25 per contract for non-electronically delivered orders.

2000® Index<sup>8</sup> (the "Reduced Value Russell Index" or "RMN"), options on the Nasdaq 100 Index<sup>9</sup> traded under the symbol NDX ("NDX") and options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX ("MNX"). The Exchange proposes increasing its current \$.22 per contract options transaction charge to \$.23 per contract and amending the title of this fee to "Options Transaction Charge (non-Penny Pilot)" to indicate this fee would be applicable to Registered Options Traders (on-floor) and Specialists for a transaction resulting from an order that was electronically delivered and not in the Penny Pilot. In addition, the Exchange proposes to adopt a \$.22 transaction charge for Penny Pilot options classes for transactions resulting from an order that was electronically delivered. The Exchange does not propose to amend the options surcharge for RUT, RMN, MNX or NDX for electronically delivered orders.

#### Non-Electronically Delivered

The Exchange is proposing to adopt fees for non-electronically delivered orders. The Exchange proposes to adopt a transaction charge for Registered Options Traders (on-floor) and

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<sup>8</sup> Russell 2000® is a trademark and service mark of the Frank Russell Company, used under license. Neither Frank Russell Company's publication of the Russell Indexes nor its licensing of its trademarks for use in connection with securities or other financial products derived from a Russell Index in any way suggests or implies a representation or opinion by Frank Russell Company as to the attractiveness of investment in any securities or other financial products based upon or derived from any Russell Index. Frank Russell Company is not the issuer of any such securities or other financial products and makes no express or implied warranties of merchantability or fitness for any particular purpose with respect to any Russell Index or any data included or reflected therein, nor as to results to be obtained by any person or any entity from the use of the Russell Index or any data included or reflected therein.

<sup>9</sup> NASDAQ(R), NASDAQ-100(R) and NASDAQ-100 Index(R) are registered trademarks of The NASDAQ OMX Group, Inc. (which with its affiliates are the "Corporations") and are licensed for use by Phlx in connection with the trading of options products based on the NASDAQ-100 Index(R). The options products have not been passed on by the Corporations as to their legality or suitability. The options products are not issued, endorsed, sold, or promoted by the Corporations. The Corporations make no warranties and bear no liability with respect to the options products.

Specialists (in Category II, Equity Option Fees) applicable to non-electronically delivered orders and titling those fees “Non-Electronically Delivered.” The Exchange proposes to assess a \$.25 per contract transaction charge on Registered Options Traders (on-floor) and Specialists for transactions resulting from an order that was non-electronically delivered. The Exchange also proposes to continue to assess Registered Options Traders (on-floor) and Specialists an options surcharge in RUT, RMN, MNX and NDX of .15 per contract for orders that are non-electronically delivered.

Currently, the equity options transaction charge applicable to Registered Options Traders (on-floor) and Specialists is subject to a \$650,000 monthly Cap (“Monthly Cap”). The options transaction charges for electronically delivered Penny and non-Penny Pilot options classes applicable to Registered Options Traders (on-floor) and Specialists are proposed to be subject to the Monthly Cap. The non-electronically delivered options transaction charge will also be subject to the Monthly Cap.

Finally, the Exchange proposes to amend the Professional equity options fee by adding the words “per contract” after the \$.20 fee. These words were inadvertently omitted from a previous filing.<sup>10</sup>

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 May 3, 2010.

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<sup>10</sup> See Securities Exchange Act Release No. 61905 (April 14, 2010), 75 FR 20871 (April 21, 2010) (SR-Phlx-2010-55).

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>11</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>12</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that its proposal to categorize orders as electronically and non-electronically delivered is consistent with the statute. First, it is consistent with our long-standing Fee Schedule which has been amended from time to time. The Exchange has categorized its broker-dealer transaction charges in a similar manner since 2006.<sup>13</sup> The Exchange has two different methods of handling orders. The non-electronic model is one that is represented on the trading floor by a floor broker. An electronic order is an entirely different model. Those orders are entered by members who are connected to the Phlx XL II system. These members are assessed different rates because the Exchange operates two different models, a floor-based model and an electronic model, which both utilize different processes. The Exchange believes that it is appropriate to charge each model differently.

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<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4).

<sup>13</sup> See Securities Exchange Act Release No. 54423 (September 11, 2006), 71 FR 54701 (September 18, 2006) (SR-Phlx-2006-54) (originally AUTOM-delivered and non-AUTOM-delivered, the Exchange amended its electronic/non-electronic distinction for broker-dealer to create a single fee of \$.25 for non-AUTOM-delivered orders (now known as Non-Electronically-Delivered) and a \$.45 transaction fee for AUTOM-delivered orders (now known as Electronically Delivered orders). AUTOM was the Exchange's electronic delivery, routing, execution and reporting system which provided [sic]

Second, NYSE Arca, Inc. (“NYSE Arca”) and The Chicago Board of Options Exchange, Inc. (“CBOE”) also distinguish between electronically and non-electronically delivered orders. Specifically, NYSE Arca categorizes its transaction fees as either electronic or manual for its broker dealer, customer and firm order types.<sup>14</sup> NYSE Arca assesses broker dealers, customers and firm proprietary transactions a different rate for manual and electronic orders. CBOE assesses broker-dealers who enter manual orders a different rate as compared to broker-dealers who enter electronic orders.<sup>15</sup> CBOE assesses electronically executed broker-dealer orders a transaction charge of \$.45 and manually executed broker-dealer order a transaction charge of \$.25.

The Exchange believes that assessing different transaction fees for electronic and non-electronic orders is reasonable because the method of handling differs and because the fees are consistent with other fees assessed by the Exchange. The Exchange also believes that these fees are equitably allocated because the fees are uniformly applied to all similarly situated ROTs and Specialists. While the Exchange is assessing different fees for orders that are electronically delivered and non-electronically delivered, for ROTs and Specialists, these charges are subject to the Monthly Cap<sup>16</sup> which is the same for both methods of delivery. As previously cited, other exchanges distinguish between delivery methods for certain market participants and charge different fees depending on the method of delivery. This type of distinction is not novel and has long existed within the industry. While the Exchange may be the first to make this distinction

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<sup>14</sup> See NYSE Arca’s Fee Schedule. See also Securities Exchange Act Release Nos. 60379 (July 23, 2009), 74 FR 38244, (July 31, 2009) (SR-NYSEARca-2009-62); 61894 (April 13, 2010), 75 FR 20413 (April 19, 2010) (SR-NYSEArca-2010-24).

<sup>15</sup> See CBOE’s Fees Schedule. See also Securities Exchange Act Release No. 55677 (April 27, 2007), 72 FR 26430 (May 9, 2007) (SR-Phlx-2007-32).

<sup>16</sup> The Monthly Cap is currently \$650,000.

with respect to ROTs and Specialists, other exchanges have distinguished between delivery methods as to certain market participants and not others and charged different rates depending on the delivery method.

In addition, the Exchange believes that assessing Registered Options Traders (on-floor) and Specialists a \$.22 per contract transaction charge for options that are trading in the Penny Pilot and increasing the current \$.22 per contract options transaction charge to \$.23 per contract for non-Penny Pilot options orders that are electronically delivered is consistent with other fees in the Fee Schedule. The Exchange currently makes a similar distinction in its Payment for Order Flow Fees<sup>17</sup> and also in its Routing Fees.<sup>18</sup>

Other exchanges also make a similar distinction in pricing equity options. Both NYSE Arca and CBOE distinguish between Penny and Non-Penny Pilot fees and assess different rates for Penny and Non-Penny Pilot options depending on whether the orders were electronically or non-electronically delivered. NYSE Arca distinguishes pricing in Penny Pilot options from its pricing for Standard Executions (Standard Executions include all executions in non-Penny Pilot issues and all manual executions in Penny)<sup>19</sup> Pilot issues.<sup>20</sup> Likewise CBOE assesses a Marketing Fee that differentiates Penny Pilot Classes from non Penny Pilot Classes.<sup>21</sup>

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<sup>17</sup> See Securities Exchange Act Release Act No. 59841 (April 29, 2009), 74 FR 21035 (May 6, 2009) (SR-Phlx-2009-38).

<sup>18</sup> See Securities Exchange Act Release Act No. 61664 (March 5, 2010), 75 FR 11957 (March 12, 2010) (SR-Phlx-2010-32).

<sup>19</sup> See NYSE Arca's Fee Schedule.

<sup>20</sup> See NYSE Arca's Fee Schedule. See also Securities Exchange Act Release Nos. 60379 (July 23, 2009), 74 FR 38244, (July 31, 2009) (SR-NYSEArca-2009-62); 61894 (April 13, 2010), 75 FR 20413 (April 19, 2010) (SR-NYSEArca-2010-24).

<sup>21</sup> See CBOE's Fees Schedule. See also Securities Exchange Act Release No. 57094 (January 3, 2008), 73 FR 1653 (January 9, 2008) (SR-CBOE-2007-154).



The Exchange believes that assessing options transaction charges for Penny Pilot and Non-Penny Pilot options with different rates is consistent with fees assessed in the options industry. The proposed rule change is equitable and reasonable because it applies uniformly to all similarly situated ROTs and Specialists. Additionally the different rates that are assessed for electronically delivered Penny and Non-Penny Pilot transactions and non-electronically delivered Penny and Non-Penny Pilot transactions are equitable because the rates are uniformly applied to similarly situated users. The fees are reasonable because they are within the range of fees assessed by the Exchange.

The degree of difference between the rates charged for different order types is the result of competitive forces in the marketplace and reflects certain competitive differences amongst market participants. The Exchange believes that the fees it charges for equity options remain competitive with fees charged by other venues and therefore continue to be reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than competing venues.

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.

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) of the Act<sup>22</sup>

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<sup>22</sup> 15 U.S.C. 78s(b)(3).

and Rule 19b-4(f)(2)<sup>23</sup> thereunder. At any time within 60 days of the filing of such 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-2010-66 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-2010-66. 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

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<sup>23</sup> 17 CFR 240.19b-4(f)(2).

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 will also 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-2010-66 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.<sup>24</sup>

Elizabeth M. Murphy  
Secretary

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<sup>24</sup> 17 CFR 200.30-3(a)(12).