

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59393; File No. SR-PHLX-2009-12)

February 11, 2009

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by NASDAQ OMX PHLX, Inc. to Amend the Exchange's Fee Schedule

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 February 2, 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. On February 9, 2009, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 ("Fee Schedule") to: (i) eliminate the Firm Proprietary Facilitation category of fees from the Equity Options Fees, Index Options Fees and U.S. Dollar-Settled Foreign Currency Option Fees; (ii) redefine what constitutes a firm proprietary order; and (iii) increase the Firm-Related Equity Option and Index Option Cap to \$75,000 and exclude JBO participants (as defined below).

The Exchange has designated these changes to be operative for transactions settling on or after February 2, 2009.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

The text of the proposed rule change is available on the Exchange's Website 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 Exchange proposes to eliminate the Firm Proprietary Facilitation³ category from the Fee Schedule in order to create a single category of Firm Proprietary Fees.⁴ It currently applies to Member Organizations for orders in a proprietary account of a Member or non-member broker-dealer that derives more than 35% of its annual, gross revenues from commissions and principal transactions with customers ("35% customer revenue threshold"). The result of eliminating the Firm Proprietary Facilitation category is that all Firm Proprietary transactions will be charged \$.24 per contract, which results in a \$.10 increase over the current Firm Proprietary Facilitation Option Transaction Charges, as the current charge for those types of

³ A facilitation occurs when a floor broker holds an options order for a public customer and a contra-side order for the same option series and, after providing an opportunity for all persons in the trading crowd to participate in the transaction, executes both orders as a facilitation cross. See Exchange Rule 1064.

⁴ The Exchange currently assesses the applicable Firm Proprietary and Firm Proprietary Facilitation transaction charges on Phlx members.

transaction is currently \$.14. This increase should raise revenue for the Exchange, and, at the same time, simplify the fees applicable to firm proprietary transactions.

In addition, the Exchange proposes to redefine what constitutes a firm proprietary order. The Exchange proposes to delete the 35% customer revenue threshold language from the current language in endnote 5 on the Fee Schedule and replace it with the following language: “Firm Proprietary Options Transaction Charge applies to firm proprietary orders (“F” account type) in all products.” The purpose of the 35% threshold was to limit the fees to a certain category of firm trade, namely Firm Proprietary trades. Now, all orders with “F” account types are subject to firm proprietary charges, which is easier to administer from a billing perspective. As a result, the requirement for member organizations to verify the amount to the Exchange regarding the threshold is no longer necessary.

The Exchange also proposes to increase the Firm-Related Equity Option and Index Option Cap (“Monthly Firm Cap”)⁵, which is set at \$65,000 per month per firm, to \$75,000 per month per firm. This is intended to raise additional revenue for the Exchange and create an incentive for Member Organizations to continue to send order flow to the Exchange. This Monthly Firm Cap would now apply to all Firm Proprietary orders that are (“F” account type) in all products, except for orders of joint back-office (“JBO”) participants.⁶ Accordingly, JBO participant orders may employ the F-account type and

⁵ See e.g. Securities Exchange Act Release Nos. 54981 (December 20, 2006), 71 FR 78251 (December 28, 2006); 53287 (February 14, 2006), 71 FR 9186 (February 22, 2006); and 56437 (September 13, 2007), 72 FR 53616 (September 19, 2007) (SR-Phlx-2007-65).

⁶ A JBO participant is a Member, Member Organization or non-member organization that maintains a JBO arrangement with a clearing broker-dealer (“JBO Broker”) subject to the requirements of Regulation T Section 220.7 of the Federal Reserve System. See also Exchange Rule 703. For purpose of the Monthly Firm Cap, JBO participant orders are excluded because the Exchange is unable to differentiate orders of a JBO participant from

qualify for the firm proprietary charge, but would not be eligible for the Monthly Firm Cap.⁷

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act⁸ in general, and furthers the objectives of Section 6(b)(4) of the Act⁹ in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. Eliminating the Firm Proprietary Facilitation category is equitable and reasonable, because it applies to all such orders and results in a reasonable increase over the current charge applicable to firm proprietary facilitation trades. The Exchange also believes that the Monthly Firm Cap is equitable, even though it is not available to JBO participants, because the Exchange intends to compete for non-JBO firm business with the CBOE, who excludes JBO participants from its sliding scale, for the same reason as the Exchange, which is that each is unable to identify these orders from a billing standpoint to bill them correctly.¹⁰

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.

orders of its JBO Broker and therefore is unable to aggregate the JBO participant's orders.

⁷ This proposal is similar to a proposed rule change filed by the Chicago Board Options Exchange, Incorporated ("CBOE"). CBOE adopted a Firm Proprietary Sliding Scale based on the number of contracts the firm trades in a month. The sliding scale applies to firm proprietary orders in all products, except for orders of joint back-office ("JBO") participants. See Securities Exchange Act Release No. 57191 (January 24, 2008), 73 FR 5611 (January 30, 2008) (SR-CBOE-2007-150).

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ See supra notes 6 and 7.

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 Act¹¹ and paragraph (f)(2) of Rule 19b-4¹² 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.¹³

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. Please include File Number SR-PHLX-2009-12 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.

¹¹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹² 17 CFR 240.19b-4(f)(2).

¹³ For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under Section 19(b)(3)(C) of the Act, the Commission considers the period to commence on February 9, 2009, the date on which the Exchange submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

All submissions should refer to File Number SR-PHLX-2009-12. 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 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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-2009-12 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.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).