

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59537; File No. SR-Phlx-2009-19)

March 9, 2009

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

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 25, 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 March 3, 2009, the Exchange filed Amendment No. 1 to the proposal.³ 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 its schedule of fees to remove certain subsidies that are available to qualifying Phlx member organizations that offer to customers automated order routing systems and electronic market access to U.S. options markets ("Market Access Providers" or "MAPs"). Specifically, the Exchange proposes to amend the Market Access Provider Subsidy section of its fee schedule by deleting the following subsidies: (i) a \$0.01 per contract incentive above the previously established per-contract

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Amendment No. 1 clarified that if there is any change to the status of the Monthly MAP Volume Bonus and/or the MAP Marketing Subsidy, or if the Exchange negotiates any MAP Agreement extension, the Exchange will file a proposed rule change with the Commission.

subsidy rate upon the renewal of a MAP Agreement; (ii) a \$50,000 per month bonus payment (the “Monthly MAP Volume Bonus”) for each month in which the number of contracts routed to the Exchange exceeds a defined number of contracts; and (iii) a \$25,000 per month marketing subsidy (the “MAP Marketing Subsidy”), as defined below.

The proposed rule change is filed for immediate effectiveness and will be effective for trades settling on or after March 1, 2009.

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 purpose of the proposed rule change is to manage Exchange expenses by removing certain subsidies from the Exchange’s fee schedule.

Market Access Provider

In August, 2007, the Exchange amended its fee schedule to provide a per contract Subsidy (the “Subsidy”) for certain Exchange members known as MAPs.⁴ A MAP is an Exchange member organization that offers to customers automated order routing systems and electronic market access to U.S. options markets. The Exchange pays a per-contract MAP Subsidy to any Exchange member organization that qualifies as a MAP (an “Eligible MAP”)⁵ who elects to participate by submitting any application(s) and/or form(s) required by the Exchange, and complying with other conditions.

A MAP must enter into and maintain an Agreement (a “MAP Agreement”) with the Exchange to function as an Eligible MAP and be in compliance with all terms thereof.

MAP Subsidy

The Exchange currently pays a Subsidy to Eligible MAPs on a monthly basis, of \$0.10 (the “Subsidy Rate”) for each Eligible Contract (as defined below) executed in the immediately preceding calendar month above the particular Eligible MAP’s Baseline Order Flow (as defined below).

“Eligible Contracts” means contracts that result from the execution on the Exchange of: (1) equity option orders (other than crosses) sent electronically to an Eligible MAP (and routed to the Exchange electronically by the Eligible MAP) by its customers; and (2) MAP Routing Orders (other than crosses) sent electronically by the Eligible MAP.

⁴ See Securities Exchange Act Release No. 56274 (August 16, 2007), 72 FR 48720 (August 24, 2007) (SR-Phlx-2007-54).

⁵ The term “Eligible MAP” is defined in current footnote 5(b) of the Market Access Provider Subsidy section of the Exchange’s fee schedule.

“Baseline Order Flow” for an Eligible MAP means the higher of: (1) 500,000 contracts; or (2) the average contracts per month, calculated for the 3-month period immediately preceding the Eligible MAP entering into an agreement with the Exchange , that resulted from the execution on the Exchange of equity option orders (other than crosses) routed to Phlx electronically by such Eligible MAP.

In addition, the Exchange pays an additional \$0.01 per contract above the previously established per-contract Subsidy Rate upon the renewal of a MAP Agreement.⁶

The Exchange proposes to delete the additional \$0.01 per contract payment provision respecting extended MAP Agreements from the Market Access Provider Subsidy section of its fee schedule. The Exchange believes that it would benefit both parties to negotiate the terms of any MAP Agreement extension on a case-by-case basis, rather than having fixed terms already in place. In that way, the parties can evaluate their current business situation and negotiate an extension, if any, that is reasonable and appropriate under then-existing conditions existing within each party, and under then-existing market and economic situations as a whole.⁷

Monthly MAP Volume Bonus

⁶ A MAP Agreement is typically in effect for a period of one year, and the Exchange may, by giving written notice to the Eligible MAP, elect to extend it for additional one year terms, in which case the per contract Subsidy payable during any extension period for that Eligible MAP is \$0.01 per contract greater than the Subsidy Rate then in effect at the date of renewal. See supra note 4.

⁷ In the event that there is any change to the status of the Monthly MAP Volume Bonus and/or the MAP Marketing Subsidy, or if the Exchange negotiates any MAP Agreement extension, the Exchange will file a proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act and Rule 19b-4(f)(2) thereunder.

The Exchange pays each Eligible MAP \$50,000 per month (the “Volume Bonus”) for each month in which the Eligible Contracts of such Eligible MAP in the immediately preceding calendar month exceed the higher of: (1) 1,500,000; or (2) three times the Baseline Order Flow of such Eligible MAP. The Volume Bonus is in addition to the amount for any Subsidy that is payable.

The Exchange proposes to delete the monthly MAP Volume Bonus from the Market Access Provider Subsidy section of its fee schedule in order to be in a better position to manage its allocation of costs.

Marketing Subsidy

Currently, the Exchange pays a MAP Marketing Subsidy of \$25,000.00 per month, for a maximum of three months (totaling \$75,000.00) to Eligible MAPs, in addition to the per-contract Subsidy.

The MAP Marketing Subsidy is intended to be used by the Eligible MAP to: (i) promote the Subsidy program; (ii) provide technical assistance and information to its customers on the equity options order routing functionality that pertains to the Subsidy program; and (iii) analyze the volume based usage of such order routing functionality by the Eligible MAP and its customers, in each case with a view towards the successful launch of the Eligible MAP’s participation in the Subsidy for Eligible MAPs.

The Exchange proposes to delete the Marketing Subsidy from the Market Access Provider Subsidy section of its fee schedule. The Exchange intends to attract new participants into the MAP program using more of a variable cost rather than a fixed cost.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act⁸ in general, and furthers the objectives of Sections 6(b)(4) of the Act⁹ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among Exchange members by deleting standardized volume bonuses and marketing subsidies, thus enabling the Exchange to manage its costs relating to MAPs.

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)(A)(ii) of the Act¹⁰ and paragraph (f)(2) of Rule 19b-4¹¹ 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

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

¹¹ 17 CFR 240.19b-4(f)(2).

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-2009-19 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-2009-19. 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 on official business days between the hours of 10:00 a.m. and 3:00 p.m. 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 Number SR-Phlx-2009-19 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.¹²

Florence E. Harmon
Deputy Secretary

¹² 17 CFR 200.30-3(a)(12).