

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58772; File No. SR-Phlx-2008-72)

October 10, 2008

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the NASDAQ OMX PHLX, Inc. Relating to a Surcharge Fee

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 October 1, 2008, 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 October 7, 2008, the Exchange filed Amendment No. 1 to the proposal.<sup>3</sup> 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, pursuant to Section 19(b)(1) of the Act<sup>4</sup> and Rule 19b-4 thereunder,<sup>5</sup> proposes to assess a surcharge fee<sup>6</sup> of \$0.10 per contract side on

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

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

<sup>3</sup> Amendment No. 1 fixed typographical errors in the rule text of the original filing that were not being changed in this proposed rule change to match the current rule text.

<sup>4</sup> 15 U.S.C. 78s(b)(1).

<sup>5</sup> 17 CFR 240.19b-4.

<sup>6</sup> The Exchange now proposes to refer to "license fees" as "surcharge fees" on its fee schedule.

firm/proprietary, firm/proprietary facilitation, Registered Option Trader (on-floor), specialist, and broker/dealer (AUTOM and non-AUTOM delivered) equity option transactions in the following products: (1) options on the one-tenth of the value of the Nasdaq 100 Index (the "Mini Nasdaq 100 Index" or "MNX"); (2) options on the full value of the Nasdaq 100 Index<sup>7</sup> (the "Full-size Nasdaq 100 Index" or "NDX"); (3) options on the Russell 2000® Index (the "Full Value Russell Index" or "RUT"), and (4) options on the one-tenth value Russell 2000® Index<sup>8</sup> (the "Reduced Value Russell Index" or "RMN").<sup>9</sup> A surcharge fee will not apply to customer transactions.<sup>10</sup>

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<sup>9</sup> Currently, a \$0.10 per contract side license fee is assessed on MNX and NDX products and a \$0.15 per contract side surcharge fee is assessed on RUT and RMN products after the \$60,000 "Firm Related" Equity Option and Index Option Cap fee cap is reached. (Equity option and index option "firm" transactions are comprised of equity option firm/proprietary comparison transactions, equity option firm/proprietary transactions, equity option firm/proprietary facilitation transactions, index option firm (proprietary and customer executions) comparison transactions, index option firm/proprietary transactions and index option firm/proprietary facilitation transaction charges (collectively "firm-related charges")). See e.g. Securities Exchange Act Release Nos. 54981 (December 20, 2006), 71 FR 78251 (December 28, 2006); and 53287 (February 14, 2006), 71 FR 9186 (February 22, 2006).

The surcharge fees would be assessed on the applicable equity option transactions, regardless of whether any fee caps relating to comparison or transaction charges are imposed.

The Exchange also proposes to credit equity option specialist units any applicable surcharge fee that is assessed in connection with customer orders that are delivered to the limit order book via Phlx XL<sup>11</sup> or via the Exchange's Options Floor Broker Management System ("FBMS")<sup>12</sup> and subsequently executed via the Intermarket Option Linkage<sup>13</sup> as a Principal Acting as Agent ("P/A") order.<sup>14</sup>

In addition, the Exchange proposes to delete certain license fees from its fee schedule.

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<sup>10</sup> Currently the Exchange does not charge equity option transaction charges for customer executions, but charges a \$0.12 per contract equity option transaction charge for customer executions in MNX and NDX.

<sup>11</sup> Phlx XL, formerly referred to as AUTOM, is the Exchange's electronic trading platform. See Exchange Rule 1080.

<sup>12</sup> FBMS is designed to enable Floor Brokers and/or their employees to enter, route and report transactions stemming from options orders received on the Exchange. FBMS also is designed to establish an electronic audit trail for options orders represented and executed by Floor Brokers on the Exchange, such that the audit trail provides an accurate, time-sequenced record of electronic and other orders, quotations and transactions on the Exchange, beginning with the receipt of an order by the Exchange, and further documenting the life of the order through the process of execution, partial execution, or cancellation of that order. See Exchange Rule 1080, Commentary .06.

<sup>13</sup> Linkage is governed by the Options Linkage Authority under the conditions set forth under the Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (the "Plan") approved by the Securities and Exchange Commission ("SEC"). The registered U.S. options markets are linked together on a real-time basis through a network capable of transporting orders and messages to and from each market.

<sup>14</sup> A P/A order is an order for the principal account of a specialist (or equivalent entity on another participant exchange that is authorized to represent public customer orders), reflecting the terms of a related unexecuted public customer order for which the specialist is acting as agent. See Linkage Plan Section 2(16)(a) and Exchange Rule 1083.

The text of the proposed rule change is available on the Exchange's Website at [http://www.phlx.com/regulatory/reg\\_rulefilings.aspx](http://www.phlx.com/regulatory/reg_rulefilings.aspx).

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 assessing a surcharge fee of \$0.10 per contract side as set forth in this proposal is to remain competitive<sup>15</sup> and to help offset the costs associated with the license fees that are incurred in connection with the trading of the RUT, RMN, MNX and NDX products. Due to competitive pressures in the industry, the Exchange proposes to continue excluding equity option customer transactions from the surcharge fee.

The surcharge fees would be assessed on the applicable equity option transactions,<sup>16</sup> regardless of whether any fee caps relating to comparison or transaction

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<sup>15</sup> See e.g. Securities Exchange Act Release No. 57128 (January 10, 2008), 73 FR 2969 (January 16, 2008).

<sup>16</sup> Although they are index options, RUT, RMN, MNX and NDX are assessed fees pursuant to the Exchange's equity option charges fee schedule. See the Exchange's Summary of Equity Option, and MNX, NDX, RUT and RMN Charges fee schedule and Securities Exchange Act Release Nos. 58049 (June 27, 2008), 73 FR 38286 (July 3, 2008); and 55473 (March 14, 2007), 72 FR 13338 (March 21, 2007).

charges are imposed.<sup>17</sup> The MNX, NDX, RUT and RMN surcharge fees that are assessed would not count towards the calculation of the \$60,000 “Firm Related” Equity Option and Index Option cap. Additionally, consistent with current practice, the proposed \$0.10 per contract surcharge fees would not be subject to the \$1,000 daily or \$25,000 monthly dividend, merger and short stock interest strategies transaction caps, nor would they count towards reaching the daily or monthly caps.<sup>18</sup>

The purpose of providing a \$0.10 per contract surcharge fee credit to equity option specialist units is to help alleviate the potential economic burden of the surcharge fee imposed on Exchange specialist units in connection with routing Linkage charges, as described above.<sup>19</sup> The Exchange believes that it is appropriate to assist specialist units in offsetting some of the costs that they incur in routing orders to other options exchanges in order to obtain the National Best Bid and Offer.

Additionally, the Exchange is deleting the current license fee on the KSX, KIX and HAI products because it no longer offers these products for trading. Additionally, the

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<sup>17</sup> For example, the surcharge fee of \$0.10 per contract side would be assessed on the MNX, NDX, RUT and RMN products, regardless of whether: (1) the ROT (on-floor) and specialist 4.5 million contract monthly cap; or (2) the 14,000 daily contract cap ROT transaction and comparison charges and specialist transaction charges when contra-party to non-AUTOM delivered customer orders is reached. The surcharge fee of \$0.10 per contract side would also be assessed regardless of whether the \$60,000 “Firm Related” Equity Option and Index Option Cap fee is reached.

<sup>18</sup> As a result of this proposal, the reference to the \$0.05 per contract side license fee for dividend strategies and short stock interest strategies would be deleted as it is no longer necessary because a \$0.10 per contract side surcharge fee will apply and appear separately on the fee schedule.

<sup>19</sup> This is similar to an option transaction charge credit given to specialist units in connection with Linkage orders. See Securities Exchange Act Release No. 57434 (March 5, 2008), 73 FR 13269 (March 12, 2008).

Exchange is deleting the current license fee on the BKK KRX, MFX products, which may, in turn, help to promote trading in these products.

## 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>20</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>21</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange believes that it is equitable for members who trade these products to pay the surcharge fee as the Exchange pays a license fee to trade these products. Additionally, the Exchange, due to competitive pressures in the industry, believes that it is equitable to continue to exclude equity option customer transactions from the surcharge fee. The Exchange also believes that it is equitable to provide a surcharge fee credit to assist specialist units in offsetting some of the costs that they incur in routing orders to other options exchanges in order to obtain the National Best Bid and Offer.

### 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.

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<sup>20</sup> 15 U.S.C. 78f(b).

<sup>21</sup> 15 U.S.C. 78f(b)(4).

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>22</sup> and paragraph (f)(2) of Rule 19b-4<sup>23</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.<sup>24</sup>

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-2008-72 on the subject line.

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

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

<sup>24</sup> 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 October 7, 2008, the date on which Phlx submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2008-72. 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-2008-72 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>25</sup>

Florence E. Harmon  
Acting Secretary

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<sup>25</sup> 17 CFR 200.30-3(a)(12).