

the FBI for the purpose of assuring correct and complete information. Written confirmation by the individual of receipt of this notification must be maintained by the Licensee for a period of one (1) year from the date of the notification.

If, after reviewing the record, an individual believes that it is incorrect or incomplete in any respect and wishes to change, correct, or update the alleged deficiency, or to explain any matter in the record, the individual may initiate challenge procedures. These procedures include either direct application by the individual challenging the record to the agency (*i.e.*, law enforcement agency) that contributed the questioned information, or direct challenge as to the accuracy or completeness of any entry on the criminal history record to the Assistant Director, Federal Bureau of Investigation Identification Division, Washington, DC 20537-9700 (as set forth in 28 CFR 16.30 through 16.34). In the latter case, the FBI forwards the challenge to the agency that submitted the data and requests that agency to verify or correct the challenged entry. Upon receipt of an Official communication directly from the agency that contributed the original information, the FBI Identification Division makes any changes necessary in accordance with the information supplied by that agency. The Licensee must provide at least ten (10) days for an individual to initiate an action challenging the results of an FBI identification and criminal history records check after the record is made available for his/her review. The Licensee may make a final unescorted access to certain radioactive material determination based upon the criminal history record only upon receipt of the FBI's ultimate confirmation or correction of the record. Upon a final adverse determination on unescorted access to certain radioactive material, the Licensee shall provide the individual its documented basis for denial. Unescorted access to certain radioactive material shall not be granted to an individual during the review process.

#### *E. Protection of Information*

1. Each Licensee who obtains a criminal history record on an individual pursuant to this Order shall establish and maintain a system of files and procedures for protecting the record and the personal information from unauthorized disclosure.

2. The Licensee may not disclose the record or personal information collected and maintained to persons other than the subject individual, his/her

representative, or to those who have a need to access the information in performing assigned duties in the process of determining whether to verify the individual for unescorted access to certain radioactive material. No individual authorized to have access to the information may re-disseminate the information to any other individual who does not have a need-to-know.

3. The personal information obtained on an individual from a criminal history record check may be transferred to another Licensee if the Licensee holding the criminal history record check receives the individual's written request to re-disseminate the information contained in his/her file, and the gaining Licensee verifies information such as the individual's name, date of birth, social security number, sex, and other applicable physical characteristics for identification purposes.

4. The Licensee shall make criminal history records, obtained under this section, available for examination by an authorized representative of the NRC to determine compliance with the regulations and laws.

5. The Licensee shall retain all fingerprints and criminal history records from the FBI, or a copy if the individual's file has been transferred:

a. For three (3) years after the individual no longer requires unescorted access, or

b. For three (3) years after unescorted access to certain radioactive material was denied.

After the required three (3) year period, these documents shall be destroyed by a method that will prevent reconstruction of the information in whole or in part.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61862; File No. SR-Phlx-2010-43]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Quote Spread Parameters and Batching of Violations

April 7, 2010.

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 March 26, 2010, NASDAQ OMX PHLX, Inc.

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

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

("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, pursuant to Section 19(b)(1) of the Act<sup>3</sup> and Rule 19b-4 thereunder,<sup>4</sup> proposes to amend Options Floor Procedure Advice ("Advice") F-6, Option Quote Parameters, to copy from Rule 1014(c)(i)(A) a provision relating to \$5 wide bid-ask differentials for electronic quotes in equity, index and foreign currency options after the opening, which was inadvertently omitted from Advice F-6. The Exchange also proposes to change the fine schedule to add three warning letters, implement the fine schedule on a one year running calendar basis, and permit the "batching" of violations of both Advice F-6 and the corresponding Rule 1014(c)(i)(A), pursuant to Rules 960 and 970, for purposes of determining what is an occurrence.

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 correct Advice F-6 and update it in order to reflect the current

<sup>3</sup> 15 U.S.C. 78s(b)(1).

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

trading environment, as well as to permit the batching of certain such violations, as described below. Currently, Rule 1014(c)(i)(A) and its corresponding Advice F-6, which is part of the Exchange's minor rule plan,<sup>5</sup> govern bid/ask differentials, which are also known as quotation or quote spread parameters; quote spread parameters establish the maximum permissible width between the bid and an offer in a particular series.<sup>6</sup> The Exchange proposes to update Advice F-6 to reflect language permitting options quoted electronically to be quoted with a \$5 wide spread after the opening of an option. Those who are quoting verbally (in open outcry) must, throughout the trading day, comply with the regular quote spread parameters that apply on the opening; those quote spread parameters appear in a chart in Advice F-6 and in the text of Rule 1014(c)(i)(A)(1)(a). The language permitting \$5 wide quote spreads after the opening for those quoting electronically was added to Rule 1014(c)(i)(A)(2) but, inadvertently, not to Advice F-6.<sup>7</sup> The Exchange proposes to correct this by inserting this language into Advice F-6.

The Exchange also proposes to change the fine schedule applicable to Advice F-6, which is administered pursuant to the Exchange's minor rule plan. The fine schedule would now consist of warning letters respecting the first three occurrences and three fines thereafter (\$250, \$500 and \$1,000), before the seventh occurrence would result in referral to the Business Conduct Committee ("BCC") for disciplinary action. In addition, the fine schedule would be administered on a one year running calendar basis, such that violations within one year of the last occurrence would count as the next "occurrence," rather than a two year running calendar basis.<sup>8</sup>

<sup>5</sup> The Exchange's minor rule plan consists of options floor procedure advices ("OPFAs" or "Advices") with preset fines, pursuant to Rule 19d-1(c) under the Act. 17 CFR 240.19d-1(c). Most OPFAs have corresponding options rules.

<sup>6</sup> See Rule 1014(c)(i)(A)(1)(a).

<sup>7</sup> See Securities Exchange Act Release No. 50728 (November 23, 2004), 69 FR 69982 (December 1, 2004) (SR-Phlx-2004-74).

<sup>8</sup> A running calendar basis means that violations within a one year period count as the next "occurrence" for purposes of the fine schedule, regardless of the calendar year. A "one-year running calendar basis" means that a violation of an Advice that occurs within one year of the first violation of that Advice will be treated as a second occurrence, and any violation of an Advice within one year of the previous violation of that Advice will be subject to the next highest fine specified in the Advice. See Securities Exchange Act Release No. 41201 (March 22, 1999), 64 FR 15391 (March 31, 1999) (SR-Phlx-99-06). The terms "running" and "rolling" calendar basis are often used interchangeably. See, e.g.,

The Exchange believes that these changes are appropriate because quoting has become entirely electronic; most Streaming Quote Traders ("SQTs") and Remote Streaming Quote Traders ("RSQTs")<sup>9</sup> quote electronically, relying on their firm's quoting technology and computer models to establish an option's price and generate the quote electronically to the Exchange. Historically, when Registered Options Traders ("ROTs")<sup>10</sup> quoting on the Exchange did so verbally (even though they relied on computer models to produce a price), the quote was subject to their own judgment and verbal delivery; sometimes an ROT stated a quote that did not comply with the maximum quote spread parameter, thus triggering a violation under Advice F-6 and a fine under the minor rule plan. In contrast, today, the Exchange believes that computer models do not make the sorts of individualized mistakes that Advice F-6 was intended to deal with; instead, when there is a quoting error today, electronically, it usually affects every series that RSQT or SQT is quoting on that particular technology, generating, potentially, hundreds of instances of quote spread parameter violations. Rather than taking each event to the BCC as a fourth occurrence under the current rule (because there may be hundreds), the Exchange proposes to treat these as a single occurrence by "batching" the violations. This way, the firm would receive a warning letter for the first three events, before being subject to a fine schedule. Of course, the Exchange could in any particular situation deem it to be egregious rather than "minor" and refer it directly to the BCC for disciplinary action. The Exchange believes that this is appropriate because the relevant warning letter or monetary fine should serve as a deterrent against future violations, while recognizing that a single programming error can have a widespread effect.

Currently, Rules 960.2(f)(ii) and 970.01 permit the Exchange to aggregate or "batch" multiple numbers of violations as one single offense, for purposes of initiating disciplinary action under Exchange rules, or imposing fines pursuant to fine schedules set forth in the relevant Options Floor Procedure Advices under the Exchange's minor rule plan.<sup>11</sup>

Securities Exchange Act Release No. 33130 (November 2, 1993), 58 FR 29502 (November 9, 1993) (SR-Phlx-93-28).

<sup>9</sup> See Rule 1014(b)(ii).

<sup>10</sup> See Rule 1014(b)(i).

<sup>11</sup> The Exchange may also refer the matter to the Business Conduct Committee ("BCC") for possible disciplinary action when the Exchange determines

Violations that are currently eligible for batching are listed on the Exchange's internal Numerical Criteria for Bringing Cases for Violations of Phlx Order Handling Rules. At this time, the Exchange proposes to permit batching with respect to Advice F-6 and Rule 1014(c)(i)(A), and proposes to amend Rules 960 and 970 accordingly. Currently, the language in both rules limits batching to certain Exchange order handling rules.

Pursuant to Rules 960.2(f)(ii) and 970.01, the batching program will continue to require that the violations be determined based on an exception-based surveillance program, with the specific surveillance guidelines (which are similar to compliance thresholds) maintained on the Numerical Criteria for Bringing Cases for Violations of Phlx Order Handling Rules.<sup>12</sup> The Exchange believes that these changes should result in a fine schedule that better fits the current electronic trading environment. In addition, the Exchange believes that Advice F-6 (and its corresponding rule) is appropriate for batching because the automated surveillance for quote spread parameter compliance,<sup>13</sup> as well as the issuance of sanctions pursuant to the minor rule plan,<sup>14</sup> will be conducted daily. The Exchange believes that its representation by regulatory staff that daily surveillance will be conducted and daily sanctions will be administered should serve as a strong deterrent against future violations.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b)

that there exists a pattern or practice of violative conduct without exceptional circumstances or when any single instance of violative conduct without exceptional circumstances is deemed to be egregious. See Securities Exchange Act Release No. 45570 (March 15, 2002), 67 FR 13395 (March 22, 2002) (SR-Phlx-2001-114).

<sup>12</sup> Such criteria can be updated subject to the Exchange providing notice to the Commission's Office of Compliance Inspections and Examinations. See Securities Exchange Act Release No. 45570 (March 15, 2002), 67 FR 13395 (March 22, 2002) (SR-Phlx-2001-114). Because neither is an "order handling rule," the Exchange is proposing herein to expressly permit batching of violations of Advice F-6 and Rule 1014(c)(i)(A).

<sup>13</sup> See confidential letters from Stephen M. Pettibone, Managing Director Surveillance, Phlx, to Michael Gaw, Division of Trading and Markets, and Tina Barry, Office of Compliance Inspections and Examinations, Securities and Exchange Commission, dated October 6, 2009 and December 30, 2009.

<sup>14</sup> See letter from Charles Rogers, Chief Regulatory Officer, Phlx, to Tina Barry, Office of Compliance Inspections and Examinations and Michael Gaw, Division of Trading and Markets, Securities and Exchange Commission, dated February 18, 2010.

of the Act<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>16</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest. The Exchange also believes that its proposal is consistent with Sections 6(b)(1) and (6) of the Act,<sup>17</sup> which require that the rules of an exchange enforce compliance with, and provide appropriate discipline for, violations of Commission and Exchange rules. In addition, because existing Rule 970 provides procedural rights to a person fined under the minor rule plan to contest the fine and permits a hearing on the matter, the Exchange believes that the proposal is consistent with Sections 6(b)(7) and 6(d)(1) of the Act,<sup>18</sup> by providing a fair procedure for the disciplining of members and persons associated with members.

#### *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**

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

### **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-2010-43 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-2010-43. 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 Web site viewing and printing in the Commission's Public Reference Room on official business days between the hours of 10 a.m. and 3 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-2010-43 and should be submitted on or before May 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-61885; File No. SR-BATS-2010-002]

#### **Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving a Proposed Rule Change, As Amended, To Offer Certain BATS Exchange Data Products**

April 9, 2010.

### **I. Introduction**

On February 2, 2010, BATS Exchange, Inc. ("BATS" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, a proposed rule change to offer certain new Exchange data products to Exchange Members<sup>3</sup> and other market data recipients. On February 22, 2010, BATS filed Amendment No. 1 to the proposed rule change. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on March 5, 2010.<sup>4</sup> The Commission received one comment letter in response to the proposed rule change.<sup>5</sup> On April 8, 2010, BATS filed Amendment No. 2 to the proposed rule change.<sup>6</sup> This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

### **II. Description of the Proposal**

The Exchange proposes to offer several new market data products: BATS Last Sale Feed; BATS Historical Data Products; and BATS Market Insight ("New Market Data Products"). In connection with making available the New Market Data Products, the Exchange proposes to amend its fee schedule applicable to Members and non-members of the Exchange pursuant to BATS Rules 15.1(a) and (c).<sup>7</sup>

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

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

<sup>3</sup> A Member is any registered broker or dealer that has been admitted to membership in the Exchange.

<sup>4</sup> See Securities Exchange Act Release No. 61592 (March 5, 2010), 75 FR 10332 ("Notice").

<sup>5</sup> See letter to Elizabeth M. Murphy, Secretary, SEC, from Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ OMX Group, Inc., dated March 26, 2009 ("NASDAQ OMX Letter").

<sup>6</sup> See Amendment No. 2 dated April 8, 2010 ("Amendment No. 2"). The text of Amendment No. 2 is available on the Exchange's Web site at <http://www.batstrading.com>, at the principal office of BATS, and on the Commission's Web site (<http://www.sec.gov/rules/sro.shtml>). Amendment No. 2 is a non-substantive, clarifying amendment.

<sup>7</sup> The Exchange currently offers other data products to Members and other data recipients free of charge. The Exchange states that such data

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78f(b)(1) and (6).

<sup>18</sup> 15 U.S.C. 78f(b)(7) and (d)(1).

<sup>19</sup> 17 CFR 200.30-3(a)(12) and 200.30-3(a)(44).