

whether the Act permits an exchange to offer the same transaction information via two different delivery mechanisms for two different prices.⁴² NASDAQ OMX then cites two of its own proposed rule changes and attempts to analogize them with the instant proposal, stating that the instant proposal implicates issues of what constitutes fair versus unfair discrimination with respect to the fees charged for market data. The Commission believes that the two proposed rule changes cited by NASDAQ OMX are factually different than the BATS' proposed rule change. As discussed above, the Commission believes that BATS offering of New Market Data Products is not unfairly discriminatory.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-BATS-2010-002), as modified by Amendments No. 1 and 2, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴³

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61863; File No. SR-Phlx-2010-54]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Fees for Participation in NASDAQ OMX PSX

April 7, 2010.

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 March 31, 2010, 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

⁴² NASDAQ OMX was referring to the BATS Last Sale Feed that contains last sale information that is also offered via PITCH free of charge.

⁴³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt a new access fee applicable to Exchange members approved for participation in PSX, to waive this fee for a six month period, and to waive certain Exchange membership fees for new members seeking to participate solely in PSX.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings>, 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

In October 2008, the Exchange ceased operation of its cash equities trading platform, XLE³, and since has solely operated an options market. The Exchange plans to launch PSX, a new cash equities market to be operated by the Exchange, in the second quarter of 2010, at a time following effectiveness of necessary filings with the Securities and Exchange Commission ("Commission").

Membership Fees

Under the Exchange's current fee schedule, a broker-dealer applying for Exchange membership ("Applicant") is assessed a non-refundable application fee of \$350.00, which must be provided to the Exchange concurrent with the membership application. An applicant that is subsequently approved for Exchange membership is assessed an initiation fee of \$1,500.00 and in return receives an A-1 trading permit,⁴ which

³ See Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR-Phlx-2008-65).

⁴ See Rule 908.

allows the approved Applicant to use the trading facilities of the Exchange. In addition to these two one-time fees, members are assessed a permit fee of \$1,000.00 per month.⁵

As a consequence of the Exchange's pending operation of both a cash equities and options market, an Applicant will have the option of applying to participate in one or both of the markets. The Exchange is proposing to waive the application, initiation, and permit fees for Applicants applying to participate in PSX. The proposed fee waivers would apply to new Exchange members applying to participate solely in PSX. The proposed fee waiver does not apply to an Applicant seeking approval to participate solely in the options market, or to an Applicant seeking to participate in both markets. In these cases, the application, initiation, and permit fees, as they relate to options, would apply. An Exchange member approved to participate in PSX would not be assessed an application fee should it subsequently determine to participate in the Exchange's options market, but would be charged the one-time initiation fee and would thereafter be charged the monthly account fee and permit fee.⁶

Because the Exchange proposes to waive the application, initiation, and permit fees as an incentive to attract market participants to the PSX, it seeks to implement the fee waivers immediately so that Applicants seeking to participate in PSX may begin submitting applications to the Exchange prior to the market's commencement of operations.

⁵ A member participating in the Exchange's options market is also assessed an account fee of \$50 per month for each account number assigned to the member in addition to the account number provided with the permit. Account numbers are assigned by the Exchange to options participants as a means to identify the member in options market transactions. Members may request additional account numbers for various business purposes. The additional account fee will not be applicable to PSX participants as MPIDs will be used to identify member firms' participation, not account numbers.

⁶ PHLX notes that the majority of time and expense incurred in reviewing an application is realized in the initial membership application process. As a consequence, a PSX participant that submits a subsequent application to participate on the Exchange's options market would result in little additional expense to the Exchange. In addition, the Exchange believes that many of the new PSX market participants will be current Exchange options market participants and therefore will have paid an application fee to participate on that market. Coupled with the fact that the current application fee set at a low level, the Exchange believes that the fee waiver will result in a non-material loss in application fee revenues.

Access Services Fees

Access to PSX will be provided through the OUCH, FIX, and RASH access protocols, with drop copies provided through the DROP protocol. Connections to PSX will be available through extranets, direct connection, and Internet-based virtual private networks. Prior to the launch of the PSX, the Exchange will make the PSX trading platform available for testing purposes, but will not charge for testing or for access ports used for testing. After the first full six months during which PSX operates, the Exchange will assess a fee of \$400 per month for each port pair, with an additional \$200 per month charged for each Internet port that requires additional bandwidth.⁷ The Exchange believes these fees are reasonable as they are identical to the fees charged by NASDAQ OMX BX ("BX") for comparable access to its cash equities market.⁸ The Exchange expects that the proposed fees will eventually cover the costs associated with establishing the service, responding to customer requests, configuring Exchange systems, programming to user specifications, and administering the service, among other things, and may provide the Exchange with a profit. Similar to the membership fees discussed above, however, the Exchange will waive access services fees until the end of the sixth calendar month of PSX's operation as an incentive to attract market participants to the PSX. Prior to launch, however, access ports will be available for testing purposes.

2. Statutory Basis

The Exchange believes that its proposal to amend its schedule of fees is consistent with Section 6(b) of the Act⁹ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁰ in particular, in that it provides for an equitable allocation of reasonable fees and other charges among Exchange members. The Exchange makes all services and products subject to its fees available on a non-discriminatory basis to similarly situated recipients. The proposed new access fees are structured in a manner comparable to corresponding fees of BX already in effect, and are set at levels equal to these comparable fees. Moreover, the proposed access fees are set at levels that are uniform for all members. The proposed waivers of both the access fees and certain membership fees are

designed to encourage broader participation in the proposed new market, and are appropriate in light of the lack of certainty with respect to the start date of the new market as well as the speed with which liquidity will develop on it.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Despite its long history of operating a cash equities market, the Exchange will effectively be entering the competitive markets for equities trading as a start-up venture, having shuttered its cash equities market in the fourth quarter of 2008. Accordingly, its fees must be set at a level that will promote competition in the markets, or potential users of its services will simply continue to obtain services from the Exchange's multiple competitors. In waiving certain fees associated with membership in the new market, the Exchange believes that market participants will be attracted to the market, which will help ensure market depth and liquidity. In its discretion, the Exchange may determine to eliminate the proposed membership fee waivers, in part or altogether, through a subsequent rule change.

The Exchange is also proposing a new fee for access to the new market and to waive this fee for a limited period to attract market participants. The fee is based on the fees assessed by BX for access to its market. Accordingly, the Exchange believes that the proposed new access fee is fairly priced based on its similarity to the fee assessed for access to BX. As a consequence, the Exchange believes that the proposed fee will not unduly place a burden on competition. The Exchange notes that, if it sets fees at inappropriately high levels, market participants will avoid using the Exchange.

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 proposed rule change establishes or changes a due, fee, or other charge applicable only to a member pursuant to Section

19(b)(3)(A)(ii) of the Act¹¹ and Rule 19b-4(f)(2)¹² thereunder. Accordingly, the proposal will take effect upon filing with the Commission.

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

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-2010-54 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-2010-54. 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, 100 F Street, NE., Washington, DC 20549, 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

⁷ See the NASDAQ OMX PHLX Fee Schedule, proposed Item XII.

⁸ See BX Rule 7015.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ 15 U.S.C. 78s(b)(3)(A)(ii).

¹² 17 CFR 240.19b-4(f)(2).

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-2010-54 and should be submitted on or before May 7, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61878; File No. SR-Phlx-2010-48]

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Market Data Fees

April 8, 2010.

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 April 6, 2010, NASDAQ OMX PHLX, Inc. (“Phlx” or the “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 its fee schedule by establishing fees for a direct data product, Top of Phlx Options Plus Orders (“TOPO Plus Orders”), which currently provides disseminated Exchange top-of-market data (including orders, quotes and trades), together with all information that is included in the Exchange’s Specialized Order Feed (“SOF”), as described more fully below. The proposed fees would become effective on and after June 1, 2010.

The Exchange anticipates that it will generally phase out SOF as of June 1, 2010, and instead offer TOPO Plus Orders to participants that wish to

continue to receive the data currently included in SOF. Accordingly, current SOF users must migrate to TOPO Plus Orders by June 1, 2010. In the event that an SOF user is unable to migrate to TOPO Plus Orders by June 1, 2010 due to circumstances beyond their control, the Exchange will apply the same monthly fee applicable to TOPO Plus Orders users that are Internal Distributors (as defined below) to such SOF users.

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, 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 raise revenue for the Exchange by establishing fees for the TOPO Plus Orders market data product.

Beginning in June, 2009, the Exchange launched its enhanced electronic trading platform for options, Phlx XL II, on which all options on the Exchange are currently traded.³

TOPO

In conjunction with the launch and rollout of the Phlx XL II system, the Exchange developed the Top of Phlx Options data feed (“TOPO”) ⁴ which provides to subscribers a direct data feed that includes the Exchange’s best bid and offer position, with aggregate size, based on displayable order and quoting interest on the Phlx XL II

system. The data contained in the TOPO data feed is identical to the data sent to the processor for the Options Price Regulatory Authority (“OPRA”), and the TOPO and OPRA data leave the Phlx XL II system at the same time.

Specialized Order Feed

Specialized Order Feed (“SOF”) is the Exchange’s real-time full limit order book data feed. SOF is currently available to any Exchange quoting participant (i.e., specialists, Streaming Quote Traders (“SQTs”),⁵ and Remote Streaming Quote Traders (“RSQTs”)⁶ (collectively, “users”)) and is available to users on an issue-by-issue basis at the user’s request. A user does not have to be assigned in an issue for the Exchange to provide SQF to such user in that issue.

The SOF provides real-time information to keep track of the single order book(s), single and complex orders, complex strategy and Live Auction for all symbols for which the user is configured. Users may be configured for one or more symbols. SOF provides real-time data for the entire book to its users. It is a compilation of limit order data resident in the Exchange’s limit order book for options traded on the Exchange that the Exchange provides through a real-time data feed. The Exchange updates SOF information upon receipt of each displayed limit order. For every limit price, the SOF includes the aggregate order volume.

TOPO Plus Orders

In October, 2009, the Exchange made the TOPO Plus Orders data feed available to all market participants.⁷ TOPO Plus Orders provides disseminated Exchange top-of-market data (including orders, quotes and trades) together with all information that is included in SOF. Currently, the Exchange does not charge fees for the use of TOPO Plus Orders. When it established TOPO Plus Orders, the

⁵ An SQT is an Exchange Registered Options Trader (“ROT”) who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. See Exchange Rule 1014(b)(ii)(A).

⁶ An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. See Exchange Rule 1014(b)(ii)(B).

⁷ See Securities Exchange act Release No. 60877 (October 26, 2009), 74 FR 56255 (October 30, 2009) (SR-Phlx-2009-92).

¹³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32).

⁴ See Securities Exchange Act Release No. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR-Phlx-2009-54).