

### *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 Act.<sup>7</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-Phlx-2012-43 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 No. SR-Phlx-2012-43. This file number should be included on the subject line if email 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 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 No. SR-Phlx-2012-43 and should be submitted on or before May 3, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-66755; File No. SR-Phlx-2012-42]**

### **Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Routing Fees**

April 6, 2012.

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 28, 2012, NASDAQ OMX PHLX LLC ("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 proposes to amend certain Customer Routing Fees to recoup costs incurred by the Exchange in routing to away markets and also create a new category of Routing Fees entitled "Firm/Broker-Dealer/Market Maker" fees.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed amendment to the ISE Select Symbols Customer Routing Fee to be operative on April 2, 2012. In addition, the Exchange has designated the new category "Firm/Broker-Dealer/Market Maker" to be operative on the same date that SR-Phlx-2012-41 becomes operative.

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 the Statutory Basis for, the Proposed Rule Change*

##### 1. Purpose

The purpose of this filing is to recoup costs that the Exchange incurs for routing and executing certain Customer orders in equity and index options to the International Securities Exchange, LLC ("ISE") and also to recoup costs related to a new category of Routing Fees entitled "Firm/Broker-Dealer/Market Maker" fees. The Exchange's Pricing Schedule at Section V, currently includes the following Routing Fees for

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

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

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

routing Customer and Professional orders to away markets:

Exchange	Customer	Professional
NYSE AMEX .....	\$0.11	\$0.31
BATS .....	0.55	0.55
BOX .....	0.11	0.11
CBOE .....	0.11	0.31
CBOE orders greater than 99 contracts in RUT, RMN, NDX, MNX, ETFs, ETNs and HOLDRs .....	0.29	0.31
C2 .....	0.55	0.56
ISE .....	0.11	0.29
ISE Select Symbols* .....	0.23	0.39
NYSE ARCA (Penny Pilot) .....	0.55	0.55
NYSE ARCA (Standard) .....	0.11	0.11
NOM .....	0.54	0.54
NOM (NDX and MNX) .....	0.56	0.56

\* These fees are applicable to orders routed to ISE that are subject to Rebates and Fees for Adding and Removing Liquidity in Select Symbols. See ISE's Schedule of Fees for the complete list of symbols that are subject to these fees.

The Exchange is proposing to amend the "ISE Select Symbols"<sup>3</sup> Customer Routing Fee from \$0.23 per contract to \$0.31 per contract. ISE recently amended its "taker" fee for regular, or non-complex, Priority Customer orders in the Select Symbols, regardless of size, from \$0.15 per contract to \$0.20 per contract.<sup>4</sup> In addition to the ISE taker fee, the Exchange also incurs other routing costs which it seeks to recoup.

In May 2009, the Exchange adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC ("NOS"), a member of the Exchange, as the Exchange's exclusive order router.<sup>5</sup> NOS is utilized by the Exchange's fully automated options trading system, PHLX XL<sup>®</sup>,<sup>6</sup> solely to route orders in options listed and open for trading on the PHLX XL system to destination markets. Each time NOS routes to away markets NOS is charged a \$0.06 clearing fee and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange currently recoups clearing and transaction charges incurred by the Exchange as well as certain other costs incurred by the Exchange when routing to away markets, such as administrative

<sup>3</sup> See ISE's Schedule of Fees for the complete list of symbols that are subject to these fees.

<sup>4</sup> See ISE's Schedule of Fees. See also Securities Exchange Act Release No. 66597 (March 14, 2012), 77 FR 16295 (March 20, 2012) (SR-ISE-2012-17).

<sup>5</sup> See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32).

<sup>6</sup> See SR-Phlx-2012-41. This proposal refers to "PHLX XL" as the Exchange's automated options trading system. In May 2009 the Exchange enhanced the system and adopted corresponding rules referring to the system as "Phlx XL II." See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32). The Exchange intends to submit a separate technical proposed rule change that would change all references to the system from "Phlx XL II" to "PHLX XL" for branding purposes.

and technical costs associated with operating NOS, membership fees at away markets, and technical costs associated with routing.<sup>7</sup> While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on April 2, 2012.

The Exchange is also proposing to create a new category of Routing Fees entitled "Firm/Broker-Dealer/Market Maker" fees. The Exchange recently filed a rule change to expand the routing capabilities of certain options orders that are eligible for electronic routing to other market centers by PHLX XL. Currently, Rule 1080(m) states that PHLX XL will route only Customer<sup>8</sup> FIND<sup>9</sup> and SRCH<sup>10</sup> orders to away markets. The rule change seeks to add non-customer FIND orders as a new category of orders that are eligible for routing.<sup>11</sup> This amendment to Exchange Rule 1080(m) would permit Firm,

<sup>7</sup> The Exchange is therefore increasing the ISE Select Symbols Customer Routing Fee to \$0.31 per contract to account for the \$0.20 ISE taker fee, the \$0.06 clearing cost and another \$0.05 per contract associated with administrative and technical costs associated with operating NOS.

<sup>8</sup> SR-Phlx-2012-41 defined the term "customer" as a person or entity that is neither a broker-dealer nor a direct or indirect affiliate of a broker-dealer. The rule filing specifically states that the term "customer" includes a "professional" as defined in Exchange Rule 1000(b)(14).

<sup>9</sup> A FIND order is currently defined as an order that is routable upon receipt. A FIND order received during open trading that is not marketable against the PHLX best Bid/Offer "PBBO" or the Away Best Bid/Offer ("ABBO") will be entered into the limit order book at its limit price. The FIND order will not be eligible for routing until the next time the option series is subject to a new Opening Process. See Exchange Rule 1080(m)(iv)(B).

<sup>10</sup> A SRCH order is an order that is routable at any time. A SRCH order received during open trading that is not marketable against the PBBO or the ABBO will be entered into the Phlx XLII book. Once on the book, the SRCH order is eligible for routing if it is locked or crossed by an away market. See Exchange Rule 1080(m)(iv)(C).

<sup>11</sup> See SR-Phlx-2012-41.

Broker-Dealer and Market Maker orders to be eligible for routing to other market centers when the Exchange cannot execute such orders at the National Best Bid or Offer ("NBBO").<sup>12</sup>

Specifically, the Exchange proposes to amend Section V of the Pricing Schedule to add a new category "Firm/Broker-Dealer/Market Maker" to correspond to the non-customer FIND orders that would be eligible for Routing upon the effectiveness of SR-Phlx-2012-41 and its proposed amendments to Rule 1080(m). The Exchange proposes to assess a fixed Routing Fee of \$0.55 per contract applicable to all away markets. The Exchange has designated the new category "Firm/Broker-Dealer/Market Maker" to be operative on the same date that SR-Phlx-2012-41 becomes operative.

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>14</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that the proposed ISE Customer Routing Fee for Select Symbols is reasonable because it seeks to recoup costs that are incurred by the Exchange when routing certain

<sup>12</sup> Under the proposal, non-customer FIND orders would be treated in the same manner as customer FIND orders, except that non-customer FIND orders would not be eligible for routing during the Opening Process. The proposed Routing Fees would apply to all orders that are routed to an away market and would not apply to orders not eligible for routing.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4).

Customer orders to ISE on behalf of its members. Each destination market's transaction charge varies and there is a standard clearing charge for each transaction incurred by the Exchange along with other administrative and technical costs that are incurred by the Exchange. The Exchange believes that the proposed Routing Fee would enable the Exchange to recover the customer taker fees assessed by ISE, plus clearing and other administrative and technical fees for the execution of Customer orders routed to ISE. The Exchange also believes that the proposed Routing Fee is equitable and not unfairly discriminatory because it would be uniformly applied to all Customer orders that are routed to ISE and part of ISE's Select Symbols.

The Exchange believes that the proposed new category of Routing Fee "Firm/Broker-Dealer/Market Maker" and the fixed \$0.55 per contract Routing Fee are reasonable because other options exchanges charge fees for non-Customer orders such as Firm, Broker-Dealer and Market Maker orders and these fees are consistently higher than fees for Customer orders.<sup>15</sup> The pricing on the various options exchanges for such orders varies significantly from exchange to exchange, with much more variation than for Customer orders. Accordingly, the Exchange is proposing a \$0.55 per contract side Routing Fee in order to capture the majority of the transaction and clearing fees for Firm, Broker-Dealer and Market Maker orders, while making the Exchange's Routing Fees easier to calculate and predict for members whose proprietary orders are routed away. In addition, fixed Routing Fees are easier to comprehend by the members whose orders are routed away. There is no uncertainty and it is simpler for members acting as agent for other members to pass-through fees to its Customer. Currently, predicting, calculating and charging back "pass-through" fees is an unduly burdensome, expensive and complicated task for Exchange members whose orders are routed away. The fixed Routing Fees for Firm, Broker-Dealer and Market Maker orders should ease the burden, expense and complexity of this task. Furthermore, fixed fees are easier to manage and maintain for the Exchange,

<sup>15</sup> The NASDAQ Options Market LLC ("NOM") assesses a fixed Routing Fee to its Firms and Market Makers of \$0.55 per contract. See Chapter V, Section (2) of The NASDAQ Stock Market LLC's Rules. In addition, the Chicago Board Options Exchange Incorporated ("CBOE") assesses non-customer orders, including voluntary professionals and professionals, routing fees of \$0.50 per contract in addition to the customary CBOE execution charges. See CBOE's Fees Schedule.

ensuring accurate billing and accounting. The Exchange believes that the proposed new category of Routing Fee "Firm/Broker-Dealer/Market Maker" and the fixed \$0.55 per contract Routing Fees are equitable and not unfairly discriminatory because the Exchange would assess all Firm, Broker-Dealer and Market Maker orders, eligible for routing to any away market, the same fee.<sup>16</sup>

#### *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*

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- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-Phlx-2012-42 on the subject line.

<sup>16</sup> A market participant may mark an order "DNR" for do not route and therefore would not be subject to the fees noted herein. See Rules 1066(h) and 1080(m).

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

#### *Paper Comments*

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

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For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>18</sup> 17 CFR 200.30-3(a)(12).