

ETP Holders deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(4) The Fund will be in compliance with Rule 10A-3 under the Act.¹⁷

(5) Except for Underlying ETPs that may hold non-U.S. issues, the Fund will not otherwise invest in non-U.S. issues.

This approval order is based on the Exchange's representations.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act¹⁸ and the rules and regulations thereunder applicable to a national securities exchange.

III. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change (SR-NYSEArca-2009-55) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60462; File No. SR-FINRA-2009-050]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to FINRA Rule 8312 (FINRA BrokerCheck Disclosure)

August 7, 2009.

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 July 24, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") 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 FINRA. 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

FINRA is proposing to amend FINRA Rule 8312 (FINRA BrokerCheck Disclosure) to retain and make publicly available in BrokerCheck certain information about former associated persons of a member who were the subject of a final regulatory action as defined in Form U4 that has been reported to the Central Registration Depository ("CRD" or "CRD System") via a uniform registration form.³

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA 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, FINRA 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. FINRA 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

FINRA Rule 8312 governs the information FINRA releases to the public via BrokerCheck. FINRA established BrokerCheck (then known as the Public Disclosure Program) in 1988 to provide the public with information on the professional background, business practices, and conduct of FINRA members and their associated persons. Via BrokerCheck, FINRA releases to the public certain information reported on uniform registration forms to the CRD System. The primary purpose of BrokerCheck is to help investors make informed choices about the individuals and firms with which they may wish to do business.

Currently, as described in FINRA Rule 8312, BrokerCheck provides information

regarding current and former members, as well as current associated persons and persons who were associated with a member within the preceding two years. The proposed rule change would expand BrokerCheck with respect to former associated persons to provide public access to certain information about such persons, regardless of when they were associated with a member, if they were the subject of any final regulatory action as defined in Form U4 that has been reported to CRD via a uniform registration form.⁴ For purposes of the proposed rule change, a final regulatory action as defined in Form U4 may include any final action, including any action that is on appeal, by the SEC, Commodity Futures Trading Commission, a federal banking agency, the National Credit Union Administration, another federal regulatory agency, a state regulatory agency, a foreign financial regulatory authority, or a self-regulatory organization (as those terms are used in Form U4).⁵ To illustrate, actions that are delineated in current Form U4 Questions 14C, 14D, or 14E would be considered "final regulatory actions." Similarly, actions that are detailed in current Form U5 Question 7D, and have a status of "final" or "on appeal," would be considered "final regulatory actions" as such actions are also addressed in Form U4.⁶

The proposed rule change would allow the public access to information about formerly registered persons who, although no longer in the securities industry in a registered capacity, may work in other investment-related industries or attain other positions of trust and about whom investors may wish to learn relevant disciplinary information. Specifically, FINRA would disclose through BrokerCheck

⁴ Because the information disclosed through BrokerCheck is derived from the CRD System, BrokerCheck will only disclose information regarding regulatory actions that have been reported to CRD via a uniform registration form.

⁵ A final regulatory action would not include any action limited to the revocation or suspension of an individual's authorization to act as an attorney, accountant or federal contractor (current Form U4 Question 14F).

⁶ FINRA staff also will review responses to all Regulatory Action Disclosure questions and Disclosure Review Pages on the Forms U4 and U5 (including the predecessor questions in this area), as well as information filed on Form U6 to determine whether a former associated person is subject to a final regulatory action and should therefore be included in BrokerCheck pursuant to the proposed rule change. Under the proposed rule change, FINRA may disclose a final action that is reported by a regulator on a Form U6 even if that action has not been reported by an individual on a Form U4 because, for example, the individual was not registered at the time the final regulatory action was reported.

¹⁷ See *supra* note 7.

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

information concerning any final regulatory action(s), as well as certain administrative information (*e.g.*, employment and registration history) and information as to qualification examinations, if available, regarding these formerly registered individuals. FINRA also would provide the most recently submitted comment, if any, provided by the subject person, presuming the comment is in the form and in accordance with the procedures established by FINRA and relates to the information provided through BrokerCheck. The proposed rule change would not expand access to other information that may be part of the CRD System regarding the former registered person, such as customer complaints, bankruptcies, liens, criminal events or arbitration claims.

FINRA notes that the amount and format of information made available for this expanded category of individuals will depend in part on when such individuals left the securities industry, and whether their CRD data is available in Web-based format. Since FINRA launched its Web-based CRD system ("Web CRD") in 1999, it has used the information in the Web CRD database to generate BrokerCheck reports. The Web CRD database contains information regarding all persons that have been registered with FINRA since the implementation of the Legacy CRD system in 1981. The majority of those records contain administrative and disclosure information and are in the Web CRD format. However, two conditions apply to a small percentage of individuals who were no longer registered at the time Web CRD was established in 1999. First, not all of these individuals' records are available in the Web CRD format; instead, their records exist in the Legacy CRD format.⁷ Second, for a very small percentage of individuals, certain administrative information is unavailable in either the Web or Legacy CRD format.⁸

⁷ For prudential reasons, FINRA did not convert into the Web CRD format the data for all individuals whose FINRA registrations were terminated prior to November 1996 ("Legacy CRD individuals"); instead, these records were moved to Web CRD in their Legacy CRD data format. As a result of the different data formats, and certain technical and operational challenges associated with providing information on eligible Legacy CRD individuals, FINRA expects to implement the expanded program in two phases. Eligible individuals whose records are in the Web CRD format will be available in the first phase; eligible individuals whose records are in the Legacy format will be available in the second phase.

⁸ During the existence of the Legacy CRD system, FINRA removed from the system administrative data for individuals who had ceased being registered for a period of time to free up storage space on the system. As a result, this data was not

Consequently, FINRA expects that, for the large majority of the individuals who will be subject to BrokerCheck as a result of the proposed expansion, all of the information proposed to be disclosed (*i.e.*, information regarding final regulatory actions, employment and registration history, qualification examinations, and most recent comment) will be made available to the public. FINRA recognizes, however, that for a limited number of individuals whose registration with FINRA ceased prior to 1999, not all of the administrative data and qualification information will be available. In such situations, only the individual's name, information about any final regulatory actions, and the most recent comment, if any, will be disclosed through BrokerCheck.

With respect to individuals whose records exist in the Legacy CRD format, FINRA staff will manually prepare the BrokerCheck report (upon request), convert the report to an electronic format, and make the report available through BrokerCheck to a requester. FINRA staff will endeavor to respond promptly to requests for information regarding these persons. This protocol also will allow FINRA staff to review the information to determine if the content is in the form and in accordance with the procedures established by FINRA prior to making the information available through BrokerCheck.⁹ Upon identifying or being made aware of the inclusion in a BrokerCheck report of potentially inappropriate information, including customer names, confidential account information or possibly offensive or potentially defamatory language, FINRA will continue to employ a balancing test to weigh the value of the language in controversy for regulatory and investor protection purposes against the objector's asserted privacy rights and/or potential defamation claims. Based on this balancing, FINRA could determine to redact the controversial language from BrokerCheck reports on a case-by-case basis.¹⁰

FINRA believes this measured expansion of BrokerCheck strikes a balance between, on the one hand, investor protection interests, and on the other hand, personal privacy and fairness to former registered persons. In

moved to Web CRD (in either Legacy or Web CRD format) and is not available for display in BrokerCheck.

⁹ See, *e.g.*, Securities Exchange Act Release No. 42402 (February 7, 2000), 65 FR 7582 (February 15, 2000) (Order Approving SR-NASD-99-45).

¹⁰ See, *e.g.*, Securities Exchange Act Release No. 42402 (February 7, 2000), 65 FR 7582 (February 15, 2000) (Order Approving SR-NASD-99-45).

this regard, FINRA notes that much of the information that would be subject to release pursuant to the proposed rule change (*i.e.*, information concerning certain final regulatory actions) may be available through other public sources. For example, FINRA provides information about its disciplinary actions involving current and formerly registered persons on its Web site; information about other actions that would be considered final regulatory actions may be available through other public sources, such as online search engines, regulators' Web sites, and fee-based services such as *Lexis* or *Westlaw*. Further, final regulatory actions are subject to procedures that allow an opportunity for the subject person to present arguments to a fact-finder about the allegations prior to the final disposition of the matter. In addition, final regulatory actions may be relevant or material to investors wishing to find out disciplinary information about a formerly registered person. As a result, providing this information through BrokerCheck would provide the public with a useful method to discover information about former registered persons without undue burden on formerly registered persons. As mentioned above, the former registered person has the opportunity to submit a comment for publication in BrokerCheck in response to information provided through BrokerCheck, provided the comment is in the form and in accordance with the procedures established by FINRA and relates to the information provided through BrokerCheck.

In further recognition of FINRA's attempt to strike a balance between personal privacy and investor protection concerns, as noted above, FINRA is not proposing to expand access to other information that may be part of the CRD System regarding former registered persons who have not been registered with a member for more than two years, such as bankruptcies, liens, criminal events or arbitration claims. In that regard, FINRA believes that these other categories of information are more relevant to an investor or potential customer when the individual is registered or was recently registered (*i.e.*, within two years). FINRA also notes that, unlike final regulatory actions, arbitration claims may not be subject to procedures that allow an opportunity for the subject person to present arguments to a fact-finder about the allegations prior to final disposition (including, *e.g.*, arbitration claims filed at or near the time the subject person left the industry). Further, a firm may

choose to settle an arbitration claim (e.g., for business reasons) notwithstanding the desire of a subject person to contest the claim. In addition, both criminal charges and convictions that are reported subsequently may have a different disposition, which may significantly change the meaning of the matter as originally reported (for example, such charges or convictions may be dismissed or expunged). Finally, FINRA does not view reportable financial matters (e.g., bankruptcies and liens) as having the same degree of materiality as final regulatory actions such that they should continue to be disclosed on a permanent basis.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. The proposed rule change, among other things, would enhance investor protection by providing access through the BrokerCheck program to certain information about former associated persons of a member who were the subject of a final regulatory action as defined in Form U4 that has been reported to CRD on a uniform registration form.

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

FINRA 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.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor 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 self-regulatory organization consents, the Commission will:

(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. Please include File Number SR-FINRA-2009-050 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-FINRA-2009-050. 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, 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 FINRA. 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-FINRA-2009-050 and should be submitted on or before September 8, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60461; File No. SR-Phlx-2009-66]

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Waivers

August 7, 2009.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on July 31, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 the NASDAQ OMX PHLX Fee Schedule to adopt, on a pilot basis, a waiver of the Phlx XL II Options Routing Pass-Through Fees for customer orders that are routed by the Exchange's enhanced electronic trading platform for options, Phlx XL II to away markets for execution.

The proposed fee waiver pilot would apply to transactions settling on or after July 1, 2009, and extend through December 31, 2009.

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

¹² 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

¹¹ 15 U.S.C. 78o-3(b)(6).