

commentaries on economic, political or market conditions.

FINRA responded that the term “research report” in the proposed rule change is intended to be much broader than that in NASD Rule 2711(a)(9) and is meant to cover adjustments to inventory positions based on non-public knowledge of the content or timing of both debt and equity research.<sup>7</sup> The proposed rule change differs in objective from NASD Rule 2711(a)(9) and is intended to “enhance investor protection and market integrity by deterring member firms from improperly accumulating or otherwise altering investor positions in securities” based on non-public advance knowledge of the content or timing of a research report in those securities. FINRA interprets the term research report in proposed FINRA Rule 5280 to cover any written information from the research department that a reasonable person would expect to result in a transaction based on that information. Thus, to the extent a reasonable person would expect that a communication containing market commentary would result in a transaction in a particular security or securities, a member could not establish or adjust its inventory in those securities based on non-public advance knowledge of that communication or the timing of its public release. Based on these reasons, FINRA declined the commenter’s additional request that the proposal be narrowed to cover only those actions taken by a member firm to adjust its inventory based upon advance non-public knowledge of material investment conclusions, such as ratings or price targets.

Second, the commenter requested that FINRA confirm that the requirement in subparagraph (b) of the proposal to establish, maintain and enforce certain policies and procedures is not meant to (1) limit or restrict communications between sales and trading personnel and research personnel concerning an analyst’s published views or (2) to require that such communications must be pre-cleared or monitored.

FINRA responded that the proposed rule sets forth an unambiguous supervision standard that “a member must establish, maintain and enforce policies and procedures reasonably designed to restrict or limit the information flow between research department personnel, or others with knowledge of the content or timing of a research report, and trading department

personnel, so as to prevent trading department personnel from utilizing non-public advance knowledge of the issuance or content of a research report for the benefit of the member or any other person.” FINRA views the supervisory standard in the proposal as purposefully flexible, to allow firms to tailor their policies and procedures to their size, structure, business model and compliance system. As such any number of specific policies and procedures may be appropriate to satisfy the standard. Thus, absent ambiguity in the standard, FINRA believes it inappropriate to opine on the adequacy of one or more elements of potentially many approaches that could satisfy the rule’s supervision requirement.

The second comment letter expressed concern that while the proposed rule addresses that a broker-dealer cannot trade ahead of its own research report, the broker-dealer’s customers and potential customers should also be so prohibited and that all customers and potential customers should get the research report at the same time. Further, the commenter indicated that the issue of whether the public should simultaneously get such reports should be explored and addressed. Per discussion, FINRA noted that the commenter’s concerns are more appropriate to and are addressed in FINRA’s proposed “Research Registration and Conflict of Interest Rules.”<sup>8</sup>

#### IV. Discussion and Findings

After careful review of the proposed rule change, the comments and FINRA’s response to the comments, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.<sup>9</sup> In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>10</sup> which requires, among other things that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and questionable principles of trade, and, in general, to protect investors and the public interest. The Commission believes that the proposed rule change will protect the investing public by preventing firms from utilizing non-public advance knowledge of the timing

or content of a research report to benefit its own trading to the detriment of its customers. Moreover, the Commission believes the proposed rule change further would clarify and streamline NASD IM-2110-4 for adoption as a FINRA Rule in the Consolidated FINRA Rulebook.<sup>11</sup> NASD IM-2110-4 has previously been found to meet the statutory requirements, and FINRA believes the rule has since proven effective in achieving statutory mandates.

#### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>12</sup> that the proposed rule change (SR-FINRA-2008-054) be, and hereby is, approved.

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

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59243; File No. SR-Phlx-2008-86]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amending the Phlx Fee Schedule

January 13, 2009.

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 December 30, 2008, NASDAQ OMX PHLX, Inc. (“Phlx” or “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 substantially prepared by the Exchange. Phlx has designated this proposal as one establishing or changing a member due, fee, or other charge imposed under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal effective upon filing with the Commission. The Commission is publishing this notice to

<sup>11</sup> See supra note 4.

<sup>12</sup> 15 U.S.C. 78s(b)(2).

<sup>13</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.

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

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

<sup>8</sup> See, FINRA NTM 08-55, October 2008.

<sup>9</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>10</sup> 15 U.S.C. 78o-3(b)(6).

<sup>7</sup> See Letter from Philip Shaikun, Associate Vice President and Associate General Counsel, FINRA, January 2, 2008.

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>5</sup> and Rule 19b-4 thereunder,<sup>6</sup> proposes to amend its Summary of Equity Option, and MNX, NDX, RUT and RMN Charges ("Summary of Equity Option"), Summary of Index Option Charges, \$60,000 "Firm Related" Equity Option and Index Option Cap, and Summary of U.S. Dollar-Settled Foreign Currency Option Charges fee schedules. Specifically, the Exchange proposes to: (1) Consolidate the comparison and transaction charges on its fee schedules into one charge, (2) assess a customer execution charge of \$0.12 per contract side on options on the Russell 2000® Index (the "Full Value Russell Index" or "RUT"), and options on the one-tenth value Russell 2000® Index<sup>7</sup> (the "Reduced Value Russell Index" or "RMN") on the Summary of Equity Option fee schedule; and (3) create a Broker-Dealer transaction charge on the Summary of Index Option Charges and Summary of U.S. Dollar-Settled Foreign Currency Option Charges fee schedules.

The Exchange also proposes to delete from the Summary of Equity Option fee schedule the Specialist Deficit (Shortfall) fee and the 14,000 contract cap that is applied to Registered Options Traders ("ROTs") transaction and comparison charges and Specialist transaction charges when contra-party to a non-AUTOM delivered customer order.

The Exchange also proposes to delete from its Summary of Equity Option fee schedule unnecessary footnotes<sup>8</sup> and to delete from its Summary of Index Option Charges and Summary of U.S. Dollar-Settled Foreign Currency Option

Charges fee schedules unnecessary text (marked with "\*\*\*") relating to rebate request forms for Firm/Proprietary transaction charges.

Additionally, the Exchange proposes to increase the Firm Related<sup>9</sup> equity option and index option cap from \$60,000 per month to \$65,000 per month and to exclude the current U.S. dollar-settled foreign currency option transaction and comparison charges from this cap.

While changes to the fee schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative for transactions settling on or after January 2, 2009.<sup>10</sup>

The text of the proposed rule change is available on the Exchange's Web site at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>.

### **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**

Generally, the purpose of the proposed rule change is to update the Exchange's fee schedules by adopting new fees and deleting fees and text that are no longer deemed necessary.

Currently, the Exchange separately itemizes comparison and transaction charges. The Exchange proposes to eliminate the comparison fee as a separate line item and instead imbed the fee in the existing transaction charge. This change will not change the actual

amount being charged to Exchange members, but should simplify the fee schedules so that total transaction costs are more easily understood.<sup>11</sup>

The purpose of creating a separate Broker-Dealer transaction charge on the Summary of Index Option Charges and Summary of U.S. Dollar-Settled Foreign Currency Option Charges fee schedules is to raise revenue and to specifically set forth the Broker-Dealer transaction charges, which are currently included in the customer transaction charges. Previously, Broker-Dealers and customers were each charged a \$.40 transaction fee and a \$.04 comparison fee for a combined charge of \$.44. The Exchange proposes to raise revenue by increasing the total fee charged to Broker-Dealers by \$.01. This new rate of \$.45 for Broker-Dealers is the same charge that Broker-Dealer incur with respect to equity options.<sup>12</sup> The Exchange believes that separating the Broker-Dealer transaction charges from the customer transaction charges should help to more readily identify the applicable transaction charges.

The purpose of assessing a customer an equity option transaction charge of \$0.12 per contract side for customer executions in RUT and RMN is to raise revenue, while remaining competitive in the marketplace.<sup>13</sup>

The Exchange proposes to delete the language that is marked with "\*\*\*" on both the Summary of Index Option Charges and the Summary of U.S. Dollar-Settled Foreign Currency Option Charges in order to delete obsolete language. The Exchange is able to identify Firm/Proprietary Orders electronically and therefore submitting a rebate request form is no longer necessary.

The purpose of deleting language, which relates to identifying certain trademarks, from footnotes that appear in the Summary of Equity Option fee schedule is to remove unnecessary and/or outdated language from the fee schedule. Although the Exchange

<sup>5</sup> 15 U.S.C. 78s(b)(1).

<sup>6</sup> 17 CFR 240.19b-4.

<sup>7</sup> Russell 2000® is a trademark and service mark of the Frank Russell Company, used under license. Neither Frank Russell Company's publication of the Russell Indexes nor its licensing of its trademarks for use in connection with securities or other financial products derived from a Russell Index in any way suggests or implies a representation or opinion by Frank Russell Company as to the attractiveness of investment in any securities or other financial products based upon or derived from any Russell Index. Frank Russell Company is not the issuer of any such securities or other financial products and makes no express or implied warranties of merchantability or fitness for any particular purpose with respect to any Russell Index or any data included or reflected therein, nor as to results to be obtained by any person or any entity from the use of the Russell Index or any data included or reflected therein.

<sup>8</sup> The Commission also notes that the remaining footnotes have been re-numbered.

<sup>9</sup> See, e.g., Securities Exchange Act Release Nos. 54981 (December 20, 2006), 71 FR 78251 (December 28, 2006) (SR-Phlx-2006-86); 53287 (February 14, 2006), 71 FR 9186 (February 22, 2006) (SR-Phlx-2006-10) and 56437 (September 13, 2007), 72 FR 53616 (September 19, 2007) (SR-Phlx-2007-65).

<sup>10</sup> This filing was inadvertently filed as a Stock Clearing Corporation of Philadelphia filing instead of a NASDAQ OMX PHLX filing. As a result of re-filing, Exhibit 5 now reflects amendments that were made in SR-Phlx-2008-85. The Commission notes that SR-Phlx-2008-85 has since been withdrawn and re-filed as SR-Phlx-2008-87.

<sup>11</sup> This proposal is similar to a proposal filed by the International Securities Exchange, LLC ("ISE") whereby ISE eliminated its comparison fee as a separate line item and imbedded the fee into the execution fee. See Securities Exchange Act Release No. 58139 (July 10, 2008), 73 FR 41142 (July 17, 2008) (SR-ISE-2008-54).

<sup>12</sup> See e-mail from Angela S. Dunn, Counsel, Phlx, to Richard Holley III, Senior Special Counsel, Commission, dated January 8, 2009.

<sup>13</sup> The Exchange currently assesses an equity option transaction charge of \$0.12 per contract for customer executions on options on the one-tenth of the value of the Nasdaq 100 Index (the "Mini Nasdaq 100 Index" or "MNX") and options on the full value of the Nasdaq 100 Index (the "Full-size Nasdaq 100 Index" or "NDX"). See Securities Exchange Act Release No. 58049 (June 27, 2008), 73 FR 38286 (July 3, 2008) (SR-Phlx-2008-46).

intends to continue trading the MNX, NDX, RUT and RMN products, it does not believe that, at this time, the language in the related footnotes should be included on the Summary of Equity Option fee schedule.

The Exchange has decided for business purposes to exclude the current U. S. dollar-settled foreign currency option transaction and comparison charges from the \$60,000 Firm-Related Equity Option and Index Option Cap calculation. The Exchange believes that it can continue to attract this business without offering the cap, which should also help to raise revenue.

## 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>14</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>15</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. By amending the Exchange's fee schedule and adding nominal fees and deleting fees and text the Exchange no longer deems necessary, the Exchange believes that members and member organizations should benefit from the proposals described herein.

### 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>16</sup> and paragraph (f)(2) of Rule 19b-4<sup>17</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.

## 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-2008-86 on the subject line.

### Paper Comments

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

All submissions should refer to File Number SR-Phlx-2008-86. 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 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 publicly available. All submissions should refer to File Number SR-Phlx-2008-86 and should be submitted on or before February 13, 2009.

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

Florence E. Harmon,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59234; File No. SR-NYSEArca-2008-140]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the Adding Liquidity Only Order

January 12, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 29, 2008, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by NYSE Arca. NYSE Arca filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. 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 Rule 7.31(nn), the Adding Liquidity Only Order ("ALO Order"). The text of the proposed rule is attached as Exhibit 5. A copy of this filing is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office 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, NYSE Arca included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the

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

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

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>18</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.

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).