

the fixed amount which, in certain circumstances, can lead to an anomalous result. For example, where a member receives a customer limit order priced at \$.01 and there is no current published inside spread, the minimum price-improvement standard would still be equal to \$.01, which would require the member to sell at \$.00 (\$.01 minus \$.01) or buy at \$.02 (\$.01 plus \$.01) to avoid triggering the customer limit order (depending on whether the customer order is a buy or sell order). Therefore, the current rule could have unduly harsh results, particularly in cases where the price is near the edge of a tier and there is no quoted market.

Accordingly, FINRA proposes to amend IM-2110-2 to provide that, for the purpose of determining the minimum price improvement obligation where there is no published current inside spread, member firms may calculate a current inside spread by contacting and obtaining priced quotations from at least two unaffiliated dealers. FINRA believes that obtaining priced quotations from at least two unaffiliated dealers provides an adequate proxy for an inside spread typically displayed for an OTC equity security, and notes that members are free to contact more than two unaffiliated dealers. FINRA also notes that, once the member has obtained bid and ask prices from at least two unaffiliated dealers, the proposed rule requires that the highest bid and lowest offer obtained must be used as the basis for calculating the current inside spread for purposes of determining the member's minimum price improvement obligation. In addition, where there is a one-sided quote, the proposed rule change permits a member to determine the current inside spread by using the best price obtained from at least two unaffiliated dealers on the other side of the quote.

Members must document: (1) The name of each dealer contacted; and (2) the quotations received that were used as the basis for determining the current inside spread. FINRA represents that the proposed rule change would apply solely to minimum price-improvement calculations under IM-2110-2 and would not implicate other rules or requirements (e.g., Three Quote Rule).

### III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national

securities association.<sup>6</sup> In particular, the Commission finds that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>7</sup> 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 Commission believes that the proposed rule change provides a reasonable method of calculating the current inside spread under IM-2110-2 for OTC equity securities priced below \$1.00 where there is no current published inside spread or there is only a one-sided quote. The Commission notes that FINRA members that use the proposed method of calculating the current inside spread are required to document the name of each dealer contacted and the quotations received for the purposes of determining the current inside spread. The Commission believes that the documentation requirement is important to allow proper oversight of calculating the current inside spread, when there is no current published inside spread, or there is only a one-sided quote, in an OTC equity security priced below \$1.00.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> that the proposed rule change (SR-FINRA-2008-064) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59377; File No. SR-ISE-2009-04]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing of Proposed Rule Change Relating to the \$1 Strike Program

February 10, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

<sup>6</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>7</sup> 15 U.S.C. 78o-3(b)(6).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 21, 2009, the International Securities Exchange, LLC (the “Exchange” or the “ISE”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change, on February 9, 2009, filed Amendment No. 1 to the proposed rule change, and on February 10, 2009 filed partial Amendment No. 2 to 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, as amended, from interested persons.

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

The ISE proposes to expand the \$1 Strike Program. The text of the proposed rule change is available on the Exchange's Web site (<http://www.ise.com>), 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 self-regulatory organization 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 self-regulatory organization 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 expand the \$1 Strike Program (the “Program”).<sup>3</sup> The Program

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

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

<sup>3</sup> The Commission approved the Program as a pilot on June 16, 2003. See Exchange Act Release No. 48033 (June 16, 2003), 68 FR 37036 (June 20, 2003). The pilot was subsequently extended through June 5, 2008. See Exchange Act Release Nos. 49827 (June 8, 2004), 69 FR 33966 (June 17, 2004) (Extending the pilot until August 5, 2004); 50060 (July 22, 2004), 69 FR 45864 (July 30, 2004) (Extending the pilot for 10 months until June 5, 2005); 51769 (May 31, 2005), 70 FR 33232 (June 7, 2005) (Extending the pilot until June 5, 2006); 53806 (May 15, 2006), 71 FR 29694 (Extending the

currently allows ISE to select a total of 10 individual stocks on which option series may be listed at \$1 strike price intervals. In order to be eligible for selection into the Program, the underlying stock must close below \$50 in its primary market on the previous trading day. If selected for the Program, the Exchange may list strike prices at \$1 intervals from \$3 to \$50, but no \$1 strike price may be listed that is greater than \$5 from the underlying stock's closing price in its primary market on the previous day. The Exchange may also list \$1 strikes on any other option class designated by another securities exchange that employs a similar Program under their respective rules. The Exchange may not list long-term option series ("LEAPS") at \$1 strike price intervals for any class selected for the Program. The Exchange also is restricted from listing any series that would result in strike prices being \$0.50 apart.

The Exchange now proposes to expand the Program to allow ISE to select a total of 55 individual stocks on which option series may be listed at \$1 strike price intervals, and to expand slightly the price range on which the Exchange may list \$1 strikes, *i.e.*, from \$1 to \$50. The existing restrictions on listing \$1 strikes would continue, *i.e.*, no \$1 strike price may be listed that is greater than \$5 from the underlying stock's closing price in its primary market on the previous day, and ISE is restricted from listing any series that would result in strike prices being \$0.50 apart.

As stated in the Commission order that initially approved ISE's Program and in subsequent extensions and expansions of the Program, ISE believes that \$1 strike price intervals provide investors with greater flexibility in the trading of equity options that overlie lower price stocks by allowing investors to establish equity options positions that are better tailored to meet their investment objectives. Indeed, member firms representing customers have repeatedly requested that ISE seek to expand the Program in terms of the number of classes on which option series may be listed at \$1 strike price intervals. The Exchange notes that current market conditions, in which the number of securities trading below \$50 has increased dramatically, further warrant the expansion of the Program.

pilot until June 5, 2007); and 55715 (May 7, 2007), 72 FR 26854 (May 11, 2007) (Extending the pilot until June 5, 2008). The pilot was subsequently expanded and made permanent in 2008. See Exchange Act Release No. 57169 (January 14, 2008), 73 FR 4654 (January 25, 2008) (Approving SR-ISE-2007-110).

The Exchange is also proposing to set forth a delisting policy. Specifically, the Exchange would, on a monthly basis, review series that were originally listed under the \$1 Strike Program with strike prices that are more than \$5 from the current values of the options classes in the Program. The Exchange would delist series with no open interest in both the put and the call series having a: (i) Strike higher than the highest strike price with open interest in the put and/or call series for a given expiration month; and (ii) strike lower than the lowest strike price with open interest in the put and/or call series for a given expiration month.

Notwithstanding the proposed delisting policy, member requests to add strikes and/or maintain strikes in certain options classes in series eligible for delisting may be granted.

Further, in connection with the proposed delisting policy, if the Exchange identifies series for delisting, the Exchange shall notify other options exchanges with similar delisting policies regarding eligible series for listing, and shall work with such other exchanges to develop a uniform list of series to be delisted so as to ensure uniform series delisting of multiply listed options classes. ISE expects that the proposed delisting policy will be adopted by other options exchanges that amend their rules to employ a similar expansion of the Program.

With regard to the impact on system capacity, ISE has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of an expanded number of series as proposed by this filing.

The Exchange believes that the Program has provided investors with greater trading opportunities and flexibility and the ability to more closely tailor their investment strategies and decisions to the movement of the underlying security. Furthermore, the Exchange has not detected any material proliferation of illiquid options series resulting from the narrower strike price intervals. For these reasons, ISE requests an expansion of the current Program.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder and, in particular, the requirements of Section 6(b) of the Act.<sup>4</sup> Specifically, the Exchange believes the

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

proposed rule change is consistent with Section 6(b)(5)<sup>5</sup> requirements that the rules of an exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, to remove impediments to and perfect the mechanism for a free and open market and a national market system, and, in general, to protect investors and the public interest. The Exchange believes that expanding the current Program will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions in greater number of securities.

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

The proposed rule change does not impose 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

## 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

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

- Send an e-mail to *rule-comments@sec.gov*. Please include File Number SR-ISE-04 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-ISE-2009-04. 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, on business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street, NE., Washington, DC 20549. 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-ISE-2009-04 and should be submitted on or before March 12, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59393; File No. SR-PHLX-2009-12]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by NASDAQ OMX PHLX, Inc. To Amend the Exchange's Fee Schedule

February 11, 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 February 2, 2009, 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. On February 9, 2009, the Exchange filed Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, 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 Exchange's Fee Schedule ("Fee Schedule") to: (i) Eliminate the Firm Proprietary Facilitation category of fees from the Equity Options Fees, Index Options Fees and U.S. Dollar-Settled Foreign Currency Option Fees; (ii) redefine what constitutes a firm proprietary order; and (iii) increase the Firm-Related Equity Option and Index Option Cap to \$75,000 and exclude JBO participants (as defined below).

The Exchange has designated these changes to be operative for transactions settling on or after February 2, 2009.

The text of the proposed rule change is available on the Exchange's Website 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 Exchange proposes to eliminate the Firm Proprietary Facilitation<sup>3</sup> category from the Fee Schedule in order to create a single category of Firm Proprietary Fees.<sup>4</sup> It currently applies to Member Organizations for orders in a proprietary account of a Member or non-member broker-dealer that derives more than 35% of its annual, gross revenues from commissions and principal transactions with customers ("35% customer revenue threshold"). The result of eliminating the Firm Proprietary Facilitation category is that all Firm Proprietary transactions will be charged \$.24 per contract, which results in a \$.10 increase over the current Firm Proprietary Facilitation Option Transaction Charges, as the current charge for those types of transaction is currently \$.14. This increase should raise revenue for the Exchange, and, at the same time, simplify the fees applicable to firm proprietary transactions.

In addition, the Exchange proposes to redefine what constitutes a firm proprietary order. The Exchange proposes to delete the 35% customer revenue threshold language from the current language in endnote 5 on the Fee Schedule and replace it with the following language: "Firm Proprietary Options Transaction Charge applies to firm proprietary orders ("F" account type) in all products." The purpose of the 35% threshold was to limit the fees to a certain category of firm trade, namely Firm Proprietary trades. Now, all orders with "F" account types are subject to firm proprietary charges, which is easier to administer from a billing perspective. As a result, the requirement for member organizations to verify the amount to the Exchange

<sup>3</sup> A facilitation occurs when a floor broker holds an options order for a public customer and a contra-side order for the same option series and, after providing an opportunity for all persons in the trading crowd to participate in the transaction, executes both orders as a facilitation cross. See Exchange Rule 1064.

<sup>4</sup> The Exchange currently assesses the applicable Firm Proprietary and Firm Proprietary Facilitation transaction charges on Phlx members.

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

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

<sup>6</sup> 17 CFR 200.30-3(a)(12).