

initial listing fee for issuers of traditional equity securities, *e.g.*, common stock.<sup>6</sup>

Accordingly, the Commission believes that the Exchange's proposed rule change provides for the equitable allocation of reasonable dues, fees, and other charges among issuers and further, does not unfairly discriminate between issuers given the additional time and resources dedicated to new Sponsors of Derivative Securities Products and given that the listing fees, including the one-time consulting fee, for Derivative Securities Products is substantially below the listing fee for traditional equity securities.<sup>7</sup> Further, the Commission believes that the proposed one time consulting fee is equitable in that it applies uniformly to all new issuers of Derivative Securities Products. For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act.<sup>8</sup>

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>9</sup> that the proposed rule change (SR-NYSEArca-2009-52) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

Elizabeth M. Murphy,  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60466; File No. SR-Phlx-2009-65]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Strike Price Intervals of \$0.50 for Options on Stocks Trading at or Below \$3.00

August 10, 2009.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup>

<sup>6</sup> *Id.*

<sup>7</sup> The Commission notes that the current listing fee for Derivative Securities Products is \$5,000, while the lowest listing fee for common stock is \$100,000. See NYSE Arca Equities, Inc. Schedule of Fees and Charges for Exchange Services.

<sup>8</sup> 15 U.S.C. 78f(b)(4). In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

<sup>9</sup> 15 U.S.C. 78s(b)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

notice is hereby given that, on July 31, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or "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 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, pursuant to Section 19(b)(1) of the Act<sup>4</sup> and Rule 19b-4 thereunder,<sup>5</sup> proposes to amend Rule 1012, Series of Options Open for Trading, Commentary .05, in order to establish strike price intervals of \$0.50, beginning at \$1, for certain options classes whose underlying security closed at or below \$3 in its primary market on the previous trading day.

The text of the proposed rule change is available on the Exchange's Web site 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 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 those 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 parts 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 the proposed rule change is to expand the ability of investors to hedge risks associated with stocks trading at or under \$3. Currently, Commentary .05(a)(ii) to Phlx Rule 1012 provides that the interval of strike prices of series of options on individual stocks may be \$2.50 or greater where the strike price is \$25 or less. Additionally, Commentary .05(a)(i) to Phlx Rule 1012 allows the Exchange to establish \$1

strike price intervals (the "\$1 Strike Program") on options classes overlying no more than fifty-five individual stocks designated by the Exchange. In order to be eligible for selection into the \$1 Strike Program, the underlying stock must close below \$50 in its primary market on the previous trading day. If selected for the \$1 Strike Program, the Exchange may list strike prices at \$1 intervals from \$1 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 \$1 Strike Program its own rules.<sup>6</sup> The Exchange is restricted from listing any series that would result in strike prices being within \$0.50 of a strike price set pursuant to Commentary .05(a)(ii) to Phlx Rule 1012 at intervals of \$2.50.

The Exchange is now proposing to establish strike prices of \$1, \$1.50, \$2, \$2.50, \$3 and \$3.50 for certain stocks that trade at or under \$3.00.<sup>7</sup> The listing of these strike prices will be limited to options classes whose underlying security closed at or below \$3 in its primary market on the previous trading day, and which have national average daily volume that equals or exceeds 1000 contracts per day as determined by The Options Clearing Corporation during the preceding three calendar months. The listing of \$0.50 strike prices would be limited to options classes overlying no more than 5 individual stocks (the "\$0.50 Strike Program") as specifically designated by the Exchange. The Exchange would also be able to list \$0.50 strike prices on any other option classes if those classes were specifically designated by other securities exchanges that employed a similar \$0.50 Strike Program under their respective rules.

Currently, the Exchange may list options on stocks trading at \$3 at strike prices of \$1, \$2, \$3, \$4, \$5, \$6, \$7 and \$8 if they are designated to participate

<sup>6</sup> The Exchange may not list long-term option series ("LEAPS") at \$1 strike price intervals for any class selected for the Program.

<sup>7</sup> The Exchange recently amended Exchange Rule 1010, Withdrawal of Approval of Underlying Securities or Options, to eliminate the \$3 market price per share requirement for continued approval for an underlying security. The amendment eliminated the prohibition against listing additional series or options on an underlying security at any time when the price per share of such underlying security is less than \$3. The Exchange explained in that proposed rule change that the market price for a large number of securities has fallen below \$3 in the current volatile market environment. See Securities Exchange Act Release No. 59346 (February 3, 2009), 74 FR 6681 (February 10, 2009).

<sup>4</sup> 15 U.S.C. 78s(b)(1).

<sup>5</sup> 17 CFR 240.19b-4.

in the \$1 Strike Program.<sup>8</sup> If these stocks have not been selected for the Exchange's \$1 Strike Program, the Exchange may list strike prices of \$2.50, \$5, \$7.50 and so forth as provided in Commentary .05(a), but not strike prices of \$1, \$2, \$3, \$4, \$6, \$7 and \$8.<sup>9</sup>

The Exchange is now proposing to amend Commentary .05 to Phlx Rule 1012 by adding new section (ii) to list strike prices on options on a number of qualifying stocks that trade at or under \$3.00, not simply those stocks also participating in the \$1 Strike Program, in finer intervals of \$0.50, beginning at \$1 up to \$3.50.<sup>10</sup> Thus, a qualifying stock trading at \$3 would have option strike prices established not just at \$2.50, \$5.00, \$7.50 and so forth (for stocks not in the Exchange's \$1 Strike Program) or just at \$1, \$2, \$3, \$4, \$5, \$6, \$7 and \$8 (for stocks designated to participate in the \$1 Strike Program), but rather at strike prices established at \$1, \$1.50, \$2, \$2.50, \$3 and \$3.50.<sup>11</sup>

The Exchange believes that current market conditions demonstrate the appropriateness of the new strike prices. Recently the number of securities trading below \$3.00 has increased dramatically.<sup>12</sup> Unless the underlying stock has been selected for the \$1 Strike Program, there is only one possible in-the-money call (at \$2.50) to be traded if an underlying stock trades at \$3.00. Similarly, unless the underlying stock has been selected for the \$1 Strike Program, only one out-of-the-money strike price choice within 100% of a stock price of \$3 is available if an investor wants to purchase out-of-the-money calls. Stated otherwise, a purchaser would need over a 100% move in the underlying stock price in order to have a call option at any strike price other than the \$5 strike price

become in-the-money. If the stock is selected for the \$1 Strike Program, the available strike price choices are somewhat broader, but are still greatly limited by the proximity of the \$3 stock price to zero, and the very large percent gain or loss in the underlying stock price, relative to a higher priced stock, that would be required in order for strikes set at \$1 or away from the stock price to become in-the-money and serve their intended hedging purpose.

As a practical matter, a low-priced stock by its very nature requires narrow strike price intervals in order for investors to have any real ability to hedge the risks associated with such a security or execute other related options trading strategies. The current restriction on strike price intervals, which prohibits intervals of less than \$2.50 (or \$1 for stocks in the \$1 Strike Program) for options on stocks trading at or below \$3, could have a negative affect on investors. The Exchange believes that the proposed \$0.50 strike price intervals would provide investors with greater flexibility in the trading of equity options that overlie lower priced stocks by allowing investors to establish equity option positions that are better tailored to meet their investment objectives. The proposed new strike prices would enable investors to more closely tailor their investment strategies and decisions to the movement of the underlying security. As the price of stocks decline below \$3 or even \$2, the availability of options with strike prices at intervals of \$0.50 could provide investors with opportunities and strategies to minimize losses associated with owning a stock declining in price.

With regard to the impact on system capacity, Phlx 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.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>14</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest, by expanding the ability of investors to

hedge risks associated with stocks trading at or under \$3. The proposal should create greater trading and hedging opportunities and flexibility, and provide customers with the ability to more closely tailor investment strategies to the price movement of the underlying stocks, trading in many of which is highly liquid.

## 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 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

No written comments were solicited or received with respect to the proposed rule change.

## 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 Exchange consents, the Commission will:

- (A) By order approve the 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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2009-65 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.

<sup>8</sup> Additionally, market participants may be able to trade \$2.50 strikes on the same option at another exchange, if that exchange has elected not to select the stock for participation in its own similar \$1 Strike Program.

<sup>9</sup> Again, market participants may also be able to trade the option at \$1 strike price intervals on other exchanges, if those exchanges have selected the stock for participation in their own similar \$1 Strike Program.

<sup>10</sup> Current sections (ii), (iii) and (iv) would be renumbered as sections (iii), (iv) and (v) respectively.

<sup>11</sup> The option on the qualifying stock could also have strike prices set at \$5, \$7.50 and so forth at \$2.50 intervals (pursuant to Commentary .05(a)(ii) to Phlx Rule 1012) or, if it has been selected for the \$1 Strike Program, at \$4, \$5, \$6, \$7 and \$8.

<sup>12</sup> As of July 31, 2009, stocks trading at or below \$3 include E\*Trade Financial Corporation, Ambac Financial Group, Inc., Alcael-Lucent, Federal Home Loan Mortgage Corporation (Freddie Mac) and Federal National Mortgage Association (Fannie Mae). A number of these stocks are widely held and actively traded equities, and the options overlying these stocks also trade actively on Phlx.

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

<sup>14</sup> 15 U.S.C. 78f(b)(5).

All submissions should refer to File Number SR-Phlx-2009-65. 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 the 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-Phlx-2009-65 and should be submitted on or before September 8, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60464; File No. SR-BATS-2009-027]

### Self-Regulatory Organizations; BATS Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Fees for Use of BATS Exchange, Inc.

August 10, 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 July 29, 2009, BATS Exchange, Inc. (the

"Exchange" or "BATS") 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. BATS has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange 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 proposed rule change 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 modify its fee schedule applicable to use of the Exchange. While changes to the fee schedule pursuant to this proposal will be effective upon filing, the changes will become operative on August 1, 2009.

The text of the proposed rule change is available at the Exchange's Web site at <http://www.batstrading.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 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 parts 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 modify its fee schedule applicable to use of the Exchange effective August 1, 2009, in order to change the fee charged by the Exchange for odd lot orders routed to NYSE Arca. Due to the pricing structure at NYSE Arca, the Exchange currently charges higher fees for odd lot orders to the extent such odd lot orders are routed to and executed at NYSE Arca. Effective

August 1, 2009, NYSE Arca will begin applying its standard fees for round lot executions to odd lot executions.<sup>5</sup> Accordingly, the Exchange proposes to delete the specific fees charged for odd lot orders routed to NYSE Arca, and instead, will charge the same fees that it charges for routed orders generally. For instance, an odd lot order routed through the Exchange's CYCLE or RECYCLE routing strategy will be charged \$0.0026 per share wherever such order is executed, including NYSE Arca. If such odd lot order is in a stock priced below \$1.00, then the Exchange will charge 0.26% of the total dollar value of the trade to the extent the order was routed to and executed at any venue (including NYSE Arca) pursuant to the Exchange's CYCLE or RECYCLE routing strategy.

###### 2. Statutory Basis

The Exchange believes 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 exchange, and, in particular, with the requirements of Section 6 of the Act.<sup>6</sup> Specifically, the Exchange believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>7</sup> in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and other persons using any facility or system which the Exchange operates or controls. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Finally, the Exchange believes that the proposed rates are equitable in that they apply uniformly to all Members.

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

The Exchange does not believe that the proposed rule change imposes any burden on competition.

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

No written comments were solicited or received.

<sup>5</sup> See NYSE Arca Trader Update, July 20, 2009, available at [http://www.nyse.com/pdfs/Arca\\_Fee\\_Schedule\\_Update.pdf](http://www.nyse.com/pdfs/Arca_Fee_Schedule_Update.pdf).

<sup>6</sup> 15 U.S.C. 78f.

<sup>7</sup> 15 U.S.C. 78f(b)(4).

<sup>15</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).