

Act and, in particular, provides for an equitable allocation of reasonable fees among its issuers consistent with Section 6(b)(4) of the Act, does not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act, and is consistent with Section 6(b)(8) of the Act.

As to the concerns raised by Business Wire that the offering of IDs by NOCS creates a conflict of interest with Nasdaq's self-regulatory functions since, among other things, Nasdaq enforces rules relating to the dissemination of material information by listed companies, Nasdaq has represented that it has effectively separated its regulatory functions from its business functions, and that its business functions, including those of NOCS, in no way influence the regulatory oversight of listed companies and their disclosure requirements.<sup>58</sup> The Commission believes that Nasdaq's assurances concerning the separation of its business and regulatory functions adequately address the conflict of interest concerns raised by Business Wire. The Commission also notes that it oversees Nasdaq as a registered national securities exchange, including the performance of its regulatory functions in a manner consistent with the Act.

With respect to its application, annual, and entry fees, Nasdaq has represented that the proposed increase in fees better reflects the costs associated with, among other things, listing application reviews, Nasdaq's new on-line application center, and enhancements to its listings compliance systems.<sup>59</sup> Moreover, Nasdaq notes that the number of listed companies on Nasdaq has declined approximately 10% since 2006, so that its regulatory costs must be allocated among fewer listed companies.<sup>60</sup> Nasdaq further notes that, despite the decline in listings, because of enhancements to its compliance programs and changes in regulatory requirements, the number of issuer filings that it reviews has substantially increased since 2002, and that the workload to monitor compliance in recent years has increased due to market conditions and other issues.

The Commission notes that Nasdaq's fees are comparable to and, in some instances, less than similar fees of the New York Stock Exchange.<sup>61</sup> Further,

the Commission did not receive any comment letters from currently-listed Nasdaq companies or prospective listed companies opposing the fee increase. Thus, the Commission finds that Nasdaq's proposed fees are reasonable, equitably allocated among issuers, and otherwise consistent with the requirements of the Act.

Finally, with respect to the increased fee for written interpretations, Nasdaq has represented that the fee increase is reasonable given the costs incurred by Nasdaq in connection with such requests. Nasdaq is proposing to charge \$15,000 for all written interpretation requests, and eliminate the distinction between a regular request, which currently costs \$5,000, and an expedited request which currently costs \$15,000. Nasdaq noted that since January 2008, the large majority of requests for a written interpretation (nearly 75%) are expedited reviews. While the Commission would be concerned if the written interpretive fee was set at a level so high that issuers were deterred from seeking such written interpretations when needed, this does not appear to be the case since the majority of issuers today elect to pay \$15,000 for an expedited review. Accordingly, the Commission believes that the proposed fee increase provides for the equitable allocation of reasonable fees among issuers consistent with Section 6(b)(4) of the Act, does not unfairly discriminate between issuers consistent with Section 6(b)(5) of the Act, and is otherwise consistent with the requirements of the Act. Moreover, the Commission notes that with respect to interpretations, issuers will still continue to receive oral interpretations at no charge.<sup>62</sup>

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>63</sup> that the proposed rule change (SR-Nasdaq-2009-081) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>64</sup>

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

[FR Doc. 2010-5413 Filed 3-11-10; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61660; File No. SR-CBOE-2010-024]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating To Temporary Membership Status and Interim Trading Permit Access Fees

March 5, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on February 26, 2010, the Chicago Board Options Exchange, Incorporated ("CBOE" or the "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 prepared by the CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

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

CBOE proposes to adjust (i) the monthly access fee for persons granted temporary CBOE membership status ("Temporary Members") pursuant to Interpretation and Policy .02 under CBOE Rule 3.19 ("Rule 3.19.02") and (ii) the monthly access fee for Interim Trading Permit ("ITP") holders under CBOE Rule 3.27. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.org/Legal/>), at the Exchange's Office of the Secretary, 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, CBOE 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 CBOE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

<sup>58</sup> Telephone conversation on March 5, 2010 between Arnold Golub, Vice President and Associate General Counsel, Nasdaq and Sharon Lawson, Senior Special Counsel, Commission.

<sup>59</sup> See Nasdaq Letter 4.

<sup>60</sup> See Nasdaq Letter 3.

<sup>61</sup> See NYSE Sections 902.02 and 902.03 of the NYSE Listed Company Manual.

<sup>62</sup> See *supra* note 17.

<sup>63</sup> 15 U.S.C. 78s(b)(2).

<sup>64</sup> 17 CFR 200.30-3(a)(12).

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

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The current access fee for Temporary Members under Rule 3.19.02<sup>2</sup> and the current access fee for ITP holders under Rule 3.27<sup>3</sup> are both \$5,433 per month. Both access fees are currently set at the indicative lease rate (as defined below) for February 2010. The Exchange proposes to adjust both access fees effective at the beginning of March 2010 to be equal to the indicative lease rate for March 2010 (which is \$4,875). Specifically, the Exchange proposes to revise both the Temporary Member access fee and the ITP access fee to be \$4,875 per month commencing on March 1, 2010.

The indicative lease rate is defined under Rule 3.27(b) as the highest clearing firm floating monthly rate<sup>4</sup> of the CBOE Clearing Members that assist in facilitating at least 10% of the CBOE transferable membership leases.<sup>5</sup> The Exchange determined the indicative lease rate for March 2010 by polling each of these Clearing Members and obtaining the clearing firm floating monthly rate designated by each of these Clearing Members for that month.

The Exchange used the same process to set the proposed Temporary Member and ITP access fees that it used to set the current Temporary Member and ITP access fees. The only difference is that the Exchange used clearing firm floating monthly rate information for the month of March 2010 to set the proposed access fees (instead of clearing firm floating monthly rate information for the month of February 2010 as was used to set the current access fees) in order to take into account changes in clearing firm floating monthly rates for the month of March 2010.

The Exchange believes that the process used to set the proposed

Temporary Member access fee and the proposed Temporary Member access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR-CBOE-2008-12 with respect to the original Temporary Member access fee.<sup>6</sup> Similarly, the Exchange believes that the process used to set the proposed ITP access fee and the proposed ITP access fee itself are appropriate for the same reasons set forth in CBOE rule filing SR-CBOE-2008-77 with respect to the original ITP access fee.<sup>7</sup>

Each of the proposed access fees will remain in effect until such time either that the Exchange submits a further rule filing pursuant to Section 19(b)(3)(A)(ii) of the Act<sup>8</sup> to modify the applicable access fee or the applicable status (*i.e.*, the Temporary Membership status or the ITP status) is terminated. Accordingly, the Exchange may, and likely will, further adjust the proposed access fees in the future if the Exchange determines that it would be appropriate to do so taking into consideration lease rates for transferable CBOE memberships prevailing at that time.

The procedural provisions of the CBOE Fee Schedule related to the assessment of each proposed access fee are not proposed to be changed and will remain the same as the current procedural provisions relating to the assessment of that access fee.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>10</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among persons using its facilities.

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

CBOE 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**

Because the foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and subparagraph (f)(2) of Rule 19b-4<sup>12</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-CBOE-2010-024 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-CBOE-2010-024. 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

<sup>2</sup> See Securities Exchange Act Release No. 56458 (September 18, 2007), 72 FR 54309 (September 24, 2007) (SR-CBOE-2007-107) for a description of the Temporary Membership status under Rule 3.19.02.

<sup>3</sup> See Securities Exchange Act Release No. 58178 (July 17, 2008), 73 FR 42634 (July 22, 2008) (SR-CBOE-2008-40) for a description of the Interim Trading Permits under Rule 3.27.

<sup>4</sup> Rule 3.27(b) defines the clearing firm floating monthly rate as the floating monthly rate that a Clearing Member designates, in connection with transferable membership leases that the Clearing Member assisted in facilitating, for leases that utilize that monthly rate.

<sup>5</sup> The concepts of an indicative lease rate and of a clearing firm floating month rate were previously utilized in the CBOE rule filings that set and adjusted the Temporary Member access fee. Both concepts are also codified in Rule 3.27(b) in relation to ITPs.

<sup>6</sup> See Securities Exchange Act Release No. 57293 (February 8, 2008), 73 FR 8729 (February 14, 2008) (SR-CBOE-2008-12), which established the original Temporary Member access fee, for detail regarding the rationale in support of the original Temporary Member access fee and the process used to set that fee, which is also applicable to this proposed change to the Temporary Member access fee as well.

<sup>7</sup> See Securities Exchange Act Release No. 58200 (July 21, 2008), 73 FR 43805 (July 28, 2008) (SR-CBOE-2008-77), which established the original ITP access fee, for detail regarding the rationale in support of the original ITP access fee and the process used to set that fee, which is also applicable to this proposed change to the ITP access fee as well.

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

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-CBOE-2010-024 and should be submitted on or before April 2, 2010.

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

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-5302 Filed 3-11-10; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61667; File No. SR-Phlx-2010-36]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish Procedures To Prevent Informational Advantages Resulting From the Affiliation Between PHLX and NOS

March 5, 2010.

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 26, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" 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 the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the

Act,<sup>3</sup> which renders the proposal 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 a rule change to establish procedures designed to manage potential informational advantages resulting from the affiliation between the Exchange and NASDAQ Options Services, LLC ("NOS"), a registered broker-dealer and a Phlx member.

The text of the proposed rule change is below. Proposed new language is *italicized*; proposed deletions are in [brackets].

##### Rule 985. Affiliation and Ownership Restrictions

(a)-(b) No change.

(c) *The NASDAQ OMX Group, Inc., which owns NASDAQ Options Services, LLC and the Exchange, shall establish and maintain procedures and internal controls reasonably designed to ensure that NASDAQ Options Services, LLC does not develop or implement changes to its system on the basis of non-public information regarding planned changes to the Exchange's systems, obtained as a result of its affiliation with the Exchange, until such information is available generally to similarly situated Exchange members in connection with the provision of inbound routing to the Exchange.*

\* \* \* \* \*

##### Rule 1080. Phlx XL and Phlx XL II

(a)-(l) No change.

(m) (i)-(ii) No change.

(iii)(A)-(B) No change.

(C) The Exchange shall establish and maintain procedures and internal controls reasonably designed to adequately restrict the flow of confidential and proprietary information between the Exchange and the Routing Facility, and any other entity, including any affiliate of the Routing Facility[, and, if the Routing Facility or any of its affiliates engages in any other business activities other than providing routing services to the Exchange, between the segment of the Routing Facility or affiliate that provides the other business activities and the routing services].

(D) No change.

(iv) No change.

\* \* \* \* \*

#### 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

###### a. Background

The Exchange is a wholly-owned subsidiary of The NASDAQ OMX Group, Inc. ("NASDAQ OMX"), a Delaware corporation. NASDAQ OMX also indirectly owns NASDAQ Options Services, LLC ("NOS" or the "Routing Facility"), a registered broker-dealer and a Phlx member. Thus, NOS is deemed an affiliate of Phlx.

The Exchange is proposing that NOS be permitted to route certain orders from The NASDAQ Option Market ("NOM") to the Exchange without checking the NOM book prior to routing. NOM is an options market operated by The NASDAQ Stock Market (the "NASDAQ Exchange") and NOS is the approved outbound routing facility of the NASDAQ Exchange for NOM. With the exception of Exchange Direct Orders, all routable orders for options that are trading on NOM check the NOM book prior to routing. In addition, NOS also routes orders in options that are not trading on NOM (referred to in the NOM Rules as "Non-System Securities"). When routing orders in options that are not listed and open for trading on NOM, NOS is not regulated as a facility of the NASDAQ Exchange but rather as a broker-dealer regulated by its designated examining authority. As provided by Chapter IV, Section 5 of the NOM Rules, all orders routed by NOS under these circumstances are routed to away markets that are at the best price, and solely on an immediate-or-cancel basis.

Under NOM Rule Chapter VI, Section 11: (1) NOM routes orders in options via NOS, which serves as the sole "routing facility" of NOM; (2) the sole function of the routing facility is to route orders in options to away markets pursuant to NOM rules, solely on behalf of NOM; (3)

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