

from functioning as market makers. The proposed rule change was published for comment in the **Federal Register** on February 26, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposal.

## II. Description of the Proposal

The Exchange proposes to amend Rule 6.8C, *Prohibition Against Members Functioning as Market Makers*, to eliminate certain of its restrictions. Rule 6.8C currently provides that a member, acting either as principal or agent, may neither enter nor permit the entry of orders into the Exchange's electronic order routing system if (i) the orders are limit orders for the account or accounts of the same beneficial owner(s); and (ii) the limit orders are entered in such a manner that the beneficial owner(s) effectively is operating as a market maker by holding itself out as willing to buy and sell such securities on a regular or continuous basis. The Exchange proposes that these restrictions be amended to apply only to customer orders (*i.e.*, non-broker-dealer orders) that are not Voluntary Professional orders.<sup>4</sup> The restrictions would no longer be applicable to instances where a member is acting as principal on its own behalf or is acting as agent on behalf of other broker-dealer orders or Voluntary Professional orders. The Exchange noted that it is retaining the restriction for customers who are not Voluntary Professionals because such customers have priority at any price over the bids and offers of market makers, other broker-dealers, and Voluntary Professionals.

In addition, in those instances where its restrictions are applicable, Rule 6.8C currently provides that, in determining whether a beneficial owner effectively is operating as a market maker, the Exchange will consider, among other things, the simultaneous or near simultaneous entry of limit orders to buy and sell the same security, the entry of multiple limit orders at different prices in the same security, and the multiple acquisition and liquidation of

positions in the security during the same day. The Exchange proposes to remove the last condition pertaining to the multiple acquisition and liquidation of positions from its list of factors used for determining whether a beneficial owner is operating as a market maker. The Exchange noted that this activity no longer should be considered as a factor in determining whether a beneficial owner is effectively acting as a market maker.

## III. Discussion

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 exchange<sup>5</sup> and, in particular, the requirements of Section 6 of the Act.<sup>6</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>7</sup> in that the proposal has been designed to promote just and equitable principles of trade, and to protect investors and the public interest.

The Commission believes that it is consistent with the Act for an options exchange not to prohibit a user of its market from operating as a market maker without registering as such. The Commission previously approved rules at other options exchanges that do not impose such a prohibition,<sup>8</sup> or impose such a prohibition on customers only.<sup>9</sup> The Commission notes that while the Exchange will continue to prohibit

<sup>5</sup> The Commission has considered the proposed rule change's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

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

<sup>7</sup> 15 U.S.C. 78f(b)(5).

<sup>8</sup> See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (approving rules governing the trading of options on the NASDAQ Options Market).

<sup>9</sup> See Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (approval of rules for the trading of listed options on NYSEAltermex).

The Commission notes that any entity that acts as "dealer," as defined in Section 3(a)(5) of the Act, 15 U.S.C. 78c(a)(5), would be required to register with the Commission under Section 15 of the Act, 15 U.S.C. 78o, and the rules and regulations thereunder, or qualify for any exception or exemption from registration. Activity that may cause a person to be deemed a dealer includes "quoting a market in or publishing quotes for securities (other than quotes on one side of the market on a quotations system generally available to non-broker-dealers, such as a retail screen broker for government securities)." See Definitions of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Securities Exchange Act Release No. 47364, 68 FR 8686, 8689, note 26 (February 24, 2003) (quoting OTC Derivatives Dealers, Securities Exchange Act Release No. 40594 (October 23, 1998), 63 FR 59362, 59370, note 61 (November 3, 1998)).

customers who are not Voluntary Professionals from operating as market makers, those customers will continue to have priority over the bids and offers of market makers, other broker-dealers, and Voluntary Professionals.

The Commission also believes that the Exchange's proposal to remove the condition pertaining to the multiple acquisition and liquidation of positions from its list of factors used for determining whether a beneficial owner is operating as a market maker is consistent with the Act. The Commission believes that the remaining factors are sufficient to enable the Exchange to determine whether a user of its market is operating as a market maker.

## IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-CBOE-2009-09) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59701; File No. SR-ISE-2009-15]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Quoting Obligations of Second Market Competitive Market Makers

April 3, 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 March 25, 2009, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange 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.

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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> See Securities Exchange Act Release No. 59425 (February 19, 2009), 74 FR 8829.

<sup>4</sup> The term "Voluntary Professional" is defined in CBOE's rules as any person or entity that is not a broker or dealer in securities that elects, in writing, to be treated in the same manner as a broker or dealer in securities for purposes of specified rules relating to priority in the execution of orders, and for cancellation fee calculation purposes. See Rule 1.1(ff) and Securities Exchange Act Release No. 58327 (August 7, 2008), 73 FR 47988 (August 15, 2008) (SR-CBOE-2008-09). As part of this proposed rule change, the Exchange is proposing to amend Rule 1.1(ff) to provide that a Voluntary Professional will be treated in the same manner as a broker or dealer in securities for purposes of Rule 6.8C.

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

The ISE proposes to amend the quoting obligations of Second Market Competitive Market Makers. The text of the proposed rule change is as follows, with deletions in [brackets] and additions in *italics*:

### Rule 904. Market Maker Quotes and Orders

(a) Quotes. Except as provided below, all of the requirements of Rules 803, 804, and 805 related to quoting obligations of Primary Market Makers and Competitive Market Makers apply to SMPMMs and SMCMMs respectively. For purposes of the Rules, SMCMMs are considered appointed to all of the options classes listed in the Second Market.

(1) SMCMMs are not required to make markets in a minimum number of options classes in the Second Market. SMCMMs may choose whether to make markets in one or more options classes traded in the Second Market on a daily basis.

(2) If an SMCMM chooses to make markets in one or more options classes in the Second Market, it must [participate in the opening rotation and] make markets and enter into any resulting transactions on a continuous basis in all of the series of the options class until the close of trading that day. *Further, SMCMMs may [not] initiate quoting in an additional number of options classes intraday, up to the number of options classes for which they participated in the opening rotation on that day.*

(b) 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 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 amend the quoting obligations of Second Market Competitive Market Makers ("SMCMMs"). Pursuant to Commission approval, ISE currently lists for trading a number of low-volume options classes that qualify for listing under its Rule 502 in a "Second Market."<sup>3</sup> Among other things, the Second Market has allowed the Exchange to provide an opportunity for additional members to provide liquidity as market makers. Specifically, the Second Market trading rules allow SMCMMs to choose whether to make markets in one or more options classes on a daily basis. Under the current rules, if a SMCMM chooses to make markets in an options class, it must participate in the opening rotation and continue to quote all of the series of the options class through the close that day. Further, SMCMMs are not allowed to initiate quoting in an options class intraday.

The Exchange proposes to amend its Second Market rules as follows: (1) Permit SMCMMs to quote in a greater number of options classes intraday, and (2) relax the requirement that SMCMMs must participate in the opening rotation in the options class that it chooses to make a market in on a specific day. With this proposed rule change, SMCMMs may initiate quoting in an options class intraday. However, the number of options classes in which a SMCMM may initiate quoting shall be limited to a number equal to the number of classes in which the SMCMM participated in the opening rotation on that day. For example, if a SMCMM participates in the opening rotation for 30 options classes, it may initiate quoting intraday in an additional 30 classes. Once an SMCMM starts quoting, it will continue to be required to quote all of the series through the remainder of the day.

The Exchange believes that relaxing the obligation for SMCMMs to participate in the opening and permitting this class of market makers to quote in a greater number of options classes intraday will encourage additional SMCMM participation and add liquidity to these low-volume options classes.

<sup>3</sup> See Securities Exchange Act Release No. 54580 (October 6, 2006), 71 FR 60781 (October 16, 2006) (SR-ISE-2006-40).

#### 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. Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(5) 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. In particular, the proposed rule change is designed to attract additional liquidity in low-volume options classes by providing for open access to market makers.

### 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

This proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change as required by Rule 19b-4(f)(6).<sup>4</sup> The proposed amendment to ISE Rule 904 will allow SMCMMs to quote in a greater number of options classes intraday and thus provide additional liquidity in the low-

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

volume options classes that trade in the Exchange's Second Market. Further, no other exchange requires its market makers to participate in the opening rotation in 100% of the series in options classes in which it makes a market. For the foregoing reasons, this rule filing qualifies for immediate effectiveness as a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4 of the Act, as it does not raise any new, unique or substantive issues, and is beneficial for competitive purposes and to promote a free and open market for the benefit of investors.

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-ISE-2009-15 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-2009-15. 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 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-ISE-2009-15 and should be submitted on or before April 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>5</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59697; File No. SR-Phlx-2009-23]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto To Amend the By-Laws, Rules and Option Floor Procedure Advices of NASDAQ OMX PHLX, Inc.

April 2, 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 March 13, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" 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 Exchange. On March 25, 2009, Phlx 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 its By-Laws, Rules of the Board of Governors and Options Rules (the two sets of rules are together known as the

"Rules"), and Option Floor Procedure Advices ("OFPA's" or "Advices")<sup>3</sup> to make changes to certain standing committees and processes of the Exchange. Specifically, the Exchange proposes to eliminate: (a) The Admissions Committee; (b) the Options Allocation, Evaluation and Securities Committee; (c) the Options Committee; (d) the Foreign Currency Options Committee; and (e) the Weekly Bulletin. Additionally, the Exchange proposes to: (a) make the Finance Committee optional; (b) change the structure of the Business Conduct Committee and eliminate reference to the Hearing Officer; and (c) authorize action in the event of an emergency or extraordinary market conditions.<sup>4</sup>

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

<sup>3</sup> OFPA's are discussed in Rule 970, which sets forth the criteria for the imposition of a fine (not to exceed \$5,000) on any member, member organization, or any partner, officer, director or person employed by or associated with any member or member organization, for any violation of an OFPA, which violation the Exchange determined is minor in nature (known as the "Minor Rule Plan"). Such a fine would be imposed in lieu of commencing a "disciplinary proceeding" as that term is used in Exchange Rules 960.1-960.12, and would be subject to Rule 19d-1 under the Act.

<sup>4</sup> Certain changes proposed in the present filing may be affected by SR-Phlx-2009-17, which is pending. See Securities Exchange Act Release No. 59538 (March 9, 2009), 74 FR 11152 (March 16, 2009). We would amend the present filing if necessary upon approval of SR-Phlx-2009-17.

<sup>5</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.