

proposed rule change will further the Exchange's goal of introducing new products to the marketplace that are competitively priced.

2. *Basis*—The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>12</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>13</sup> in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities.

#### *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**

The foregoing rule change has become effective pursuant to section 19(b)(3) of the Act<sup>14</sup> and Rule 19b-4(f)(2)<sup>15</sup> thereunder. At any time within 60 days of the filing of such 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

No. SR-ISE-2008-77 on the subject line.

##### *Paper Comments*

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

All submissions should refer to File Number SR-ISE-2008-77. 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 Commissions 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 ISE. 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-2008-77 and should be submitted by November 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-25164 Filed 10-21-08; 8:45 am]

**BILLING CODE 8011-01-P**

#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-58772; File No. SR-Phlx-2008-72]

#### **Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 Thereto by the NASDAQ OMX PHLX, Inc. Relating to a Surcharge Fee**

October 10, 2008.

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 October 1, 2008, 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 October 7, 2008, the Exchange filed Amendment No. 1 to the proposal.<sup>3</sup> 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, pursuant to section 19(b)(1) of the Act<sup>4</sup> and Rule 19b-4 thereunder,<sup>5</sup> proposes to assess a surcharge fee<sup>6</sup> of \$0.10 per contract side on firm/proprietary, firm/proprietary facilitation, Registered Option Trader (on-floor), specialist, and broker/dealer (AUTOM and non-AUTOM delivered) equity option transactions in the following products: (1) Options on the one-tenth of the value of the Nasdaq 100 Index (the "*Mini Nasdaq 100 Index*" or "MNXX"); (2) options on the full value of the Nasdaq 100 Index<sup>7</sup> (the "Full-size Nasdaq 100 Index" or "NDX"); (3) options on the Russell 2000<sup>®</sup> Index (the "Full Value Russell Index" or "RUT"), and (4) options on the one-tenth value

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

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

<sup>3</sup> Amendment No. 1 fixed typographical errors in the rule text of the original filing that were not being changed in this proposed rule change to match the current rule text.

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

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

<sup>6</sup> The Exchange now proposes to refer to "license fees" as "surcharge fees" on its fee schedule.

<sup>7</sup> NASDAQ<sup>®</sup>, NASDAQ-100<sup>®</sup> and NASDAQ-100 Index<sup>®</sup> are registered trademarks of The NASDAQ OMX Group, Inc. (which with its affiliates are the "Corporations") and are licensed for use by the NASDAQ OMX PHLX, Inc. in connection with the trading of options products based on the NASDAQ-100 Index<sup>®</sup>.

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

<sup>13</sup> 15 U.S.C. 78f(b)(4).

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 19b-4(f)(2) [sic].

<sup>16</sup> 17 CFR 200.30-3(a)(12).

Russell 2000® Index<sup>8</sup> (the “Reduced Value Russell Index” or “RMN”).<sup>9</sup> A surcharge fee will not apply to customer transactions.<sup>10</sup>

The surcharge fees would be assessed on the applicable equity option transactions, regardless of whether any fee caps relating to comparison or transaction charges are imposed.

The Exchange also proposes to credit equity option specialist units any applicable surcharge fee that is assessed in connection with customer orders that are delivered to the limit order book via Phlx XL<sup>11</sup> or via the Exchange’s Options Floor Broker Management System (“FBMS”)<sup>12</sup> and subsequently executed via the Intermarket Option Linkage<sup>13</sup> as

<sup>8</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>9</sup> Currently, a \$0.10 per contract side license fee is assessed on MNX and NDX products and a \$0.15 per contract side surcharge fee is assessed on RUT and RMN products after the \$60,000 “Firm Related” Equity Option and Index Option Cap fee cap is reached. (Equity option and index option “firm” transactions are comprised of equity option firm/proprietary comparison transactions, equity option firm/proprietary transactions, equity option firm/proprietary facilitation transactions, index option firm (proprietary and customer executions) comparison transactions, index option firm/proprietary transactions and index option firm/proprietary facilitation transaction charges (collectively “firm-related charges”). See e.g. Securities Exchange Act Release Nos. 54981 (December 20, 2006), 71 FR 78251 (December 28, 2006); and 53287 (February 14, 2006), 71 FR 9186 (February 22, 2006).

<sup>10</sup> Currently the Exchange does not charge equity option transaction charges for customer executions, but charges a \$0.12 per contract equity option transaction charge for customer executions in MNX and NDX.

<sup>11</sup> Phlx XL, formerly referred to as AUTOM, is the Exchange’s electronic trading platform. See Exchange Rule 1080.

<sup>12</sup> FBMS is designed to enable Floor Brokers and/or their employees to enter, route and report transactions stemming from options orders received on the Exchange. FBMS also is designed to establish an electronic audit trail for options orders represented and executed by Floor Brokers on the Exchange, such that the audit trail provides an accurate, time-sequenced record of electronic and other orders, quotations and transactions on the Exchange, beginning with the receipt of an order by the Exchange, and further documenting the life of the order through the process of execution, partial execution, or cancellation of that order. See Exchange Rule 1080, Commentary.06.

<sup>13</sup> Linkage is governed by the Options Linkage Authority under the conditions set forth under the

a Principal Acting as Agent (“P/A”) order.<sup>14</sup>

In addition, the Exchange proposes to delete certain license fees from its fee schedule.

The text of the proposed rule change is available on the Exchange’s Web site at [http://www.phlx.com/regulatory/reg\\_rulefilings.aspx](http://www.phlx.com/regulatory/reg_rulefilings.aspx).

## 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 purpose of assessing a surcharge fee of \$0.10 per contract side as set forth in this proposal is to remain competitive<sup>15</sup> and to help offset the costs associated with the license fees that are incurred in connection with the trading of the RUT, RMN, MNX and NDX products. Due to competitive pressures in the industry, the Exchange proposes to continue excluding equity option customer transactions from the surcharge fee.

The surcharge fees would be assessed on the applicable equity option transactions,<sup>16</sup> regardless of whether

Plan for the Purpose of Creating and Operating an Intermarket Option Linkage (the “Plan”) approved by the Securities and Exchange Commission (“SEC”). The registered U.S. options markets are linked together on a real-time basis through a network capable of transporting orders and messages to and from each market.

<sup>14</sup> A P/A order is an order for the principal account of a specialist (or equivalent entity on another participant exchange that is authorized to represent public customer orders), reflecting the terms of a related unexecuted public customer order for which the specialist is acting as agent. See Linkage Plan section 2(16)(a) and Exchange Rule 1083.

<sup>15</sup> See e.g. Securities Exchange Act Release No. 57128 (January 10, 2008), 73 FR 2969 (January 16, 2008).

<sup>16</sup> Although they are index options, RUT, RMN, MNX and NDX are assessed fees pursuant to the Exchange’s equity option charges fee schedule. See the Exchange’s Summary of Equity Option, and MNX, NDX, RUT and RMN Charges fee schedule and Securities Exchange Act Release Nos. 58049 (June 27, 2008), 73 FR 38286 (July 3, 2008); and

any fee caps relating to comparison or transaction charges are imposed.<sup>17</sup> The MNX, NDX, RUT and RMN surcharge fees that are assessed would not count towards the calculation of the \$60,000 “Firm Related” Equity Option and Index Option cap. Additionally, consistent with current practice, the proposed \$0.10 per contract surcharge fees would not be subject to the \$1,000 daily or \$25,000 monthly dividend, merger and short stock interest strategies transaction caps, nor would they count towards reaching the daily or monthly caps.<sup>18</sup>

The purpose of providing a \$0.10 per contract surcharge fee credit to equity option specialist units is to help alleviate the potential economic burden of the surcharge fee imposed on Exchange specialist units in connection with routing Linkage charges, as described above.<sup>19</sup> The Exchange believes that it is appropriate to assist specialist units in offsetting some of the costs that they incur in routing orders to other options exchanges in order to obtain the National Best Bid and Offer.

Additionally, the Exchange is deleting the current license fee on the KSX, KIX and HAI products because it no longer offers these products for trading. Additionally, the Exchange is deleting the current license fee on the BKX KRX, MFX products, which may, in turn, help to promote trading in these products.

#### 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>20</sup> in general, and furthers the objectives of section 6(b)(4) of the Act<sup>21</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members. The

55473 (March 14, 2007), 72 FR 13338 (March 21, 2007).

<sup>17</sup> For example, the surcharge fee of \$0.10 per contract side would be assessed on the MNX, NDX, RUT and RMN products, regardless of whether: (1) The ROT (on-floor) and specialist 4.5 million contract monthly cap; or (2) the 14,000 daily contract cap ROT transaction and comparison charges and specialist transaction charges when contra-party to non-AUTOM delivered customer orders is reached. The surcharge fee of \$0.10 per contract side would also be assessed regardless of whether the \$60,000 “Firm Related” Equity Option and Index Option Cap fee is reached.

<sup>18</sup> As a result of this proposal, the reference to the \$0.05 per contract side license fee for dividend strategies and short stock interest strategies would be deleted as it is no longer necessary because a \$0.10 per contract side surcharge fee will apply and appear separately on the fee schedule.

<sup>19</sup> This is similar to an option transaction charge credit given to specialist units in connection with Linkage orders. See Securities Exchange Act Release No. 57434 (March 5, 2008), 73 FR 13269 (March 12, 2008).

<sup>20</sup> 15 U.S.C. 78f(b).

<sup>21</sup> 15 U.S.C. 78f(b)(4).

Exchange believes that it is equitable for members who trade these products to pay the surcharge fee as the Exchange pays a license fee to trade these products. Additionally, the Exchange, due to competitive pressures in the industry, believes that it is equitable to continue to exclude equity option customer transactions from the surcharge fee. The Exchange also believes that it is equitable to provide a surcharge fee credit to assist specialist units in offsetting some of the costs that they incur in routing orders to other options exchanges in order to obtain the National Best Bid and Offer.

#### *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>22</sup> and paragraph (f)(2) of Rule 19b-4<sup>23</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.<sup>24</sup>

### **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-2008-72 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-Phlx-2008-72. 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 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-Phlx-2008-72 and should be submitted on or before November 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-25030 Filed 10-21-08; 8:45 am]

**BILLING CODE 8011-01-P**

## **DEPARTMENT OF TRANSPORTATION**

### **Office of the Secretary**

#### **Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (Formerly Subpart Q) During the Week Ending October 10, 2008**

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 *et seq.*). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

*Docket Number:* DOT-OST-2008-0301.

*Date Filed:* October 10, 2008.

*Due Date for Answers, Conforming Applications, or Motion to Modify Scope:* October 31, 2008.

*Description:* Application of Orbest S.A. ("Orbest") requesting issuance of a foreign air carrier permit to the full extent authorized by the Air Transport Agreement between the United States and the European Community and the Member States of the European Community to enable Orbest to engage in: (i) Foreign scheduled and charter air transportation of persons, property and mail between any point or points in a Member State of the European Union and any point or points in the United States and beyond or behind coextensive with the rights provided under the US-EC Agreement; (ii) foreign scheduled and charter air transportation of persons, property and mail between any point or points in the United States and any point or points in any member of the European Common Aviation Area; (iii) other charter pursuant to prior approval requirements; and (iv) transportation authorized by any additional route rights made available to European Community carriers in the future. Orbest also requests exemption authority to the extent necessary to enable it to hold out and provide the

<sup>22</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>23</sup> 17 CFR 240.19b-4(f)(2).

<sup>24</sup> For purposes of calculating the 60-day period within which the Commission may summarily abrogate the proposed rule change under section 19(b)(3)(C) of the Act, the Commission considers the period to commence on October 7, 2008, the date on which Phlx submitted Amendment No. 1. See 15 U.S.C. 78s(b)(3)(C).

<sup>25</sup> 17 CFR 200.30-3(a)(12).