

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-NYSEArca-2010-36 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-NYSEArca-2010-36. 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 Web site viewing and printing 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-NYSEArca-2010-36 and should be submitted on or before May 27, 2010.

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. 34-61997; File No. SR-FINRA-2010-017]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Allow FINRA Members To Use the OTC Reporting Facility To Transfer Transaction Fees Charged by One Member to Another Member

April 28, 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 April 12, 2010, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. Additionally, FINRA has designated the proposed rule change as "establishing or changing a due, fee or other charge" under Section 19(b)(3)(A) of the Act<sup>5</sup> and Rule 19b-4(f)(2) thereunder,<sup>6</sup> which renders the proposal effective upon receipt of this filing by 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

FINRA is proposing to (1) adopt FINRA Rule 7330(i) to permit FINRA members to use the OTC Reporting Facility (the "ORF") to transfer transaction fees charged by one member to another member on trades reported to

the ORF; and (2) amend FINRA Rule 7710 to establish the fee to be charged by the ORF for use of the transaction fee transfer service.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, on the Commission's Web site at <http://www.sec.gov>, at the principal office of FINRA 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, FINRA 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. FINRA 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

###### *Background:*

Rule 7230A(h) permits FINRA members to agree in advance to transfer a transaction fee charged by one member to another member on a transaction in NMS stocks effected otherwise than on an exchange through the submission of a clearing report to the FINRA/Nasdaq Trade Reporting Facility ("FINRA/Nasdaq TRF"). Prior to the adoption of Rule 7230A(h) in 2007,<sup>7</sup> there was no mechanism for members to charge each other commissions or other explicit transaction fees through the FINRA trade reporting and clearance submission process. Generally, members wanting to charge other members an explicit transaction fee either billed and collected those fees directly from the other member outside the transaction reporting and clearing process or traded on a "net" basis.<sup>8</sup> Rule 7230A(h)

<sup>7</sup> See Securities Exchange Act Release No. 56007 (July 3, 2007), 72 FR 37807 (July 11, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-046). SR-NASD-2007-046 proposed to adopt paragraph (h) of NASD Rule 6130. Pursuant to SR-FINRA-2008-021, NASD Rule 6130 was renumbered as FINRA Rule 7230A. See Securities Exchange Act Release No. 58643 (September 25, 2008), 73 FR 57174 (October 1, 2008) (Order Approving File No. SR-FINRA-2008-021).

<sup>8</sup> Trading on a "net basis" means that the broker-dealer's compensation is implicitly included in the execution price disseminated to the tape and reported for clearance and settlement to the

<sup>9</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).

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

<sup>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

provides members with another alternative by permitting the transfer of a transaction fee as part of a clearing report submitted to the FINRA/Nasdaq TRF.

*Proposed Amendments Relating to Transfer of Transaction Fees in Clearing Reports Submitted to the ORF:*

The proposed rule change would adopt a provision identical to Rule 7230A(h) for purposes of transferring transaction fees between members as part of a clearing report submitted to the ORF. Specifically, pursuant to proposed Rule 7330(i), members would be required to provide in reports submitted to the ORF, in addition to all other information required to be submitted by any other rule, a total per share or contract price amount, inclusive of the transaction fee. As a result, members would submit two price amounts as part of their report to the ORF: one price including the transaction fee, which would be submitted by the ORF to NSCC for clearance and settlement; and one price exclusive of the transaction fee, which would be publicly disseminated. For example, if B/D 1 purchases from B/D 2 at \$10.00 and B/D 1 and B/D 2 agree to a transaction fee of \$.001 per share, the trade price that would be publicly disseminated would be \$10.00, while the trade would be cleared and settled by NSCC at \$10.001.<sup>9</sup> The parties to the trade would know both prices—the price reported for public dissemination and the clearance/settlement price.

Proposed Rule 7330(i) provides that both members and their respective clearing firms, as applicable, must execute an agreement, as specified by FINRA, permitting the facilitation of the transfer of the transaction fee through the ORF, as well as any other applicable agreement, such as a give up agreement.<sup>10</sup> Such agreement must be

National Securities Clearing Corporation ("NSCC"). For example, broker-dealer 1 (B/D 1) purchases a security at \$10 and sells the security to broker-dealer 2 (B/D 2) "net" at a price of \$10.001. Because \$10.001 is the reported trade price, the transaction fee is included as part of the trade and is transferred as part of the clearance and settlement process.

<sup>9</sup>If the parties were trading on a net basis with the fee incorporated in the trade price, the transaction at a price of \$10.001 would be reported to the tape and also submitted to NSCC.

<sup>10</sup>FINRA also is proposing to adopt paragraph (h) of Rule 6622, which would provide expressly that members may enter into "give up" arrangements whereby one member reports to the ORF on behalf of another member, provided that both members have executed and submitted to the ORF the appropriate documentation. The proposed provision is identical to the current rules relating to the FINRA/Nasdaq Trade Reporting Facility and the FINRA/NYSE Trade Reporting Facility and codifies current practice and guidance with respect to reporting to the FINRA Facilities. See Rules 6380A(h) and 6380B(g); *Member Alert: Notice to All*

executed and submitted to the ORF before the members can transfer any transaction fee under the proposed rule. Among other things, the form of agreement specified by FINRA would expressly provide that the acceptance and processing by the ORF of the transaction fee as part of a trade report shall not constitute an estoppel as to FINRA or bind FINRA in any subsequent administrative, civil or disciplinary proceeding with respect to the transaction fee transferred. In other words, processing of a transaction fee by the ORF should not be taken to mean that FINRA approved that transaction fee or its amount or its appropriateness under FINRA rules or federal securities laws. The mere fact that the transaction fee flowed through a FINRA facility will not be a defense to any action taken by FINRA relating to the fee. The proposed rule also provides that the relevant agreements are considered member records for purposes of NASD Rule 3110(a) and must be made and preserved by both members in conformity with applicable FINRA rules.

Furthermore, the proposed rule expressly provides that it shall not relieve a member from its obligations under FINRA rules and federal securities laws, including but not limited to, NASD Rule 2230 (Confirmations) and SEA Rule 10b-10. To the extent that any transaction fee is passed onto the customer, members should review their customer confirmation obligations to ensure that they are disclosing such fees in compliance with all applicable rules and regulations, as well as other FINRA rules, including but not limited to, NASD Rules 2320 (Best Execution and Interpositioning) and 2440 (Fair Prices and Commissions).

The proposed rule relates solely to transaction fees charged by one FINRA member to another FINRA member. Members would not be able to use the ORF to facilitate the transfer of fees for transactions with a customer (*i.e.*, clients that are not brokers or dealers) or a non-member. In addition, the ORF can only be used to facilitate the transfer of transaction fees. Members would not be able to use the ORF to transfer access fees or rebates on transactions.

FINRA also is proposing to amend Rule 7330(d) to require that for any transaction for which the ORF is used to transfer a transaction fee between two members, the trade report must comply with the requirements of proposed Rule

7330(i). Thus, while use of the ORF to transfer transaction fees between members is voluntary, members that opt to use this service must comply with the requirements of proposed Rule 7330(i), as well as all other applicable FINRA rules.

*Proposed Fee for Use of Transaction Fee Transfer Service:*

In this filing, FINRA also is proposing to establish the fee to be charged by the ORF for use by members of the transaction fee transfer service. Pursuant to Rule 7710, the fee will be \$0.03 per side for each clearing report submitted to the ORF to transfer a transaction fee. This fee is in addition to any other fee applicable to the transaction. The amount of this fee is identical to the fee charged by the FINRA/Nasdaq TRF under Rule 7620A for the same transaction fee transfer service.

FINRA has filed the proposed rule change for immediate effectiveness. The operative date will be June 1, 2010.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>11</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. FINRA believes that by automating and improving transaction fee transfers between members as a value-added service, the proposed rule change will enhance market transparency.

Additionally, FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,<sup>12</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the proposed fee for the service is reasonably allocated among members based on their usage of the functionality to transfer transaction fees between members and is generally consistent with other fees charged by the ORF and other FINRA trade reporting facilities.

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

FINRA does not believe that the proposed rule change will result in any burden on competition that is not

*TRF, ADF and Other NASD Facility Participants Regarding AGU and QSR Relationships* (January 25, 2007).

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

<sup>12</sup> 15 U.S.C. 78o-3(b)(5).

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*

Written comments were neither solicited nor received.

**I. Date of Effectiveness of the Proposed Rule Change and Timing of Commission Action**

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup> Additionally, the foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and paragraph (f)(2) of Rule 19b-4 thereunder.<sup>16</sup>

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.

**II. 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-FINRA-2010-017 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-FINRA-2010-017. 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 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 the filing also will be available for inspection and copying at the principal office of the FINRA. 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-FINRA-2010-017 and should be submitted on or before May 27, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-10594 Filed 5-5-10; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-61994; File No. SR-Phlx-2010-58]

**Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX, Inc. To Amend the By-Laws of The NASDAQ OMX Group, Inc.**

April 27, 2010.

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

(“Act”)<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on April 9, 2010, 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 and II 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 proposes to file a proposed rule change relating to the By-Laws of its parent corporation, The NASDAQ OMX Group, Inc. (“NASDAQ OMX”). 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, on the Commission's Web site at <http://www.sec.gov>, 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

NASDAQ OMX has proposed making certain amendments to its By-Laws to make improvements in its governance. In SR-NASDAQ-2010-025, The NASDAQ Stock Market LLC (“NASDAQ Exchange”) sought Commission approval to adopt these By-Laws changes as part of the rules of NASDAQ Exchange, and the Commission granted approval to these changes in an order dated April 8, 2010.<sup>3</sup> The Exchange is

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied the pre-filing requirement.

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

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

<sup>17</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. 61876 (April 8, 2010), 75 FR 19436 (April 14, 2010) (SR-NASDAQ-2010-025).