

available publicly. All submissions should refer to File Number SR–NYSE–2011–03 and should be submitted on or before March 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63905; File No. SR–Phlx–2011–17]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and PSX Data Add-On

February 14, 2011.

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 4, 2011, NASDAQ OMX PHLX LLC (“Phlx” or “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 substantially prepared by Phlx. 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 the Substance of the Proposed Rule Change

Phlx proposes to adopt a fee for the Short Sale Monitor and the PSX Data Add-On, a new service and related NASDAQ OMX PSX (“PSX”) add-on data that assist subscribers in complying with new requirements arising from recent amendments to Regulation SHO. The Exchange will implement the service as soon as practicable following the effective date of the filing.

The text of the proposed rule change is available at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<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.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, Phlx 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. Phlx 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

Phlx is proposing to amend its fee schedule to establish the Short Sale Monitor offered to subscribing member firms at no cost through March 31, 2011 and for a fee of \$750 per market participant identifier (“MPID”), per month thereafter. The Short Sale Monitor is a new service that provides subscribers with real-time surveillance of trades reported to the FINRA/Nasdaq Trade Reporting Facility (“FINRA/NASDAQ TRF”)<sup>3</sup> marked as “short” and “short exempt” to assist them in monitoring their compliance with amendments to Regulation SHO under the Act.<sup>4</sup> The Commission recently amended Regulation SHO to adopt a new short sale-related circuit breaker combined with an alternative uptick rule under Rule 201.<sup>5</sup> The new rule imposes a restriction on the price at which a security may be sold short if the circuit breaker is triggered. Specifically, the new rule requires trading centers,<sup>6</sup> which include self-regulatory organizations (“SROs”), to establish,

<sup>3</sup> The FINRA/NASDAQ TRF is a facility of FINRA operated by The NASDAQ OMX Group, Inc.

<sup>4</sup> Securities Exchange Act Release No. 61595 (February 26, 2010), 75 FR 11232 (March 10, 2010) (amending Rule 201 and Rule 200(g) of Regulation SHO). The amendments to Rules 201 and 200(g) of Regulation SHO have a compliance date of February 28, 2011. See Securities Exchange Act Release No. 63247 (November 4, 2010), 75 FR 68702 (November 9, 2010) (extending the compliance date of the amendments to Rules 201 and 200(g) of Regulation SHO from November 10, 2010 until February 28, 2011).

<sup>5</sup> 17 CFR 242.201.

<sup>6</sup> Rule 201(a)(9) defines the term “trading center” as having the same meaning as in Rule 600(b)(78) of Regulation NMS. Rule 600(b)(78) defines a “trading center” as “a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.” 17 CFR 242.600(b)(78).

maintain and enforce written policies and procedures reasonably designed to prevent the execution or display of short sale orders in a covered security<sup>7</sup> at a price that is less than or equal to the current national best bid<sup>8</sup> if the price of that covered security decreases by 10% or more from its closing price as determined by the listing market<sup>9</sup> as of the end of regular trading hours on the prior day.<sup>10</sup> In addition, the rule requires that the trading center establish, maintain, and enforce written policies and procedures reasonably designed to impose this short sale price test restriction for the remainder of the day and the following day when a national best bid for the covered security is calculated and disseminated on a current and continuing basis by a plan processor pursuant to an effective national market system plan.<sup>11</sup> Trading centers are required to regularly surveil to ascertain the effectiveness of these policies and procedures. Rule 201 generally permits short selling at a price above the current national best bid during the time a short sale price test restriction is in effect for a covered security.

The Commission also amended Regulation SHO to provide that a broker-dealer may mark certain qualifying sell orders “short exempt.”<sup>12</sup>

<sup>7</sup> Rule 201(a)(1) defines the term “covered security” for purposes of Rule 201. See 17 CFR 242.201(a)(1). Rule 201(a)(1) defines “covered security” to mean any “NMS stock” as defined under Rule 600(b)(47) of Regulation NMS. Rule 600(b)(47) of Regulation NMS defines an “NMS stock” as “any NMS security other than an option.” 17 CFR 242.600(b)(47). Rule 600(b)(46) of Regulation NMS defines an “NMS security” as “any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options.” 17 CFR 242.600(b)(46).

<sup>8</sup> Rule 201(a)(4) defines the term “national best bid” for purposes of Rule 201. See 17 CFR 242.201(a)(4).

<sup>9</sup> Rule 201(a)(3) defines the term “listing market” for purposes of Rule 201. See 17 CFR 242.201(a)(3).

<sup>10</sup> 17 CFR 242.201(b)(1)(i).

<sup>11</sup> 17 CFR 242.201(b)(1)(ii). Further, if the price of a covered security declines intra-day by at least 10% on a day on which the security is already subject to the short sale price test restriction of Rule 201, the restriction will be re-triggered and, therefore, will continue in effect for the remainder of that day and the following day. Rule 201 does not place any limit on the frequency or number of times the circuit breaker can be re-triggered with respect to a particular stock. See Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A No. 2.2 (<http://sec.gov/divisions/marketregrule201faq.htm>).

<sup>12</sup> Formerly, Rule 200(g) of Regulation SHO provided that a broker-dealer must mark all sell orders of any security as “long” or “short.” As amended, Rule 200(g) now provides a “short exempt” marking requirement. 17 CFR 242.200(g). Rule 200(g)(2) provides that a sale order may only

If a broker-dealer marks an order “short exempt,” it is not subject to the short sale price test restrictions of Rule 201 and can be executed by a trading center without regard to its price.<sup>13</sup> Paragraphs (c) and (d) of Rule 201 specify the circumstances under which a broker-dealer may mark certain sale orders as “short exempt.”<sup>14</sup> If a broker-dealer chooses to rely on its own determination that it is submitting a short sale order to the trading center at a price that is above the current national best bid at the time of submission under Rule 201(c) or to rely on an exception specified in Rule 201(d), it may mark the order “short exempt.” The Commission noted in adopting the “short exempt” marking requirement that it will both provide a record of broker-dealers availing themselves of the provisions of paragraphs (c) or (d) to the rule and aid surveillance by SROs and the Commission for compliance with the provisions of Rule 201.<sup>15</sup>

The Short Sale Monitor provides subscribing member firms with a tool to aid them in monitoring their trades reported into the FINRA/NASDAQ TRF for compliance with the requirements of the amended rules.<sup>16</sup> Accessed through either a Workstation or Weblink ACT 2.0 terminal, the Short Sale Monitor provides subscribers with notifications of their reported trades marked “short” and “short exempt” for covered securities subject to the short sale price test restrictions of Rule 201. Specifically, the Short Sale Monitor will provide subscribers notice of covered securities subject to the restrictions of Rule 201, and provide access to historical lists of such covered securities. In addition, the Short Sale Monitor will provide notice of trades in covered securities that are: (i) Subject to the short sale price test restriction, and marked “short,” (ii) subject to the short sale price test restriction, and marked “short exempt,” (iii) subject to the short sale price test restriction, and sold above the current national best bid at the time of trade execution time, and

(iv) not subject to the short sale price test restriction, but marked “short exempt.”<sup>17</sup> The Short Sale Monitor will provide this information to a subscribing firm both as real-time alerts and through a historical database of the firm’s trades that prompted the alerts, which will assist the firm in meeting its obligation to ascertain the effectiveness of its policies and procedures.<sup>18</sup> As such, member firms will have a useful compliance tool with which they can monitor, post-trade, their compliance with the amendments to Regulation SHO under the Act.<sup>19</sup> In this regard, the Short Sale Monitor is similar to NASDAQ’s InterACT service in that it provides member firms with post-trade analysis of their trades for compliance with regulatory obligations.<sup>20</sup> Lastly, Phlx will supplement and enhance the Short Sale Monitor as needed to address any amendments to Regulation SHO or other related rules, and from time to time will make changes to enhance the service.

Phlx is also proposing to amend its fee schedule to establish the PSX Data Add-On service as an additional service to an existing Short Sale Monitor subscription, which will provide subscribers with access to records of their trades in covered securities subject to the short sale price restrictions of Rule 201 executed on PSX and marked “short exempt.” The proposed add-on service will be offered at no cost through March 31, 2011, and for an additional fee of \$50 per MPID, per month thereafter. As noted above, to be eligible for the PSX Data Add-On service a member’s MPID must first be subscribed to the Short Sale Monitor.

Last, Phlx is proposing waive the Short Sale Monitor fee for members seeking to subscribe to the PSX Data Add-on service if the MPID is currently subscribed to either the NASDAQ or NASDAQ OMX BX Short Sale Monitor. NASDAQ and NASDAQ OMX BX will offer<sup>21</sup> the Short Sale Monitor to their members for a price identical to that of Phlx’s at \$750 per MPID, per month. Phlx notes that the Short Sale Monitor of each of the three exchanges offers the

identical service and access to data. As such, Phlx does not believe that it is appropriate to charge members of Phlx an additional fee of \$750 per MPID, per month if the member currently subscribes to the Short Sale Monitor offered by another NASDAQ OMX exchange.<sup>22</sup> Accordingly, Phlx believes that a member should only pay for the market-specific data if it has a pre-existing subscription to the Short Sale Monitor, irrespective of the NASDAQ OMX exchange through which it subscribes.

## 2. Statutory Basis

Phlx believes that the proposed rule change is consistent with Section 6(b) of the Act in general,<sup>23</sup> and Section 6(b)(4) of the Act<sup>24</sup> specifically, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Phlx operates or controls, and it does not unfairly discriminate between customers, issuers, brokers or dealers. Phlx believes that offering the Short Sale Monitor at no cost on a trial basis, and for a fee of \$750 per MPID, per month thereafter, and the PSX Data Add-On at no cost on a trial basis, and for a fee of \$50 per MPID, per month thereafter is fair and provides an equitable allocation of fees in that subscription is voluntary and it will apply uniformly to all members that use the FINRA/NASDAQ TRF or execute on PSX, as applicable, and elect to subscribe to one or both of the services. Further, Phlx believes that, as discussed above, waiving the Short Sale Monitor fee for a member seeking a subscription to the PSX Data Add-On is appropriate in cases where the member has subscribed the MPID to the Short Sale Monitor of NASDAQ or NASDAQ OMX BX. As noted, the Short Sale Monitors of the NASDAQ OMX exchanges provide identical services and are offered at an identical fee. As such, Phlx does not believe requiring a firm to subscribe to a redundant service solely to access PSX-specific data is an equitable allocation of fees. Phlx notes that subscribing members may cancel their subscription(s) at any time prior to the expiration of the trial period at no cost. The proposed fee will apply to all members equally based on the number of MPIDs subscribed. The proposed fee will cover the costs associated with separately offering the service,

be marked “short exempt” if the provisions of Rule 201(c) or Rule 201(d) are met. 17 CFR 242.200(g)(2). See *supra* note 4. See also Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A Nos. 5.4 and 8.1.

<sup>13</sup> 17 CFR 242.201(b)(1)(iii)(B).

<sup>14</sup> 17 CFR 242.201(c); 17 CFR 242.201(d).

<sup>15</sup> See *supra* note 4, 75 FR at 11275–76.

<sup>16</sup> FINRA recently amended its rules to conform them to the requirements of the changes made by the Commission to Regulation SHO, including amending its trade reporting rules applicable to over-the-counter trades in NMS stocks to reintroduce the short sale exempt category. See Securities Exchange Act Release No. 63032 (December 4, 2010), 75 FR 62439 (December 8, 2010) (SR-FINRA–2010–043).

<sup>17</sup> See also Division of Trading and Markets: Responses to Frequently Asked Questions Concerning Rule 201 of Regulation SHO, Q&A Nos. 5.4 and 5.5.

<sup>18</sup> The Commission notes that broker-dealers subscribing to the Short Sale Monitor and Data Add-On service remain responsible for compliance with Rule 201 of Regulation SHO.

<sup>19</sup> *Supra* note 4.

<sup>20</sup> See NASDAQ Rule 7049 (explaining the InterACT service).

<sup>21</sup> NASDAQ and NASDAQ OMX BX have filed related rule changes with the Commission concurrent with Phlx’s filing. See SR-NASDAQ–2011–024 and SR-BX–2011–008.

<sup>22</sup> Rule changes proposed by both NASDAQ and NASDAQ OMX BX provide an identical waiver of the Short Sale Monitor fee.

<sup>23</sup> 15 U.S.C. 78f(b).

<sup>24</sup> 15 U.S.C. 78f(b)(4).

responding to customer requests, configuring PSX's systems, programming to user specifications, and administering the service, among other things, and may provide Phlx with a profit to the extent costs are covered.

Phlx also believes that the proposed rule change is consistent with the provisions of Section 6(b)(5) of the Act<sup>25</sup> because it is designed to, among other things, prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to foster cooperation and coordination with persons engaged in facilitating transactions in securities. The Short Sale Monitor will assist subscribing member firms in monitoring their compliance with the amendments to Regulation SHO under the Act<sup>26</sup> with respect to trades reported to the FINRA/NASDAQ TRF. Phlx notes that the Short Sale Monitor is similar to NASDAQ's InterACT service,<sup>27</sup> which allows member firms to supervise trade activity required to be reported to the FINRA/NASDAQ TRF, and provides member firms with real time totals of open trades awaiting review and acceptance within the twenty minute period required by FINRA Rule 7230A(b). As noted above, the Short Sale Monitor is similar to this service in that it provides member firms with post-trade analysis of their trades for compliance with regulatory obligations. In the case of the Short Sale Monitor and PSX Data Add-On, such analysis include trades reported to the FINRA/NASDAQ TRF and trades executed on PSX marked "short exempt" in covered securities.

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

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

#### *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.

### **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>28</sup> and subparagraph (f)(2) of Rule 19b-4

thereunder.<sup>29</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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, as amended, 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-2011-17 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-Phlx-2011-17. 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 such filing also will be available for inspection and copying at the principal offices 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-2011-17, and should be submitted on or before March 11, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-63906; File No. SR-NASDAQ-2011-024]**

### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish and Adopt Fees for the New Short Sale Monitor Service and Nasdaq Data Add-On**

February 14, 2011.

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 4, 2011, The NASDAQ Stock Market LLC ("NASDAQ"), 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 substantially prepared by NASDAQ. 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 the Substance of the Proposed Rule Change**

NASDAQ proposes to adopt a fee for the Short Sale Monitor and the Nasdaq Data Add-On, a new service and related add-on data that assist subscribers in complying with new requirements arising from recent amendments to Regulation SHO. NASDAQ will implement the service as soon as practicable following the effective date of the filing.

<sup>30</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>25</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> *Supra* note 4.

<sup>27</sup> *Supra* note 20.

<sup>28</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>29</sup> 17 CFR 240.19b-4(f)(2).