



7 Roszel Road  
Fifth Floor, Suite 5-A  
Princeton, New Jersey 08540  
T 609 897 7300  
F 609 987 2201

November 27, 2013

**VIA ELECTRONIC SUBMISSION AND  
OVERNIGHT DELIVERY**

Ms. Elizabeth M. Murphy  
Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: **Release No. 70866; File No. SR-PHLX-2013-113**

Dear Ms. Murphy:

Miami International Securities Exchange, LLC ("MIAX" or "Exchange"), appreciates the opportunity to submit this comment letter to the Securities and Exchange Commission ("Commission") regarding a recent filing by NASDAQ OMX PHLX ("PHLX") to tie a customer rebate to the trading activity of market participants and their affiliates across multiple competing national registered securities exchanges and independent self-regulatory organizations.<sup>1</sup> MIAX respectfully requests that the Commission take action to Temporarily Suspend the PHLX Proposal and Institute Disapproval Proceedings against the PHLX Proposal. MIAX believes that the PHLX Proposal is not consistent with the requirements of the Securities Exchange Act of 1934 (the "Act") and that the Commission should ultimately disapprove the filing. As described below, MIAX believes that the PHLX Proposal is inconsistent with the requirements of Sections 6(b)(4), 6(b)(5), and 6(b)(8) of the Act.<sup>2</sup>

**PHLX Proposal**

The PHLX Proposal would allow market participants to aggregate their trading volume with an affiliate's trading volume on PHLX, NASDAQ Options Market LLC ("NOM"), and/or NASDAQ OMX BX ("BX") to qualify for higher customer rebate tiers. MIAX wants to thank PHLX for taking

<sup>1</sup> See Securities Exchange Act Release No. 70866 (November 13, 2013), 78 FR 69483 (November 19, 2013) (SR-PHLX-2013-113) ("PHLX Proposal").

<sup>2</sup> 15 U.S.C. 78f(b)(4), (5), (8).

the time to draft such a long and interesting read about the nexus between exchange fees, antitrust laws, and the U.S. Supreme Court. While the antitrust laws fall under the purview of the U.S. Department of Justice and not the Commission per se, MIAX certainly encourages the antitrust department of the U.S. Department of Justice to review the interesting arguments presented.

Regardless, MIAX respectfully disagrees with PHLX's arguments that the PHLX Proposal complies with the requirements of the Act. Specifically, MIAX represents that: (i) the proposed fee rebate is an inequitable allocation of fees and dues that results in unfair discrimination amongst market participants; and (ii) the proposed fee imposes an unnecessary burden on competition that is inconsistent with the Act.

#### **Inconsistent with Section 6(b)(4) and 6(b)(5)**

Section 6(b)(4) of the Act<sup>3</sup> provides that rules of the exchange shall "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities." Section 6(b)(5) of the Act<sup>4</sup> provides that the rules of the exchange shall be designed not to "permit unfair discrimination between, customers, issuers, brokers, or dealers."

MIAX disagrees with PHLX's empty arguments that the proposed fee is an equitable allocation of fees and dues and is not unfairly discriminatory. Take the simple example of two seemingly identical market participants on PHLX - BD1 and BD2. BD1 and BD2 are both the same class of market participant and execute the same exact transaction volume, of 2% of the national customer volume on PHLX. However, BD1 sends the balance of their customer order flow of 1% to MIAX because they value low latency and quality of execution, while BD2 sends the balance of their customer order flow of 1% to NOM. An equitable allocation of reasonable fees and dues that was not unfairly discriminatory would result in the charging BD1 and BD2 the exact same fees for the identical trading activity on PHLX. In contrast, PHLX's Proposal would result in BD1 and BD2 being charged different fees even though they are performing the same exact activity on PHLX. BD1 would be eligible for a \$0.14 rebate, while BD2 would be eligible for a \$0.17 rebate for executing the identical 2% of the national customer volume on PHLX. BD1 would be essentially penalized for sending their additional customer order flow to MIAX instead of sending it to an affiliate options exchange of PHLX. This disparate treatment between similarly positioned market participants is unfair discrimination. BD1 would be treated worse than BD2 not based on the transaction volume that they performed on PHLX, but for the lack of trading volume on another independent self-regulatory organization.

#### **Inconsistent with Section 6(b)(8)**

Section 6(b)(8) of the Act<sup>5</sup> provides that the rules of the exchange shall "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.

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<sup>3</sup> 15 U.S.C. 78f(b)(4).

<sup>4</sup> 15 U.S.C. 78f(b)(5).

<sup>5</sup> 15 U.S.C. 78f(b)(8).

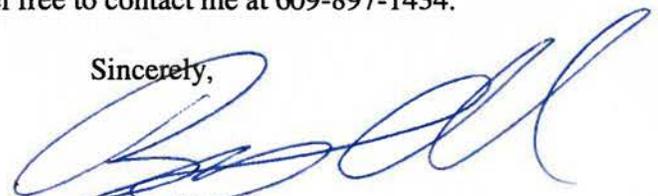
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The PHLX Proposal imposes a burden on both intermarket and intramarket competition that is inconsistent with the purposes of the Act. The PHLX Proposal would allow market participants to aggregate their trading volume with an affiliate's trading volume on PHLX, NOM, and/or BX to qualify for higher customer rebate tiers. MIAX as a single independent new options exchange would have no ability to compete against a fee structure that leverages the execution volume and fees across 3 competing options exchanges. In addition, the PHLX Proposal would establish a precedent that would allow exchanges to leverage transaction volume and fees across independent self-regulatory organizations within affiliate exchange groups. Affiliate exchange groups of NASDAQ, NYSE, and CBOE would thus be allowed to leverage the execution volume across their multiple independent self-regulatory organizations that trade options to fix pricing of fees to the detriment of other options exchanges that don't have such affiliate options exchanges. Such an outcome would severely hinder competition amongst options exchanges and damage the existing market structure that is built on competition and innovation.

The proposed fee is also a burden on competition amongst market participants on PHLX as well. Any market participant that does not execute options transactions on an affiliate options exchange of PHLX would be subject to an additional competitive burden on PHLX against market participants that do execute options transactions on PHLX affiliate options exchanges. Market participants may not have the capacity to be members of multiple options exchanges, nor have affiliates that are members on other options exchanges. These market participants would be subject to an additional competitive burden due to this filing because of an inability to leverage additional customer trading volume on a PHLX affiliate options exchange to lower their fees. Some market participants with limited ability to be on multiple markets may naturally favour an exchange like MIAX for low latency and quality of execution for their Market Maker side while sending customer orders to PHLX. These market participants would also be subject to an additional competitive burden due to this filing because of an inability to leverage additional customer trading volume on a PHLX affiliate options exchange to lower their fees.

For the reasons stated above, MIAX believes that the PHLX Proposal is not consistent with the requirements of the Act and that the Commission should ultimately disapprove the filing. Once again, MIAX appreciates the opportunity to comment on the PHLX Proposal. Should the Commission or the Staff have any questions, please feel free to contact me at 609-897-1434.

Sincerely,



Brian O'Neill  
Vice President and Senior Counsel

cc: John Ramsey, Acting Director, Division of Trading and Markets  
James Burns, Deputy Director, Division of Trading and Markets  
Heather Seidel, Associate Director, Division of Trading and Markets