

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66884; File Nos. SR-Phlx-2012-27; SR-Phlx-2012-54)

April 30, 2012

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes Relating to Complex Order Fees and Rebates for Adding and Removing Liquidity in Select Symbols

I. Introduction

On March 1, 2012 and April 23, 2012, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (the “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² two proposed rule changes relating to the transaction fees for certain Complex Order transactions.³

In SR-Phlx-2012-27 (filed on March 1, 2012), Phlx proposed to amend the Exchange’s Fee Schedule to increase the transaction fees and rebates for certain Complex Order transactions and create a new rebate for certain Complex Orders. The proposed rule change was immediately

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ A Complex Order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced at a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. A Complex Order may also be a stock-option order, which is an order to buy or sell a stated number of units of an underlying stock or exchange-traded fund (“ETF”) coupled with the purchase or sale of options contract(s). See Exchange Rule 1080, Commentary .08(a)(i).

effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ Notice of filing of the proposed rule change was published in the Federal Register on March 15, 2012.⁵

In SR-Phlx-2012-54 (filed on April 23, 2012), Phlx proposed to replace a portion of SR-Phlx-2012-27 to provide additional information concerning the Directed Participant and Market Maker fees for removing liquidity in Complex orders (“Second Proposal,” and, together with SR-Phlx-2012-27, the “Phlx Proposals”).⁶ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁷

To date, the Commission has not received any comment letters on the Exchange’s proposed rule changes.

Under Section 19(b)(3)(C) of the Act, the Commission is: (1) hereby temporarily suspending the Phlx Proposals; and (2) instituting proceedings to determine whether to approve or disapprove the Phlx Proposals.

II. Summary of the Proposed Rule Changes

SR-Phlx-2012-27

The Exchange’s proposal amended Complex Order fees and rebates for adding and removing liquidity in its Select Symbols.⁸ Specifically, Phlx’s proposal: (1) increased the Customer Rebate for Adding Liquidity from \$0.30 per contract to \$0.32 per contract; (2) created a new Rebate for Removing Liquidity of \$0.06 per contract for each contract of liquidity

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ See Securities Exchange Act Release No. 66551 (March 9, 2012) 77 FR 15400 (“Notice”).

⁶ See Securities Exchange Act Release No. 66883 (April 30, 2012) (SR-Phlx-2012-54) (notice of filing of the proposed rule change).

⁷ 15 U.S.C. 78s(b)(3)(A).

⁸ The Select Symbols are listed in Section I of the Phlx Fee Schedule.

removed by an order designated as a Customer Complex Order; (3) amended the Fee for Removing Liquidity for all participants who are assessed such a fee; and (4) created a volume incentive for certain market participants that transact significant volumes of Complex Orders on the Exchange.

Phlx's proposal to amend the Fee for Removing Liquidity increased the Complex Order Fees for Removing Liquidity for the Directed Participant,⁹ Market Maker,¹⁰ Firm, Broker-Dealer, and Professional¹¹ categories of market participants. The fee for Directed Participant transactions increased from \$0.30 to \$0.32 per contract; the fee for Market Makers increased from \$0.32 to \$0.37 per contract; and the fee for Firms, Broker-Dealers, or Professionals increased from \$0.35 to \$0.38 per contract.

The proposal also provided a new volume incentive to Market Makers. The Exchange has four categories of market makers - Specialists,¹² ROTs,¹³ SQTs¹⁴ and RSQTs¹⁵ - that would

⁹ The term "Directed Participant" applies to transactions for the account of a Specialist, Streaming Quote Trader ("SQT") or Remote Streaming Quote Trader ("RSQT") resulting from a Customer order that is (1) directed to it by an order flow provider, and (2) executed by it electronically on Phlx XL II. See Phlx Fee Schedule at 3.

¹⁰ A "Market Maker" includes Specialists (see Exchange Rule 1020) and Registered Options Traders ("ROT") (see Exchange Rule 1014(b)(i) and (ii), which includes SQTs (see Exchange Rule 1014(b)(ii)(A)) and RSQTs (see Exchange Rule 1014(b)(ii)(B)).

¹¹ The term "professional" means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Exchange Rule 1000(b)(14).

¹² A Specialist is an Exchange member who is registered as an options specialist pursuant to Exchange Rule 1020(a).

¹³ A ROT includes a SQT, a RSQT and a Non-SQT ROT, which by definition is neither a SQT nor a RSQT. A Registered Option Trader is defined in Rule 1014(b) as a regular member of the Exchange located on the trading floor who has received permission from the Exchange to trade in options for his own account. See Exchange Rule 1014(b)(i) and (ii).

all be eligible to receive the volume incentive. If the Market Maker executes more than 25,000 contracts of Complex Orders each day in a given month, all of that Market Maker's transactions in Complex Orders that remove liquidity, both as a Directed Participant and as a Market Maker, shall be reduced by \$0.01 per contract for that month.

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The Exchange's proposal replaced a portion of SR-Phlx-2012-27 to provide additional information concerning the current Complex Order Directed Participant and Market Maker Fees for Removing Liquidity in Select Symbols. The Exchange did not propose to amend any of the fees for the Complex Order Directed Participant and Market Maker Fees for Removing Liquidity in Select Symbols, but rather included additional justification for the differential between the fees paid by Directed Participants and Market Makers.

III. Suspension of the Phlx Proposals

Pursuant to Section 19(b)(3)(C) of the Act,¹⁶ at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,¹⁷ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization 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.

¹⁴ An SQT is defined in Exchange Rule 1014(b)(ii)(A) as an ROT who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned.

¹⁵ An RSQT is defined Exchange Rule in 1014(b)(ii)(B) as an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange.

¹⁶ 15 U.S.C. 78s(b)(3)(C).

¹⁷ 15 U.S.C. 78s(b)(1).

The Commission believes it is appropriate to further evaluate the potential effect of the proposed rule changes on competition among different types of market participants and on market quality, particularly with respect to the fee differential between Directed Participants and Market Makers, and the basis for such differential put forth by the Exchange. Under the proposed rule changes, the Exchange increased the differential between the fee charged to Directed Participants and Market Makers from \$0.02 to \$0.05. As a result, if a Market Maker that is a Directed Participant executes against a Customer order directed to that Market Maker for execution by an Order Flow Provider (“OFP”),¹⁸ it will be charged \$0.05 less per contract than another Market Maker to whom the order is not directed would have been charged for executing against that same order.

In the Notice for SR-Phlx-2012-27, the Exchange stated that the changes to the Complex Order taker fees in the Select Symbols for Market Makers and Directed Participants are reasonable, equitable, and not unfairly discriminatory.¹⁹ The Exchange did not specifically analyze the impact, if any, of the changes to the Complex Order taker fees on competition.²⁰ The Exchange argued that the proposed fee change is reasonable, equitable, and not unfairly discriminatory because:

- (i) Market Makers are not entitled to guaranteed allocations for directed Complex Orders; (ii) all Market Makers have an equal opportunity to incentivize an OFP to direct an order to it for execution on the Exchange; (iii) only Customer orders that are directed by an OFP and executed by the intended Market Maker receive the Complex Order Directed Participant fee; (iv) the proposed Directed Participant

¹⁸ The term “Order Flow Provider” (“OFP”) means any member or member organization that submits, as agent, orders to the Exchange. See Exchange Rule 1080(l)(i)(B).

¹⁹ See Notice, supra note 5, at 15403.

²⁰ See Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].”

and Market Maker Complex Order fees are less than the fees assessed to Firms, Professionals and Broker-Dealers because of obligations carried by those Market Makers which do not burden other participants; (v) Market Makers are unaware of the identity of the contra-party at the time of the trade and are also required to execute at the best price, pursuant to Exchange Rules, against an order intended for them by an OFP in order to be assessed the Directed Participant Complex Order Fee for Removing Liquidity (the only benefit) which does not happen more than 80% of the time; (vi) order flow arrangements benefit all market participants equally through added liquidity. . .²¹

In support of this argument, the Exchange noted that “an average of 14.5% of Customer Complex Orders trade with the Market Maker to which they are directed.”²² It also provided an analysis for the week of October 10, 2011 of the level of price improvement received by Customer Complex Order trading in an auction process on the Exchange. Phlx noted that, based on its analysis, “Customer Complex Orders received price improvement 29% of the time and the average level of price improvement was \$0.059 per option or \$5.90 per contract for options receiving price improvement.”²³ The Exchange stated that difference between the proposed fee differential and the price improvement levels “supports the Exchange’s belief that the proposed fee is reasonable and will have a negligible impact on Directed and non-Directed Market Makers,”²⁴ given that the fee differential between Directed Participants and Market Makers rose by \$0.03 per contract, while the average level of price improvement, for options receiving price improvement, is \$5.90 per contract.

²¹ See id. at 15404.

²² See id. at 15403.

²³ See id.

²⁴ Id.

The Exchange also noted the justification for the existing \$0.02 differential between Directed Participants and Market Makers is that Market Makers that receive Directed Orders have higher quoting obligations than Market Makers who do not.²⁵

The Exchange further stated that increasing this differential is intended “to also reflect the increased costs that are incurred by such Market Makers that enter into order flow arrangements at a cost and without the benefit of a guaranteed allocation.”²⁶ Phlx stated that it wants to encourage Market Makers to enter into order flow arrangements and that “[t]he benefit that a Market Maker brings to the Exchange when it pays for order flow is not an insignificant one and this benefit should not go unrewarded.”²⁷ The competition for order flow, according to the Exchange, provides better execution quality on the Exchange, which benefits all participants.²⁸

In the Second Proposal, Phlx replaced a portion of SR-Phlx-2012-27 to provide additional justification for the differential between the Complex Order Directed Participant and Market Maker Fees for Removing Liquidity in Select Symbols (as modified by SR-Phlx-2012-27). The Exchange argued that the \$0.05 per contract differential is reasonable, equitable and not unfairly discriminatory because: (i) it is consistent with the fee structures at other options exchanges; (ii) Market Makers do not receive guaranteed allocations for directed Complex Orders; (iii) the only executions that receive the reduced Complex Order Directed Participant fee are Market Maker executions against Customer orders that are directed by an OFP to the executing Market Maker; (iv) Market Makers do not know the identity of the contra-party at the

²⁵ See id. at 15402.

²⁶ See id.

²⁷ See id. at 15404.

²⁸ See id.

time of a trade and must execute at the best price; (v) Market Makers compete to offer price improvement in auctions; and (vi) the fees for removing liquidity in Complex Orders allow the Exchange to offer increased Customer rebates, which attracts additional Customer order flow to the Exchange and benefits all market participants.

The Exchange also provided data for the time period from September 1, 2011 through April 19, 2012, showing the percentage of Customer Complex directed orders that traded with the Market Maker to which the order was directed, as follows:

September 2011	October 2011	November 2011	December 2011	January 2012	February 2012	March 2012	April 1-19, 2012
17.02%	16.16%	17.94%	14.01%	6.19%	11.47%	14.19%	17.13%

The Exchange maintained that “in a given month the effective Complex Order Fee for Removing Liquidity for a Market Maker that also has executions subject to the Directed Participant rate is approximately \$0.02 below the Market Maker Complex Order Fee for Removing Liquidity.” The Exchange also updated the price improvement statistics described above to note that the average level of price improvement during the week of April 9, 2012 was \$5.60 per contract for options receiving price improvement.

The Commission intends to further assess whether the resulting fee disparity between Directed Participants and Market Makers (\$0.05 per contract) is consistent with the statutory requirements applicable to a national securities exchange under the Act, as described below. In particular, the Commission will assess whether the Phlx Proposals satisfy the standards under the Exchange Act and the rules thereunder requiring, among other things, that an exchange’s rules: provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers,

issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.

IV. Proceedings to Determine Whether to Approve or Disapprove the Phlx Proposals

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)²⁹ and 19(b)(2) of the Act³⁰ to determine whether the Exchange's proposed rule changes should be approved or disapproved. Pursuant to Section 19(b)(2)(B) of the Act,³¹ the Commission is providing notice of the grounds for disapproval under consideration. As discussed above, under the proposal, a Market Maker that is a Directed Participant pays a lower fee than a Market Maker that is not a Directed Participant when executing against a Complex Order in a Select Symbol that was directed to the Directed Participant. The Exchange Act and the rules thereunder require that an exchange's rules: provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on

²⁹ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

³⁰ 15 U.S.C. 78s(b)(2).

³¹ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. Id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. Id.

competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. The Commission intends to further assess whether the Phlx Proposals are consistent with these Exchange Act standards.

The Commission believes it is appropriate and in the public interest to institute disapproval proceedings at this time in view of the significant legal and policy issues raised by the Phlx Proposals.³² Institution of disapproval proceedings does not indicate, however, that the Commission has reached any conclusions with respect to the issues involved. The sections of the Act and the rules thereunder that are applicable to the proposed rule changes include:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”³³
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”³⁴ and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act].”³⁵

³² See also Securities Exchange Act Release No. 61547 (February 19, 2010) 75 FR 8762 (February 25, 2010) (Order of Summary Abrogation, in which the Commission abrogated several Phlx fee filings, including a fee that would have instituted a \$0.16 differential between certain classes of market makers depending on whether they had orders directed to them).

³³ 15 U.S.C. 78f(b)(4).

³⁴ 15 U.S.C. 78f(b)(5).

³⁵ 15 U.S.C. 78f(b)(8).

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁶

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes. The Commission is focusing its request for comment on the fee for removing liquidity assessed on Directed Participants as compared to the fee for removing liquidity assessed on Market Makers, not the other fee changes that were included in Phlx-2012-27. In particular, the Commission seeks comment on the following:

- As noted above, Section 6(b)(5) of the Act requires, among other things, that the rules of a national securities exchange not be "designed to permit unfair discrimination between customers, issuers, brokers or dealers." The Commission seeks comment on whether discrimination on the basis of whether a market maker has an off-exchange arrangement to pay an OFP to direct its orders to that market maker is a "fair" basis for discrimination

³⁶ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding -- either oral or notice and opportunity for written comments -- is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

among its members with respect to the fees charged by the exchange. Do commenters' views change depending on whether the payment for order flow is pursuant to exchange rules or an off-exchange payment for order flow arrangement?;

- The Commission seeks comment on whether the filing for SR-Phlx-2012-27 or for SR-Phlx-2012-54 was sufficient under Section 19(b) of the Act in addressing issues regarding the basis for discrimination between Market Makers and Directed Participants in Complex Order transaction fees, and whether the basis for such discrimination is fair, and why or why not;
- As noted above, Section 6(b)(4) requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” The Commission seeks comment on whether the filing for SR-Phlx-2012-27 or for SR-Phlx-2012-54 was sufficient under Section 19(b) of the Act in addressing issues regarding the reasonableness of the proposed fees (and thus the proposed fee differential), and whether the amount of the proposed fees (and thus the amount of the proposed fee differential), are reasonable, and why or why not. Does a flat \$0.05 fee differential appropriately reflect potential differences that may exist in payment for order flow arrangements between market makers and OFPs?;
- Section 6(b)(8) of the Act requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Exchange Act]. The Commission seeks comment on whether the filing for SR-Phlx-2012-27 or for SR-Phlx-2012-54 was sufficient under Section 19(b) of the Act in addressing issues regarding the effects of the proposed fee change on competition,

and what, if any, impact the proposed fee change has or will have on competition, especially as between Directed Participants and Market Makers; and

- Whether the proposed fee changes will affect the quality of execution of Customer Complex Orders or broader market quality; and if so, how and what type of impact will they have.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposed rule changes are 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. Please include File Number SR-Phlx-2012-27 and/or SR-Phlx-2012-54 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-2012-27 and/or SR-Phlx-2012-54. The 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 website 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 10:00 a.m. and 3:00 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 publicly available. All submissions should refer to File Number SR-Phlx-2012-27 and SR-Phlx-2012-54 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,³⁷ that File

³⁷ 15 U.S.C. 78s(b)(3)(C).

Nos. SR-Phlx-2012-27 and SR-Phlx-2012-54, be and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

Kevin M. O'Neill
Deputy Secretary

³⁸ 17 CFR 200.30-3(a)(57) and (58).