

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70940; File No. SR-Phlx-2013-113)

November 25, 2013

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Offer a Customer Rebate

I. Introduction

On October 31, 2013, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Customer Rebate Program in Section B of the Exchange’s Pricing Schedule to increase Customer rebates available to certain market participants that transact Customer orders on Phlx. Phlx designated the proposed rule change as immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The Commission published notice of filing of the proposed rule change in the Federal Register on November 19, 2013.⁴ To date, the Commission has received two comment letters on the proposal.⁵

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release No. 70866 (November 13, 2013), 78 FR 69472 (“Notice”).

⁵ See letters to Elizabeth M. Murphy, Secretary, Commission from: Michael J. Simon, Secretary, International Securities Exchange, LLC, dated November 11, 2013 (“ISE Letter”); and William O’Brien, Chief Executive Officer, Direct Edge Holdings LLC, dated November 13, 2013 (“DirectEdge Letter”).

Pursuant to Section 19(b)(3)(C) of the Act, the Commission hereby is: (1) temporarily suspending File No. SR-Phlx-2013-113; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR-Phlx-2013-113.

II. Summary of the Proposed Rule Change

The Exchange's proposal amends the Customer Rebate Program in Section B of the Exchange's Pricing Schedule. Under the Customer Rebate Program, the Exchange pays tiered rebates to members for certain Customer orders executed on Phlx.⁶ In general, the tiers (there are four tiers) are based on Customer volume in multiply-listed options that member organizations under Common Ownership⁷ transact monthly on Phlx as a percentage of total national Customer volume in multiply-listed options.⁸ Phlx's proposal provides an additional \$0.02 per contract rebate for Customer orders executed on Phlx that currently qualify for the Customer Rebate Program provided the member organization, together with any affiliate under Common Ownership, transacts aggregate Customer volume on Phlx, The NASDAQ Options Market LLC ("NOM") and/or NASDAQ OMX BX, Inc. ("BX Options") (collectively, the "NASDAQ OMX exchanges") in multiply-listed options that is electronically delivered and executed equal to or greater than 2.5% of national Customer volume in multiply-listed options in a month.⁹

⁶ For a more detailed description of the Customer Rebate Program in Section B of the Exchange's Pricing Schedule, see Notice, supra note 4.

⁷ Phlx defines Common Ownership in the Preface to the Pricing Schedule as a member or member organizations under 75% common ownership or control.

⁸ See supra note 6.

⁹ For a more detailed description of the proposed rule change, see Notice, supra note 4.

III. Summary of Comments Received

As noted above, the Commission has received two comment letters on the proposed rule change.¹⁰ Among other things, both commenters believe that further scrutiny and public comment of the proposal is necessary given the unprecedented nature of the proposed rule change and the potential impact the proposal could have across all exchange pricing going forward.¹¹ One commenter notes that the proposed rule change links the fees for transactions executed on Phlx to executions on two exchanges under common ownership with Phlx, which is unprecedented.¹² This commenter states its view that the proposed rule change raises issues of such critical importance to the national market system that it is imperative that the fee change not be in effect during the period of public comment and Commission consideration.¹³ Another commenter states its view that a period of public notice and comment pursuant to Section 19(b)(2) of the Act is strongly warranted.¹⁴

IV. Suspension of SR-Phlx-2013-113

Pursuant to Section 19(b)(3)(C) of the Act,¹⁵ 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,¹⁶ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization if it

¹⁰ See supra note 5.

¹¹ See ISE Letter, supra note 5, at 1 and DirectEdge Letter, supra note 5, at 1.

¹² See ISE Letter, supra note 5, at 1.

¹³ See id.

¹⁴ See DirectEdge Letter, supra note 5, at 1.

¹⁵ 15 U.S.C. 78s(b)(3)(C).

¹⁶ 15 U.S.C. 78s(b)(1).

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.

The Commission believes it is appropriate in the public interest to temporarily suspend the proposal to solicit comment on and evaluate further the statutory basis for Phlx's proposal to vary the amount of the per contract Customer rebate that it will pay for certain transactions in options on its market based on the aggregate amount of volume in certain options across all three of the NASDAQ OMX exchanges.

In temporarily suspending the proposal, the Commission intends to further assess whether the additional Customer rebate, which is based on execution volume across the NASDAQ OMX exchanges, is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will assess whether the proposed rule change satisfies the requirements of the 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 Act.¹⁷

Therefore, the Commission finds that it is appropriate in the public interest,¹⁸ for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.

¹⁷ See 15 U.S.C. 78f(b)(4), (5) and (8).

¹⁸ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

V. Proceedings to Determine Whether to Approve or Disapprove SR-Phlx-2013-113

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)¹⁹ and 19(b)(2) of the Act²⁰ to determine whether Phlx's proposed rule change should be approved or disapproved. Pursuant to Section 19(b)(2)(B) of the Act,²¹ the Commission is providing notice of the grounds for disapproval under consideration. As discussed above, the proposal increases the per contract Customer rebates for transactions on Phlx if the aggregate volume of Customer orders transacted by a member organization and its affiliates on Phlx, NOM and/or BX Options exceeds a specified volume threshold. The Act requires that exchange rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; that exchange rules not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and that exchange rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Commission intends to assess whether Phlx's proposal is consistent with these and other requirements of the Act.

The Commission believes it is appropriate to institute disapproval proceedings at this time in view of the legal and policy issues raised by the proposal. Institution of disapproval proceedings does not indicate, however, that the Commission has reached any conclusions with

¹⁹ 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.

²⁰ 15 U.S.C. 78s(b)(2).

²¹ 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.

respect to the issues involved. The sections of the Act and the rules thereunder which are applicable to the proposed rule change include:

- Section 6(b)(4) of the Act,²² 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.”
- Section 6(b)(5) of the Act,²³ which requires that the rules of a national securities exchange be designed to, among other things, “remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers.”
- Section 6(b)(8) of the Act,²⁴ which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate” in furtherance of the Act.

VI. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as other relevant concerns. Such comments should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from 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

²² 15 U.S.C. 78f(b)(4).

²³ 15 U.S.C. 78f(b)(5).

²⁴ 15 U.S.C. 78f(b)(8).

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.²⁵

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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. Please include File Number SR-Phlx-2013-113 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-2013-113. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the

²⁵ 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 Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 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. 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-2013-113 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from the date of publication in the Federal Register].

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,²⁶ that File Number SR-Phlx-2013-113, be and hereby is, 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.²⁷

Kevin M. O'Neill
Deputy Secretary

²⁶ 15 U.S.C. 78s(b)(3)(C).

²⁷ 17 CFR 200.30-3(a)(57) and (58).