

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61486; File No. SR-Phlx-2010-18)

February 3, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing of Proposed Rule Change to Codify Prices for Co-Location Services

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 January 29, 2010, NASDAQ OMX PHLX (“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 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 the Substance of the Proposed Rule Change

NASDAQ OMX PHLX is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to codify pricing for co-location services. The text of the proposed rule change is available at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, on the Commission’s Web site at <http://www.sec.gov>, at the Exchange’s principal office, and at the Commission’s Public Reference Room. The Exchange will implement the proposed rule change on the first day of the month immediately following Commission approval (or on the date of approval, if on the first business day of a month).

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 C.F.R. 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, 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

The Exchange is proposing to codify fees for its existing co-location services. Co-location services are a suite of hardware, power, telecommunication, and other ancillary products and services that allow market participants and vendors to place their trading and communications equipment in close physical proximity to the quoting and execution facilities of the Exchange. Phlx provides co-location services and imposes fees through Nasdaq Technology Services LLC and pursuant to agreements with the owner/ operator of its data center where both the Exchange's quoting and trading facilities and co-located customer equipment are housed.<sup>3</sup> Users of co-location services include private extranet providers, data vendors, as well as the Exchange members and non-members. The use of co-location services is entirely voluntary.

As detailed in the proposed co-location fee schedule, the Exchange imposes a uniform, non-discriminatory set of fees for various co-location services, including: fees for cabinet space

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<sup>3</sup> Currently, the Exchange provides its current co-location services through data centers located in the New York City and Mid-Atlantic areas.

usage, or options for future space usage<sup>4</sup>; installation and related power provision for hosted equipment; connectivity among multiple cabinets being used by the same customer as well as customer connectivity to the Exchange and telecommunications providers<sup>5</sup>; and related maintenance and consulting services. Fees related to cabinet and power usage are incremental, with additional charges being imposed based on higher levels of cabinet and/or power usage, the use of non-standard cabinet sizes or special cabinet cooling equipment, or the re-selling of cabinet space.

Co-location customers are not provided any separate or superior means of direct access to the Exchange quoting and trading facilities. Nor does the Exchange offer any separate or superior means of access to the Exchange quoting and trading facilities as among co-location customers themselves within in [sic] the datacenter. Likewise, the Exchange does not make available to co-located customers any market data or data feed product or service for data going

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<sup>4</sup> NASDAQ OMX PHLX is implementing a Cabinet Proximity Option program where, for a monthly a fee, customers can obtain an option for future use on available currently-unused cabinet floor space in proximity to their existing equipment. Under the program, customers can reserve up to maximum of 20 cabinets which the Exchange will endeavor to provide as close as reasonably possible to the customer's existing cabinet space, taking into consideration power availability within segments of the datacenter and the overall efficiency of use of datacenter resources as determined by the Exchange. Should reserved datacenter space be needed for use, the reserving customer will have three business days to formally contract with the Exchange for full payment for the reserved cabinet space in contention or it will be reassigned. In making determinations to require exercise or relinquishment of reserved space as among numerous customers, the Exchange will take into consideration several factors, including: proximity between available reserved cabinet space and the existing space of a customer seeking additional space for actual cabinet usage; a customer's ratio of cabinets in use to those reserved; the length of time that a particular reservation(s) has been in place; and any other factor that the Exchange deems relevant to ensure overall efficiency in use of the datacenter space.

<sup>5</sup> These fees are for telecommunications connectivity only. Market Data fees are charged independently by NASDAQ OMX PHLX and other exchanges.

into, or out of, the Exchange systems that is not likewise available to all the Exchange members.<sup>6</sup> Finally, all orders sent to the Exchange market enter the marketplace through [sic] same central system quote and order gateway regardless of whether the sender is co-located in the Exchange data center or not. In short, the Exchange has created no special market technology or programming that is available only to co-located customers and the Exchange has organized its systems to minimize, to the greatest extent possible, any advantage for one customer versus another.

Co-location services are generally available to all qualified market participants who desire them. With the exception of customers participating in the Cabinet Proximity Option program, the Exchange allocates cabinets and power on a first-come/first-serve basis. Should available cabinet inventory shrink to 40 cabinets or less, the Exchange will limit new cabinet orders to a maximum of 4 cabinets each, and all new cabinets will be limited to a maximum power level of 5kW. Should available cabinet inventory shrink to zero, the Exchange will place firms seeking services on a waiting list based on that the Exchange receives signed orders for the services from the firm. In order to be placed on the waiting list, a firm must have utilized all existing cabinets they already have in the datacenter. Once on the list, the firms, on a rolling basis, will allocated a single 5kW cabinet each time one becomes available. After receiving a cabinet, the firm will move to the bottom of the waiting list.

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<sup>6</sup> Currently, the Exchange makes available to co-located customers a 10Gb fiber connection. The Exchange will likewise make available a 10Gb fiber connection to other customers in the first quarter of 2010. The Exchange has not received any requests for 10Gb fiber connections from firms that are not co-located.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>7</sup> in general, and with Sections 6(b)(5) of the Act,<sup>8</sup> in particular, in that the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to 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. In particular, the filing codifies and makes transparent the uniform fees imposed by the Exchange's technology subsidiary for co-location services.

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

The Exchange 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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

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<sup>7</sup> 15 U.S.C. 78f.

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

- A. by order approve such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be 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-2010-18 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2010-18. 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 10:00 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 available publicly. All submissions should refer to File Number SR-Phlx-2010-18 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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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<sup>9</sup> 17 C.F.R. 200.30-3(a)(12).