

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-63257; File No. SR-Phlx-2010-155)

November 5, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Fees Assessed for use of the Testing Facility

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 October 29, 2010, 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 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 amend the fees assessed for use of the Testing Facility. PHLX will implement the proposed rule change on November 1, 2010.

The text of the proposed rule change is available on the Exchange’s website, at the principal office of the Exchange, on the Commission’s website at <http://www.sec.gov>, and at the Commission’s Public Reference Room.

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.

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

<sup>2</sup> 17 CFR 240.19b-4.

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 proposes to amend the fees assessed for use of the Testing Facility. The Testing Facility provides subscribers with a virtual PHLX System test environment that closely approximates the production environment, on which they may test their automated systems that integrate with PHLX. Subscribers may test upcoming PHLX releases and product enhancements, as well as test software prior to implementation. Currently, PHLX assesses a fee of \$285 per hour for active connection testing using current PHLX access protocols during the normal operating hours, and \$333 per hour for such testing after hours.

PHLX does not currently assess a fee for idle test ports. Subscribers often have test ports assigned to them through which no testing is conducted for extended periods, yet PHLX must maintain and constantly monitor these idle testing ports for purposes of billing under the current rule. Such monitoring represents a cost to PHLX with no off-setting fee. Further, subscribers have no incentive to notify PHLX when they have completed testing and no longer require a test port. Accordingly, PHLX is proposing to eliminate the current hourly fee structure and assess a flat fee of \$300 per test port, per month. This fee will cover the cost of maintaining these test ports and provide an incentive to firms to cancel test ports when they have completed testing.

PHLX notes that it will continue to allow new subscribers and existing subscribers to test new services and modifications initiated by PHLX, and to test new services not previously accessed for the first 30 days at no cost pursuant to paragraph (c) of the Testing Facility rule. This 30-day fee waiver includes testing for subscribers that are accessing PHLX through a

service bureau for the first time. Subscribers must cancel the test port prior to the expiration of the 30-day free period in order to avoid future charges for test ports under the new rule. In addition, current subscribers will be able to cancel their idle ports at no cost at any point during the first month that the fee is effective. Further, PHLX is eliminating the word “hourly” from paragraph (c) of the Testing Facility rule, since the fees for the Testing Facility no longer include hourly fees. Last, PHLX is eliminating language concerning market data feed testing from paragraph (c) of the Testing Facility rule, since it is superfluous given that the rule already references fees that include such testing.

## 2. Statutory Basis

PHLX believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>3</sup> in general, and with Section 6(b)(4) of the Act,<sup>4</sup> in particular, 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 PHLX operates or controls. The amended fee schedule applies to all subscribers equally based on the number of test ports subscribed. This proposed charge would apply to both members that obtain test ports for direct access and non-member service bureaus that act as a conduit for orders entered by PHLX members that are their customers. The proposed fees will cover the costs associated with separately offering the service, responding to customer requests, configuring PHLX’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 believes that the proposed fee structure strikes a balance between covering these costs, and providing incentives to subscribers to make efficient use of Test Facility ports.

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<sup>3</sup> 15 U.S.C. 78f.

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

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 Regarding 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>5</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder.<sup>6</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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, 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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2010-155 on the subject line.

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<sup>5</sup> 15 U.S.C. 78s(b)(3)(a)(ii).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

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-2010-155. 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 website (<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 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-2010-155 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>7</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).