

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67271; File No. SR-Phlx-2012-85)

June 27, 2012

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify its Excess Order Fee

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 June 25, 2012, NASDAQ OMX PHLX LLC (“Phlx” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II below, which Items have been 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

Phlx proposes to institute an Excess Order Fee. [sic] Phlx will implement the proposed change on July 2, 2012. The text of the proposed rule change is available at <http://nasdaqomxphlx.cchwallstreet.com/nasdaqomxphlx/phlx/>, at Phlx’s principal office, 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, the self-regulatory organization 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 those statements may be examined at the

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

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

places specified in Item III below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Phlx recently submitted a proposed rule change to introduce an Excess Order Fee,<sup>3</sup> aimed at reducing inefficient order entry practices of certain market participants that place excessive burdens on Phlx's NASDAQ OMX PSX system ("PSX") and the member organizations that trade on it and that may negatively impact the usefulness and life cycle cost of market data. The fee is scheduled to be implemented on July 2, 2012. In general, the determination of whether to impose the fee on a particular market participant identifier ("MPID") is made by calculating the ratio between (i) entered orders, weighted by the distance of the order from the national best bid or offer ("NBBO"), and (ii) orders that execute in whole or in part. The fee is imposed on MPIDs that have an "Order Entry Ratio" of more than 100.

Through this proposed rule change, the Exchange is modifying the parameters of the fee slightly to provide that all calculations under the rule establishing the fee will be based on orders received by PSX during regular market hours (generally, 9:30 a.m. to 4:00 p.m.)<sup>4</sup> and will exclude orders received at other times, even if they execute during regular market hours. Phlx is making the change because the concerns about inefficient order entry practices that have prompted the fee are generally not present with regard to trading activity outside of regular market hours, when volumes are light. Phlx is also concerned that lower execution rates outside

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<sup>3</sup> Securities Exchange Act Release No. 67004 (May 17, 2012), 77 FR 30581 (May 23, 2012) (SR-Phlx-2012-64).

<sup>4</sup> Regular market hours may be different in some circumstances, such as on the day after Thanksgiving, when regular market hours on all exchanges traditionally end at 1:00 p.m.

of regular market hours may skew calculations under the rule, such that an MPID that is considered acceptably efficient during regular market hours would be required to pay a fee under the rule due to its activity outside of regular market hours.

## 2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>5</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>6</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, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As originally proposed and as modified by this proposed rule change, Phlx believes that the Order Entry Fee is reasonable because it is designed to achieve improvements in the quality of displayed liquidity and market data that will benefit all market participants. In addition, although the level of the fee may theoretically be very high, the fee is reasonable because market participants may readily avoid the fee by making improvements in their order entry practices that reduce the number of orders they enter, bring the prices of their orders closer to the NBBO, and/or increase the percentage of their orders that execute. The proposed change to the fee is reasonable because it will reduce the likelihood of the fee being imposed on an MPID that is considered acceptably efficient during regular market hours, when the impact of inefficient trading on PSX and other market participants is highest.

For similar reasons, the fee is consistent with an equitable allocation of fees, because although the fee may apply to only a small number of market participants, the fee would be

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<sup>5</sup> 15 U.S.C. 78f.

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

applied to them in order to encourage better order entry practices that will benefit all market participants. Ideally, the fee will be applied to no one, because market participants will adjust their behavior in order to avoid the fee. The proposed change will increase the likelihood that the fee will not be imposed in unwarranted circumstances. Finally, Phlx believes that the fee is not unfairly discriminatory. Although the fee may apply to only a small number of market participants, it will be imposed because of the negative externalities that such market participants impose on others through inefficient order entry practices. The proposed modification to the fee is not unfairly discriminatory because although it will lessen the potential impact of the fee on MPIDs that are active outside of regular market hours, this change is rationally related to the fee's purpose of promoting efficient trading practices in conditions where inefficiency may negatively impact Phlx and other market participants.

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. Specifically, Phlx believes that the fee will constrain market participants from pursuing certain inefficient and potentially abusive trading strategies. To the extent that this change may be construed as a burden on competition, Phlx believes that it is appropriate in order to further the purposes of Section 6(b)(5) of the Act.<sup>7</sup> The proposed change will lessen any burden on competition by removing from consideration orders entered outside of regular market hours, when concerns about the impact of inefficient trading on Phlx and other market participants are diminished.

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<sup>7</sup> 15 U.S.C. 78f(b)(5).

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>8</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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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 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-2012-85 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.

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(a)(ii). [sic]

All submissions should refer to File Number SR-Phlx-2012-85. 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 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 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 offices 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-2012-85, 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>

Kevin M. O'Neill  
Deputy Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).