

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68984; File No. SR-Phlx-2013-17)

February 25, 2013

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to amend Routing Fees to C2

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 February 12, 2013, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, 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 Substance of the Proposed Rule Change

The Exchange proposes to amend Section V of the Pricing Schedule entitled “Routing Fees.”

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqomxphlx.cchwallstreet.com/>, at the principal office of the Exchange, 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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it

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

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

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to amend Routing Fees in Section V of the Pricing Schedule in order to recoup costs applicable to the C2 Options Exchange, Inc. ("C2") that the Exchange incurs for routing and executing orders in equity options. Today, the Exchange calculates Routing Fees by assessing certain Exchange costs related to routing orders to away markets plus the away market's transaction fee. The Exchange assesses a \$0.05 per contract fixed Routing Fee when routing orders to the NASDAQ Options Market LLC ("NOM") and NASDAQ OMX BX, Inc. ("BX Options") and a \$0.11 per contract fixed Routing Fee to all other options exchanges in addition to the actual transaction fee or rebate paid by the away market.<sup>3</sup>

The fixed Routing Fee is based on costs that are incurred by the Exchange when routing to an away market in addition to the away market's transaction fee. For example, the Exchange incurs a fee when it utilizes Nasdaq Options Services LLC ("NOS"), a

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<sup>3</sup> Today, the transaction fee assessed by the Exchange is based on the away market's actual transaction fee or rebate for a particular market participant at the time that the order was entered into the Exchange's trading system. This transaction fee is calculated on an order-by-order basis, since different away markets charge different amounts. In the event that there is no transaction fee or rebate assessed by the away market, the only fee assessed is the fixed Routing Fee. With respect to the rebate, the Exchange pays a market participant the rebate offered by an away market where there is such a rebate. Any rebate available is netted against a fee assessed by the Exchange. The Exchange is not proposing to amend its calculation of the away market's transaction fee as described herein.

member of the Exchange and the Exchange's exclusive order router,<sup>4</sup> to route orders in options listed and open for trading on the PHLX XL system to destination markets. Each time NOS routes to away markets NOS incurs a clearing-related cost<sup>5</sup> and, in the case of certain exchanges, a transaction fee is also charged in certain symbols, which fees are passed through to the Exchange. The Exchange also incurs administrative and technical costs associated with operating NOS, membership fees at away markets, Options Regulatory Fees ("ORFs") and technical costs associated with routing options.

C2 recently filed a rule change to amend its transaction fees and rebates for simple,<sup>6</sup> non-complex orders, in equity options classes which became operative on February 1, 2013.<sup>7</sup> C2 assesses its transaction fees based on a formula wherein fees are calculated on a per-contract basis.<sup>8</sup> C2 pays rebates based on a formula wherein rebates

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<sup>4</sup> In May 2009, the Exchange adopted Rule 1080(m)(iii)(A) to establish Nasdaq Options Services LLC ("NOS"), a member of the Exchange, as the Exchange's exclusive order router. See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32). NOS is utilized by the Exchange's fully automated options trading system, PHLX XL.<sup>®</sup> "PHLX XL" is the Exchange's automated options trading system.

<sup>5</sup> The Options Clearing Corporation ("OCC") assesses a clearing fee of \$0.01 per contract side. See Securities Exchange Act Release No. 68025 (October 10, 2012), 77 FR 63398 (October 16, 2012) (SR-OCC-2012-18).

<sup>6</sup> C2 defines simple orders to exclude ETFs and indexes.

<sup>7</sup> See Securities Exchange Act Release No. 68792 (January 31, 2013), 78 FR 8621 (February 6, 2013) (SR-C2-2013-004).

<sup>8</sup> C2 utilizes the following formula to calculate its transaction fees: C2 BBO Market Width at time of execution) x (Market Participant Rate) x 50. The C2 BBO Market Width is the difference between the quoted best offer and best bid in each class on C2 (the displayed C2 ask price minus the displayed C2 bid price). The Market Participant Rates are different rates for different types of market participants, as follows: Market Participant Rate; C2 Market-Maker 30%; Public Customer (Maker) 40%; all other origins 50%. See C2's Fees Schedule.

are calculated on a per-contract basis.<sup>9</sup> Because of this recent rule change, the Exchange proposes to amend C2 Routing Fees to provide transparency to its market participants.

The Exchange proposes to amend its non-Customer C2 Routing Fees to assess the fixed cost of \$0.11 per contract plus a flat rate of \$0.85 per contract, except with respect to Customers.<sup>10</sup> With respect to Customers, the Exchange proposes not to pass the rebate offered by C2, as is the case today for Routing to C2 and other away markets. The Exchange proposes to not assess Customers a Routing Fee when routing orders to C2. This is similar to the manner in which the BATS Exchange, Inc. (“BATS”) prices Customer orders routed to C2.<sup>11</sup> The Exchange proposes to specifically note the amended rates on its Pricing Schedule in order to simplify C2 Routing Fees.

As with all fees, the Exchange may adjust these Routing Fees in response to competitive conditions by filing a new proposed rule change.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act<sup>12</sup> in general, and furthers the objectives of Section

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<sup>9</sup> C2 utilizes the following formula to compute rebates for simple, non-complex Public Customer orders in all equity options classes that remove liquidity (i.e. takers):  $\text{Rebate} = (\text{C2 BBO Market Width at time of execution}) \times (\text{Order Size Multiplier}) \times 50$ . The order size multiplier is as follows: 1-10 contracts will be 36%; 11-99 contracts will be 30%; 100-250 contracts will be 20% and 251 plus contracts is 0%. The maximum rebate is capped at \$0.75 per contract. See C2’s Fees Schedule.

<sup>10</sup> Recent pricing changes by C2 will result in a maximum fee of \$0.85 per contract for non-Customer orders executed at C2 and rebates or free executions for Customer orders executed at C2.

<sup>11</sup> See SR-BATS-2013-012 (not yet published).

<sup>12</sup> 15 U.S.C. 78f(b).

6(b)(4) of the Act,<sup>13</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members.

The Exchange believes that its proposal to amend non-Customer C2 Routing Fees from actual transaction charges to a flat rate, in addition to its fixed cost, is reasonable because the current C2 Routing Fees are not transparent. The Exchange believes that assessing a flat rate in addition to the fixed cost assessed by the Exchange will provide market participants certainty with respect to C2 Routing Fees. Further, each destination market's transaction charge varies and there is a cost incurred by the Exchange when routing orders to away markets. The costs to the Exchange include clearing costs, administrative and technical costs associated with operating NOS, membership fees at away markets, ORFs and technical costs associated with routing options. The Exchange believes that the proposed non-Customer C2 Routing Fees will enable the Exchange to recover the costs it incurs to route orders to C2 in addition to the flat fee to recoup transaction costs.

The Exchange believes that its proposal to amend the non-Customer C2 Routing Fees from actual transaction charges to a flat rate, in addition to its fixed cost, is equitable and not unfairly discriminatory because the Exchange would uniformly assess the same C2 Routing Fees to all non-Customer market participants. Under its flat fee structure, taking all costs to the Exchange into account, the Exchange may operate at a slight gain or a slight loss for orders routed to and executed at C2. The Exchange believes that its proposed Routing Fees for routing non-Customer orders to C2 are reasonable because

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<sup>13</sup> 15 U.S.C. 78f(b)(4).

they are an approximation of the maximum fees the Exchange will be charged for such executions, including costs. As a general matter, the Exchange believes that the proposed fees will allow it to recoup and cover its costs of providing routing services to C2.

The Exchange believes that its proposal to not pay a rebate to Customers and assess no Customer Routing Fee is reasonable, equitable and not unfairly discriminatory. The Exchange believes that the pricing structure is reasonable because, although not an approximation of the cost of routing to C2, Customer orders will still receive executions free of charge, whereas all other non-Customer routed orders routed to C2 would be assessed a Routing Fee. The Exchange believes that the proposed pricing for Customer orders is equitable and not unfairly discriminatory because it would apply uniformly to all Customer transactions. Members desiring the rebate offered by C2 can route orders directly in order to take advantage of the rebate. Market participants may submit orders to the Exchange as ineligible for routing or “DNR” to avoid Routing Fees.

Further, the Exchange believes that it is equitable and not unfairly discriminatory to assess a fixed cost of \$0.05 per contract to route orders to NASDAQ OMX away markets (BX Options and NOM) because the cost, in terms of actual cash outlays, to the Exchange to route to those markets is lower. For example, costs related to routing to BX Options and NOM are lower as compared to other away markets because NOS is utilized by all three exchanges to route orders.<sup>14</sup> NOS and the three NASDAQ OMX options markets have a common data center and staff that are responsible for the day-to-day operations of NOS. Because the three exchanges are in a common data center, Routing Fees are reduced because costly expenses related to, for example, telecommunication

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<sup>14</sup> See Chapter VI, Section 11 of the BX Options and NOM Rules.

lines to obtain connectivity are avoided when routing orders in this instance. The costs related to connectivity to route orders to other NASDAQ OMX exchanges are de minimis. When routing orders to non-NASDAQ OMX exchanges, the Exchange incurs costly connectivity charges related to telecommunication lines and other related costs when routing orders. The Exchange believes it is reasonable, equitable and not unfairly discriminatory to pass along savings realized by leveraging NASDAQ OMX's infrastructure and scale to market participants when those orders are routed to BX Options and NOM. It is important to note with respect to routing to an away market that orders are routed based on price first. PHLX XL will route orders to away markets where the Exchange's disseminated bid or offer is inferior to the national best bid (best offer) ("NBBO") price.<sup>15</sup>

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the rule change would allow the Exchange to recoup its costs when routing orders designated as available for routing by the market participant to C2. Members and member organizations may choose to mark the order as ineligible for

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<sup>15</sup> See Rule 1080(m). The Phlx XL II system will contemporaneously route an order marked as an Intermarket Sweep Order ("ISO") to each away market disseminating prices better than the Exchange's price, for the lesser of: (a) the disseminated size of such away markets, or (b) the order size and, if order size remains after such routing, trade at the Exchange's disseminated bid or offer up to its disseminated size. If contracts still remain unexecuted after routing, they are posted on the book. Once on the book, should the order subsequently be locked or crossed by another market center, the Phlx XL II system will not route the order to the locking or crossing market center, with some exceptions noted in Rule 1080(m).

routing to avoid incurring these fees.<sup>16</sup> Today, other options exchanges also assess similar fees to recoup costs incurred by the Exchange to route orders to away markets. PHLX XL routes orders to away markets where the Exchange's disseminated bid or offer is inferior to the national best bid (best offer) ("NBBO") price and based on price first.<sup>17</sup>

The Exchange operates in a highly competitive market, comprised of eleven exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. Accordingly, the fees that are assessed by the Exchange must remain competitive with fees charged by other venues and therefore must continue to be reasonable and equitably allocated to those members that opt to direct orders to the Exchange rather than competing venues.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or 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>18</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

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<sup>16</sup> Id.

<sup>17</sup> See supra note 15.

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-2013-17 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-2013-17. 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, 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 Phlx. 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-2013-17, 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>19</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).