

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-73535; File No. SR-Phlx-2014-70)

November 5, 2014

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule Under Section VIII with Respect to Execution and Routing of Orders in Securities Priced at \$1 or More Per Share and the Excess Order Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 24, 2014, 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Pricing Schedule under Section VIII, entitled "NASDAQ OMX PSX FEES," with respect to execution and routing of orders in securities priced at \$1 or more per share and to eliminate the Excess Order Fee.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated that they become operative on November 3, 2014. 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 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 purpose of the proposed changes to Chapter VIII of the Exchange's Pricing Schedule is to reduce the fee assessed for shares executed on the NASDAQ OMX PSX System ("PSX") in securities listed on the Nasdaq Stock Market ("Nasdaq") and traded at \$1 or more per share, to modify the eligibility requirements of two credits provided for providing displayed liquidity in securities traded at \$1 or more per share, and to eliminate the Excess Order Fee under the rule.

Chapter VIII(a)(1) of the PSX Pricing Schedule concerns fees assessed for execution of quotes/orders on PSX in securities priced at \$1 or more per share that are Nasdaq-listed, are listed on the New York Stock Exchange ("NYSE") and listed on exchanges other than Nasdaq and NYSE. The Exchange currently assesses three separate fees for execution of securities based on the venue on which the security is listed. Specifically, the Exchange assesses a charge of \$0.0024 per share executed in securities listed on NYSE, \$0.0024 per share executed in securities listed on an exchange other than Nasdaq or NYSE, and \$0.0026 per share executed in securities listed on Nasdaq. The Exchange is proposing to reduce the fee assessed for execution of Nasdaq-listed securities on PSX to \$0.0024 per share executed. Reducing the fee will

harmonize the fees currently assessed member organizations that are participants on PSX for removing liquidity from PSX and may attract more volume to PSX in Nasdaq-listed securities.

The Exchange is also proposing to amend the eligibility requirements of two credits provided under the rule to member organizations that provide displayed liquidity on PSX. First, the Exchange currently provides a credit of \$0.0025 per share executed for Quotes/Orders entered by a member organization that provides an average daily volume of 6 million or more shares of liquidity during the month; provided that (i) the Quote/Order is entered through a PSX MPID through which the member organization displays, on average over the course of the month, 100 shares or more at the national best bid and/or national best offer at least 25% of the time during regular market hours in the security that is the subject of the Quote/Order, or (ii) the member organization displays, on average over the course of the month, 100 shares or more at the national best bid and/or national best offer at least 25% of the time during regular market hours in 500 or more securities. The Exchange is proposing to eliminate the 6 million average daily volume requirement and replace it with a requirement to have average daily volume in shares of liquidity during the month that represents at least 0.12% of Consolidated Volume, which the Exchange defines as the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month, excluding executed orders with a size of less than one round lot.³ Replacing the current average daily volume requirement with an average daily volume requirement based on Consolidated Volume will cause the required level of liquidity provision to vary depending on overall market volumes during the month. As such, the change is expected to increase the number of member

³ In lieu of marking each individual fee level with the definition of Consolidated Volume, where applicable, the Exchange is inserting the definition prior to the schedule of fees under subparagraph (a)(1) of the rule.

organizations that qualify for this credit tier during months when overall trading volumes are lower, by allowing the required level of liquidity provision to vary with overall trading volumes, and conversely reduce the number of member organizations eligible for the credit when market volumes are high, for firms that maintain the same level of average daily volume as is currently provided. The Exchange believes that the 0.12% threshold will result in a change in market behavior that will improve liquidity on PSX overall.

Second, the Exchange currently provides a credit of \$0.0024 per share executed for Quotes/Orders entered by a member organization that provides an average daily volume of 2 million or more shares of liquidity during the month; provided that (i) the Quote/Order is entered through a PSX MPID through which the member organization displays, on average over the course of the month, 100 shares or more at the national best bid and/or national best offer at least 25% of the time during regular market hours in the security that is the subject of the Quote/Order, or (ii) the member organization displays, on average over the course of the month, 100 shares or more at the national best bid and/or national best offer at least 25% of the time during regular market hours in 500 or more securities. The Exchange is proposing to eliminate the 2 million average daily volume requirement and replace it with a requirement to have average daily volume in shares of liquidity during the month that represents at least 0.04% of Consolidated Volume. In addition, the Exchange is proposing to eliminate the additional requirements found under (i) and (ii) of the credit tier. Like the change to the credit tier discussed immediately above, replacing the current average daily volume requirement with an average daily volume requirement based on Consolidated Volume will cause the required level of liquidity provision to vary depending on overall market volumes during the month, thereby increasing the number of member organizations that qualify for this credit tier during months

when overall trading volumes are lower, and conversely reducing the number of member organizations eligible for the credit when market volumes are high, for firms that maintain the same level of average daily volume as is currently provided. Likewise, the Exchange believes that the 0.04% threshold will result in a change in market behavior that will improve liquidity on PSX overall. The Exchange also believes that eliminating the extra requirements under (i) and (ii) of the credit tier will make the tier achievable to more member organizations and may provide incentive to a greater number of member organizations to achieve the tier, thereby improving liquidity on PSX.

Lastly, the Exchange is proposing to eliminate the Excess Order Fee under subparagraph (c) of Chapter VIII of the Pricing Schedule. The Excess Order Fee was designed to provide a disincentive to member organizations to engage in order entry practices that are inefficient and thereby burdensome on the systems of PSX by assessing a fee on member organizations if they reach a threshold of order activity based on an Order Entry Ratio calculation.⁴ Although not a pervasive characteristic of the market, the fee was adopted to encourage member organizations with such practices to enhance the efficiency of their systems and modify their order entry practices, thus improving the market for all participants.⁵ An unwanted consequence of the rule has been to capture beneficial order flow and thereby dissuade member organizations from participating in PSX in an effort to avoid triggering the fee. Moreover, the Exchange has observed that the fee is not assessed on a significant number of member organizations nor is it triggered every month, leading the Exchange to conclude that the small number of member organizations that may have been affected by the fee because of their inefficient order practices

⁴ See Chapter VIII(c)(2) for a definition of “Order Entry Ratio.”

⁵ See Securities Exchange Act Release Nos. 67004 (May 17, 2012), 77 FR 30581 (May 23, 2012) (SR-Phlx-2012-64) (adopting the Excessive Order Fee).

have taken the steps necessary to avoid such practices. The Exchange believes that, in light of the lack of consistent order activity that triggers the fee and the negative effect it has had on beneficial order flow, the Excess Order Fee should be eliminated. The Exchange notes that, should the inefficient order entry practices that gave rise to the fee once again arise, it may adopt the fee once again or take other steps to provide disincentive for such practices.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁷ 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 the Exchange operates or controls, and 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed reduction in the charge assessed member organizations that remove liquidity from PSX in Nasdaq-listed securities priced \$1 or more per share is reasonable because it is a fee reduction designed to improve liquidity in Nasdaq-listed securities on PSX. Moreover, the proposed reduced charge is reasonable because it harmonizes the charges assessed for removing liquidity in all securities priced at \$1 or more per share,

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4) and (5).

thereby simplifying the charges assessed for removing liquidity under the rule. The Exchange believes that the change is consistent with an equitable allocation of fees and is not unfairly discriminatory because every member organization removing liquidity in securities priced at \$1 or more per share will be assessed the same charge per share, regardless of the listing venue of the security. Lastly, the Exchange believes that the proposed change does not unfairly burden competition because it may promote member organizations to provide greater liquidity in Nasdaq-listed securities, thereby promoting competition among member organizations rather than placing a burden thereon.

The changes amending the eligibility requirements for the \$0.0025 and \$0.0024 per share credits that PSX gives to member organizations that provide certain levels of displayed liquidity through PSX are reasonable because they provide member organizations an incentive to provide more meaningful liquidity by tying eligibility for the credits to how impactful their order activity is in relation to overall market volume. Thus the credit is more precise in awarding the credits for order activity that improves the PSX market for all market participants and is consistent with the Exchange's longstanding policy of encouraging the use of displayed orders, which promote price discovery. The changes to the eligibility requirements are consistent with an equitable allocation of fees and not unfairly discriminatory because they allocate the credits in a manner that is tied more closely to the impact on liquidity a member organization has as compared to overall market volume. The current requirement that is being replaced is based on achieving a fixed number of average daily volume in shares of liquidity provided during the month, without accounting for the relative impact that liquidity had on the market at the time. Moreover, the proposed change is equitably allocated because all member organizations that achieve the Consolidated Volume level required by the tiers, together with any other requirements of the

rule, will receive the credit. The Exchange believes that the proposed change does not unfairly burden competition, but rather it will promote competition among member organizations to provide more meaningful displayed liquidity on PSX.

The Exchange believes that elimination of the additional eligibility requirements to qualify for the \$0.0024 credit tier is reasonable because it broadens the number of member organizations that may qualify for the credit by eliminating requirements tied to the nature and timing of the volume provided on PSX, not the volume of liquidity. Although the additional requirements that are being deleted from the credit tier are designed to improve market quality, the Exchange believes market quality will be improved more at this juncture by attracting additional member organizations to provide liquidity on PSX. The elimination of additional requirements of the tier is consistent with an equitable allocation of fees and not unfairly discriminatory because the credit will be available to more member organizations than is the currently the case, and all member organizations that qualify under the amended tier will receive the credit. Lastly, the Exchange believes that the elimination of the additional requirements under the tier will not unfairly burden competition, but rather will promote competition among member firms to provide greater liquidity to PSX.

The Exchange believes that elimination of the Excessive Order Fee is reasonable because the fee is not triggered by a significant number of member organizations nor is it triggered every month, however, the Exchange believes that certain member organizations are disincentivized from providing order activity that is beneficial to market participants. Moreover, the Exchange may adopt the fee once again should the issues that gave rise to it reemerge. The Exchange believes that the proposed change is consistent with an equitable allocation of fees and is not unfairly discriminatory because it eliminates a fee, which applies to all member organizations

and which has served as a disincentive to certain market participants in providing beneficial order activity while also not being assessed significantly on member organizations. The Exchange believes that elimination of the Excess Order Fee will not unfairly burden competition because the fee is not relevant to competition. The Exchange notes that the fee was adopted to deter member organizations from using inefficient order practices that place excessive burden on the systems of PSX and, as a consequence, was not designed to impact competition among member organizations.

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, as amended.⁸ The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, the reduced charge assessed member organizations that remove liquidity from PSX is intended to provide incentive to market participants to add liquidity to the Exchange in securities listed on Nasdaq, which is reflective of a relative decline in liquidity on PSX in Nasdaq-listed securities. The proposed changes to the

⁸ 15 U.S.C. 78f(b)(8).

credits provided are designed to more precisely reward displayed liquidity provided by member organizations and, in the case of the lower tier, expand eligibility for the credit by eliminating other requirements not directly tied to the amount of displayed liquidity provided. As noted above, the Exchange believes that elimination of the Excess Order Fee will not unfairly burden competition because the fee is not relevant to competition as it was adopted to deter member organizations from using inefficient order practices that place excessive burdens on the systems of PSX. Moreover, other exchanges' fee schedules do not restrict order activity by using a fee like the Excess Order Fee. As noted, the practices that prompted the Exchange to adopt the rule have subsided and, consequently, the change does not impact the ability of any market participant or trading venue to compete.

Because there are numerous competitive alternatives to PSX, it is possible that the changes will not have the desired effect and, although the Exchange believes it to be unlikely as a result of the current proposal, the Exchange could lose market share as a result of the changes to the extent that they are unattractive to market participants. Accordingly, the Exchange does not believe the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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 change has become effective pursuant to Section 19(b)(3)(A) of the Act⁹ and paragraph (f) of Rule 19b-4¹⁰ thereunder. At any time within 60 days of the filing of the proposed

⁹ 15 U.S.C. 78s(b)(3)(A).

¹⁰ 17 CFR 240.19b-4(f).

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. Please include File Number SR-Phlx-2014-70 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2014-70. 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 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-2014-70, 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.¹¹

Kevin M. O'Neill
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).