

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-76370; File No. SR-Phlx-2015-90)

November 5, 2015

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt Business Continuity and Disaster Recovery Plans Testing Requirements

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 November 2, 2015, 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 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 Substance of the Proposed Rule Change

The Exchange proposes to adopt business continuity and disaster recovery plans (“BC/DR Plans”) testing requirements for certain Exchange Member Organizations<sup>3</sup> and PSX

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

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

<sup>3</sup> The term “Member Organization” is defined as “a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a member organization by virtue of (i) admission to membership given to it by the Membership Department pursuant to the provisions of Rules 900.1 or 900.2 or the By-Laws or (ii) the transitional rules adopted by the Exchange pursuant to Section 6-4 of the By-Laws. References herein to officer or partner, when used in the context of a member organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a member organization.” See Exchange Rule 1(o).

Participants<sup>4</sup> (“Participants”) in connection with Regulation Systems Compliance and Integrity (“Regulation SCI”).<sup>5</sup>

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 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 adopt new Rule 926 to implement the BC/DR Plans requirements of Rule 1004 of Regulation SCI. As adopted by the Commission, Regulation SCI

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<sup>4</sup> The term “PSX Participant” or “Participant” is defined as “an entity that fulfills the obligations contained in Rule 3211 regarding participation in the System, and includes: (1) ‘Equities ECNs,’ which are member organizations that meet all of the requirements of Rule 3223, and that participate in the System with respect to one or more System Securities; (2) ‘PSX Market Makers’ or ‘Market Makers’, member organizations that are registered as PSX Market Makers for purposes of participation in the System on a fully automated basis with respect to one or more System securities; and (3) ‘Order Entry Firms,’ which are member organizations that are registered for the purposes of entering orders in System Securities into the System. This term shall also include any Electronic Communications Network or Alternative Trading System (as such terms are defined in Regulation NMS) that fails to meet all the requirements of Rule 3223.” See PSX Rule 3301(c).

<sup>5</sup> See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72252 (December 5, 2014) (“SCI Adopting Release”).

applies to certain self-regulatory organizations (including the Exchange), alternative trading systems (“ATs”), plan processors, and exempt clearing agencies (collectively, “SCI entities”), and will require these SCI entities to comply with requirements with respect to the automated systems central to the performance of their regulated activities. Among the requirements of Regulation SCI is Rule 1001(a)(2)(v), which requires the Exchange and other SCI entities to maintain “[b]usiness continuity and disaster recovery plans that include maintaining backup and recovery capabilities sufficiently resilient and geographically diverse and that are reasonably designed to achieve next business day resumption of trading and two-hour resumption of critical SCI systems following a wide-scale disruption.”<sup>6</sup> The Exchange has put extensive time and resources toward planning for system failures and already maintains robust BC/DR Plans consistent with the Rule. As set forth below, in connection with Regulation SCI, the Exchange is proposing to require certain Member Organizations and Participants to participate in testing of the operation of the Exchange’s BC/DR Plans.

With respect to an SCI entity’s BC/DR Plans, including its backup systems, paragraph (a) of Rule 1004 of Regulation SCI requires each SCI entity to: “[e]stablish standards for the designation of those members or participants that the SCI entity reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans.”<sup>7</sup> Paragraph (b) of Rule 1004 of Regulation SCI further requires each SCI entity to “[d]esignate members or participants pursuant to the standards established in paragraph (a) of [Rule 1004] and require participation by such designated members or participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the SCI entity, provided that such frequency shall not be

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<sup>6</sup> 17 CFR 242.1001(a)(2)(v).

<sup>7</sup> 17 CFR 242.1004(a).

less than once every 12 months.”<sup>8</sup> In order to comply with Rule 1004 of Regulation SCI, the Exchange proposes to adopt new Rule 926, which incorporates the requirements of Rule 1004 of Regulation SCI as part of the Exchange’s rules, and sets forth the notice, selection criteria and obligations of Member Organizations and Participants with respect to BC/DR Plans testing.

The Exchange proposes to adopt Rule 926(a), which will set forth the Exchange’s obligations with respect to the selection of Members Organizations and Participants for testing. Specifically, the rule will require the Exchange to “[e]stablish standards for the designation of those Members Organizations and Participants that the Exchange reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans.” The proposed new rule further provides that “[s]uch standards may include volume-based and/or market share-based criteria, and may be adjusted from time to time by the Exchange.” Lastly, the proposed new rule will require the Exchange to provide public notice of the standards that it adopts.

The Exchange is proposing to adopt Rule 926(b), which will set forth the obligations of the Exchange and its Members Organizations and Participants with respect to testing. Specifically, the rule will require the Exchange to “designate Members Organizations and PSX Participants pursuant to the standards established in paragraph (a) of this rule and require participation by such designated Members Organizations and PSX Participants in scheduled functional and performance testing of the operation of such plans, in the manner and frequency specified by the Exchange, provided that such frequency shall not be less than once every 12 months.” Moreover, the rule will require the Exchange to provide at least six months prior notice to Members Organizations and Participants that are designated for mandatory testing.

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<sup>8</sup> 17 CFR 242.1004(b).

Lastly, the rule will provide notice that participation in testing is a condition of membership for Members Organizations and Participants that are designated for testing.

The Exchange encourages all Member Organizations and Participants to connect to the Exchange's backup systems and to participate in testing of such systems;<sup>9</sup> however, certain Member Organizations and Participants will be obligated to participate in BC/DR Plans testing. In adopting new Rule 926, the Exchange will require mandatory participation in BC/DR Plans testing by those Member Organizations and Participants that the Exchange reasonably determines are, taken as a whole, the minimum necessary for the maintenance of fair and orderly markets in the event of the activation of such plans on the Exchange and PSX, respectively. The Exchange believes that using overall participation on its markets (by volume and/or market share) as a measure to select Member Organizations and Participants for mandatory participation in BC/DR Plans testing is a reasonable means by which it can determine which Member Organizations and Participants are necessary for the maintenance of fair and orderly markets in the event of the activation of such plans.<sup>10</sup> For each BC/DR Plans test cycle, the Exchange will select the top ten Member Organizations on the Exchange and the top five Participants on PSX based on the Exchange's measure of overall participation on each of those markets. All notices concerning BC/DR Plans testing will be posted on the Exchange's website.

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<sup>9</sup> In this regard, the Exchange will allow any Member Organization or Participant to participate in the testing of the Exchange's BC/DR Plans, which is consistent with the Plan. See SCI Adopting Release, supra note 5 at 72350. The Exchange will provide instructions on how a Member Organization and Participant must inform the Exchange of its interest in participating in an upcoming BC/DR Plans test via the announcement of the test date. A Member Organization or Participant must provide the Exchange notice of its interest to participate at least a week prior to the test date and must have the appropriate connection for testing in place.

<sup>10</sup> The Exchange will provide notice of the specific selection criteria and measurement period in a notice to Member Organizations and Participants. The initial selection criteria and measurement period will be announced no later than November 3, 2015.

The Exchange is proposing to initially select Member Organizations and Participants with the highest levels of trading volume on the Exchange and PSX over four calendar months (“Measurement Period”) as mandatory testing Member Organizations and Participants, respectively.<sup>11</sup> Specifically, the Measurement Period will be the four calendar months of trading immediately prior to the Exchange’s announcement of the next BC/DR Plans test date. The Measurement Period will always begin at a point after the Exchange announces the criteria to be used in the next BC/DR Plans test. By way of example, if on October 6, 2017 the Exchange announced the BC/DR Plans test selection criteria and on March 2, 2018 the Exchange announced a BC/DR Plans test date of September 8, 2018, the Measurement Period used to select Member Organizations and Participants subject to mandatory testing would be November 2017 through February 2018. Members Organizations and Participants not obligated to participate that wish to participate in this test must inform the Exchange no later than September 1, 2018.<sup>12</sup>

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>13</sup> in general, and further the objectives of Section 6(b)(5) of the Act,<sup>14</sup> in particular, in that it 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

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<sup>11</sup> The Exchange may change the total number of Member Organizations and Participants selected from time to time.

<sup>12</sup> See note 9.

<sup>13</sup> 15 U.S.C. 78f.

<sup>14</sup> 15 U.S.C. 78f(b)(5).

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 proposal will ensure that the Member Organizations and Participants necessary to ensure the maintenance of fair and orderly markets are properly designated consistent with Rule 1004 of Regulation SCI. Specifically, the proposal will adopt clear and objective criteria with respect to the designation of Member Organizations and Participants that are required to participate in the testing of the Exchange's BC/DR Plans, as well as appropriate notification regarding such designation. As set forth in the SCI Adopting Release, "SROs have the authority, and legal responsibility, under Section 6 of the Exchange Act, to adopt and enforce rules (including rules to comply with Regulation SCI's requirements relating to BC/DR testing) applicable to their members or participants that are designed to, among other things, 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."<sup>15</sup> The Exchange believes that this proposal is consistent with such authority and legal responsibility.

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. To the contrary, the proposal is not a competitive proposal but rather is necessary for the Exchange's compliance with Regulation SCI.

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<sup>15</sup> See SCI Adopting Release, supra note 5 at 72350.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>17</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.<sup>18</sup> A proposed rule change filed under Rule 19b-4(f)(6)(iii)<sup>19</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>20</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as it will allow the Exchange to incorporate changes required under Regulation SCI, such as establishing standards for designating BC/DR participants, prior to the November 3, 2015

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

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

<sup>18</sup> In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6)(iii).



compliance date. Accordingly, the Commission designates the proposed rule change to be operative upon filing.<sup>21</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-2015-90 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-2015-90. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

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<sup>21</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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 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 the 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-2015-90 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>22</sup>

Robert W. Errett  
Deputy Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).