

The Commission finds that the proposed modification to the dissemination of the final Order Imbalance Indicator is consistent with the Act. Currently, any time an imbalance remains just prior to the opening cross, the Exchange disseminates one last Order Imbalance Indicator. The Exchange proposes to disseminate that final Order Imbalance Indicator only when the imbalance contains routable trading interest that is marketable against the NBBO. After the opening cross is executed, any non-routable interest that is not cancelled will be posted. As such, dissemination of this interest will be broadcast via the consolidated quote. The effect of this change is that the Exchange will not disseminate the very last Order Imbalance Indicator that it would otherwise have disseminated right before the opening cross when the imbalance only contains non-routable interest. While this change could have the effect of reducing the last message on imbalances that the Exchange currently sends immediately before the opening cross, it also mitigates message traffic for orders that the Exchange expects would post immediately thereafter. The Commission believes this change will not adversely affect transparency with respect to imbalance information immediately prior to the opening cross.

The Commission finds that the proposed establishment of an opening cross following a trading halt is consistent with the Act. The Exchange believes that conducting an opening cross will provide a more orderly opening of the market after a halt, particularly to the extent that NOM attracts higher levels of liquidity than it did previously.<sup>36</sup> The Commission notes that the halt cross will operate in the same manner as the opening cross. It is also consistent with the use of an opening cross following a trading halt on NASDAQ's equities platform.<sup>37</sup> The Commission notes that similar auctions are used by other options markets following a trading halt.<sup>38</sup> The Commission believes that the adoption of a halt cross is designed to provide for

a fair and orderly re-opening of the market and contribute to the quality of executions following a trading halt.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>39</sup> that the proposed rule change (SR-NASDAQ-2011-037) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>40</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64451; File No. SR-Phlx-2011-59]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NASDAQ OMX PHLX LLC Relating to Inactive Nominees

May 10, 2011.

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 May 3, 2011, 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 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 codify its existing procedures to designate an Inactive Nominee as an effective permit holder and make other non-substantive clarifying changes to the text of Rule 925 titled "Inactive Nominees."<sup>3</sup>

<sup>39</sup> 15 U.S.C. 78s(b)(2).

<sup>40</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The term "inactive nominee" means a natural person associated with and designated as such by a member organization and who has been approved for such status and is registered as such with the Membership Department. An Inactive Nominee shall have no rights or privileges under a permit unless and until said Inactive Nominee becomes admitted as a member of the Exchange pursuant to the By-Laws and Rules of the Exchange. An Inactive Nominee merely stands ready to exercise rights under a permit upon notice by the member organization to the Membership Department on an expedited basis. See Exchange Rule 1(i) [sic].

The Exchange is also proposing to amend certain typographical errors in Exchange Rules 1 and 124 and By-Law Article II.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, at the principal office of the Exchange, at the Commission's Public Reference Room, and on the Commission's Web site at <http://www.sec.gov>.

#### 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 rule change is to codify the Exchange's existing procedures for designating an Inactive Nominee as an effective permit holder. Additionally, the Exchange is proposing to amend the text of Rule 925 to delete irrelevant and repetitive rule language.

Rule 925 titled "Inactive Nominees" states that a member organization may designate an individual as an "Inactive Nominee" and shall pay for the privilege of maintaining that status.<sup>4</sup> Further, to be eligible as an Inactive Nominee, an individual must be approved as eligible to hold a permit in accordance with the Exchange's By-Laws and Rules. Pursuant to Rule 925, an Inactive Nominee does not have any rights or

<sup>4</sup> The Exchange assesses an Inactive Nominee Fee of \$500 for every six months and a monthly Trading Floor Personnel Registration Fee of \$100 on Inactive Nominees. See the Exchange's Fee Schedule. An Inactive Nominee is also assessed the Application and Initiation Fees when such person applies to be an Inactive Nominee. Such fees are reassessed if there is a lapse in the Inactive Nominee's membership status. However, an Inactive Nominee would not be assessed the Application and Initiation Fees if such Inactive Nominee applied for membership without a lapse in that individual's association with a particular member organization. See Securities Exchange Act Release No. 64010 (March 2, 2011), 76 FR 12780 (March 8, 2011) (SR-Phlx-2011-26).

<sup>36</sup> See *id.* at 18591.

<sup>37</sup> See NASDAQ Rule 4753.

<sup>38</sup> See, e.g., Securities Exchange Act Release No. 54238 (July 28, 2006), 71 FR 44758, 44762 (August 7, 2006) (SR-NYSEArca-2006-13) (approving the OX Trading Platform, including trading auctions following halts, for NYSE Arca, Inc. ("NYSE Arca")); Securities Exchange Act Release No. 59472 (February 27, 2009), 74 FR 9843, 9851 (March 6, 2009) (SR-NYSEALTR-2008-14) (finding that NYSE Alternext US LLC's (now NYSE Amex LLC) rules on trading auctions and procedures for trading halts are closely modeled on the rules of NYSE Arca and consistent with the Act).

privileges of a permit holder unless and until the Inactive Nominee becomes an effective permit holder and all applicable Exchange fees are paid.<sup>5</sup>

The Exchange proposes to add additional language to Rule 925 to codify the existing practice of notifying the Membership Department when a member organization desires to designate an Inactive Nominee as an effective permit holder. The Exchange is proposing to add language to state that the member organization is required to notify the member organization of its desire to designate an Inactive Nominee as an effective permit holder in writing and prior to the opening of trading on any business day.<sup>6</sup> Further, the member organization must identify the name of the permit holder that the Inactive Nominee will be acting on behalf of as well as the expected duration that such Inactive Nominee will remain activated. This practice of notifying the Membership Department of the Inactive Nominee designation exists today. Members were previously notified that the Exchange required notice prior to such a designation.<sup>7</sup> The Exchange desires to codify this practice in its Rules.

Additionally, the Exchange is proposing to add a statement that an Inactive Nominee shall meet all membership requirements including examinations administered by the Exchange to clarify a requirement that was included in the original Inactive Nominee rule filing which was approved by the Commission.<sup>8</sup> Finally, the Exchange is proposing additional non-substantive amendments to the text of Rule 925 to remove irrelevant and repetitive language.

The Exchange recently filed a rule change, to among other things, amend

<sup>5</sup> The Inactive Nominee allows a member to have additional flexibility in obtaining coverage on the trading floor. An Inactive Nominee stands ready to assume a membership upon notice by the member requesting that a specific permit be transferred intra-firm on an expedited and temporary basis. This transfer allows an Inactive Nominee to become an effective member of the Exchange. By way of example, an Inactive Nominee would be activated in the event of an emergency due to illness or other factors. This would allow a member organization to have a full staff available to conduct business on the Exchange trading floor.

<sup>6</sup> This requirement is noted in the original rule change which established the Inactive Nominee, but the language was not carried over to the rule text. See Securities Exchange Act Release No. 39851 (April 10, 1998), 63 FR 19282 (April 17, 1998) (SR-Phlx-97-35).

<sup>7</sup> See Exchange Memorandum number 1701-02.

<sup>8</sup> See Securities Exchange Act Release No. 39851 (April 10, 1998), 63 FR 19282 (April 17, 1998) (SR-Phlx-97-35) (a rule change which subjected Inactive Nominees to the membership application process, including fees, including a fee for the privilege of maintaining an inactive nominee status).

several Exchange Rules.<sup>9</sup> Among those Rules, the Exchange amended Rule 124 and inadvertently removed the word "Options" before the term "Exchange Official." The Exchange is proposing to add the word "Options" in two places in Rule 124 to conform to the remainder of the Rule.<sup>10</sup> Additionally, the Exchange inadvertently capitalized the word "Rule" in Exchange Rule 1(aa) titled "Protected Bid, Offer or Quotation." The word "Rule" in that definition refers to rules of Regulation NMS and not the Exchange's Rules and therefore that term should be lowercase.

Finally, the Exchange proposes to correct one typographical error in the Exchange's By-Laws. By-Law Article II, Section 2-3, titled "Filling of Vacancies" states that in the event of a board vacancy, specifically a Member Representative Director position, the Member shall elect a Person from a list of candidates prepared by the Member Nominating Committee to fill such vacancy.<sup>11</sup> The Exchange mirrored the language of the NASDAQ Stock Market LLC's By-Laws in adopting this language. The term "Member" was intended to refer to the limited liability company Member, not an Exchange member. The Exchange desires to change the word "Member" to "Stockholder" in order to properly reflect the intent of the provision and correspond to the Exchange's Limited Liability Company Agreement.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>12</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>13</sup> in particular, in that it is designed to promote just and equitable principles of trade, 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, by codifying procedures to designate

<sup>9</sup> See Securities Exchange Act Release No. 64338 (April 25, 2011), 76 FR 12180 (March 4, 2011) [sic] (SR-Phlx-2011-13).

<sup>10</sup> The term "Options Exchange Official" is defined in Rule 1(w).

<sup>11</sup> The entire provision of Article II, Section 2-3 is as follows: "[i]f a Member Representative Director position shall become vacant prior to the expiration of such person's term, or if an increase in the size of the Board results in the creation of a new Member Representative Director position, the Member shall elect a Person from a list of candidates prepared by the Member Nominating Committee to fill such vacancy, except that if the remaining term of office for the vacant Director position is less than six months, no replacement shall be required."

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

<sup>13</sup> 15 U.S.C. 78f(b)(5).

Inactive Nominees as effective permit holders within its Rules.

The Exchange believes that providing member organizations information related to the eligibility and requirements of Inactive Nominees within Rule 925 further clarifies the member organization's obligations with respect to the designation of Inactive Nominees as effective permit holders.

Finally, the Exchange believes that the proposed amendments to correct typographical errors would further clarify the Exchange's Rules.

## 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.

## 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

Pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4(f)(1)<sup>15</sup> thereunder, the Exchange has designated this proposal as one that constitutes a stated policy, practice or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the SRO, and therefore has become effective.

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:

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(1).

*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-2011-59 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-2011-59. 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 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 Web site 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 a.m. and 3 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-2011-59 and should be submitted on or before June 6, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-64440; File No. SR-NASDAQ-2011-061]

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Fees for Non Co-Location Services**

May 9, 2011.

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 April 28, 2011, The NASDAQ Stock Market LLC ("NASDAQ" 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 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 modify fees for non co-location services. While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on May 1, 2011. The text of the proposed rule change is available at <http://nasdaq.cchwallstreet.com/>, at the Exchange'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 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 amending Rule 7051 entitled "Direct Connectivity to Nasdaq" to establish pricing for customers who are not co-located in NASDAQ's data center, but require shared cabinet space and power for optional routers, switches, or modems to support their direct circuit connections. The Exchange proposes to assess customers who are not co-located in NASDAQ's data center monthly fees for space based on a height unit of approximately two inches high, commonly call a "U" space and a maximum power of 125 Watts per U space.

Currently, non co-located customers are assessed fees for direct circuit connection to NASDAQ, as well as installation of an optional on-site cable router.<sup>3</sup> However, there is no charge to non co-located customers for the space and utility cost to maintain the optional router. As more and more non co-located customers seek to utilize the optional router, the Exchange must utilize more space and utilities to accommodate the influx. It has become a necessity for NASDAQ to offset the space and utility cost to maintain the optional router in the same manner as has been established for co-located customers. Additionally, the optional router may include other networks devices (e.g., switches or modems) to operate the customer's business.

While co-located customers are assessed the same per U fee, the co-located customers are assessed in increments of a 4U Block at \$600 per month. The Exchange seeks to establish and make transparent the fees imposed for space and utility costs to non co-located customers.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>4</sup> in general, and with Section 6(b)(4) of the Act,<sup>5</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 the Exchange operates or controls. The Exchange believes the

<sup>3</sup> See NASDAQ Rule 7051, Direct Connectivity to Nasdaq, Release No. 62663 (August 9, 2010), 75 FR 49543 (August 13, 2010) (SR-NASDAQ-2010-77) [sic].

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

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

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

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

<sup>16</sup> 17 CFR 200.30-3(a)(12).