

20. What additional data, if any, should be provided by the Exchange to help assess during the pilot period whether the Fixed Incentive Program is achieving its stated goals? For example, if the Exchange required ETPs to be listed and traded outside the Fixed Incentive Program for a period of time before being eligible for the program, could such a requirement provide useful “before and after” data for ETPs to permit the Exchange and the Commission to more accurately assess the market quality of the securities before participating in the program and the market quality of the same securities while participating in the program? If so, how? If not, please explain.

21. The Exchange represents that it will provide certain public disclosures relating to the Fixed Incentive Program (i.e., notification on its Web site regarding the ETPs participating in the Fixed Incentive Program and the assigned LMMs). Do commenters believe that these disclosures would provide sufficient information to investors? If not, why not? Do commenters believe the program is sufficiently transparent? Why or why not? Is there any other information that the Exchange should provide on its Web site regarding the Fixed Incentive Program and participating ETPs, issuers, and LMMs? For example, should the Exchange be required to publish on its Web site any notices from an issuer or LMM to withdraw from the program, or notices that an issuer or LMM has been removed from the program? Should the Exchange be required to publish on its Web site the performance standards to which LMMs in the program are subject? What advantages or disadvantages would such disclosures provide? Please explain.

22. Would it be helpful to investors to have public notice of an issuer’s participation in the Fixed Incentive Program through means other than on the Exchange’s Web site, such as in the issuer’s periodic reports to the Commission, on the issuer’s Web site, or through a ticker symbol identifier on the consolidated tape? Why or why not?

23. What are commenters’ views on whether the proposed disclosures are sufficient to enable all investors, even less sophisticated investors, to understand the potential impact of the proposed Fixed Incentive Program on an ETP, including that an issuer’s participation in the program is voluntary and subject to withdrawal?

24. Should the Exchange be required to publicly (and anonymously) disclose statistics on the performance of LMMs? Would such disclosure provide meaningful information to investors

(e.g., would such disclosure provide investors the opportunity to assess how much perceived liquidity is being provided by LMMs in the Fixed Incentive Program, as opposed to liquidity provided by market makers and other market participants who are not paid an LMM Payment)? If so, what information should be disclosed and why? If not, why not? What advantages or disadvantages would such disclosure provide? Please explain.

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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR–NYSEArca–2012–37 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–NYSEArca–2012–37. This file number should be included on the subject line if email 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 Section, 100 F Street NE., Washington, DC 20549–1090, on official business days between 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the NYSE’s principal office and on its Internet Web site at [www.nyse.com](http://www.nyse.com). 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–NYSEArca–2012–37 and

should be submitted on or before June 7, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Kevin M. O’Neill,**  
*Deputy Secretary.*

[FR Doc. 2012–11914 Filed 5–16–12; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–66968; File No. SR–Phlx–2012–57]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Complex Order Fees for Removing Liquidity in Select Symbols

May 11, 2012.

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 30, 2012, 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 amend Section I of the Exchange’s Pricing Schedule entitled “Rebates and Fees for Adding and Removing Liquidity in Select Symbols.” The Exchange previously filed an immediately effective rule change, SR–Phlx–2012–27,<sup>3</sup> to amend certain fees and rebates in Section I, which filing was temporarily suspended by the Commission as of April 30, 2012 (“Suspension Order”).<sup>4</sup> At this time, to continue the effectiveness of certain fees and rebates that were contained in SR–Phlx–2012–27, the Exchange is filing this rule

<sup>21</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> See Securities Exchange Act Release No. 66551 (March 9, 2012), 77 FR 15400 (March 15, 2012) (SR–Phlx–2012–27).

<sup>4</sup> By order dated April 30, 2012, the Commission suspended SR–Phlx–2012–27 and SR–Phlx–2012–54. See Securities Exchange Release No. 66884 (April 30, 2012).

change. The Exchange is also proposing additional amendments.

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, 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 proposes to continue the effectiveness of certain rebates and fees originally proposed in SR-Phlx-2012-27, which fees and rebates were temporarily suspended by the Commission. Specifically, the Exchange is proposing to continue the effectiveness of: (i) An increased Customer Complex Order<sup>5</sup> Rebate for Adding Liquidity; (ii) the adoption of a Rebate for Removing Liquidity category and Customer Complex Order Rebate for Removing Liquidity; and (iii) increased Firm, Broker-Dealer and Professional<sup>6</sup> Complex Order Fees for Removing Liquidity. Also, the Exchange proposes to increase the Directed Participant and Market Maker Complex Order Fees for Removing Liquidity in this proposal. Specifically, the Exchange is proposing

<sup>5</sup> A Complex Order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced at a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. Furthermore, a Complex Order can also be a stock-option order, which is an order to buy or sell a stated number of units of an underlying stock or exchange-traded fund ("ETF") coupled with the purchase or sale of options contract(s). See Exchange Rule 1080, Commentary .08(a)(i).

<sup>6</sup> The term "professional" means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Rule 1000(b)(14).

to amend the Complex Order fees and rebates in Section I of the Exchange's Pricing Schedule, entitled "Rebates and Fees for Adding and Removing Liquidity in Select Symbols."<sup>7</sup> The proposed amendments will enable the Exchange to continue to reward market participants that add liquidity to the Exchange and allow the Exchange to compete more effectively respecting Complex Orders. The increased Complex Order fees will continue to offset the costs of offering Complex Order rebates to Customers to bring liquidity to the market.

Specifically, SR-Phlx-2012-27 proposed to: (1) Increase the Customer Complex Order Rebate for Adding Liquidity from \$0.30 to \$0.32 per contract, (2) create a new Complex Order Rebate for Removing Liquidity and specifically pay a Customer a \$0.06 Complex Order Rebate for Removing Liquidity, and (3) increase the Complex Order Fees for Removing Liquidity for Firms, Broker-Dealers and Professionals from \$0.35 per contract to \$0.38 per contract. The Exchange is proposing to continue to pay the rebates and assess the fees, as noted above, which were initially proposed in SR-Phlx-2012-27.

The Exchange is also proposing to increase the Complex Order Directed Participant<sup>8</sup> Fee for Removing Liquidity from \$0.30 per contract<sup>9</sup> to \$0.34 per contract and the Complex Order Market Maker<sup>10</sup> Fee for Removing Liquidity from \$0.32 per contract<sup>11</sup> to \$0.36 per contract.

The Exchange is not proposing any amendments to Parts A or C of Section I of the Pricing Schedule.<sup>12</sup>

<sup>7</sup> The Select Symbols are listed in Section I of the Pricing Schedule.

<sup>8</sup> The term "Directed Participant" applies to transactions for the account of a Specialist, Streaming Quote Trader ("SQT") or Remote Streaming Quote Trader ("RSQT") resulting from a Customer order that is (1) directed to it by an order flow provider, and (2) executed by it electronically on Phlx XL II.

<sup>9</sup> The Suspension Order reverted the Complex Order Directed Participant Fee for Removing Liquidity from \$0.32 per contract to \$0.30 per contract as of the date of the Suspension Order.

<sup>10</sup> A "Market Maker" includes Specialists (see Rule 1020) and Registered Options Traders ("ROTs") (Rule 1014(b)(i) and (ii), which includes SQTs (see Rule 1014(b)(ii)(A)) and RSQTs (see Rule 1014(b)(ii)(B)).

<sup>11</sup> The Suspension Order reverted the Complex Order Market Maker Fee for Removing Liquidity from \$0.37 per contract to \$0.32 per contract as of the date of the Suspension Order.

<sup>12</sup> As part of SR-Phlx-2012-27, the Exchange proposed a volume incentive for Market Makers that executed more than 25,000 contracts per day in a month of Complex Orders, either adding or removing liquidity, in Select Symbols. Market Makers that met the aforementioned volume criteria received a \$0.01 per contract reduction of both the Directed Participant and Market Maker Complex Order Fees for Removing Liquidity, as applicable,

#### 2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act<sup>13</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>14</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities. The Exchange also believes that it is an equitable allocation of reasonable rebates among Exchange members and other persons using its facilities.

#### Complex Order Customer Rebates

Customer Complex Orders are becoming an increasingly important segment of options trading. The Exchange believes that it is reasonable to increase the current Customer Complex Order Rebate for Adding Liquidity to \$0.32 per contract and create a new Customer Complex Order Rebate for Removing Liquidity of \$0.06 per contract, because the Exchange seeks to incentivize market participants to direct and transact a greater number of Customer Complex Orders at the Exchange. Creating these incentives and attracting Customer Complex Orders to the Exchange, in turn, benefits all market participants through increased liquidity at the Exchange. A higher percentage of Customer Complex Orders leads to increased Complex Order auctions and better opportunities for price improvement.

The Exchange also believes it is reasonable, equitable and not unfairly discriminatory to only offer rebates to Customers and not other market participants. Customer Complex Order flow brings unique benefits to the marketplace in terms of liquidity and order interaction. It is an important Exchange function to provide an opportunity to all market participants to trade against Customer Complex Orders. The Exchange believes that it is equitable and not unfairly discriminatory to increase the current Customer Complex Order Rebate for Adding Liquidity to \$0.32 per contract and create a new Customer Complex Order Rebate for Removing Liquidity of \$0.06 per contract, because the Exchange will uniformly pay these rebates to all Customer orders from any member organization.

on all of their transactions for the month. The Suspension Order would eliminate this incentive. The Exchange is not proposing to reinstate that incentive, which will no longer be effective as of the Suspension Order.

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

<sup>14</sup> 15 U.S.C. 78f(b)(4).

### *Complex Order Fees for Removing Liquidity*

The Exchange believes that it is reasonable to increase the Complex Order Fees for Removing Liquidity for Directed Participants, Market Makers, Firms, Broker-Dealers and Professionals so that the Exchange can offer increased rebates to Customers. As previously noted, the Exchange is proposing to increase the Customer Complex Order Rebate for Adding Liquidity and offer a new Customer Complex Order Rebate for Removing Liquidity.

The Exchange believes that it is equitable and not unfairly discriminatory to increase the Complex Order Fees for Removing Liquidity for Directed Participants, Market Makers, Firms, Broker-Dealers and Professionals because, the Exchange is increasing these fees for all market participants, except Customers who are not assessed a fee, to position itself to offer greater Customer Complex Order rebates. The Exchange is consistently assessing lower Complex Order Fees for Removing Liquidity to Directed Participants and Market Makers as compared to Firms, Broker-Dealers and Professionals, because, as has been described in previous filings, these participants have requisite quoting obligations in the series in which they are assigned. Market Makers<sup>15</sup> have burdensome quoting obligations to the market which do not apply to Firms, Professionals and Broker-Dealers. Also, Market Makers that receive Directed Orders<sup>16</sup> have higher quoting obligations compared to other Market Makers and therefore are assessed a lower fee when they transact with a Customer order that was directed to them for execution as compared to Market Makers. In addition, the fee differential of \$0.02 per contract as between a Market Maker and Directed Participant is comparable to the fee differential at the International Stock Exchange, Inc. ("ISE")<sup>17</sup> and is lower than the fee differential at NYSE Amex, LLC ("Amex").<sup>18</sup> Firms, Broker-Dealers and Professionals are being assessed the

<sup>15</sup> See Rule 1014 titled "Obligations and Restrictions Applicable to Specialists and Registered Options Traders."

<sup>16</sup> *Id.*

<sup>17</sup> ISE has a \$.02 fee differential as between ISE Market Makers who remove liquidity from the Complex Order Book by trading with orders that are preferenced to them (\$.32 per contract) and non-preferenced ISE Market Makers (\$.34 per contract). See ISE's Fee Schedule.

<sup>18</sup> Amex assesses directed and non-directed Specialists and eSpecialists (termed Market Makers at Phlx) a fee of \$.13 per contract for removing liquidity in complex orders and a non-directed Market Maker a fee of \$.20 per contract for removing liquidity in complex orders. This \$.07 fee differential is greater than Phlx's proposed \$.02 fee differential.

same \$.38 per contract fees. Customers are not assessed a Fee for Removing Liquidity, as is the case on competing exchanges.<sup>19</sup>

The Exchange operates in a highly competitive market, comprised of nine 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 or rebates offered to be insufficient. Accordingly, the fees that are assessed by the Exchange and the rebates it pays for options overlying the various Select Symbols in Complex Orders must remain competitive with fees and rebates charged/paid 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.

#### *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**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>20</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:

<sup>19</sup> See the Chicago Board Options Exchange Incorporated's ("CBOE") Fees Schedule.

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2012-57 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-2012-57. This file number should be included on the subject line if email 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 10:00 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-2012-57 and should be submitted on or before June 7, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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<sup>21</sup> 17 CFR 200.30-3(a)(12).