SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69497; File No. SR–NSCC–2013–04]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing of Proposed Rule Change in Connection With the Implementation of the Foreign Account Tax Compliance Act (FATCA)

May 2, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 22, 2013, National Securities Clearing Corporation (''NSCC'') 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 substantially prepared by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change modifies NSCC's Rules and Procedures (''Rules''), as described below, in connection with the implementation of sections 1471 through 1474 of the Internal Revenue Code of 1986, as amended, which sections were enacted as part of the Foreign Account Tax Compliance Act, and the Treasury Regulations or other official interpretations thereunder (collectively ''FATCA'').

II. Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements.[3]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Background

FATCA was enacted on March 18, 2010, as part of the Hiring Incentives to Restore Employment Act, and became effective, subject to transition rules, on January 1, 2013. The U.S. Treasury Department finalized and issued various implementing regulations (''FATCA Regulations'') on January 17, 2013. FATCA's intent is to curb tax evasion by U.S. citizens and residents through their use of offshore bank accounts. FATCA generally requires foreign financial institutions (''FFIs'')[4] to become ''participating FFIs'' by entering into agreements with the Internal Revenue Service (''IRS''). Under these agreements, FFIs are required to report to the IRS information on U.S. persons and entities that have (directly or indirectly) accounts with these FFIs. If an FFI does not enter into such an agreement with the IRS, FATCA will impose a 30% withholding tax on U.S.-source interest, dividends and other periodic amounts paid to such ''nonparticipating FFI'' (''Income Withholding''), as well as on the payment of gross proceeds arising from the sale, maturity or redemption of securities or any instrument yielding U.S.-source interest and dividends (''Gross Proceeds Withholding,'' and, together with Income Withholding, ''FATCA Withholding''). The 30% FATCA Withholding taxes will apply to payments made to a nonparticipating FFI acting in any capacity, including payments made to a nonparticipating FFI that is not the beneficial owner of the amount paid and acting only as a custodian or other intermediary with respect to such payment. To the extent that U.S.-source interest, dividend, and other periodic amount or gross proceeds payments are due to a nonparticipating FFI in any capacity, a U.S. payor, such as NSCC, transmitting such payments to the nonparticipating FFI will be liable to the IRS for any amounts of FATCA Withholding that the U.S. payor should, but does not, withhold and remit to the IRS. For the reasons described below, NSCC is not in a position to accept this liability and, by making the proposed rule changes set forth herein, is implementing preventive measures to protect itself against such liability.

In addition, under FATCA, a U.S. payor, such as NSCC, could be required to deduct Income Withholding with regard to a participating FFI if either: (x) the participating FFI makes a statutory election to shift its withholding responsibility under FATCA to the U.S. payor; or (y) the U.S. payor is required to ignore the actual recipient and treat the payment as if made instead to certain owners, principals, customers, account holders or financial counterparties of the participating FFI. NSCC is not in a position to accept this burden shift and, by making the proposed rule changes set forth herein, is implementing preventive measures to protect itself against such a burden.

As an alternative to FFIs entering into individual agreements with the IRS, the U.S. Treasury Department provided another means of complying with FATCA for FFIs which are resident in Non-U.S. jurisdictions that enter into intergovernmental agreements (''IGA'') with the United States.[5] Generally, such a jurisdiction (''FATCA Partner'') would pass laws to eliminate the conflicts of law issues that would otherwise make it difficult for FFIs in its jurisdiction to collect the information required under FATCA and transfer this information, directly or indirectly, to the United States. An FFI resident in a FATCA Partner jurisdiction would either transmit FATCA reporting to its local competent tax authority, which in turn would transmit the information to the IRS, or the FFI would be authorized/required by FATCA Partner law to enter into an FFI agreement and transmit FATCA reporting directly to the IRS. Under both IGA models, payments to such FFIs would not be subject to FATCA Withholding so long as the FFI complies with the FATCA Partner's laws mandated in the IGA.

Under the FATCA Regulations, (A) beginning January 1, 2014, NSCC will be required to do Income Withholding on any payments made to any nonparticipating FFI approved for membership by NSCC as of such date or thereafter, (B) beginning July 1, 2014, NSCC will be required to do Income Withholding on any payments made to any nonparticipating FFI approved for membership by NSCC prior to January 1, 2014 and (C) beginning January 1, 2017, NSCC will be required to do Gross Proceeds Withholding on all nonparticipating FFIs, regardless when any such FFI's membership was approved.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission has modified the text of the summaries prepared by the clearing agency.

[4] Non-U.S. financial institutions are referred to as ''foreign financial institutions'' or ''FFIs'' in the FATCA Regulations.

[5] As of the date of this proposed rule change filing, the United Kingdom, Mexico, Ireland, Switzerland, Spain, Norway, Denmark, Italy, and Germany have signed or initialed an IGA with the United States. The U.S. Treasury Department has announced that it is engaged in negotiations with more than 50 countries and jurisdictions regarding entering into an IGA.

Preparing for Implementation of FATCA

In preparation for FATCA's implementation, FFIs are being asked to identify their expected FATCA status as a condition of continuing to do business. Customary legal agreements in the financial services industry already contain provisions allocating the risk of any FATCA Withholding tax that will need to be collected, and requiring that, upon FATCA's effectiveness, foreign counterparties must certify (and periodically recertify) their FATCA status using the relevant tax forms that the IRS has announced it will provide.[6] Advance disclosure by an FFI client or counterparty would permit a withholding agent to readily determine whether it must, under FATCA, withhold on payments it makes to the FFI. If an FFI fails to provide appropriate compliance documentation to a withholding agent, such FFI would be presumed to be a nonparticipating FFI and the withholding agent will be obligated to withhold on certain payments.

As it applies to NSCC specifically, FATCA will require NSCC to deduct FATCA Withholding on payments to certain members and limited members arising from certain transactions processed by NSCC on behalf of such members.[7] Because FATCA treats any entity holding financial assets for the account of others as a ''financial institution,'' NSCC believes that almost all of its members and limited members which are treated as non-U.S. entities for federal income tax purposes, including those members and limited members that are U.S. branches of non-U.S. entities, will likely be FFIs under FATCA (collectively, ''FFI Members'').[8] As such, NSCC will be liable to the IRS for any failures to withhold correctly under FATCA on payments made to its FFI Members.

In light of this, NSCC has evaluated its existing systems and services to determine whether and how it may comply with its FATCA obligations. As a result of this evaluation, NSCC has determined that its existing systems cannot process the new FATCA Withholding obligations with regard to the securities transactions processed by it, as no similar withholding obligation of this magnitude has ever been imposed upon it to date, and NSCC has therefore not built its systems to support such an obligation.

In addition, the vast majority of the transactions that are processed at NSCC are processed through its Continuous Net Settlement (''CNS'') System. CNS is NSCC's core netting, allotting, and fail-control engine. Within CNS, each security and related money settlement obligation is netted to one net security and/or payment position per member, including FFI Members, with NSCC as its central counterparty. CNS maintains an orderly flow of security and money balances, providing clearance and settlement for equities, corporate bonds, unit investment trusts and municipal bonds that are eligible for book entry delivery at The Depository Trust Company (''DTC''), an affiliate of NSCC.

Further, NSCC's related Money Settlement Service provides for net money settlement with regard to payments attributable to CNS, as well as with regard to payments attributable to other Corporation-processed transactions, including mutual fund and insurance transactions. Money settlement at NSCC occurs at the end of the day and, from an operational perspective, is centralized with DTC's end-of-day money settlement in order to provide common Corporation members/DTC participants with consolidated reporting and a single point of access for all settlement information. Throughout the day, debit and credit data generated by member activity are recorded in the settlement system. At the end of the processing day, the data is summarized by product category (e.g., CNS, mutual funds, etc.) and netted to produce an aggregate debit or credit for each member. Similarly, DTC activity is also recorded and netted, separately. Following the determination of final net numbers for each Corporation member and/or DTC participant, these amounts are further netted to produce a consolidated net settlement obligation. So, for example, a member with a settlement debit at NSCC, which member is also a DTC participant, will have that debit netted against its settlement credit at DTC. Settling banks, who may settle on behalf of multiple Corporation members and/or DTC participants, must separately acknowledge the respective settlement balances of their customer members/participants at each clearing agency. The consolidated net balances of their respective member/participant customers are then further netted to produce a single net-net settling bank consolidated debit or credit. Settlement of these net-net balances occurs through use of the Federal Reserve's National Settlement Service, whereby DTC, on its own behalf and as NSCC's settlement agent, submits instructions to have the Federal Reserve accounts of the settling banks charged for their net-net debit balances and credited with their net-net credit balances. NSCC believes that this net-net settlement functionality could make FATCA Withholding virtually impossible, or, at the very least, would create onerous efficiency and liquidity issues for both NSCC and its membership.

Undertaking FATCA Withholding, given NSCC's net-net settlement functionality, could require NSCC in certain circumstances to resort to a draw on NSCC's clearing fund (''Clearing Fund'') in order to fund FATCA Withholding taxes with regard to nonparticipating FFI Members in non-FATCA Partner jurisdictions whenever the net credit owed to such FFI Member is less than the 30% FATCA tax. For example, if a nonparticipating FFI (in a non-FATCA Partner jurisdiction) is owed a $100M payment from the sale of U.S. securities, but such nonparticipating FFI is in a net debit position at the end of that day because of NSCC's net settlement functionality and end-of-day crediting and debiting, there would be no payment to this FFI Member from which NSCC can withhold. In this example, NSCC would likely need to fund the $30M FATCA Withholding tax until such time as the FFI Member can reimburse NSCC and, as NSCC has no funds for this purpose, it likely would require a draw on the Clearing Fund.[9] NSCC would need to consider an increase in the amount of cash required to be deposited into the

[6] For example, credit agreements now routinely require foreign lenders to agree to provide certifications of their FATCA status under approved IRS forms to U.S. borrowers, and subscription agreements for alternative investment funds that are anticipated to earn U.S.-source income are routinely requiring similar covenants.

[7] FFI members and limited members resident in IGA countries that are compliant with the terms of applicable IGAs should not be subject to FATCA Withholding.

[8] Currently, only a small percentage of the Corporation's members and limited members are treated as non-U.S. entities for federal income tax purposes.

[9] We note that the FATCA Regulations provide that ''clearing organizations'', which settle money on a net basis, may withhold on a similar net basis for FATCA purposes. However, the end-of-day net settlement amounts, which are attributable to the sales and dispositions of many different securities as well as debits and credits for other items, would likely not qualify for the special FATCA netting rule. Additionally, as discussed above, each of the Corporation's member's end-of-day money settlement obligation is cross-netted with such member's respective money settlement obligation at DTC, and therefore, qualifying as a ''clearing organization'' under FATCA would still not prevent the possibility that the Corporation would need to fund FATCA Withholding taxes from the Clearing Fund. Even if the end-of-day net-net settlement amount would qualify as the correct amount from which to do FATCA Withholding, the liquidity risks described herein are still present. This is because the sheer dollar value attributable to the Corporation's net daily payments among the Corporation and members means that withholding FATCA tax from such net settlement payments, in any material proportion, would likely reduce liquidity and thus increase financial instability.

Clearing Fund, either by FFI Members or perhaps all of its members, which would reduce such member's liquidity and could have significant systemic effects. The amount of the FATCA Withholding taxes would be removed from market liquidity, which could lead to increased risk of member failure and increased financial instability.

For the reasons explained above and the following additional reasons, NSCC is proposing amendments to its Rules (detailed below) to implement preventive measures that would generally require all of NSCC's (i) existing members and limited members that are treated as Non-U.S. entities for federal tax income purposes and (ii) any applicants applying to become members or limited members, that are treated as Non-U.S. entities for federal income tax purposes to be participating FFIs:

• Undertaking FATCA Withholding by NSCC (even if possible) would make it economically unfeasible for affected FFI Members to engage in transactions involving U.S. securities. It would likely also quickly cause a significant negative impact on such FFI Members' liquidity because such withholding taxes would be imposed on the very large sums that NSCC pays to such FFI Members. Furthermore, FFI Members would be burdened with extra costs and the negative impact on liquidity caused by the likely need to substantially increase the amount of cash required to be deposited into the Clearing Fund.

• The cost of implementing a FATCA Withholding system for a small number of nonparticipating FFI Members would be substantial and disproportionate to the related benefit. Under the Model I IGA form and its executed versions with various FATCA Partners, NSCC would not be required to withhold with regard to FFI residents in such FATCA Partner jurisdictions. Accordingly, NSCC's withholding obligations under FATCA would effectively be limited to nonparticipating FFI Members in non-FATCA Partner jurisdictions. Since the cost of developing and maintaining a complex FATCA Withholding system would be passed on to NSCC's members at large, it may burden members that otherwise comply with, or are not subject to, FATCA Withholding.

• As briefly noted above, if the proposed rule changes were not to take effect, in order to avoid counterparty credit risk, NSCC would likely require each of the nonparticipating FFI Members in non-FATCA Partner jurisdictions to make initial or additional cash deposits to the Clearing Fund as collateral for the approximate potential FATCA tax liability of such nonparticipating FFI Member or otherwise adjust required deposits to the Clearing Fund. The amount of such deposits, which could amount to billions of dollars, would be removed from market liquidity.

• From the nonparticipating FFI Member's perspective, having 30% of its payments withheld and sent to the IRS would have a severe negative impact on such nonparticipating FFI Member's financial status. In many cases, the gross receipts would be for client accounts, and the nonparticipating FFI Member would need to make such accounts whole. Without receipt of full payment for its dispositions, the nonparticipating FFI Member would not have sufficient assets to fund its client accounts.

• The proposed rule changes set forth herein should not create business issues or be onerous to NSCC's membership because requiring FFIs to certify (and to periodically recertify) their FATCA status, and imposing the costs of non-compliance on them, are becoming standard market practice in the United States, separate and apart from membership in NSCC.

Proposed Rule Changes

Managing the risks inherent in executing securities transactions is a key component of NSCC's business. The globalization of financial markets, the trading of more complex instruments and the application of new technology all make risk management more critical and challenging. NSCC's risk tolerances (i.e., the levels of risk NSCC is prepared to confront, under a range of possible scenarios, in carrying out its business functions) are determined by the Board of Directors, in consultation with the Group Chief Risk Officer. NSCC uses a combination of risk management tools, including strict criteria for membership, to mitigate the risks inherent in its business. In line with its risk management focus, NSCC has determined that compliance with FATCA, such that NSCC shall not be responsible for FATCA Withholding, should be a general membership requirement (A) for all applicants that are treated as non-U.S. entities for federal income tax purposes, and (B) for all existing FFI Members.[10] In connection therewith, NSCC proposes to amend its Rules as follows:

• *Rule 1:* adding ''FFI Member,'' ''FATCA,'' ''FATCA Certification,'' ''FATCA Compliance Date'' [11] and ''FATCA Compliant'' as defined terms;

• *Rule 2, Section 4:* requiring that all FFI Members (both new and existing), in general: (i) Agree not to conduct any transaction or activity through NSCC if such FFI Member is not FATCA Compliant, (ii) certify and, as required under the timelines set forth under FATCA, periodically recertify, to NSCC that they are FATCA Compliant, and (iii) indemnify NSCC for any losses sustained by NSCC resulting from such FFI Member's failure to be FATCA Compliant;

• *Rule 2A, Section 1.B.:* adding FATCA Compliance as a qualification requirement for any applicant that will be an FFI Member;

• *Rule 2A, Section 1.B., Foot Note 1:* making a technical clarification to expressly include the policy statement set forth in Addendum O as other qualification standards that NSCC has promulgated with regard to certain applicants;

• *Rule 2A, Section 1.C.:* adding that each applicant must complete and deliver a FATCA Certification to NSCC as part of its membership application unless NSCC has waived this requirement with regard to membership type;

• *Rule 2B, Section 1:* Making a technical clarification by adding a footnote to expressly include the policy statement set forth in Addendum O as qualifications and standards which are continuing membership requirements;

• *Rule 2B, Section 2.B:* Specifying that failure to be FATCA Compliant creates a duty upon an FFI Member (both new and existing) to inform NSCC;

• *Addendum O:* Requiring applicants that are subject to this Policy Statement (i) to be FATCA Compliant, (ii) to deliver to NSCC a FATCA Certification, and to periodically recertify such FATCA Certification, (iii) to agree not to submit any order for processing through NSCC if the applicant fails to be FATCA Compliant at any time, and (iv) to agree to indemnify NSCC for any losses sustained by NSCC resulting from the applicant's failure to be FATCA Compliant, as conditions to admission and continued membership.

• NSCC believes the proposed rule changes are consistent with the requirements of the Exchange Act. In

[10] NSCC may grant a waiver under certain circumstances, provided, however, that NSCC will not grant a waiver if it causes NSCC to be obligated to withhold under FATCA on gross proceeds from the sale or other disposition of any property.

[11] Although Income Withholding with regard to FFI Members approved for membership by the Corporation prior to January 1, 2014 is first required under FATCA beginning July, 1 2014, the proposed amendments to the Rules would require such existing FFI Members to be FATCA compliant approximately 60 days prior to July 1, 2014 in order for the Corporation to comply with its disciplinary and notice processes as set forth in its Rules.

particular, the proposed rule changes are consistent with Section 17A(b)(3)(F) of the Exchange Act [12] because they promote the prompt and accurate clearing and settlement of securities transactions by eliminating an uncertainty in payment settlement that would arise if NSCC were subject to FATCA Withholding obligations under FATCA. The proposed rule changes are also consistent with Section 17A(b)(3)(D) of the Exchange Act [13] because they provide for the equitable allocation of reasonable dues, fees, and other charges among NSCC's members. Specifically, the proposed rule changes allow NSCC to comply with FATCA Regulations without developing and maintaining a complex FATCA Withholding system, the cost of which, as discussed above, would be would be passed on to NSCC's members at large for the benefit of a small number of nonparticipating FFI Members.

(B) Clearing Agency's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have any impact, or impose any burden, on competition.

(C) Clearing Agency's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

NSCC has not solicited, and does not intend to solicit, comments regarding the proposed rule changes. NSCC has not received any unsolicited written comments from interested parties. To the extent NSCC receives written comments on the proposed rule changes, NSCC will forward such comments to the Commission.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

[12] 12 U.S.C. 78q–1(b)(3)(F).

[13] 12 U.S.C. 78q–1(b)(3)(D).

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 Exchange 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 email to *rule-comments@sec.gov*. Please include File Number SR–NSCC–2013–04 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–NSCC–2013–04 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 NSCC and on NSCC's Web site (*http://www.dtcc.com/legal/rule_filings/nscc/2013.php*). 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–NSCC–2013–04 and should be submitted on or before May 29, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–10848 Filed 5–7–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Release No. 34–69500; File No. SR–Phlx–2013–43]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Waive the Application and Initiation Fees in Certain Circumstances

May 2, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 [2] thereunder, notice is hereby given that on April 24, 2013, 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 the Exchange's Pricing Schedule to waive the Application and Initiation Fees, for a defined period of time, in order that certain market making firms may comply with new requirements imposed by the Exchange at no additional cost.

The text of the proposed rule change is available on the Exchange's Web site 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

[14] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.