

**Federal Register** on October 18, 2012.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> On November 21, 2012, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> the Commission extended the time period for Commission action on the proposed rule change to January 16, 2013.<sup>6</sup> The Commission thereafter received one response letter from the Exchange.<sup>7</sup> On January 16, 2013, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.<sup>8</sup> The Commission thereafter received one comment letter and one response letter from the Exchange.<sup>9</sup> On April 11, 2013, the Commission issued a notice of designation of a longer period for Commission action on proceedings to determine whether to disapprove the proposed rule change.<sup>10</sup> On June 6, 2013, the Exchange withdrew the proposed rule change (SR–NASDAQ–2012–117).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69717; File No. SR–Phlx–2013–60]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the Schedule of Fees and Rebates for Execution of Quotes and Orders on NASDAQ OMX PSX

June 7, 2013.

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 31, 2013, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes changes to its schedule of fees and rebates for execution of quotes and orders on NASDAQ OMX PSX (“PSX”). Phlx proposes to implement the proposed rule change on June 3, 2013. The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaqomxphlx.cchwallstreet.com/nasdaqomxphlx/phlx>, 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

Phlx is proposing two modifications to its schedule of fees and rebates for transactions occurring on PSX.<sup>3</sup> First, the Exchange currently charges a fee of \$0.00275 per share executed for orders in securities listed on The NASDAQ Stock Market (“NASDAQ”) or the New York Stock Exchange (“NYSE”) entered through a PSX market participant identifier (“MPID”) through which a member organization provides an average daily volume of 10,000 or more shares of liquidity during the month. On

May 1, 2013, Phlx submitted a proposed rule change that would have, among other things, set the applicable fee for this volume tier at \$0.0028 per share executed.<sup>4</sup> When that proposed rule change was rejected for unrelated reasons, Phlx submitted another proposed rule change to modify fees on May 3, 2013.<sup>5</sup> Because, however, the change filed on May 3 did not apply retroactively to May 1, Phlx determined that it would be advisable to set the applicable fee at \$0.00275 per share executed for the month of May, to reflect the fact that member organizations qualifying for the tier would be paying the pre-existing higher rate of \$0.0030 per share executed for transactions occurring on May 1 and 2. Phlx is now proposing to set the applicable fee at the originally intended rate of \$0.0028 per share executed.

Second, the Exchange proposes to modify its rebate tier of \$0.0028 per share executed for displayed quotes/orders entered by a member organization that provides an average daily volume of 2 million or more shares of liquidity during the month by also requiring that (i) the quote/order is entered through an MPID through which the member organization displays, on average over the course of the month, 100 shares or more at the national best bid and/or national best offer at least 25% of the time during regular market hours<sup>6</sup> in the security that is the subject of the quote/order, or (ii) the member organization displays, on average over the course of the month, 100 shares or more at the national best bid and/or national best offer at least 25% of the time during regular market hours in 500 or more securities. A member organization is not required to register as a PSX Market Maker in order to qualify for the pricing tier. Rather, the trading data compiled by the Exchange’s systems on an ongoing basis allow it to determine which member organizations and MPIDs satisfy the requirements for the tier, and Phlx will use this information to determine the applicable rebate rate to reflect in each member organization’s monthly bill. To the extent that a member organization satisfies the requirements for the tier

<sup>3</sup> See Securities Exchange Act Release No. 68042 (Oct. 12, 2012), 77 FR 64167.

<sup>4</sup> See Letter from Dorothy Donohue, Deputy General Counsel, Investment Company Institute, dated Nov. 8, 2012.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 68279, 77 FR 70857 (Nov. 27, 2012).

<sup>7</sup> See Letter from Stephen Matthews, Senior Associate General Counsel, NASDAQ OMX, dated Jan. 15, 2013.

<sup>8</sup> See Securities Exchange Act Release No. 68672, 78 FR 4949 (Jan. 23, 2013).

<sup>9</sup> See Letter from Dorothy Donohue, Deputy General Counsel, Investment Company Institute, dated Feb. 13, 2013. See Letter from Jeffrey S. Davis, Vice President and Deputy General Counsel, NASDAQ OMX, dated Feb. 27, 2013.

<sup>10</sup> See Securities Exchange Act Release No. 69363, 78 FR 22925 (Apr. 17, 2013).

<sup>11</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 changes apply to securities priced at \$1 or more per share.

<sup>4</sup> SR–Phlx–2013–47 (May 1, 2013).

<sup>5</sup> Securities Exchange Act Release No. 69588 (May 15, 2013), 78 FR 29801 (May 21, 2013) (SR–Phlx–2013–51).

<sup>6</sup> Phlx is adding a footnote to the fee schedule defining regular market hours to mean “9:30 a.m. through 4:00 p.m. Eastern Time, or such shorter period as may be designated by the Exchange on a day when PSX closes early” (e.g., the day after Thanksgiving).

during a particular month, the rebate will apply throughout that month.

The overall purpose of this change is to use financial incentives to encourage member organizations to increase the extent to which they choose to offer displayed liquidity at the inside market through PSX.<sup>7</sup> In doing so, the Exchange hopes to increase the attractiveness of PSX as a trading venue and benefit all of its market participants by increasing the extent to which liquidity is available on PSX at or near the national best bid and/or national best offer. This pricing tier is similar to programs that are in effect at NASDAQ and NASDAQ OMX BX (“BX”) as well as similar programs for options that have been in effect at other national securities exchanges, under which the availability of a particular fee or rebate is conditioned upon the extent to which quotes/orders are at or near the inside market.<sup>8</sup>

## 2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>9</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>10</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 Phlx operates or controls, and is not designed

<sup>7</sup> In its “Recommendations Regarding Regulatory Responses to the Market Events of May 6, 2010” (February 18, 2011) (available at [http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/jacreport\\_021811.pdf](http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/jacreport_021811.pdf)), the Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues recommend that the Commission “consider encouraging, through incentives or regulation, persons who regularly implement market maker strategies to maintain best buy and sell quotations which are ‘reasonably related to the market,’” noting that such “measures could certainly include differential pricing.” Phlx believes that this proposed rule change expands on this recommendation by providing incentives for all member organizations, whether or not registered as market makers, to maintain buy and sell quotations at the inside market for a significant portion of the trading day.

<sup>8</sup> See NASDAQ Rule 7014(g) and BX Rule 7018(a). See also Securities Exchange Act Release No. 62507 (July 15, 2010), 75 FR 42802 (July 22, 2010) (SR–ISE–2010–68); Securities Exchange Act Release No. 65076 (August 9, 2011), 76 FR 50525 (August 15, 2011) (SR–BATS–2011–024). Phlx also notes that to the extent that the proposed modification to the tier takes account of a member organization’s time at the inside market, it requires the Exchange to perform calculations similar to those performed in connection with its Excess Order Fee, which weights orders differently for purposes of calculating a fee depending on the extent to which the price of an order deviates from the inside market. See NASDAQ OMX PHLX Pricing Schedule, Section VIII, paragraph (c). See also NASDAQ Rule 7018(m), BX Rule 7018(d).

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposal to condition the availability of a rebate tier of \$0.0028 per share executed upon the satisfaction of stipulated requirements for volume and extent of time with quotes/orders at the national best bid and/or national best offer is reasonable because it will condition the availability of a higher rebate tier on the extent to which a member organization makes significant contributions to PSX and its market quality by providing liquidity in the aggregate and by maintaining trading interest at prices favorable to market participants on the opposite side of the market. Moreover, the proposed change is consistent with an equitable allocation of fees because the rebate is provided to member organizations that benefit other market participants through high levels of liquidity provision and consistent quoting at the NBBO. In instances where a member organization’s contribution to PSX’s time at the inside is limited to a small number of securities, the rebate is allocated solely to transactions in the securities where the member organization achieves time at the inside requirements. Conversely, where the member organization makes notable market quality contributions across 500 securities, the rebate is allocated to all of the member organization’s displayed quotes/orders, to reflect the more significant contribution of the member organization to supporting transactions at best prices and PSX’s overall attractiveness as a trading venue. The proposal is not unreasonably discriminatory because the rebate is consistent with the benefits provided by market participants receiving it, and because the Exchange offers alternative means to receive a rebate that is only slightly lower (\$0.0026 per share executed) and that has very modest liquidity requirements associated with it. The change does not result in any burden on competition that is not necessary or appropriate; rather, the change will promote competition by using pricing incentives to encourage market participants to quote at the inside market to a greater extent, thereby increasing the attractiveness of PSX as a trading venue. Although the tier allows members qualifying for it to receive a higher rebate than other market participants, this does not unduly burden competition because the difference between the applicable rebate and the next lowest rebate is only \$0.0002 per share executed, and Phlx believes that the difference is commensurate with the benefits

provided through satisfaction of the tier’s volume and quoting requirements.

The change with respect to the fee charged for orders in securities listed on NASDAQ or NYSE that are entered through a PSX MPID through which a member organization provides an average daily volume of 10,000 or more shares of liquidity during the month is reasonable because it reflects a small increase of \$0.00005 per share executed. Moreover, the fee in question is consistent with the requirements of SEC Rule 610(c) under Regulation NMS.<sup>11</sup> In adopting that rule, the Commission found that fees not in excess of \$0.0030 per share executed would promote the objective of equal regulation and preventing excessive fees.<sup>12</sup> The change is consistent with an equitable allocation of fees because the modified fee applicable to the volume tier in question remains lower than the fee charged to member organizations not achieving the tier, and therefore continues to provide a financial incentive for member organizations to achieve higher volume levels at PSX. The change is not unfairly discriminatory because the resulting fee is not higher than the fee that other members may achieve through the use of routable orders. Finally, the fee change does not unduly burden competition because affected member organizations will continue to pay an access fee that is lower than the base rate of \$0.0030 per share executed, and therefore their ability to compete will not be impacted; rather, they will continue to pay a comparatively lower fee that reflects a volume-based discount, conceptually similar to volume-based pricing incentives that are provided by numerous other trading venues.

### *B. Self-Regulatory Organization’s Statement on Burden on Competition*

Phlx 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.<sup>13</sup> Phlx notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, Phlx must continually adjust its fees to remain competitive with other

<sup>11</sup> 17 CFR 242.610(c).

<sup>12</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37596 (June 29, 2005).

<sup>13</sup> 15 U.S.C. 78f(b)(8).

exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, Phlx believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, Phlx is instituting a small increase to one fee and imposing conditions upon the availability of an enhanced rebate tier. If the changes are unattractive to market participants, it is likely that PSX will fail to increase its share of executions above its current low level. Accordingly, Phlx does not believe that the changes will impair the ability of member organizations or competing order execution venues to maintain their competitive standing in the financial markets.

*C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>15</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.

**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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2013-60 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-2013-60. 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-2013-60 and should be submitted on or before July 5, 2013.

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

**Kevin M. O'Neill,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-69719; File No. SR-NASDAQ-2013-031]

**Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Order Granting Approval to Proposed Rule Change To Amend the Attestation Requirement of Rule 4780 To Allow a Retail Member Organization To Attest That "Substantially All" Orders Submitted to the Retail Price Improvement Program Will Qualify as "Retail Orders"**

June 7, 2013.

**I. Introduction**

On February 19, 2013, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") 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> a proposed rule change to allow Retail Member Organizations ("RMOs") to attest that "substantially all," rather than all, orders submitted to the Exchange's Retail Price Improvement Program ("Program") qualify as "Retail Orders." The proposed rule change was published for comment in the **Federal Register** on March 11, 2013.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> NASDAQ submitted a response to the comment letter on April 24, 2013.<sup>5</sup> On April 25, 2013, the Commission extended the time for Commission action on the proposed rule change until June 9, 2013.<sup>6</sup> This order approves the proposed rule change.

**II. Description of the Proposal**

The Exchange began operating the Program after it was approved by the Commission on a pilot basis in February, 2013.<sup>7</sup> Under the current rules, a member organization that wishes to participate in the Program as an RMO must submit: (A) An application form; (B) supporting

<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. 69039 (March 5, 2013), 78 FR 15392.

<sup>4</sup> See Letter to the Commission from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (SIFMA), dated March 11, 2013.

<sup>5</sup> See Letter to the Commission from Jonathan F. Cayne, Associate General Counsel, NASDAQ OMX, dated April 24, 2013 ("Exchange's Response Letter").

<sup>6</sup> See Securities Exchange Act Release No. 69450, 78 FR 25501 (May 1, 2013).

<sup>7</sup> See Securities Exchange Act Release No. 68937 (February 15, 2013), 78 FR 12397 (February 22, 2013) ("RPI Approval Order").

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

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

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