

the elimination of the Program; instead, the Exchange anticipates that all e-DPMs will stay on as Market-Makers and, on an order-by-order basis, as PMMs.<sup>12</sup> The Exchange believes that the greater participation entitlement under the PMM program when an order is preferred provides a stronger incentive for TPHs to quote at the NBBO than the lower participation entitlement for e-DPMs, which, according to the Exchange, helps to encourage narrower spreads.<sup>13</sup>

In support of its proposal to discontinue the e-DPM program, the Exchange further represented that it believes that the Program adds an unnecessary layer of complexity to CBOE rules, system processes, matching algorithms, and trading procedures.<sup>14</sup> The Exchange does not believe that the e-DPM Program provides CBOE with any competitive advantage, and believes that the elimination of the Program will provide the Exchange with more flexibility to consider other methods of encouraging DPM performance.<sup>15</sup>

In its filing, the Exchange represented that, if its proposal is approved by the Commission, CBOE would announce the elimination of the Program via a Regulatory Circular, which will include an end date for the Program that will be at least two weeks in advance in order for current e-DPMs to determine their course of action following elimination of the Program.<sup>16</sup>

### III. Discussion and Commission Findings

After careful review of the proposal, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.<sup>17</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>18</sup> which requires, among other things, that the Exchange be so organized and have the capacity to carry out the purposes of the Act. The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>19</sup> which requires, among other things, that the rules of a national securities exchange

be designed to prevent fraudulent and manipulative acts and practices, 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.

As noted above, CBOE represents that all e-DPMs are also registered as PMMs. Accordingly, CBOE does not believe that elimination of the Program will harm CBOE's market quality as it anticipates current e-DPMs will continue to serve as market-makers on the Exchange and as PMMs on orders that are preferred to them.

Further, because such a high percentage of CBOE's order-flow is preferred (85% as indicated by CBOE), and because PMM status provides a comparably larger entitlement for preferred orders compared to e-DPM status, CBOE believes that the e-DPM program does not provide an incentive great enough to warrant the complexity the e-DPM program brings to the Exchange's rules, systems, and processes. CBOE also noted that other options exchanges do not have programs similar to the e-DPM program.<sup>20</sup>

Based on CBOE's representations, discussed above, the Commission believes that elimination of the e-DPM Program should not hinder the Exchange's capacity to carry out the purposes of the Act nor should it impede CBOE's ability to remove impediments to and perfect the mechanism of a free and open market and a national market system.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>21</sup> that the proposed rule change (SR-CBOE-2013-110) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71228; File No. SR-Phlx-2013-128]

### Self-Regulatory Organizations; The NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Further Describe the Application of Fees Assessed for Connectivity to the Carteret Test Environment under Chapter VIII of the Exchange's Pricing Schedule

January 2, 2014.

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 December 23, 2013, NASDAQ OMX PHLX LLC ("Phlx" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes a rule change to further describe the application of fees assessed pursuant to subparagraph (d) of "Testing Facilities" under Chapter VIII of the Exchange's Pricing Schedule. The Exchange is also eliminating outdated text relating to the applicability of the fees assessed for use and connectivity to the Testing Facilities.

The text of the proposed rule change is below. Proposed new language is italicized. Proposed deletions are in brackets.

\* \* \* \* \*

#### NASDAQ OMX PHLX LLC<sup>1</sup> PRICING SCHEDULE

ALL BILLING DISPUTES MUST BE SUBMITTED TO THE EXCHANGE IN WRITING AND MUST BE ACCOMPANIED BY SUPPORTING DOCUMENTATION. ALL DISPUTES MUST BE SUBMITTED NO LATER THAN SIXTY (60) DAYS AFTER RECEIPT OF A BILLING INVOICE, EXCEPT FOR DISPUTES CONCERNING NASDAQ OMX PSX FEES, PROPRIETARY DATA FEED FEES AND CO-LOCATION SERVICES FEES. AS OF JANUARY 3, 2011, THE EXCHANGE

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

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

<sup>12</sup> See *id.*

<sup>13</sup> See *id.*

<sup>14</sup> See *id.*

<sup>15</sup> See *id.*

<sup>16</sup> See *id.*

<sup>17</sup> In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>18</sup> 15 U.S.C. 78f(b)(1).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> See Notice, *supra* note 3, at 69724.

<sup>21</sup> 15 U.S.C. 78s(b)(2).

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

WILL CALCULATE FEES ON A TRADE DATE BASIS.

<sup>1</sup> PHLX® is a registered trademark of The NASDAQ OMX Group, Inc.

\* \* \* \* \*

VIII. NASDAQ OMX PSX FEES

\* \* \* \* \*

**Testing Facilities[†]**

The Exchange operates two test environments. One is located in Ashburn, Virginia and the other in Carteret, New Jersey. Unless otherwise noted, reference to the “Testing Facility” applies to both environments.

(a)–(c) No change.

(d) Subscribers to the Testing Facility located in Carteret, New Jersey shall pay a fee of \$1,000 per hand-off, per month for connection to the Testing Facility. The hand-off fee includes either a 1Gb or 10Gb switch port and a cross connect to the Testing Facility. Subscribers shall also pay a one-time installation fee of \$1,000 per hand-off, which is waived for all installations ordered prior to March 31, 2014.

The connectivity provided under this rule also provides connectivity to the other test environments of NASDAQ OMX BX, Inc. and The NASDAQ Stock Market LLC.

[† Testing Facility fees will be waived for the period ending on the sixth full calendar month following the launch of NASDAQ OMX PSX.]

\* \* \* \* \*

**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 those 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 parts of such statements.

*A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

**1. Purpose**

The Exchange is proposing to amend the Phlx Pricing Schedule to more fully describe the application of the newly-

adopted fee<sup>3</sup> assessed for direct connectivity to the Testing Facility<sup>4</sup> test environment located in Carteret, New Jersey (“Carteret”). The Testing Facility provides subscribers with a virtual Exchange System test environment that closely approximates the production environment and on which they may test their automated systems that integrate with the Exchange. The Exchange recently developed a test environment located in Carteret that provides NASDAQ OMX PSX (“PSX”)<sup>5</sup> equity trade testing functionality. The new test environment was developed together with equity test environments of the Phlx’s sister exchanges, NASDAQ OMX BX, Inc. and The NASDAQ Stock Market LLC, also located at Carteret, New Jersey (collectively with PSX, the “Equity Markets”).

The Exchange is proposing to add language to subparagraph (d) of “Testing Facilities” under Chapter VIII of the Exchange’s Pricing Schedule that was erroneously omitted when the fee was originally adopted.<sup>6</sup> The new rule text explains that a firm that is a member of more than one of the Equity Markets may access the test environments of each of the Equity Markets of which it is a member through a single connectivity subscription under the rule. The Exchange notes that each of the Equity Markets has identical installation and hand-off fees for Carteret connectivity and these fees relate to the physical connection to the hardware infrastructure that houses all three test environments of the Equity Markets. Members of the Equity Markets must separately pay port fees to connect to the individual test environments of the Equity Markets of which it is a member within the hardware infrastructure housing them.<sup>7</sup> Therefore, a firm that is a member of multiple Equity Markets is not charged the Carteret connectivity fees for a hand-off under each of the identical rules of such markets, but rather is assessed a single market’s Carteret connectivity fees. Consequently, a member organization of PSX using the Carteret test environment may be assessed the connectivity fee under another Equity Markets’ rules of which it is a member, yet pay the PSX port fee to connect to the PSX test

<sup>3</sup> See Securities Exchange Act Release No. 71036 (December 11, 2013), 78 FR 76350 (December 17, 2013) (SR-Phlx-2013-116).

<sup>4</sup> See <http://www.nasdaqtrader.com/Trader.aspx?id=TestingFacility> for a description of the Testing Facility.

<sup>5</sup> PSX is the Phlx equity market.

<sup>6</sup> *Supra* note 3.

<sup>7</sup> Phlx Pricing Schedule, Chapter VIII Testing Facilities subparagraph (a), NASDAQ Rule 7030(d)(1)(B), and BX Rule 7030(d)(1).

environment. Similarly, a member organization may subscribe to Carteret connectivity under the Phlx Pricing Schedule and not have an obligation to pay the same fee under the rules of the other Equity Markets of which it is a member, but have an obligation to pay those markets’ port fees. The Exchange notes that, in adopting the identical fee for Carteret connectivity, NASDAQ OMX BX, Inc. included rule text consistent with the rule text proposed herein.<sup>8</sup> Accordingly, the Exchange is adding rule text to Carteret connectivity fee rule to reflect that the connectivity provided by the rule also provides access to the test environments of NASDAQ OMX BX, Inc. and The NASDAQ Stock Market LLC.

The Exchange is also eliminating text from the Testing Facilities rule that relates to a general waiver of fees under the rule, which was effective with the launch of PSX and ended six months thereafter. PSX launched in October 2010,<sup>9</sup> and consequently the fee waiver period has expired. Accordingly, the Exchange is removing the text relating to this fee waiver period.

**2. Statutory Basis**

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>10</sup> in general, and with Section 6(b)(5) of the Act,<sup>11</sup> in particular. The Exchange believes the proposal furthers the objectives of Section 6(b)(5) of the Act<sup>12</sup> 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 and is not designed to permit unfair discrimination between customer, issuers, brokers and dealers. The Exchange is proposing to add clarifying language to the rule, which was erroneously omitted when the rule was adopted and further describes the application of the rule. Moreover, the proposed new rule text is consistent with the identical rule of NASDAQ OMX BX, Inc. and how fees are assessed under that rule. Last, the Exchange is proposing to eliminate outdated rule text from the rule, which serves no purpose. Accordingly, the Exchange believes that it is consistent with the protection of investors and the public

<sup>8</sup> See Securities Exchange Act Release No. 71035 (December 11, 2013), 78 FR 76344 (December 17, 2013) (SR-BX-2013-058).

<sup>9</sup> See <http://www.nasdaqtrader.com/Tradernews.aspx?id=eta2010-56>.

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

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> *Id.*

interest to avoid potential market participant confusion that may be caused by the omission of the proposed rule text and the inclusion of outdated rule text.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule change clarifies how fees will be assessed to a firm that is a member of more than one of the Equity Markets and makes clear that a member organization may gain access to the test environments of the other Equity Markets through a subscription under the rule. Members of multiple Equity Markets are assessed the same fee for Carteret connectivity and must pay the port fees of each of the Equity Markets to gain access to such markets' test environments. In addition, the proposed change eliminates rule text that relates to a fee waiver that has since expired. As a consequence, the Exchange does not believe that the proposed rule change is impactful to competition in any respect.

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

Written comments were neither solicited nor received.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>13</sup> and Rule 19b-4(f)(6)<sup>14</sup> thereunder. Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and

subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>16</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>17</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>18</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange notes that such waiver will allow the Exchange to immediately add language to its rule text that was incorrectly omitted from a previous rule change, thereby clarifying its rules and avoiding potential market participant confusion.<sup>19</sup> The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest as the proposal is designed to avoid potential investor confusion regarding the Exchange's rules and provide clarification to the public. For these reasons, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<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 change should be approved or disapproved.

### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

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

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2013-128 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-2013-128. 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 such filing also will be available for inspection and copying at the principal offices 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-2013-128, and should be submitted on or before January 29, 2014.

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>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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

<sup>16</sup> 17 CFR 240.19b-4(f)(6).

<sup>17</sup> *Id.*

<sup>18</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>19</sup> See SR-Phlx-2013-128, Item 7.

<sup>20</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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