

Dated: October 6, 2015.

Robert W. Errett,

Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-76083; File No. SR-Phlx-2015-79]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Proposed Rule Change Relating to Active Specialized Quote Feed Port Fee

October 6, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 23, 2015, 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 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 Substance of the Proposed Rule Change

The Exchange proposes to refund Specialists<sup>3</sup> and Market Makers<sup>4</sup> a certain portion of the variable Active SQF Port Fee that was effective and operative in the month of April 2015 and paid by these Exchange members. The proposed refund is unique to April 2015 only, and arose when a filing to delete the variable Active SQF Port Fee<sup>5</sup> operative on April 1, 2015 was rejected and was then re-filed with the operative date of May 1, 2015.

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 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 refund Specialists and Market Makers a certain portion of the variable Active SQF Port Fee that was effective and operative in the month of April 2015 and paid by these Exchange members. The fees proposed to be refunded (the “Refund”) represent the difference between the variable Active SQF Port Fees that were in place in Section VII B. of the Pricing Schedule during the month of April 2015 (“variable Active SQF Port Fees”), and the current one price Active SQF Fee with the operative date of May 1, 2015 (“Active SQF Port Fee”). The Refund is unique to April 2015 only, and arose when a filing to delete the monthly variable Active SQF Port Fee operative on April 1, 2015 was rejected for reasons unrelated to the changes proposed in this filing, and was re-filed with the operative date of May 1, 2015.<sup>6</sup> The Exchange did not intend to impose the variable Active SQF Port Fees in April but rather intended to apply the Active SQF Port Fee and is, therefore, proposing this unique, one-time Refund.

SQF is an interface that enables Specialists, Streaming Quote Traders (“SQTs”)<sup>7</sup> and Remote Streaming Quote

Traders (“RSQTs”)<sup>8</sup> to connect and send quotes into Phlx XL.<sup>9</sup> Active SQF Ports are ports that receive inbound quotes at any time within that month. Active SQF Ports allow users to access information such as execution reports, execution report messages, auction notifications, and administrative data through a single feed.

The variable Active SQF Port Fees became operative on April 1, 2015. The proposal to replace the variable Active SQF Port Fee with the current Active SQF Port Fee operative April 1, 2015 was rejected and was refiled with the operative date of May 1, 2015.<sup>10</sup> The Active SQF Port Fee with the operative date of May 1, 2015 is not tiered or variable but rather is one price akin to other current port fees.<sup>11</sup> The variable Active SQF Port Fee, which like the current Active SQF Port Fee is a monthly fee, was therefore in effect only from April 1 to April 30, 2015 (the “April billing period”).

The variable Active SQF Fee was implemented in December of last year with a delayed operative date of April 1, 2015, in large measure to encourage members and member organizations to work through the now-completed technology refresh (“technology refresh” or “refresh”).<sup>12</sup> The goal of the technology refresh (to deploy state-of-the-art hardware and software architecture for a more efficient and robust infrastructure) has been met. As the Exchange had anticipated, Specialists and Market Makers have benefitted from the efficiency of the service that is available to them as a result of the refresh. While Specialists and Market Makers were required to make network and other technical changes in order to connect to the Phlx

Exchange to generate and submit option quotations electronically in options to which such SQT is assigned.

<sup>8</sup> An RSQT is defined in Exchange Rule in 1014(b)(ii)(B) as an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange.

<sup>9</sup> See Securities Exchange Act Release No. 63034 (October 4, 2010), 75 FR 62441 (October 8, 2010) (SR-Phlx-2010-124) (notice of filing and immediate effectiveness regarding sending certain information over SQF).

<sup>10</sup> See supra note 6.

<sup>11</sup> See, e.g., Order Entry Port Fee and Clearing Trade Interface (“CTI”) Port Fee in Section VII B. of the Pricing Schedule.

<sup>12</sup> See Securities Exchange Act Release No. 73687 (November 25, 2014), 79 FR 71485 (December 2, 2014) (SR-Phlx-2014-73) (notice of filing and immediate effectiveness that, among other things, during the Phlx technology refresh instituted the variable Active SQF Port Fee operative on April 1, 2015) (the “technology refresh filing”).

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

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

<sup>3</sup> A “Specialist” is an Exchange member who is registered as an options specialist pursuant to Exchange Rule 1020(a).

<sup>4</sup> A “Market Maker” includes Registered Options Traders (Exchange Rule 1014(b)(i) and (ii)), which includes Streaming Quote Traders (Exchange Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (Exchange Rule 1014(b)(ii)(B)).

<sup>5</sup> Exchange fees are found in the NASDAQ OMX PHLX LLC Pricing Schedule (“Pricing Schedule”).

<sup>6</sup> See Securities Exchange Act Release No. 74833 (April 29, 2015), 80 FR 25749 (May 5, 2015) (SR-Phlx-2015-36) (immediately effective filing that, among other things, instituted the one price Active SQF Port Fee in lieu of a variable Active SQF Port Fee with the operative date of May 1, 2015) (the “one price Active SQF Fee filing”). See also Equity Trader Alerts at <http://nasdaqtrader.com/TraderNews.aspx?id=ETA2015-37> and <http://www.phlx.com/TraderNews.aspx?id=OTA2015-9> (the “alerts”). The alerts show how some members may have anticipated lower Active SQF Port Fees but had to pay higher fees because the filing to delete the variable Active SQF Port Fee was initially rejected.

<sup>7</sup> An SQT is defined in Exchange Rule 1014(b)(ii)(A) as a Registered Options Trader (“ROT”) who has received permission from the

system via SQF, the Exchange believes that member costs declined overall as a result of the more efficient connectivity offered by the refresh. The Exchange's proposal to delete the variable Active SQF Port Fee, which was re-filed with the operative date of May 1, 2015 because of the monthly nature of the fee, reduced the Active SQF Port Fees paid by the majority of Market Makers on the Exchange. The Exchange's proposal is simply to refund eligible Specialists and Market Makers the overage or difference between the variable Active SQF Port Fee that was paid in the month of April 2015 and the amount that these Specialist and Market Makers would have paid if the Active SQF Port Fee was operative on April 1 rather than on May 1 (the "overage"). Moreover, because the current Active SQF Port Fee did not become operative until May 1, 2015 and the fee reduction did not occur as intended on April 1, Specialists and Market Makers were not able to take advantage of the cheaper Active SQF Port Fee and had to pay for the more expensive variable Active SQF Port Fee in the April billing period. The Exchange believes that the proposed one-time Refund, for the April billing period only, is reasonable and proper.

Currently, per Section VII B. of the Pricing Schedule all Specialists and Market Makers on the Exchange are subject to an Active SQF Port Fee of \$1,250 per port per month. Per note 26 in Section VII B., which is applicable to this section, the Active SQF Port Fee is capped at \$42,000 per month. During the April billing period, all Specialists and Market Makers on the Exchange were subject to the following variable Active SQF Port Fee:

Number of active SQF port	Monthly fee per port
1 .....	\$2,500
2-6 .....	4,000
7 and over .....	15,000

The cap is likewise applicable to the variable Active SQF Port Fee. The proposal simply refunds the overage or difference between the variable Active SQF Port Fee paid and the fixed Active SQF Port Fee (in each instance capped at \$42,000).<sup>13</sup> For example, if Specialist A was assessed and paid a variable Active SQF Port Fee of \$16,000 for the month of April 2015 (4 ports at \$4000 per port) whereas he would have paid

only a \$5,000 Active SQF Port Fee if this fee had been operative in April (4 ports at \$1250 per port), his Refund amount would be \$11,000. Or, if Market Maker B was assessed and paid a variable Active SQF Port Fee of \$42,000 for the month of April 2015 (8 ports at \$15,000 per port for an uncapped total of \$120,000, to which the cap is applied) whereas he would have paid only a \$10,000 Active SQF Port Fee if this fee had been operative in April (8 ports at \$1,250 per port), his Refund amount would be \$32,000.

The proposed Refund of overages paid by Specialists and Market Makers to the Exchange is, as discussed, uniquely applicable only to the April billing period. The Exchange believes that its proposal is reasonable and proper under the circumstances, and is consistent with the Act.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>14</sup> in general, and with Sections 6(b)(4) and 6(b)(5) of the Act,<sup>15</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which the Exchange operates or controls [sic] and is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 customers, issuers, brokers, or dealers. The proposal allows the Exchange to refund, for the April billing period only (April 1 to April 30, 2015), overages of assessed and paid variable Active SQF Port Fees as compared to Active SQF Port Fees. The Exchange believes that its proposal is reasonable, proper and correct under the circumstances, and reflects the Exchange's continuing efforts to improve its market and market quality in order to perfect a free and open market and national market system.

During the April billing period of April 1 to April 30, 2015 the Exchange had in place a variable Active SQF Port

Fee applicable to Specialists and Market Makers that exceeded the current Active SQF Port Fee, which became operative on May 1, 2015. This created the overages that are proposed to be refunded to eligible Specialists and Market Makers. That is, Specialists and Market Makers paid more in April than was anticipated by the Exchange and members, as compared to the one price Active SQF Port Fee that has been operative since May 1, 2015, and the Exchange proposes to refund the difference. Only those Specialists and Market Makers that were assessed and in fact paid an overage are eligible for the Refund. For example, if Specialist A was assessed and paid a variable Active SQF Port Fee of \$16,000 for the month of April 2015 (4 ports at \$4000 per port) whereas he would have paid only a \$5,000 Active SQF Port Fee if this fee had been operative in April (4 ports at \$1250 per port), his Refund amount would be \$11,000. Or, if Market Maker B was assessed and paid a variable Active SQF Port Fee of \$42,000 for the month of April 2015 (8 ports at \$15,000 per port for an uncapped total of \$120,000, to which the cap is applied) whereas he would have paid only a \$10,000 Active SQF Port Fee if this fee had been operative in April (8 ports at \$1,250 per port), his Refund amount would be \$32,000.

The Exchange believes it is reasonable to refund eligible Specialists and Market Makers that were assessed per the Pricing Schedule and actually paid an overage. The Exchange's intention was to delete the variable Active SQF Port Fee and institute the Active SQF Port Fee operative April 1; however, the proposal to do so was rejected. The Exchange then filed a proposal that was in fact instituted to be operative on May 1, 2015 since the fees regarding the Active SQF Ports are monthly. The Exchange believes that it is reasonable and equitable to assess all firms the same Active SQF Port Fee as opposed to a variable fee and refund the overage to eligible Specialists and Market Makers because, as discussed, the variable Active SQF Port Fee is more expensive for the great majority of Specialists and Market Makers; this was not the expected outcome of the technology refresh. In addition, Specialists and Market Makers have, as a group, successfully worked with the Exchange through the technology refresh and as a result most such members need, and use, fewer ports to connect to the Exchange's matching engine.<sup>16</sup> The

<sup>13</sup> A few Specialists and Market Makers hit the cap of \$42,000 for the variable Active SQF Port Fee and the cap of \$42,000 for the fixed Active SQF Port Fee. As a result, they did not, in fact, pay any overage and are not eligible for a Refund.

<sup>14</sup> 15 U.S.C. 78f.

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

<sup>16</sup> Because of the internal technologic configuration and technology development required

proposed Refund is a unique, one-time situation that applies only to the April billing period. The Exchange believes that its well-formulated fee structure in the Pricing Schedule, which includes the Active SQF Port Fees, continues to work to attract liquidity to the Exchange. This benefits market participants and provides the opportunity for increased order interaction on the Exchange. The Exchange continues to incentivize members and member organizations, through the Exchange's Pricing Schedule, to select Phlx as a venue for bringing liquidity and trading by offering competitive pricing. Such competitive, differentiated pricing exists today on other options exchanges. The Exchange's goal is creating and increasing incentives to attract orders to the Exchange that will, in turn, benefit all market participants through increased liquidity at the Exchange.

The Exchange believes that its proposal to refund Specialists and Market Makers as discussed is equitable and not unfairly discriminatory because the Exchange will refund all Specialists and Market Makers that are eligible for such Refunds. A few Specialists and Market Makers hit the cap of \$42,000 for the variable Active SQF Port Fee and the cap of \$42,000 for the fixed Active SQF Port Fee. As a result, they did not, in fact, pay any overage and are not eligible for a Refund.<sup>17</sup> The Exchange believes that this is equitable because the Refunds will be given to all Specialists and Market Makers that are eligible. The Exchange believes that this is not unfairly discriminatory because the Refunds will be given only to those Specialists and Market Makers that, in fact, paid an overage for the April billing period.

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

The Exchange does not believe that the proposed rule change will impose an undue burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that offering Specialists and Market Makers the opportunity to utilize certain Active SQF Ports and returning to eligible Specialists and Market Makers the overages between the variable Active SQF Port Fee and fixed Active SQF Port Fee for the April billing period does not burden competition. The Exchange continues to charge all Specialists and Market Makers the Active SQF Port Fee.

The Exchange operates in a highly competitive market, comprised of twelve options 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 to be inadequate. Accordingly, the fees that are assessed by the Exchange are influenced by these robust market forces and therefore must remain competitive with fees charged and rebates 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.

Finally, in establishing the pricing structure for Active SQF Ports, the Exchange has considered the competitive nature of the market and believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all users. The Exchange believes that its proposal to return the overages from the April billing period complement this process.

#### *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**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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-2015-79 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2015-79. 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-2015-79 and should be submitted on or before November 3, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Robert W. Errett,**

*Deputy Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

### **Submission for OMB Review; Comment Request**

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services,

by the technology refresh, a few members still need to keep the same number of ports.

<sup>17</sup> See supra note 13.

<sup>18</sup> 17 CFR 200.30-3(a)(12).