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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76513; File No. SR-Phlx-2015-79)

November 24, 2015

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving a Proposed Rule Change Relating to the Active Specialized Quote Feed Port Fee

I. Introduction

On September 23, 2015, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to pay eligible Specialists and Market Makers a refund for a portion of the monthly variable Active Specialized Quote Feed (“SQF”) Port Fees (“Variable Active SQF Port Fees”) that were in effect under Section VII.B. of the Phlx Pricing Schedule during the month of April 2015. The proposed rule change was published for comment in the Federal Register on October 13, 2015.³ The Commission did not receive any comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

On April 2, 2015, the Exchange submitted a proposed rule change for immediate effectiveness pursuant to Section 19(b)(3)(A)⁴ of the Act and Rule 19b-4(f)(2)⁵ thereunder to,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 76083 (October 6, 2015), 80 FR 61537 (SR-Phlx-2015-79) (“Notice”).

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ 17 CFR 240.19b-4(f)(2).

among other things, replace monthly Variable Active SQF Port Fees applicable to Specialists⁶ and Market Makers⁷ with a monthly fixed Active SQF Port Fee (“Fixed Active SQF Port Fee”).⁸ According to the Exchange, all Specialists and Market Makers on the Exchange were subject to the following Variable Active SQF Port Fees beginning in April 2015:⁹

Number of Active SQF Port	Monthly Fee Per Port
1	\$2,500
2 – 6	\$4,000
7 and over	\$15,000

The Variable Active SQF Port Fees were capped at \$42,000 per month.¹⁰ Under the Fixed Active SQF Port Fees, Specialists and Market Makers would pay \$1,250 per port per month and this fee would also be capped at \$42,000 per month.¹¹

The Exchange notes that the April 2015 submission proposing to replace the monthly Variable Active SQF Port Fees with a monthly Fixed Active SQF Port Fee was rejected.¹² As a

⁶ A “Specialist” is an Exchange member who is registered as an options specialist pursuant to Exchange Rule 1020(a).

⁷ “Market Makers” include Registered Options Traders (Exchange Rule 1014(b)(i) and (ii)), which include Streaming Quote Traders (Exchange Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (Exchange Rule 1014(b)(ii)(B)).

⁸ See SR-Phlx-2015-33, available at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/pdf/phlx-filings/2015/SR-Phlx-2015-33.pdf>.

⁹ See Notice, supra note 3, at 61538.

¹⁰ See id. at 61537. See also Securities Exchange Act Release No. 73687 (November 25, 2014), 79 FR 71485 (December 2, 2014) (SR-Phlx-2014-73) (implementing the Variable Active SQF Port Fees with a delayed operative date of April 1, 2015).

¹¹ See Notice, supra note 3, at 61538 (referencing note 26 in Section VII.B. of the Phlx Pricing Schedule).

¹² See id. at 61537.

result, the Exchange assessed Specialists and Market Makers the applicable Variable Active SQF Port Fees that were in effect from April 1, 2015 - April 30, 2015 (“April 2015 Billing Period”) and not the comparably lower Fixed Active SQF Port Fee.¹³ The Exchange subsequently refiled another proposed rule change for immediate effectiveness pursuant to Section 19(b)(3)(A)¹⁴ of the Act and Rule 19b-4(f)(2)¹⁵ thereunder to replace the monthly Variable Active SQF Port Fees with the monthly Fixed Active SQF Port Fee.¹⁶ This proposal became operative May 1, 2015.

According to the Exchange, because the April 2015 submission to replace the Variable Active SQF Port Fees with the Fixed Active SQF Port Fee was rejected, the Exchange is proposing to pay a refund to eligible Specialists and Market Makers for a portion of the Variable Active SQF Port Fees that the Exchange assessed during the month of April 2015 and that these eligible Specialists and Market Makers paid to the Exchange.¹⁷ The Exchange states that it did not intend to impose the Variable Active SQF Port Fees in April 2015, but rather the Exchange intended to charge the less expensive Fixed Active SQF Port Fee for the April 2015 Billing Period.¹⁸ The Exchange notes that, because the Fixed Active SQF Port Fee did not become operative until May 1, 2015, and the fee reduction resulting from the Fixed Active SQF Port Fee did not occur as intended on April 1, 2015, Specialists and Market Makers were not able to take advantage of the cheaper Fixed Active SQF Port Fee for April 2015 and had to pay the more

¹³ See id.

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(2).

¹⁶ See Securities Exchange Act Release No. 74833 (April 29, 2015), 80 FR 25749 (May 5, 2015) (SR-Phlx-2015-36) (proposed rule change that, among other things, instituted the Fixed Active SQF Port Fee in lieu of the Variable Active SQF Port Fees as of May 1, 2015).

¹⁷ See Notice, supra note 3, at 61537.

¹⁸ See id.

expensive Variable Active SQF Port Fees for the April 2015 Billing Period. The Exchange also states that Specialists and Market Makers paid more in April 2015 than was anticipated by the Exchange and the Specialists and Market Makers.¹⁹

The fees that the Exchange proposes to refund to eligible Specialists and Market Makers represent the difference between the Variable Active SQF Port Fees and the Fixed Active SQF Port Fee that became operative on May 1, 2015, each subject to the \$42,000 monthly cap.²⁰ For example, according to the Exchange, 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 \$4,000 per port) whereas the Specialist would have paid only a \$5,000 Fixed Active SQF Port Fee if this fee had been operative in April (4 ports at \$1,250 per port), the Exchange would pay that member a refund amount of \$11,000. In addition, 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 was applied) whereas the Market Maker would have paid only a \$10,000 Fixed Active SQF Port Fee if this fee had been operative in April (8 ports at \$1,250 per port), the Exchange would pay that member a refund amount of \$32,000.²¹

¹⁹ See Nasdaq Equity Trader Alert No. 2015-37 (March 25, 2015), available at <http://nasdaqtrader.com/TraderNews.aspx?id=ETA2015-37>; and Nasdaq Options Trader Alert No. 2015-9 (April 14, 2015), available at <http://www.phlx.com/TraderNews.aspx?id=OTA2015-9> (the “Alerts”). The Exchange notes that the Alerts show how some Exchange members may have anticipated the proposed lower Fixed Active SQF Port Fee in April 2015, but had to pay higher fees because the filing to delete the Variable Active SQF Port Fees was initially rejected by the Commission. See Notice, supra note 3, at 61537, n.6.

²⁰ The Exchange represents that a few members reached the cap of \$42,000 for the Variable Active SQF Port Fees and would have also reached the cap of \$42,000 for the Fixed Active SQF Port Fee. According to the Exchange, these members did not pay any overage and would not be eligible for a refund. See Notice, supra note 3, at 61538, n.13.

²¹ See Notice, supra note 3, at 61538.

The Exchange notes that the payment of a refund to eligible Specialists and Market Makers is unique to April 2015 only and applies only to the April 2015 Billing Period.

III. Discussion and Commission's Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²² In particular, approval of the retroactive application of the proposal is consistent with Section 6(b)(4) of the Act,²³ which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities.

The Commission notes that the refund the Exchange proposes to pay would have a retroactive effect on eligible Specialists and Market Makers because these members of the Exchange would effectively be subject to the Fixed Active SQF Port Fee during the month of April 2015, which was a month that the Variable Active SQF Port Fees were operative under the Exchange's rules. The Commission further notes that the proposed change from the Variable Active SQF Port Fees to the Fixed Active SQF Port Fee was contained in an April 2015 submission by the Exchange for immediate effectiveness pursuant to Section 19(b)(3)(A)²⁴ of the Act and Rule 19b-4(f)(2)²⁵ thereunder; however that submission was rejected by the Commission because it was not filed in accordance with the requirements of the Act and the rules and

²² Additionally, in approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²³ 15 U.S.C. 78f(b)(4).

²⁴ 15 U.S.C. 78s(b)(3)(A).

²⁵ 17 CFR 240.19b-4(f)(2).

regulations thereunder.²⁶ The proposed fee changes would otherwise qualify for immediate effectiveness pursuant to Section 19(b)(3)(A)²⁷ of the Act and Rule 19b-4(f)(2) thereunder.²⁸ However, because the proposed rule change seeks retroactive application of a fee change, the Exchange filed the proposed rule change pursuant to Section 19(b)(2) of the Act,²⁹ seeking approval retroactive to April 1, 2015. Retroactive approval of this proposal allows the proposed rule change to take effect for the month of April 2015.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³⁰ that the proposed rule change (File No. SR-Phlx-2015-79) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

Robert W. Errett
Deputy Secretary

²⁶ See 17 CFR 240.19b-4 and 17 CFR 249.819 Appendix A.

²⁷ 15 U.S.C. 78s(b)(3)(A).

²⁸ 17 CFR 240.19b-4(f)(2).

²⁹ 15 U.S.C. 78s(b)(2).

³⁰ Id.

³¹ 17 CFR 200.30-3(a)(12).

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