

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77286; File No. SR-Phlx-2016-31)

March 3, 2016

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Access Services Fees under Chapter VIII of the Pricing Schedule

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 23, 2016, NASDAQ OMX PHLX LLC (“Exchange”)³ 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 to amend the Exchange’s Access Services fees under Chapter VIII of the Exchange’s Pricing Schedule to: (i) assess a \$25/port/month Disaster Recovery Port fee for Disaster Recovery Ports used with FIX Trading Ports, OUCH, RASH, and DROP ports; and (ii) assess a \$100/port/month fee for Trading Ports used in Test Mode.

The text of the proposed rule change is available on the Exchange’s website at <http://nasdaqomxphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. § 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange notes that it has legally changed its name to NASDAQ PHLX LLC with the state of Delaware, and is in the process of amending its Form 1 and changing its rules to reflect the new name.

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 purpose of the proposed rule change is to amend the Exchange's Access Services fees under Chapter VIII of the Exchange's Pricing Schedule to: (i) assess a \$25/port/month Disaster Recovery Port fee for Disaster Recovery Ports used with FIX Trading Ports, OUCH, RASH, and DROP ports; and (ii) assess a \$100/port/month fee for Trading Ports used in Test Mode.

First Change

The Exchange is in the process of transitioning its Disaster Recovery ("DR") functionality for the U.S. equities and options markets from Ashburn, VA to its new Chicago, IL data center. The Exchange has invested and installed new equipment in the Chicago data center for client connectivity and for the infrastructure of Exchange systems. The Exchange chose Chicago as the location of its new DR data center as many other exchanges are using this same location for a disaster recovery or a primary location and, as a result, many of our market participants have a presence or connection at this location, thus making it easier and less expensive for many market participants to connect to the Exchange for DR.

Under Chapter VIII of the Exchange's Pricing Schedule, member firms may subscribe to DR ports, which provide backup connectivity in the event of a failure or disaster rendering their primary connectivity at Carteret, NJ subscribed to under Chapter VIII of the Exchange's Pricing Schedule unavailable. To date, the Exchange has transitioned FIX Trading Ports, OUCH, RASH, and DROP Ports to the Chicago center from Ashburn. Currently, the Exchange does not assess a fee for any DR ports.

The Exchange has incurred an initial cost associated with moving DR ports to the Chicago center, including the purchase of upgraded hardware and physical space to house the DR ports, which is more expensive than the Ashburn location. The Exchange also incurs ongoing costs in maintaining the DR ports, including costs incurred maintaining servers and their physical location, monitoring order activity, and other support, which is collectively more expensive in Chicago than Ashburn. Accordingly, the Exchange is proposing to assess a fee of \$25 per port, per month for DR Ports used with FIX Trading Ports, OUCH, RASH, and DROP Ports.

Second Change

Under Chapter VIII of the Exchange's Pricing Schedule, Member firms may subscribe to Trading Ports used in Test Mode, which are trading ports available in primary market location in Carteret, NJ, that are exclusively used for testing purposes, at no cost. These ports may not be used for trading in securities in the System, but rather allow a member firm to test their systems prior to connecting to the live trading environment. Test Ports are identical to trading ports⁴ and share the same infrastructure, but are restricted to only allow order entry into the System in test symbols. A member firm may elect to designate a subscribed trading port as either in

⁴ E.g., FIX, RASH, and OUCH.

“production mode” or in “test mode.” A Trading Port that is in production mode allows a member firm to send orders for execution on the Exchange system in the normal course. When a member firm changes a trading port’s status to test mode, the Exchange will not allow normal order activity to occur through the port but rather it limits all order activity to test symbols. Under Chapter VIII of the Exchange’s Pricing Schedule, member firms are assessed a monthly fee of \$400 per port for each trading port subscribed in production mode. Member firms are not currently assessed a fee for Trading Ports used in Test Mode.

The Exchange has audited the use of Trading Ports used in Test Mode and found that a majority of Trading Ports used in Test Mode are not used for testing, but rather remain idle. The Exchange incurs costs associated with maintaining such ports, including costs incurred maintaining servers and their physical location, monitoring order activity, and other support. Accordingly, the Exchange is proposing to assess a fee of \$100 per port, per month.⁵

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act⁷ in particular, in

⁵ The Exchange bills Access Services subscriptions by prorating the first monthly fee by the number of days that subscription was subscribed and thereafter assesses the full monthly fee, including the full month in which the subscription is cancelled. If a subscriber elects to change a test mode port to a production port in a given month, the Exchange will assess the Trading Ports used in Test Mode fee, which may be prorated if subscribed to in the same month, and will also assess the production port fee, which will be prorated from the date the change is made through the end of the month. Likewise, if a subscriber elects to change a production mode port to a test mode port in a given month, the Exchange will assess the monthly production port fee, which may be prorated if subscribed to in the same month, and will also assess the Trading Ports used in Test Mode fee, which will be prorated from the date the change is made through the end of the month.

⁶ 15 U.S.C. § 78f(b).

⁷ 15 U.S.C. § 78f(b)(4) and (5).

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, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁸ Likewise, in NetCoalition v. Securities and Exchange Commission⁹ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹⁰ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹¹

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route

⁸ Securities Exchange Act Release No. 51808 at 37499 (June 9, 2005) (“Regulation NMS Adopting Release”).

⁹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁰ See NetCoalition, at 534.

¹¹ Id. at 537.

orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹²

DR Port Fees

The fee assessed for DR Ports is reasonable because it is based on the cost incurred by the Exchange in purchasing and maintaining DR ports in the Chicago data center. Currently, the Exchange does not have a means to recoup its investment and costs associated with providing member firms with DR ports in the Chicago data center. Thus, the Exchange believes that the proposed fee is reasonable because the fee is intended to cover the Exchange’s costs incurred in maintaining DR ports. The proposed fee may also allow the Exchange to make a profit to the extent the costs associated with purchasing and maintaining DR ports are covered. The Exchange believes that the proposed fee is equitably allocated and not unfairly discriminatory because it will apply equally to all subscribers to DR ports based on the number of ports subscribed. Last, the Exchange notes that, for most member firms, subscription to DR ports is voluntary, and member firms may subscribe to as many or as few ports they believe is necessary. A select number of member firms chosen by the Exchange to participate in business continuity and disaster recovery plan testing pursuant to Rule 926 will be obligated to subscribe to a DR port to participate in the annual test. Although subscription to DR ports is not voluntary for member firms selected for this once a year test, the Exchange believes that assessing the proposed fee is an equitable allocation and not unfairly discriminatory because such member firms will derive the same benefit as those members that voluntarily elect to subscribe to DR

¹² Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

ports and such members may cancel their DR port subscription once their Rule 926 testing obligation is satisfied.

Trading Ports used in Test Mode Fees

The proposed fee is also reasonable because it is based on the cost incurred by the Exchange in developing and maintaining multiple port connections, which are not used in the production environment and are designated as in test mode. As noted, the Exchange invests time and capital in initiating, monitoring and maintaining port connections to its system. Currently, the Exchange does not have a means to recoup its investment and costs associated with providing member firms with Trading Ports used in Test Mode. Thus, the Exchange believes that the proposed fee is reasonable because the fee is intended to cover the Exchange's costs incurred in maintaining test mode ports and is less than what is charged for a trading port in production mode. The proposed fee may also allow the Exchange to make a profit to the extent the costs associated with developing and maintaining Trading Ports used in Test Mode are covered. The Exchange believes that the proposed fee does not discriminate unfairly as it will promote efficiency in the market by incentivizing member firms to either place idle ports into production or cancel them if unneeded. The proposed fee is also equitably allocated because all Exchange member firms that voluntarily elect to subscribe to trading ports, yet maintain them in test mode, will be charged the fee equally on a per-port basis. Last, the Exchange notes that subscription to Trading Ports used in Test Mode is voluntary, and member firms may subscribe to as many or as few ports they believe is necessary for their testing purposes.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange 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, the Exchange must continually adjust its fees to remain competitive with other 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, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed fee merely allows the Exchange to recapture the costs associated with maintaining member ports that are in test mode and DR, and may provide the Exchange with a profit to the extent its costs are covered. The Trading Port used in Test Mode fee is applied uniformly to member firms that have such ports in the Carteret data center, where the Exchange incurs expenses to support this port configuration option.

The proposed fee will also promote efficient use of Trading Ports for testing. Similarly, the Exchange incurs greater costs in offering DR ports in the new Chicago data center, which the Exchange is seeking to cover. Any burden arising from the fees is necessary to cover costs associated with the location of the functionality in Chicago. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result as member firms chose one of many alternative venues on which they may trade. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members 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)(ii) of the Act.¹³

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 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 e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2016-31 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.

¹³ 15 U.S.C. § 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-Phlx-2016-31. This file number should be included on the subject line if e-mail 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 website (<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 website 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-2016-31 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Robert W. Errett
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).