

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-87094; File No. SR-Phlx-2019-35)

September 24, 2019

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule, at Equity 7, Section 3

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 September 12, 2019, Nasdaq 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 to amend the Exchange's transaction fees at Equity 7, Section 3, as described further below.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqphlx.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

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

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

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

Presently, the Exchange has a pricing schedule, at Equity 7, Section 3, which sets forth several different fees that it charges for orders in securities priced at \$1 or more per share that remove liquidity from the Exchange and several different credits that it provides for orders in such securities that add liquidity on the Exchange. The pricing schedule also provides a supplemental credit to member organizations that make significant contributions to improving the market during each month. The Exchange proposes to amend this pricing schedule to increase removal activity on the Exchange and to improve overall market quality.

Changes to Remove Fees

The Exchange proposes to largely restate its schedule of charges for member organizations that enter orders that execute on the Exchange. Presently, the Exchange charges a fee of \$0.0029 per share executed in securities in all three Tapes entered by a member organization that accesses 0.065% or more of Consolidated Volume<sup>3</sup> during a month. For all other member organizations, the exchange presently charges execution fees of \$0.0030 per share executed. The Exchange proposes to eliminate the \$0.0029 fee and replace it with two tiers of

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<sup>3</sup> As used in Equity 7, Section 3, the term "Consolidated Volume" means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity, the date of the annual reconstitution of the Russell Investments Indexes are excluded from both total Consolidated Volume and the member's trading activity.

fees. First, the Exchange proposes to charge a fee of \$0.0024 per share executed in securities entered by a member organization that accesses 0.055% or more of Consolidated Volume during a month and that adds 0.025% or more of Consolidated Volume during a month. Second, the Exchange proposes to charge a fee of \$0.0025 per share executed in securities entered by a member organization that accesses 0.01% or more of Consolidated Volume during the month and that adds 5,000 shares or more to the Exchange during a month. The Exchange proposes to maintain its existing \$0.0030 per share executed fee for all other member organizations.

The purpose of these changes, which will reduce the overall fees that the Exchange charges to member organizations that remove liquidity from the Exchange, is to increase the extent of member organizations' removal activity on the Exchange. Moreover, by tying the availability of the two new, reduced removal fees to the extent of member organizations' liquidity adding activity on the Exchange, the Exchange intends to incentivize member organizations to maintain or increase their liquidity adding activity on the Exchange at the same time that they increase their removal activity, which in turn will help to improve overall market quality.

#### Changes to Add Credits

Additionally, the Exchange proposes to largely restate its schedule of credits to member organizations that provide displayed liquidity to the Exchange. Presently, the Exchange provides the following credits for member organizations that provide displayed liquidity to the Exchange: (1) a \$0.0030 per share executed credit for quotes/orders entered by member organizations that provide and access 0.20% or more of Consolidated Volume during a month; (2) a \$0.0027 per share executed credit for quotes/orders entered by member organizations that provide and access 0.15% or more of Consolidated Volume during a month; (3) a \$0.0027 per share executed credit

for quotes/orders entered in securities listed on exchanges other than Nasdaq or the NYSE by member organizations that (i) provide a minimum of 1 million shares a day on average in securities listed on Exchanges other than Nasdaq or NYSE and (ii) double the daily average share volume provided in Securities Listed on Exchanges other than Nasdaq or NYSE during the month versus the member organization's daily average share volume provided in Securities Listed on Exchanges other than Nasdaq or NYSE in February 2017<sup>4</sup>; (4) a \$0.0025 per share executed credit for quotes/orders entered by member organizations that provide and access 0.05% or more of Consolidated volume during a month; and (5) a \$0.0023 per share executed credit for all other quotes/orders.

The Exchange proposes to replace those credits with the following: (1) a \$0.0026 per share executed credit for quotes/orders entered by member organizations that provide 0.15% or more of total Consolidated Volume during a month; and (2) a \$0.0024 per share executed credit for quotes/orders entered by member organizations that provide 0.07% or more of total Consolidated Volume during a month. Additionally, the Exchange will continue to provide a \$0.0023 per share executed credit for all other quotes/orders.

The Exchange proposes these changes to its schedule of transaction credits to offset its costs of reducing its transaction fees.

#### Changes to QMM Program

Earlier this year, the Exchange established a Qualified Market Maker ("QMM") Program and related credits to incentivize member organizations to make significant contributions to

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<sup>4</sup> If a member had no activity in February 2017 in Securities Listed on Exchanges other than Nasdaq or NYSE or became a member after February 2017, its February 2017 daily average share volume in Securities Listed on Exchanges other than Nasdaq or NYSE is zero for purposes of determining that member's eligibility for the credit in subsequent months.

market quality by providing liquidity at the national best bid and offer (“NBBO”) in a large number of securities for a significant portion of the day.<sup>5</sup> The program is designed to attract liquidity both from traditional market makers and from other firms that are willing to commit capital to support liquidity at the NBBO. Under existing Equity 7, Section 3, a member organization that qualifies as a QMM – i.e., because it quotes at the NBBO at least 10 percent of the time during regular market hours in an average of at least 750 securities per day during a month – is entitled to receive a supplemental credit of \$0.0002 per share executed for executions of displayed orders in securities in Tape A priced at \$1 or more per share that provide liquidity on the Exchange.

The Exchange now proposes to amend the QMM Program in several respects. First, the Exchange proposes to adjust downward the average number of securities for which a member organization must quote at the NBBO during a month to qualify as a QMM as well as the amount of the credit that the Exchange will pay to a member organization that qualifies as a QMM. Whereas presently, a member organization must quote at the NBBO at least 10 percent of the time for an average of at least 750 securities per day to qualify as a QMM, the Exchange proposes to reduce this number to 500 securities per day. Under the proposal, however, a member organization that meets this adjusted criteria will be entitled to a supplemental credit of \$0.0001 per share executed with respect to all of its displayed orders in all securities priced at \$1 or more that provide liquidity, rather than \$0.0002 per share executed with respect to all of its displayed orders only in securities in Tape A that are priced at \$1 or more that provide liquidity.

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<sup>5</sup> See Securities Exchange Act Release No. 34-85862 (May 15, 2019), 84 FR 23112 (May 21, 2019) (SR-Phlx-2019-19).

Additionally, the Exchange proposes to establish a new second tier QMM Program credit for QMMs that quote at the NBBO for the requisite time for a larger average number of securities. Specifically, the Exchange proposes to provide a credit of \$0.0002 per share executed with respect to all displayed orders of a QMM in securities priced at \$1 or more per share that provide liquidity, provided that the QMM quotes the NBBO at least 10 percent of the time during Market Hours in an average of at least 650 securities per day during a month. To the extent that a QMM qualifies for this new credit, it will apply in lieu of the \$0.0001 QMM credit described above.

The Exchange intends for its proposed amendments to its QMM Program to broaden and fortify participation in the Program. The Exchange intends to broaden participation in the Program by lowering the qualifying criteria for QMMs so that member organizations will be able to qualify that either cannot do so now or simply do not wish to quote at the NBBO at least 10 percent of the time for an average of at least 750 securities per day. The proposal intends to fortify existing participation in the Program by easing the burden on existing QMMs to maintain their qualifications as such. That is, member organizations that quote at the NBBO at least 10 percent of the time in as few as an average of 500 securities per day during a month will be able to earn a \$0.0001 per share executed supplemental credit, whereas now, member organizations that engage in the same level of activity would earn no supplemental credit at all. Meanwhile, the \$0.0002 per share executed supplemental credit would be available to member organizations that quote at the NBBO in only an average of 650 securities per day during a month, whereas now, such a credit is available only when member organizations quote at the NBBO for an average of at least 750 securities per day during a month.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>7</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, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

### The Proposal is Reasonable

The Exchange's proposed change to its schedule of credits and charges is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: "[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 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' ...."<sup>8</sup>

The Commission and the courts have repeatedly expressed their preference for

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<sup>6</sup> 15 U.S.C. 78f(b).

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>8</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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.”<sup>9</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.<sup>10</sup>

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules.<sup>11</sup> Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to increase its market share relative to its competitors.

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<sup>9</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>10</sup> See Cboe EDGX U.S. Equities Exchange Fee Schedule, available at [https://markets.cboe.com/us/equities/membership/fee\\_schedule/edgx/](https://markets.cboe.com/us/equities/membership/fee_schedule/edgx/).

<sup>11</sup> The Exchange perceives no regulatory, structural, or cost impediments to market participants shifting order flow away from it. In particular, the Exchange notes that such shifts in liquidity and market share occur within the context of market participants’ existing duties of Best Execution and obligations under the Order Protection Rule under Regulation NMS.



Generally, the Exchange's proposed schedule of credits and charges in Equity 7, Section 3 provide increased overall incentives to member organizations to increase their liquidity removal activity on the Exchange, and to do so broadly in orders in securities in all Tapes. An increase in overall liquidity removal activity on the Exchange will, in turn, improve the quality of the Exchange's equity market and increase its attractiveness to existing and prospective participants. The proposed new fees are consistent with the current design of Equity 7, Section 3 because they provide incrementally lower fees in return for increased removal and provision of liquidity on the Exchange. Moreover, the proposed credits will be comparable to, if not favorable to, those that its competitors provide.<sup>12</sup>

The proposed changes to the Exchange's QMM Program is also a reasonable attempt to improve market quality by broadening its QMM Program. By lowering the thresholds for member organizations to qualify as QMMs and to receive supplemental credits for quoting at the NBBO for a significant percentage of the trading day in a significant percentage of securities, the Exchange will encourage new member organizations to become QMMs and help ensure that existing QMMs continue to qualify as such. The Exchange also proposes to broaden the utility of the QMM credits it provides to QMMs by making the credits applicable to displayed orders in all Tapes, rather than only to those in Tape A.

#### The Proposals are an Equitable Allocation of Credits and Charges

The Exchange believes its proposals will allocate its proposed credits and charges fairly among its market participants. The proposal will provide a member organization with an opportunity to pay lower fees for removing liquidity from the Exchange than it does now. It is equitable for the Exchange to lower its fees to participants whose orders remove liquidity from

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<sup>12</sup> See n. 10, *supra*.

the Exchange as a means of incentivizing increased liquidity removal activity and to do so broadly in orders in securities in all Tapes. An increase in overall liquidity removal activity on the Exchange will improve the quality of the Exchange's equity market and increase its attractiveness to existing and prospective participants.

Meanwhile, the Exchange believes that it is reasonable to offset the costs of charging lower fees for liquidity removal by lowering its credits for liquidity provision to the Exchange. Although the proposed credits will be lower, in many cases, than the existing credits, and may be harder to achieve, the Exchange believes that the proposed credits will continue to be comparable to liquidity adding rebates provided by its competitors.<sup>13</sup> That said, the Exchange again notes that those participants that do not wish to receive lower credits are free to shift their order flow to competing venues that offer them higher credits.

Finally, the Exchange believes its proposal to adjust the qualification criteria and supplemental credits applicable to its QMM program is an equitable allocation of proposed credits because the modified qualification criteria will continue to require member organizations to quote significantly at the NBBO for a large number of securities and will continue to contribute to market quality in a meaningful way. In fact, by lowering the thresholds for member organizations to qualify as QMMs and to receive supplemental credits, the Exchange will encourage new member organizations to become QMMs and help ensure that existing QMMs continue to qualify as such, which will further improve market quality.

#### The Proposal is not Unfairly Discriminatory

The Exchange believes that the proposals are not unfairly discriminatory. As an initial matter, the Exchange believes that nothing about its volume-based tiered pricing model is

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<sup>13</sup> See id.

inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries – from co-branded credit cards to grocery stores to cellular telephone data plans – that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

The Exchange intends for the proposal to improve market quality for all members on the Exchange and by extension attract more liquidity to the market, improving market wide quality and price discovery. Although net removers of liquidity will benefit most from the proposed lower charges, this result is fair insofar as increased liquidity removal activity will help to improve market quality and the attractiveness of the Exchange's equity market to all existing and prospective participants.

The Exchange's proposal to modify the QMM program is not unfairly discriminatory because any member organization may quote at the NBBO at the level required by the modified qualification criteria of the QMM Program and, in fact, the modified criteria will render qualification as a QMM easier for member organizations to achieve.

**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.

**Intramarket Competition**

The Exchange does not believe that its proposals will place any category of Exchange participant at a competitive disadvantage. As noted above, all members of the Exchange will

benefit from an increase in the removal of liquidity by those that choose to meet the tier qualification criteria. Members may grow their businesses so that they have the capacity to pay lower removal fees. Moreover, members are free to trade on other venues to the extent they believe that the fees assessed and credits provided are not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. The Exchange notes that the tier structure is consistent with broker-dealer fee practices as well as the other industries, as described above.

Moreover, the Exchange's proposal to modify its QMM program will not burden intramarket competition because the QMM Program, as modified, will continue to provide all member organizations with an opportunity to obtain supplemental credits for transactions if they improve the market by providing significant quoting at the NBBO in a large number of securities which the Exchange believes will improve market quality. By relaxing the qualification criteria, the modifications will make the Program more accessible to new member organizations and easier for existing QMMs to remain in the Program.

#### Intermarket Competition

Addressing whether the proposed fee could impose a burden on competition on other SROs that is not necessary or appropriate, the Exchange believes that its proposed modifications to its schedule of credits and charges will not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from the other 12 live exchanges and from off-exchange venues, which include 32 alternative trading systems. 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.

The proposed restated schedule of credits and charges and the proposed modifications to the QMM Program are reflective of this competition because, as a threshold issue, the Exchange is a relatively small market so its ability to burden intermarket competition is limited. In this regard, even the largest U.S. equities exchange by volume only has 17-18% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprised more than 37% of industry volume for the month of July 2019.

In sum, the Exchange intends for the proposed fees and credits and modified QMM Program to increase member incentives to remove liquidity from the Exchange and to contribute to market quality, which is reflective of fierce competition for order flow noted above; however, if the proposed fees and credits are unattractive to market participants, it is likely that the Exchange will either fail to increase its market share or even lose market share as a result. Accordingly, the Exchange does not believe that the proposed new fees and credits 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.<sup>14</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: (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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2019-35 on the subject line.

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

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-2019-35. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2019-35 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.<sup>15</sup>

Jill M. Peterson

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<sup>15</sup> 17 CFR 200.30-3(a)(12).

Assistant Secretary