

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87403; File No. SR-Phlx-2019-46)

October 25, 2019

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx Rule 1097

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 October 22, 2019, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“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 amend Phlx Rule 1097, “Limitations on Order Entry.”

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 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

1. Purpose

The Exchange proposes an amendment to Phlx Rule 1097, “Limitations on Order Entry” to add additional rule text concerning limitations on solicited orders. Specifically, the Exchange proposes to reinstate a paragraph that was recently removed from Rule 1080. The Exchange recently filed a rule change³ which, among other thing, removed a paragraph from Phlx Rule 1080(c)(ii)(C)(2) and (3) which provided,

Solicitation Orders. Order Entry Firms must expose orders they represent as agent for at least one (1) second before such orders may be automatically executed, in whole or in part, against orders solicited from members and non-member broker-dealers to transact with such orders, except for: (a) orders entered into PIXL pursuant to Rule 1087, (b) orders entered into COLA pursuant to Rule 1080, Commentary .02(c)(ii)(e), or (c) orders entered into the QCC mechanism pursuant to Rules 1080(o).

(3) It shall be a violation of Rule 1080(c)(ii)(C) for any Exchange member or member organization to be a party to any arrangement designed to circumvent Rule 1080(c)(ii)(C) by providing an opportunity for a customer, member, member organization, or non-member broker-dealer to execute immediately against agency orders delivered to the Exchange, whether such orders are delivered via AUTOM or represented in the trading crowd by a member or a member organization, except for: (a) orders entered into PIXL pursuant to Rule 1087, (b) orders entered into COLA pursuant to Rule 1080, Commentary .02(c)(ii)(e), or (c) orders entered into the QCC mechanism pursuant to Rules 1080(o).

In its July Filing, the Exchange noted that the above language was repetitive of language within current Rule 1080(c)(ii)(C)(1), which text was relocated to Rule 1097(b) and requires exposure similar to of one second and describes the same behavior as current Rule 1080(c)(ii)(C)(2) and (3) and lists the same exceptions. At this time, the Exchange desires to reinstate the rule text of Rule 1080(c)(ii)(C)(2) and (3) because while some circumstances are covered by current Rule 1097(b), after further consideration, there are circumstances which are specific to the text that

³ See Securities Exchange Act Release Nos. 86286 (July 2, 2019), 84 FR 32794 (July 9, 2019) (SR-Phlx-2019-25) (“July Filing”).

was previously within Rule 1080(c)(ii)(C)(2) and (3), such as certain crossing transactions.

Specifically, the Exchange proposes to adopt rule text similar to previous Rule 1080(c)(ii)(C)(2) and (3) within Rule 1097(c) which conforms to rule text currently within Nasdaq ISE, LLC, Nasdaq GEMX, LLC and Nasdaq MRX, LLC Options 3, Section 22(c). The Exchange proposes to similarly title the new section “Limitations on Solicitation Orders.” The Exchange proposes to state,

Limitations on Solicitation Orders. Members may not execute orders they represent as agent on the Exchange against orders solicited from Members and non-Member broker-dealers to transact with such orders unless (i) the unsolicited order is first exposed on the Exchange for at least one (1) second; (ii) the member has been bidding or offering on the Exchange for at least 1 second prior to receiving an agency order that is executable against such order; (iii) the orders are entered into Price Improvement XL or "PIXL" pursuant to Rule 1087; (iv) the orders are entered into the Complex Order Live Auction or "COLA" pursuant to Rule 1098(e); or (v) the orders are entered into the Qualified Contingent Cross or "QCC" mechanism pursuant to Rules 1088 or Options 8, Section 30(e).

The Exchange proposes the same exceptions to order entry for orders represented as agent as specified within Rule 1097(b) for principal transactions, with one exception. Rule 1097(b) currently contains an exception which provides, “the member proceeds in accordance with the crossing rules contained in Rule 1064.” Rule 1064 was recently relocated to Options 8, Section 30, “Crossing, Facilitation and Solicited Orders.” This rule describes certain crossing orders, including facilitation and solicited orders which are available on the Exchange’s Trading Floor. The Exchange notes that, today, these orders are exposed in the trading crowd for at least 1 second in accordance with the general provision of Rule 1097 and therefore is not an exception to Rule 1097(b) or proposed (c). The Exchange proposes to remove this exception from Rule 1097(b) and not include the exception within proposed Rule 1097(c), with the exception of noting the Floor Qualified Contingent Cross exception within Options 8, Section 30(e). Similar to Qualified Contingent Cross Orders that execute electronically, the Floor Qualified Contingent

Cross Orders is an exception to both Rule 1097(b) and (c).

The Exchange does not believe the proposed rule text within Rule 1097(c) is substantively different than the rule text within former Rule 1080(c)(ii)(C)(2) and (3). The Exchange desires to conform the rule text with Nasdaq affiliated exchanges, where applicable. Today, the behavior specified within proposed Rule 1097(c) would be a violation of Phlx Rule 707, “Conduct Inconsistent with Just and Equitable Principles of Trade.” The Exchange proposes to specifically note the prohibition within proposed Rule 1097(c) so that members are aware when they execute orders they represent as agent on the Exchange against orders solicited from members and non-member broker-dealers that certain limitations exist. The Exchange believes the proposed rule will assist members in understanding the type of behavior that would violate Exchange rules when executing agency orders, namely executing agency orders to increase its economic gain from trading against the order without first giving other trading interest on Phlx an opportunity to either trade with the agency order or to trade at the execution price when the member was already bidding or offering on the book. The Exchange proposes to make clear with this Rule that members may not gain by failing to expose orders submitted on an agency basis. The Exchange is promoting transparency of orders to prevent members from seeking price discovery and potentially preventing price improvement which may result from exposing an order.

The Exchange proposes to amend the lettering to numbering within Rule 1097(b) for consistency and update a rule reference. Finally, the Exchange proposes to renumber Rule 1097(c) as “(d)”.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,⁵ in particular, 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 as provided for within the purpose section.

The Exchange's proposal to adopt rule text related to solicited orders similar to other Nasdaq affiliated markets⁶ will bring greater clarity to current limitations that exist when entering orders. Proposed Rule 1097(c) is consistent with the Act because it will promote just and equitable principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because it will continue to make clear the requirement to expose orders as well as present more specific limitations on order entry which would violate Phlx Rules. Specifically, the proposed rule will assist members in understanding the type of behavior that would violate Exchange rules when executing agency orders, namely executing agency orders to increase its economic gain from trading against the order without first giving other trading interest on Phlx an opportunity to either trade with the agency order or to trade at the execution price when the member was already bidding or offering on the book. The Exchange proposes to make clear with this Rule that members may not gain by failing to expose orders submitted on an agency basis. The Exchange is promoting transparency of orders to prevent members from seeking price discovery and potentially preventing price improvement

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

⁶ Nasdaq ISE, LLC, Nasdaq GEMX, LLC and Nasdaq MRX, LLC Options 3, Section 22(c).

which may result from exposing an order.

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 that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that proposed Rule 1097(c) will apply uniformly to all members. Until recently rule text describing limitations on solicitation orders was described within the Rulebook. Despite the removal of the rule text, the behavior was prohibited pursuant to Phlx Rule 707. There is no impact to market participants as a result of adding the new rule text, rather the new rule text will provide specificity on the type of behavior that is prohibited.

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

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)(iii) of the Act⁷ and subparagraph (f)(6) of Rule 19b-4 thereunder.⁸

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative

⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

for 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)⁹ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. In its filing, Phlx requested that the Commission waive the 30-day operative delay so that the Exchange can implement the proposed rule change promptly after filing. The Exchange explained that the behavior prohibited by the proposed rule change is currently also prohibited by Phlx Rule 707, but stated that adding a more specific description of the prohibited behavior would provide their members with greater transparency regarding this specific limitation on entering orders. The Commission also notes that the behavior prohibited by the proposed rule change was previously prohibited by Phlx Rule 1080 and that the Exchange is simply reinstating the prohibition in a manner that conforms to the rule text of affiliate exchanges.

The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest, as such waiver will permit the Exchange to promptly update its rules to provide greater transparency to its members and to maintain consistency with its affiliate exchanges. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change operative upon filing.¹⁰

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

⁹ 17 CFR 240.19b-4(f)(6)(iii).

¹⁰ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2019-46 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-2019-46. 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-2019-46 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.¹¹

Eduardo A. Aleman
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12) and (59).