

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75942; File No. SR-Phlx-2015-49)

September 17, 2015

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend and Correct Rule 1080.07

I. Introduction

On June 5, 2015, NASDAQ OMX PHLX LLC (“Exchange” or “Phlx”) 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 amend and correct several provisions in Phlx Rule 1080.07, “Complex Orders on Phlx XL,” which governs the trading of Complex Orders on the Phlx’s Complex Order System (“System”). The proposed rule change was published for comment in the Federal Register on June 23, 2015.³ On July 30, 2015, the Commission extended the time period for Commission action to September 21, 2015.⁴ The Commission received no comments regarding the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Act⁵ to determine whether to disapprove the proposed rule change.

II. Description of the Proposal

The Phlx proposes to make a number of changes to Phlx Rule 1080.07 to amend and correct inconsistencies in the rule and provide additional clarity regarding the trading of

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 75189 (June 17, 2015), 80 FR 35997 (“Notice”).

⁴ See Securities Exchange Act Release No. 75570, 80 FR 46619 (August 5, 2015).

⁵ 15 U.S.C. 78s(b)(2)(B).

Complex Orders on the Exchange. The Phlx's System for trading Complex Orders includes a Complex Order Opening Process ("COOP"); the Complex Order Live Auction ("COLA"), an automated auction for seeking liquidity and price improvement for Complex Orders; and a Complex Limit Order Book ("CBOOK"). According to the Phlx, among other things, the proposal would revise Phlx Rule 1080.07 to: (i) accurately describe the operation of the COOP and the execution of orders at the opening, including the treatment of Immediate-or-Cancel ("IOC") orders and Do Not Auction ("DNA") orders at the opening; (ii) add definitions of "COOP Sweep" and "COLA Sweep," and correct existing rule text to indicate that only Phlx XL market makers may submit COLA Sweeps; (iii) delete rule text that incorrectly states that a specialist could be entitled to receive 40% of the remainder of a COLA-eligible order, as well as rule text indicating that only a specialist's interest at the cPBBO is aggregated for purposes of determining the specialist's entitlement in the COLA, so that the revised rule will provide that the specialist is entitled to receive the greater of (a) the proportion of the aggregate size associated with the specialist's COLA Sweep, SQT and RSQT COLA Sweeps, and non-SQT ROT Complex Orders on the CBOOK, or (b) the Enhanced Specialist Participation as described in Phlx Rule 1014(g)(ii); (iv) delete rule text indicating that, for allocation purposes, the size of a COLA Sweep or responsive Complex Order will be limited to the size of the COLA-eligible order, thereby clarifying that the size of a COLA Sweep or responsive Complex Order that exceeds the size of the COLA-eligible order may trade against remaining interest after the COLA-eligible order has been executed to the fullest extent possible; (v) revise rule text to indicate that other interest in a COLA may trade after a COLA-eligible order has been executed to the fullest extent possible, rather than in its entirety, and to correct the description of the execution of crossing interest after a COLA-eligible order has been executed; (vi) provide that

the System will place a Complex Order received during a configurable period of time prior to the end of a trading session on the CBOOK after any marketable portion of the order has been executed; and (vii) describe the handling of all-or-none Complex Orders.

In addition to these changes, the Phlx proposes to amend Phlx Rule 1080.07 to add a definition of “Firm.”⁶ Specifically, the Phlx proposes to define a “Firm” to mean “a broker-dealer trading for its own (proprietary) account that is: a member of The Options Clearing Corporation (“OCC”) or maintains a Joint Back Office (“JBO”) arrangement with an OCC member.”⁷ The Phlx also proposes to revise Phlx Rule 1080.07 to provide that orders from Firms, like orders from market makers, would not trigger a COLA.⁸ In addition, the Phlx proposes to treat Firms like market makers for purposes of determining the allocations and execution price that their trading interest will receive at the conclusion of a COLA.⁹

The Phlx proposes to treat Firm orders like non-Phlx market makers for purposes of these rules because the Phlx believes that the trading style and needs of Firms are more like market makers.¹⁰ The Phlx states that Firms are large, well-capitalized broker-dealers that trade for their own accounts and generally submit large orders, including orders that facilitate their clients’

⁶ See Phlx Rule 1080.07(a)(x).

⁷ Id. Unless otherwise specified, Firms are included in the category of non-market-maker off-floor broker-dealer. Id.

⁸ See Phlx Rule 1080.07(e)(i)(B)(1). Orders from non-market maker off-floor broker-dealers that are not Firms would be COLA-eligible. See Phlx Rule 1080.07(e)(i)(B)(1) and Notice, 80 FR at 36003.

⁹ See Phlx Rule 1080.07(e)(viii)(C)(2) and Notice, 80 FR at 36003. Orders of non-market maker off-floor broker-dealers that are not Firms would be executed along with the orders of non-broker-dealer customers at the conclusion of the COLA. See Phlx Rule 1080.07(e)(viii)(C)(1) and Notice, 80 FR at 36003. At the same price, non-broker-dealer customer orders would be executed in time priority, while non-market-maker off-floor broker-dealer orders would be executed on a pro rata basis at each price level. See Phlx Rule 1080.07(e)(viii)(C)(1)(d).

¹⁰ See Notice, 80 FR at 36003.

orders or offset large positions taken to accommodate their customers.¹¹ According to the Phlx, Firms must have the financial wherewithal that this role necessitates.¹² Thus, the Phlx states that Firms, in general, are commonly viewed as liquidity providers, much like market makers.¹³ The Phlx states that Firms do not expect or need their Complex Orders to trigger a COLA, nor do they need or expect to submit Good Til Cancelled Orders, because these are features commonly associated with customers rather than liquidity providers who function to accommodate trading interest.¹⁴ The Phlx notes that both of these features involve a temporal component, and that both a delay and long-lasting interest are inconsistent with the sort of accommodation that Firms provide.¹⁵ The Phlx believes that by tailoring its offerings to the needs and trading style of Firms, Firms are more likely to send orders to the Exchange.¹⁶

III. Proceedings to Determine Whether to Approve or Disapprove SR-Phlx-2015-49 and Grounds for Disapproval under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁷ to determine whether the proposed rule change should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in

¹¹ See Notice, 80 FR at 36003-36004.

¹² See Notice, 80 FR at 36004. In addition, Firms that are OCC clearing members must comply with OCC rules regarding, among other things, net capital, risk management procedures, and margin. See id.

¹³ See id.

¹⁴ See Notice, 80 FR at 36005.

¹⁵ See id.

¹⁶ See id.

¹⁷ 15 U.S.C. 78s(b)(2)(B).

greater detail below, the Commission seeks and encourages interested persons to comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁸ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposed rule change with Section 6(b)(5) of the Act,¹⁹ which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, 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.

In addition, under the Commission's rules of procedure, a self-regulatory organization that proposes to amend its rules bears the burden of demonstrating that its proposal is consistent with the Act.²⁰ In this regard:

the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with the applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. Any failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder that are applicable to the self-regulation organization.²¹

¹⁸ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding.

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ Rule 700(b)(3), 17 CFR 201.700(b)(3).

²¹ Id.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any others they may have identified with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.²²

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposed rule change, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission asks that commenters address the sufficiency of the Exchange's statements, which are set forth in the Notice,²³ in support of its proposal to prevent Firms' orders from triggering a COLA, in addition

²² Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29, 89 Stat. 97 (1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

²³ See supra note 3.

to any other comments they may wish to submit about the proposed rule change. The Commission notes that the Phlx states that Firms, like market makers, are liquidity providers that function to accommodate the trading interest of their clients, and that Firms do not expect or need their orders to trigger a COLA. With respect to this conclusion, the Commission seeks comment on whether there are circumstances in which a Firm might want its order to trigger a COLA, and the potential impact of permitting or prohibiting Firms' orders from triggering a COLA.

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-2015-49 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-Phlx-2015-49. 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-2015-49 and should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

Brent J. Fields
Secretary

²⁴ 17 CFR 200.30-3(a)(57).