

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95985; File No. SR-Phlx-2022-37)

October 5, 2022

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Temporarily Waive Certain Port-related Fees at Equity 7, Section 3

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 September 22, 2022, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a 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 temporarily waive certain port-related 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 <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, 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

¹ 15 U.S.C. 78s(b)(1).

² 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

The purpose of the proposed rule change is to amend Equity 7, Section 3 to provide a temporary fee waiver for newly added OUCH order entry ports (production and Testing Facility environments) with the updated version of the OUCH Order entry protocol,³ referred to as “OUCH 5.0.” The Exchange has proposed⁴ to introduce this new upgraded version of the OUCH Order entry protocol that will enable the Exchange to make functional enhancements and improvements to specific Order Types⁵ and Order Attributes.⁶

First, the Exchange proposes to amend Equity 7, Section 3 to provide a 30-day waiver of the OUCH production port fee for up to five⁷ newly added OUCH ports with the updated version of the OUCH Order entry protocol, OUCH 5.0. The fee waiver would be offered for a three-

³ The OUCH Order entry protocol is a proprietary protocol that allows subscribers to quickly enter orders into the System and receive executions. OUCH accepts limit Orders from members, and if there are matching Orders, they will execute. Non-matching Orders are added to the Limit Order Book, a database of available limit Orders, where they are matched in price-time priority. OUCH only provides a method for members to send Orders and receive status updates on those Orders. See <https://www.nasdaqtrader.com/Trader.aspx?id=OUCH>.

⁴ See Securities Exchange Act Release No. 95769 (September 14, 2022), 87 FR 57527 (September 20, 2022).

⁵ An “Order Type” is a standardized set of instructions associated with an Order that define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the Exchange. See Equity 1, Section 1(e).

⁶ An “Order Attribute” is a further set of variable instructions that may be associated with an Order to further define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the Exchange. See *id.*

⁷ The fee waiver is limited to a maximum of five OUCH production ports per Web Central Registration Depository (“CRD”) membership.

month period, beginning on October 10, 2022. At the end of the three-month period, users would no longer be eligible for the waiver. A user may only receive the 30-day waiver once per port (up to a maximum of five ports) within the three-month window. The Exchange proposes to offer this temporary waiver to encourage new, prospective customers to adopt and returning customers to migrate to the updated version of the OUCH Order entry protocol.

Second, the Exchange proposes to amend Equity 7, Section 3 to provide a 30-day waiver of the \$300 Testing Facility fee for up to five⁸ newly added OUCH Testing Facility ports with the updated version of the OUCH Order entry protocol, OUCH 5.0. This fee waiver would be offered for a three-month period, beginning on September 22, 2022. At the end of the three-month period, users would no longer be eligible for the waiver. A user may only receive the 30-day waiver once per port (up to a maximum of five ports) within the three-month window. The Testing Facility provides subscribers with a virtual System test environment that closely approximates the production environment on which they may test their automated systems that integrate with the Exchange. For example, the Testing Facility provides subscribers a virtual System environment for testing upcoming releases and product enhancements, as well as testing firm software prior to implementation. The Exchange proposes to offer this temporary waiver to encourage customers to test the updated version of the OUCH Order entry protocol free of charge.

⁸ The fee waiver is limited to a maximum of five OUCH Testing Facility ports per CRD membership.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ 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 Exchange's proposed changes to its fee schedule are 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 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."¹¹

The Exchange believes that it is reasonable to provide temporary fee waivers for up to five newly added OUCH order entry ports (production and Testing Facility environments) with the updated version of the OUCH Order entry protocol, OUCH 5.0. The Exchange believes it is

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

¹¹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

important to provide users an opportunity to test OUCH 5.0 free of charge. The temporary fee waivers would encourage users to test and adopt the enhanced OUCH Order entry protocol.

The Exchange believes that the proposed temporary fee waivers are an equitable allocation of reasonable dues, fees and other charges and not unfairly discriminatory because the Exchange will apply the same temporary fee waivers to all similarly situated members. The waivers will reduce fees for and benefit all users that add OUCH 5.0 order entry ports (production and Testing Facility environments) within the three-month window.

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 proposal will place any category of Exchange participants at a competitive disadvantage. The proposed change to temporarily waive fees for newly added OUCH 5.0 order entry ports (production and Testing Facility environments) will apply uniformly to all similarly situated participants. The temporary fee waivers are available to all users and would enable users to test the OUCH enhancements at no cost.

Intermarket Competition

The Exchange believes that the proposed temporary fee waivers 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 live exchanges and from off-exchange venues, which include alternative trading systems that trade national market system stock.

The proposed fee waivers 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. The proposed fee waivers would facilitate adoption of enhancements to the Exchange's System and Order entry protocols, which is pro-competitive because the enhancements bolster the efficiency, functionality, and overall attractiveness of the Exchange in an absolute sense and relative to its peers. Accordingly, the Exchange does not believe that the proposed change will impair the ability of members, participants, 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,¹² and Rule 19b-4(f)(2)¹³ thereunder.

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.

¹² 15 U.S.C. 78s(b)(3)(A)(ii).

¹³ 17 CFR 240.19b-4(f)(2).

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-2022-37 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-2022-37. 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-2022-37 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

J. Matthew DeLesDernier

Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).