

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98377; File No. SR-Phlx-2023-43)

September 13, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Equity 4, Rules 3301A and 3301B

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 5, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (the “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 Equity 4, Rules 3301A and 3301B.³

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.

³ References herein to Phlx Rules in the 3000 Series shall mean Rules in Phlx Equity 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 Exchange proposes amendments to its Rules to address inconsistencies between the Rule Text and observed System behavior as well as behavior unaccounted for in the existing Rule text, as follows. This proposal is similar to a rule change filed by the Exchange’s sister exchange, the Nasdaq Stock Market, LLC, on August 16, 2023.⁴

FIRST RULE CHANGE

The first proposed rule change addresses an edge case of inconsistency between the Rule text and System behavior, this time regarding Market Maker Peg Orders.⁵ Rule 3301A states that, if after entry of a Market Maker Peg Order that has a displayed price based on the NBBO, and the NBBO subsequently shifts such that the displayed price of the Market Maker Peg Order to buy (sell) is equal to or greater (less) than the National Best Bid (or National Best Offer), the

⁴ See Securities Exchange Act Release No. 34-98225 (August 16, 2023), 88 FR 60255 (August 31, 2023) (SR-NASDAQ-2023-030). The Exchange’s proposal differs from that of Nasdaq in that it excludes changes to Order Types and Attributes that are inapplicable to the Exchange due to its absence of opening and closing crosses.

⁵ Pursuant to Rule 3301B(b)(5)(A), a “Market Maker Peg Order” is an Order Type designed to allow a Market Maker to maintain a continuous two-sided quotation at a displayed price that is compliant with the quotation requirements for Market Makers set forth in Equity 2, Section 5(a)(2). The displayed price of the Market Maker Peg Order is set with reference to a “Reference Price” in order to keep the displayed price of the Market Maker Peg Order within a bounded price range. The Reference Price for a Market Maker Peg Order to buy (sell) is the then-current National Best Bid (National Best Offer), or if no such National Best Bid or National Best Offer, the most recent reported last-sale eligible trade from the responsible single plan processor for that day, or if none, the previous closing price of the security as adjusted to reflect any corporate actions (e.g., dividends or stock splits) in the security.

Market Maker Peg Order will not be subsequently repriced until a new reference price is established that is more aggressive than the displayed price of the Market Maker Peg Order. System testing revealed that the System does not reprice Market Maker Peg Orders in this scenario, but only if such Orders are in round lot sizes, whereas it does reprice such Orders when they are in odd lot sizes. After evaluation, the Exchange determined to maintain this System behavior and amend the Rule to conform to it. The Exchange proposes to do so because the existing language proscribing repricing only makes sense within the context of round lot Market Maker Peg Orders, which this scenario would set a new NBBO and when they do so, cannot reprice with respect to the reference price they just set. By contrast, odd lot Market Maker Peg Orders are ineligible to set the NBBO, and do not have this same problem. Accordingly, the Exchange proposes to amend Rule 3301A to clarify that the prohibition against repricing only applies to Market Maker Peg Orders in round lot sizes.

SECOND RULE CHANGE

The second proposal would amend Equity 4, Rule 3301B(h), to correct its description of behavior of the Non-Displayed portion of Orders with the Reserve Attribute.⁶ Rule 3301B(h) provides as follows, in pertinent part:

⁶ “Reserve Size” is, in part, an Order Attribute that “permits a Participant to stipulate that an Order Type that is displayed may have its displayed size replenished from additional non-displayed size.” Rule 3301B(h). The Rule also states that Reserve “is not available for Orders that are not displayed; provided, however, that if a Participant enters Reserve Size for a Non-Displayed Order with a Time-in-Force of IOC, the full size of the Order, including Reserve Size, will be processed as a Non- Displayed Order.” *Id.* In addition to the change proposed above, the Exchange proposes to eliminate from the immediately preceding language “with a Time-in-Force of IOC” because the Exchange does not assess a reason to include this qualifier. The statement that a Non-Displayed Order with Reserve will be entirely non-displayed is true even as to Non-Displayed Orders with other TIFs.

In all cases, if the remaining size of the Non-Displayed Order is less than the fixed or random amount stipulated by the Participant, the full remaining size of the Non-Displayed Order will be displayed and the Non-Displayed Order will be removed.

As stated, this Rule requires that the entire Non-Displayed portion of a Reserve Order will become Displayed the moment the size of the Non-Displayed portion drops below an amount that a participant designates or has directed the System to randomly designate (the “Max Floor”). In conducting a test of System behavior, however, the Exchange observed that the System does not, in fact, operate in this manner. Instead, the System maintains the Non-Displayed portion of a Reserve Order as such when the size of that Non-Displayed Portion drops below the Max Floor. Rather than correct the current System behavior to match the Rule, the Exchange determined that users of Reserve Orders prefer the current System behavior because it is true to the underlying intent of Reserve functionality, which is to help limit the price impacts of trading large quantities of shares by displaying only small portions of such shares at a given time, while hiding the rest in reserve. Thus, the Exchange proposes to address the inconsistency between the Rule text and the behavior of the System by deleting the aforementioned language from Rule 3301B(h). Going forward, the System will not convert to a Displayed Order the Non-Displayed remainder of a Reserve Order that falls below the Max Floor, and the System will not remove it.

2. Statutory Basis

The Exchange believes that its proposals are consistent with Section 6(b) of the Act,⁷ in general, and further the objectives of Section 6(b)(5) of the Act,⁸ in particular, in that they are

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

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.

It is consistent with the Act to amend the Exchange's Rules to address inconsistencies between the Rule text and observed System behavior, including by adapting the Rule text to codify observed System behavior, where the observed behavior is more consistent with the underlying purpose of an Order Attribute than is the Rule text (maintaining the Non-Displayed status of a reserve portion of a Reserve Order that drops below the Max Floor) and where System behavior reflects a nuance not contemplated by the existing Rules (clarifying that the prohibition against repricing Market Maker Peg Orders that have prices equal to or better than the NBBO only applies to round lot Market Maker Peg Orders, and not to odd lots).

Finally, it is consistent with the Act to amend Rule 3301B(h) to delete qualifying language which erroneously suggests that Non-Displayed Orders with Reserve are only non-displayed when such Orders have a TIF of IOC. Investors and the public have an interest in the Exchange maintaining a Rulebook that is accurate.

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

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposals merely address inconsistencies between Rule text and System behavior. The Exchange neither intends nor perceives that these rule changes will have any impact on competition.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act⁹ and Rule 19b-4(f)(6) thereunder.¹⁰ Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6)(iii) thereunder.¹²

At any time within 60 days of the filing of such 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 Commission shall institute proceedings under Section 19(b)(2)(B)¹³ of the Act to determine whether the proposed rule change should be approved or disapproved.

⁹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁰ 17 CFR 240.19b-4(f)(6).

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 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, along with a brief description and text of 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.

¹³ 15 U.S.C. 78s(b)(2)(B).

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2023-43 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-2023-43. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3

p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-Phlx-2023-43 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

Sherry R. Haywood,

Assistant Secretary.

¹⁴ 17 CFR 200.30-3(a)(12).