

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79545; File No. SR-Phlx-2016-118)

December 14, 2016

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 3317 (Compliance with Regulation NMS Plan to Implement a Tick Size Pilot)

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 November 30, 2016, 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 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 3317 to modify the web site data publication requirements relating to the Regulation NMS Plan to Implement a Tick Size Pilot Program (“Plan”) and to clarify a provision related to the reporting of certain Market Maker profitability data. Phlx also proposes to amend Rule 3317(b)(5) to clarify the timing and format of publication of data related to Market Maker registration.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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.

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

1. Purpose

On August 25, 2014, Phlx and several other self-regulatory organizations (the “Participants”) filed with the Commission, pursuant to Section 11A of the Act³ and Rule 608 of Regulation NMS thereunder,⁴ the Plan to Implement a Tick Size Pilot Program.⁵ The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.⁶ The Plan was published for comment in the Federal Register on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.⁷ The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.⁸ On November 6, 2015, the SEC exempted the Participants from implementing the Pilot until

³ 15 U.S.C. 78k-1.

⁴ 17 CFR 242.608.

⁵ See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

⁶ See Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

⁷ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (“Approval Order”).

⁸ See Approval Order at 27533 and 27545.

October 3, 2016.⁹ Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.¹⁰

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

Phlx adopted rule amendments to implement the requirements of the Plan, including relating to the Plan's data collection requirements and requirements relating to website data publication.¹¹ Specifically, with respect to the website data publication requirements pursuant to Section VII and Appendices B and C to the Plan, Phlx Rule 3317(b)(2)(B) provides, among other things, that Phlx shall make the data required by Items I and II of Appendix B to the Plan, and collected pursuant to paragraph (b)(2) of Rule 3317, publicly available on the Exchange web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Rule 3317(b)(3)(C), provides, among other things, that Phlx shall make the data required by Item

⁹ See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

¹⁰ See Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., dated September 13, 2016; see also Letter from Eric Swanson, EVP, General Counsel and Secretary, Bats Global Markets, Inc., to Brent J. Fields, Secretary, Commission, dated September 9, 2016.

¹¹ See, e.g., Securities Exchange Act Release No. 77458 (March 28, 2016), 81 FR 18919 (April 1, 2016) (SR-Phlx-2016-39); see also Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

IV of Appendix B to the Plan, and collected pursuant to paragraph (b)(3) of Rule 3317, publicly available on the Exchange web site on a monthly basis at no charge and shall not identify the Trading Center that generated the data. Commentary .08 to Rule 3317 provides, among other things, that the requirement that Phlx make certain data publicly available on the Exchange web site pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period.

Phlx is proposing amendments to Rule 3317(b)(2)(B) (regarding Appendix B.I and B.II data) and Rule 3317(b)(3)(C) (regarding Appendix B.IV data) to provide that data required to be made available on Phlx's web site be published within 120 calendar days following month end. In addition, the proposed amendments to Commentary .08 to Rule 3317 would provide that, notwithstanding the provisions of paragraphs (b)(2)(B), (b)(3)(C), and (b)(5), Phlx shall make data for the Pre-Pilot period publicly available on the Phlx web site pursuant to Appendix B and C to the Plan by February 28, 2017.¹²

The purpose of delaying the publication of the website data is to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information.

Phlx also proposes to amend Rule 3317(b)(4), which relates to the reporting of Market Maker profitability data for members for the Exchange is the Designated Examining Authority ("DEA"). Currently, Rule 3317(b)(4)(A) states that a Member that is a Market Maker shall collect and transmit to their DEA the data described in Item I of Appendix C of the Plan with

¹² With respect to data for the Pilot Period, the requirement that Phlx make data publicly available on the Phlx web site pursuant to Appendix B and C to the Plan shall continue to commence at the beginning of the Pilot Period. Thus, the first website publication date for Pilot Period data (covering October 2016) would be published on the Phlx web site by February 28, 2017, which is 120 days following the end of October 2016.

respect to executions on any Trading Center that have settled or reached settlement date.

Information related to Market Maker profitability will be collected by FINRA and transmitted to the SEC and, on an aggregate basis, also be made publicly available.¹³

The Financial Industry Regulatory Authority, Inc. (“FINRA”) recently submitted a proposed rule change amending FINRA Rule 6191(b), which sets forth FINRA’s obligations with respect to data collection and reporting under the Plan. With this rule change, FINRA proposes to publish (1) Market Maker profitability statistics for Market Makers for which FINRA is the DEA; (2) Market Maker profitability statistics collected from other Participants that are DEAs, and (iii) Market Maker profitability statistics for Market Makers whose DEA is not a Participant.¹⁴ As part of its rule change, FINRA also stated that it would make this data publicly available on the FINRA web site within 120 calendar days following month end at no charge. In its proposal, FINRA noted that the publication by FINRA of Market Maker profitability data on the FINRA website, including Market Makers for which FINRA is not the DEA, is intended to address confidentiality concerns with respect to the Appendix C data required to be made publicly available by the Participants. Although the Participants that are DEAs also would not have identified the Market Makers when publishing required Appendix C data, FINRA noted that some of the Participants are DEAs for a very small number of Market Makers, and the published data from these DEAs raised concerns regarding the potential for identifying the Market Makers that correspond to those statistics.¹⁵

Although the Exchange is currently a DEA for certain member firms, Rule 3317 does not currently require Phlx as DEA to report the information collected pursuant to paragraph (b)(4) to

¹³ See FINRA Rule 6191(b)(4)(B).

¹⁴ See SR-FINRA-2016-042.

¹⁵ Id.

FINRA for publication. Given FINRA's recent proposed rule change, the Exchange is therefore proposing to adopt Rule 3317(b)(4)(C) to address the reporting of Market Maker profitability data for members for which Phlx is the DEA. Rule 3317(b)(4)(C) states that the Exchange, as DEA, shall collect the data required by Item I of Appendix C to the Plan and paragraph (b)(4)(A) for those Members that are Market Makers for which the Exchange is DEA, and on a monthly basis transmit such data, categorized by the Control Group and each Test Group, to the SEC in a pipe delimited format. Rule 3317(b)(4)(C) also provides that the Exchange, as DEA, shall make the data collected pursuant to subparagraph (4) of Rule 3317(b) available to FINRA for aggregation and publication, categorized by the Control Group and each Test Group, on the FINRA website pursuant to FINRA Rules. Rule 3317(b)(4)(C) does not alter the information required to be submitted to the SEC.

Finally, Phlx proposes to amend Rule 3317(b)(5), which relates to the collection and transmission of Market Maker registration statistics. Currently, Rule 3317(b)(5) provides that the Exchange shall collect and transmit to the SEC the data described in Item III of Appendix B of the Plan relating to daily Market Maker registration statistics in a pipe delimited format within 30 calendar days following month end for (1) transactions in each Pre-Pilot Data Collection Security for the period beginning six months prior to the Pilot Period through the trading day immediately preceding the Pilot Period; and (2) transactions in each Pilot Security for the period beginning on the first day of the Pilot Period through six months after the end of the Pilot Period. Although the Plan requires that such data be made publicly available,¹⁶ Rule 3317(b)(5) does not currently include a provision requiring the Exchange to publish such data to its website. The Exchange therefore proposes to amend Rule 3317(b)(5) to provide that the Exchange shall make

¹⁶ See Section VII.A. 4 of the Plan.

Market Maker registration data publicly available on the Exchange web site within 120 calendar days following month end at no charge.

Phlx has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the 30-day operative delay. If the Commission waives the 30-day operative delay, the operative date of the proposed rule change will be the date of filing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁸ 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, because it is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan and is in furtherance of the objectives of the Plan, as identified by the SEC.

In approving the Plan, the Commission recognized that requiring the publication of Market Maker data may raise confidentiality concerns, especially for Pilot Securities that may have a relatively small number of designated Market Makers.¹⁹ For this reason, the Commission modified the Plan so that the data that would be made publicly available would not contain profitability measures for each security, but would be aggregated by the Control Group and each Test Group. Phlx believes that this proposal is consistent with the Act in that it is designed to address confidentiality concerns by permitting Phlx to delay web site publication to provide for passage of additional time between the market information reflected in the data and the public

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

¹⁹ See Approval Order at 27543 - 27544.

availability of such information. With respect to the change to Rule 3317(b)(5), the Exchange believes this change will clarify the timing and format of publication of data related to Market Maker registration.

Phlx believes that the addition of Rule 3317(b)(4)(C) relating to the reporting of Market Maker profitability data to FINRA is consistent with the Act because it effectuates FINRA's recent proposal, which itself is designed to further address confidentiality concerns by permitting FINRA to aggregate and publish Market Maker profitability data for all Participant DEAs, including Market Makers for which FINRA is not the DEA.²⁰ Phlx notes that this proposal also does not alter the information required to be submitted to the SEC.

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. Phlx notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan.

The proposal is intended to address confidentiality concerns that may adversely impact competition, especially for Pilot Securities that may have a relatively small number of designated Market Makers, by (1) permitting Phlx to delay website publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information; and (2) making Market Maker profitability statistics that Phlx has gathered as DEA available to FINRA for aggregation and publication. The proposal also does not alter the information required to be submitted to the SEC.

²⁰ See SR-FINRA-2016-042.

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.²¹

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 Act²² and subparagraph (f)(6) of Rule 19b-4 thereunder.²³

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii), the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing so that it may become operative immediately.

The Exchange notes that the proposed rule change implements the provisions of the Plan, and is designed to assist the Participants in meeting their regulatory obligations pursuant to the Plan. The proposal is intended to address confidentiality concerns by permitting the Exchange to

²¹ Phlx notes that Financial Information Forum (FIF) submitted a letter to the staff of the Commission raising concerns regarding the publication of certain Appendix B statistics on a disaggregated basis using a unique masked market participant identifier. See Letter from Mary Lou Von Kaenel, Managing Director, FIF, to David S. Shillman, Associate Director, Division of Trading and Markets, Commission, dated August 16, 2016, available at <https://www.fif.com/comment-letters>.

²² 15 U.S.C. 78s(b)(3)(A)(iii).

²³ 17 CFR 240.19b-4(f)(6).

(i) delay website publication to provide for passage of additional time between the market information reflected in the data and the public availability of such information; and (ii) allow for FINRA to aggregate and publish Market Maker profitability data for all Participant DEAs. The Exchange notes that the proposed change will not affect the data reporting requirements for members for which PHLX is the DEA. The proposal also does not alter the information required to be submitted to the Commission.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will allow the Exchange to implement these proposed changes that are intended to address confidentiality concerns. The Commission notes that some Pilot data was scheduled to be published on November 30, 2016. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposed rule change to be operative on November 30, 2016.²⁴

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.

²⁴ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2016-118 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-2016-118. 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 Web site (<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-2016-118 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.²⁵

Robert W. Errett
Deputy Secretary

²⁵ 17 CFR 200.30-3(a)(12).