

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80483; File No. SR-Phlx-2017-31)

April 19, 2017

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Transaction Fees at Section VIII

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 April 10, 2017, 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, II, and III, 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 the Exchange's transaction fees at Section VIII (NASDAQ PSX Fees) to provide an additional credit tier for displayed quotes and orders on NASDAQ PSX ("PSX") in securities that are listed on exchanges other than The NASDAQ Stock Market LLC ("Nasdaq") or the New York Stock Exchange LLC ("NYSE").

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

The purpose of the proposed rule change is to provide an additional credit tier for displayed quotes and orders on PSX in securities listed on exchanges other than Nasdaq or NYSE ("Tape B securities") that are priced at \$1 and above.³

Currently, the Exchange provides two credits for providing liquidity through PSX. First, the Exchange provides a credit for displayed quotes and orders, with the amount of the credit determined by the member's Consolidated Volume in that month.⁴ Second, the Exchange provides a credit for certain non-displayed orders.⁵

³ Tape C securities are those that are listed on the Exchange [sic], Tape A securities are those that are listed on NYSE, and Tape B securities are those that are listed on exchanges other than Nasdaq or NYSE.

The Exchange initially filed the proposed pricing changes on April 3, 2017 (SR-Phlx-2017-28). On April 10, 2017, the Exchange withdrew that filing and submitted this filing.

⁴ Specifically, the Exchange provides a credit of \$0.0031 per share executed for Quotes/Orders entered by a member organization that provides and accesses 0.35% or more of Consolidated Volume during the month; \$0.0029 per share executed for Quotes/Orders entered by a member organization that provides and accesses 0.25% or more of Consolidated Volume during the month; \$0.0027 per share executed for Quotes/Orders entered by a member organization that provides and accesses 0.15% or more of Consolidated Volume during the month; \$0.0025 per share executed for

The Exchange now proposes to provide an additional credit tier for displayed quotes and orders in Tape B securities on the Exchange. Specifically, the Exchange will provide a credit of \$0.0027 per share executed for displayed Quotes/Orders entered in securities listed on exchanges other than Nasdaq or NYSE by a member organization that (1) provides a minimum of 1 million shares a day on average in securities listed on exchanges other than Nasdaq or NYSE and (2) doubles the daily average share volume provided in securities that are listed on exchanges other than Nasdaq or NYSE during the month versus the member organization's daily average share volume provided in securities that are listed on exchanges other than Nasdaq or NYSE in February 2017.⁶ This credit will only apply to securities that are priced at \$1 or above.

Quotes/Orders entered by a member organization that provides and accesses 0.05% or more of Consolidated Volume during the month; and \$0.0023 per share executed for all other Quotes/Orders.

⁵ Specifically, the Exchange provides a credit of \$0.0023 per share executed credit for all orders with midpoint pegging that provide liquidity, and \$0.0000 per share executed credit for other non-displayed orders that provide liquidity.

⁶ As an example, assume that a member had a daily average share volume of 600,000 shares in Tape B securities in February 2017. If the member provided 1.2 million shares per day on average in Tape B securities in April, the member would receive the rebate for that month, since it had doubled its daily average share volume in Tape B securities in comparison to its February Tape B volume, and also exceeded the one million daily share average volume requirement in Tape B securities in the month of April.

If a member had a daily average share volume of 400,000 shares in Tape B securities in February 2017, the member would have to increase its average daily share volume by 2.5 times in order to meet the requirements of the proposed rebate, since doubling its February average daily volume in Tape B securities would result in an average daily volume of 800,000 shares, which would not satisfy the requirement that the member provide a minimum of 1 million shares a day on average in securities listed on exchanges other than Nasdaq and NYSE.

A member that had a daily average share volume of 900,000 shares in Tape B securities in February 2017 would have to increase its average daily volume in Tape B securities to 1.8 million shares in order to qualify for the credit in a given month, since this would satisfy the requirement that the member double its average daily share volume in Tape B securities in the given month in comparison to its February 2017 volume, in addition to adding at least 1 million shares a day on average in Tape B securities in the month in which eligibility for the credit is being assessed.

If a member had no activity in February 2017 in securities listed on exchanges other than Nasdaq or NYSE or became a member after February 2017, its February 2017 daily average share volume in securities that are listed on exchanges other than Nasdaq or NYSE would be zero for purposes of determining that member's eligibility for the credit in subsequent months.

The Exchange believes this credit tier will incentivize members to provide increased liquidity in Tape B securities on the Exchange, thereby enhancing the Exchange's market quality in Tape B securities.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ 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 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."⁹

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

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

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁰ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹¹ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹²

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹³

The Exchange believes that the additional credit tier is reasonable because it is designed to incentivize members to provide increased liquidity in Tape B securities on the Exchange, thereby enhancing the Exchange’s market quality in Tape B securities. The Exchange believes that the amount of the credit (\$0.0027 per share executed) is proportionate to the requirements necessary to qualify for the credit, and will act as an incentive to add liquidity in Tape B securities. The Exchange notes that the amount of the credit is comparable to other credits

¹⁰ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹¹ See NetCoalition, at 534 - 535.

¹² Id. at 537.

¹³ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

offered by the Exchange for adding displayed liquidity, which range from \$0.0023 to \$0.0031 and impose comparable requirements.¹⁴

The Exchange believes it is reasonable to provide this credit tier to displayed liquidity only, since displayed liquidity plays a significant role in the price formation process, and should thus be incentivized through a credit tier such as is being proposed here. The Exchange believes that it is reasonable to provide this credit tier to Tape B securities that are priced at \$1 or greater, because the Exchange desires to increase its market share in Tape B securities, and because securities priced at less than \$1 are subject to a separate pricing structure.

The Exchange believes that using February 2017 as the basis for determining eligibility for the credit tier is reasonable because that month represents the most recent full month of trading for which the Exchange has completed its assessment of members' activity on the Exchange for purposes of assessing charges and credits, and because the selection of a previous month as a baseline prevents members from changing their behavior prospectively to influence their baseline, and thus, their eligibility for the credit tier. The Exchange also notes that other exchanges use prior months as benchmarks for assessing transaction credits.¹⁵

¹⁴ For example, the Exchange pays a credit of \$0.0027 per share executed for displayed Quotes/Orders that are entered by a member organization that provides and accesses 0.15% or more of Consolidated Volume during the month. While that credit uses percentage of Daily Volume, rather than a daily average share volume measurement, the Exchange believes that the requirements are nonetheless comparable.

The Exchange also notes that Bats BZX Exchange, Inc. pays a credit of \$0.0027 for displayed orders that add liquidity in Tape B securities where the member has an average daily added volume that equals or exceeds 0.08% of Total Consolidated Volume.

¹⁵ For example, Bats BZX Exchange, Inc. pays a credit of \$0.0030 per share for adding displayed orders if the member increases its share of total Consolidated Volume for adding liquidity by 0.15% or more in comparison to its volume in April 2016, and if the member has an average daily added volume as a percentage of total Consolidated Volume that equals or exceeds 0.20%.

The Exchange believes that it is reasonable to require a member to both double its daily average share volume in Tape B securities in comparison to its February 2017 volume and also provides a minimum of 1 million shares a day on average in Tape B securities for the month in which eligibility for the credit is being assessed. Requiring that a member double its daily average share volume in Tape B securities in comparison to its February 2017 volume means that the member is required to add volume in an amount which is meaningful to the member, while requiring that the member provide a daily average share volume of at least of 1 million shares a day in Tape B securities means that the member is required to add volume in an amount which is meaningful to the Exchange.

The Exchange believes that proposed credit tier is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same credit to all similarly situated members. The Exchange notes that participation on the Exchange, and eligibility for the credit tier, is voluntary, and that the proposed credit tier applies equally to all members that qualify for it, e.g., the member doubles its daily average share volume in Tape B securities in comparison to its February 2017 level and provides a minimum of 1 million shares a day on average in Tape B securities for the month in which eligibility for the credit tier is being assessed. This way to receive an ongoing credit is open to any member that elects to meet the volume requirements in Tape B securities.

The Exchange notes that it already offers other credits for adding displayed liquidity that do not require the member to transact in Tape B securities. In adopting this credit tier, the Exchange is providing members with another way in which they may qualify for a credit on the Exchange, while incentivizing members to add increased displayed liquidity in Tape B securities, thereby enhancing the market quality on the Exchange in those securities and benefitting all

participants. The Exchange notes that, given the requirement that a member double its daily average share volume in Tape B securities in comparison to its February 2017 level and provide a minimum of 1 million shares a day on average in Tape B securities in the given month, a member may have to more than double its daily average share volume in Tape B securities in comparison to its February 2017 volume, or provide more than 1 million shares a day on average in Tape B securities in the given month, in order to be eligible for the credit tier. The Exchange believes that this is equitable and not unfairly discriminatory because the requirements to qualify for the credit tier apply to all members, and because imposing both elements requires a member to add volume in an amount which is meaningful to the member (by doubling its February 2017 average daily volume in Tape B securities) and to the Exchange (providing a daily average share volume of at least of 1 million shares a day in Tape B securities).

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. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable.

In such an environment, the Exchange must continually adjust its fees and credits to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the

degree to which fee and credit changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed credit tier does not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. The new credit tier is consistent with transaction credits currently assessed by the Exchange and by other exchanges. The new credit tier applies equally to all members that meet the volume requirements, and all similarly situated members are equally capable of qualifying for the credit if they choose to meet the volume requirements. Finally, the purpose of the credit is to incentivize members to add displayed liquidity to the Exchange in Tape B securities. The Exchange believes this will create greater liquidity in those securities on the Exchange, which will potentially attract additional participants to the Exchange and thereby promote competition.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members 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.¹⁶

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

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.

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-2017-31 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-2017-31. 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-2017-31 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.¹⁷

Eduardo A. Aleman
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).