SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93406; File No. SR-Phlx-2021-64)

October 22, 2021

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Equity 7, Section 3 to Modify the Enhanced Market Quality Program

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 October 19, 2021, 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 pricing schedule at Equity 7, Section 3, to modify the Enhanced Market Quality Program, 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

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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 modify the Enhanced Market Quality Program, which the Exchange established earlier this year.[3]

The Existing Enhanced Market Quality Program

The Enhanced Market Quality Program, as it presently exists on the Exchange, provides supplemental incentives to member organizations that meet certain quality standards in acting as market makers for securities on the Exchange. It rewards member organizations that make a significant contribution to market quality by providing liquidity at the national best bid and offer ("NBBO") in a large number of securities for a significant portion of the day.[4]

Specifically, the Exchange makes a lump sum payment at the end of each month (a "Fixed Payment") to a member organization to the extent that the member organization, through one or more of its MPIDs, quotes at the NBBO for at least a threshold percentage of the time during Market Hours in an average number of securities per day during the month, as specified below (satisfying the "NBBO requirement").

On a daily basis, the Exchange determines the number of securities in which each of a member organization's MPIDs satisfies the NBBO requirement. The Exchange aggregates all of

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3 See Securities Exchange Act Release No. 34-92754 (August 25, 2021), 86 FR 48789 (August 31, 2021) (SR-Phlx-2021-47).

4 For purposes of the Enhanced Market Quality Program, a member organization is deemed to quote at the NBBO in a security if it quotes a displayed order of at least 100 shares in the security and prices the order at either the national best bid or the national best offer or both the national best bid and offer for the security.

a member organization's MPIDs to determine the number of securities for purposes of the NBBO requirement.

The Program is open to all member organizations. A member organization may, but is not required to be, a registered market maker in any security; thus, the Program does not by itself impose a two-sided quotation obligation or convey any of the benefits associated with being a registered market maker. Accordingly, the Program is designed to attract liquidity both from traditional market makers and from other firms that are willing to commit capital to support liquidity at the NBBO.

The Exchange determines the amount of the Fixed Payment that it pays to a qualifying member organization by multiplying the average daily number of its qualifying securities during the month within the range set forth in the highest qualifying Tier (rounded to the nearest whole number) by the applicable amounts set forth in the tables below and adding the specified lump sum, where applicable. For a particular Tape A security to count towards the threshold for qualifying for the Fixed Payment on a particular day, and receiving the Fixed Payment, a member organization has to quote such security at the NBBO for at least 30% of the time during Market Hours on that day. For a particular Tape B security to count towards the threshold for qualifying for the Fixed Payment on a particular day, and receiving the Fixed Payment, a member organization has to quote such security at the NBBO for at least 50% of the time during Market Hours on that day. A member organization that qualifies for the Fixed Payment for securities in each of Tapes A and B receive Fixed Payments covering qualifying securities in both Tapes, but within each Tape, a member organization may only qualify for one Tier during a month. The Exchange notes that it makes the Fixed Payment in addition to other rebates or fees provided under Equity 7, Sections 3 (a) - (c).

The existing schedules of Tiers and Fixed Payments are as follows:

Tape A Securities		
Tiers	**Average daily number of securities quoted at the NBBO for at least 30% of the time during Market Hours during the month**	**Fixed Payment**
1	0-199	$0 per qualified security per month
2	200-299	$25 per qualified security over 199
3	300-399	$2,500 + ($200 per qualified security over 299)
4	400-499	$22,500 + ($300 per qualified security over 399)
5	500 or greater	$52,500 + ($400 per qualified security over 499)

Tape B Securities		
Tiers	**Average daily number of securities quoted at the NBBO for at least 50% of the time during Market Hours during the month**	**Fixed Payment**
1	0-299	$0 per qualified security per month
2	300-399	$100 per qualified security over 299
3	400-499	$10,000 + ($200 per qualified security over 399)

Tape B Securities		
Tiers	**Average daily number of securities quoted at the NBBO for at least 50% of the time during Market Hours during the month**	**Fixed Payment**
4	500 or greater	$30,000 + ($300 per qualified security over 499)

In establishing this Program, the Exchange hoped to provide improved trading conditions for all market participants through narrower bid-ask spreads and increased depth of liquidity available at the inside market. In addition, the Program reflected an effort by the Exchange to use financial incentives to encourage a wider variety of member organizations to make positive commitments to promote market quality. The Exchange believes that different member organizations may respond to different incentives, and therefore the Enhanced Market Quality Program was designed to promote market quality through quoting activity. The Exchange recognized that while generally market participants will provide quotes with the intention of trading, market makers and liquidity providers cannot control when counterparties choose to interact with those quotes; as such, the Exchange believed that it would be beneficial to the market to offer this incentive based on quoting activity directly.

Proposed Amendments to the Existing Enhanced Market Quality Program

The Exchange remains committed to achieving the objectives of the Enhanced Market Quality Program insofar as it believes that the Program will facilitate the growth and strengthening of its market. However, the Exchange has determined that the existing design of the Program requires modification to improve its effectiveness. As presently designed, the Enhanced Market Quality Program provides incentives to those member organizations that meet the NBBO requirement for all securities in Tapes A and B, without consideration for the extent to which such securities actually trade. As a result, the Exchange has observed that it has paid much of its Fixed Payments to member organizations for quoting at the NBBO in securities that trade scarcely, if at all. Paying incentives in this way has done little to raise the profile and attractiveness of the Exchange. The Exchange believes that it would be better positioned to meet its objectives by reallocating incentives so that they reward member organizations that meet the NBBO requirement for securities in Tapes A and B that are in demand among market participants and trade extensively. To this end, the Exchange proposes the following amendments to the Enhanced Market Quality Program.

First, rather than pay Fixed Payments to member organizations that meet the NBBO requirements for any Tape A or B security, the Exchange proposes to limit payments each month to the top 1,500 securities in each of these Tapes, as determined by their total value traded during the second month prior to the current month. The Exchange would then divide these 1,500 securities into three equal groups (or "Classes") for each Tape, with the top 500 ranked securities placed in Class 3, the middle 500 ranked securities placed in Class 2, and the lowest ranked 500 securities placed in Class 1. The Exchange would assign Fixed Payment amounts to each of the three Classes in each Tape and in each of five Tiers,[5] with these amounts generally increasing from Class 1 to Class 3, and from Tiers 1-5. Generally speaking (with exceptions set forth in the schedules below), this proposed structure would provide the largest Fixed Payments to those member organizations that meet the NBBO requirement in the greatest number of qualifying securities and those that trade most extensively, and the lowest incentives to those member

5 For securities in Tape B, the Exchange proposes to increase the number of Tiers from 4 to 5. For securities in both Tapes A and B, the Exchange proposes to modify the numbers of securities for which a member organization must meet the NBBO requirement during Market Hours during the month to qualify for each of these Tiers.

organizations that meet the NBBO requirement in the fewest number of qualifying securities and those that trade least extensively.

The proposed amended schedules are as follows:

Tape A Securities				
Tiers	**Average daily number of securities quoted at the NBBO for at least 30% of the time during Market Hours during the month**	**Fixed payment for securities in Tape A in Class 1**	**Fixed payment for securities in Tape A in Class 2**	**Fixed payment for securities in Tape A in Class 3**
1	0-24	$0 per qualified security per month	$0 per qualified security per month	$0 per qualified security per month
2	25-49	$0 per qualified security per month	$0 per qualified security per month	$200 per qualified security over 24 per month
3	50-149	$50 per qualified security per month [sic]	$200 per qualified security over 49 per month	$5,000 + ($450 per qualified security over 49) per month
4	150-249	$5,000 + ($100 per qualified security over 149) per month	$20,000 + ($300 per qualified security over 149) per month	$50,000 + ($600 per qualified security over 149) per month
5	250 or greater	$15,000 + ($150 per qualified security over 249) per month	$50,000 + ($350 per qualified security over 249) per month	$50,000 + ($600 per qualified security over 149) per month

Tape B Securities				
Tiers	**Average daily number of securities quoted at the NBBO for at least 50% of the time during Market Hours during the month**	**Fixed payment for securities in Tape B in Class 1**	**Fixed payment for securities in Tape B in Class 2**	**Fixed payment for securities in Tape B in Class 3**
1	0-24	$0 per qualified security per month	$0 per qualified security per month	$0 per qualified security per month

2	25-49	$0 per qualified security per month	$0 per qualified security per month	$100 per qualified security over 24 per month
3	50-149	$0 per qualified security per month	$25 per qualified security over 49 per month	$2,500 + ($150 per qualified security over 49) per month
4	150-249	$50 per qualified security over 149 per month	$2,500 + ($50 per qualified security over 149) per month	$17,500 + ($300 per qualified security over 149) per month
5	250 or greater	$5,000 + ($75 per qualified security over 249) per month	$7,500 + ($150 per qualified security over 249) per month	$17,500 + ($300 per qualified security over 149) per month

Under these proposed amended schedules, a member organization that meets the NBBO requirement for a requisite number of qualifying securities during a month to qualify for a particular Tier will be entitled to receive the Fixed Payment that corresponds to the combination of: (i) that Tier; and (ii) the Class in which the Exchange has placed the qualifying securities for that month.

Generally speaking, the Tier qualification calculation methodology will not change under the proposal,[6] except that the numbers of securities for which a member organization must meet the NBBO requirement to qualify for each Tier will be different. Also, the universe of qualifying securities that count towards the Tier requirement will be limited to the Exchange's list of the top 1,500 securities for each Tape by total value traded during the second month prior to the current month (e.g., for October 2021, the measurement period for determining the list will be August 2021). The Exchange notes that a symbol that did not trade during the measurement month will not be eligible for inclusion in the list.

6 The amended Program will continue to be open to all member organizations. As in the existing Program, a member organization may, but is not required to be, a registered market maker in any security.

Under the proposal, a member organization that qualifies for a Fixed Payment for securities in each of Tapes A and B and in multiple Classes within each Tape will receive Fixed Payments covering qualifying securities in both Tapes, and within each Tape, for the each of the applicable Classes, but within each Tape and Class, a member organization may only qualify for one Tier during a month. The Exchange will continue to pay the Fixed Payment in addition to other rebates or fees provided under Equity 7, Sections 3(a) - (c).

As of the outset of every month, the Exchange will reevaluate and, as applicable, update its lists of the securities that it places in each Class, and it will publish its updated lists on its website as of the outset of the month in which they will apply.

The following are examples of the operation of the proposed amended Enhanced Market Quality Program.

Example 1: A member organization quotes an average of 200 symbols a day in Tape A, Class 2 in excess of the 30% NBBO requirement to qualify for a Tier during the month. Under the proposal, the member organization would qualify for a Fixed Payment equal to the combination of Tier 4, Class 2. The Fixed Payment due to such member organization is calculated as follows: 51 (the number of symbols over 149) times $300, which equals $15,300, plus $20,000, for a total of $35,300 for the month.

Example 2: A member organization meets the NBBO requirements for an average of 200 symbols a day in Tape A, Class 2, 26 symbols a day in securities in Tape A, Class 3, and 51 securities in Tape B, Class 2. In this scenario, the member organization would qualify for three Fixed Payments.

- First, for the 200 Tape A, Class 2 securities for which the member organization meets the NBBO requirement during the month, the member organization would receive a Fixed Payment equal to the combination of Tier 4, Class 2. The Fixed Payment due to such member organization is calculated as follows: 51 (the number of symbols over 149) times $300, which equals $15,300, plus $20,000, for a total of $35,300 for the month.

- Second, for the 26 Tape A, Class 3 securities for which the member organization meets the NBBO requirement during the month, the member organization would receive a Fixed Payment equal to the combination of Tier 2, Class 3. The Fixed Payment due to such member organization is calculated as follows: 2 (the number of symbols over 24) times $200, which equals $400 for the month.
- Third, for the 51 Tape B, Class 2 securities for which the member organization meets the NBBO requirement during the month, the member organization would receive a Fixed Payment equal to the combination of Tier 3, Class 2. The Fixed Payment due to such member organization is calculated as follows: 2 (the number of symbols over 49) times $25, which equals $50 for the month.

The total of all Fixed Payments due to the member organization for the month will be $35,750 ($35,300 + $400 + $50).

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

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7 15 U.S.C. 78f(b).

8 15 U.S.C. 78f(b)(4) and (5).

member organizations 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]

Likewise, in <u>NetCoalition v. Securities and Exchange Commission</u>[10] ("NetCoalition") the D.C. Circuit stated as follows: "[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'…."[11]

The Exchange believes that the proposed amended Enhanced Market Quality Program is reasonable because it is similar to other incentive programs offered by the Exchange for displayed orders that provide liquidity, like the Qualified Market Maker Program set forth in

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

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

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

Equity 7, Sections 3(c). The proposed amended Fixed Payment will provide an opportunity to member organizations to receive an additional credit in return for certain levels of participation on the Exchange as measured by quoting at the NBBO for a significant portion of the day each month. The proposed Fixed Payment is set at a level that reflects the beneficial contributions of market participants that quote significantly at the NBBO in certain qualifying securities. The Exchange believes that it is reasonable to amend the Program to limit the universe of qualifying securities to a list of 1,500 symbols that traded most extensively on the Exchange in Tapes A and B during the second month prior to the current month, and to vary the amount of Fixed Payments in relation to the relative extent to which symbols on that list trade, because improving the quality of quotes for more popular symbols will do more to enhance the attractiveness of the Exchange than will improving quote quality for thinly-traded symbols. Given that the Exchange has finite resources to allocate to incentive programs, it is reasonable to allocate (or reallocate) those resources in a manner that is most likely to achieve its intended objectives. The Exchange notes that a competing exchange which operates a similar incentive program also targets its incentives to a select list of symbols.[12]

The Exchange believes that it remains reasonable to limit applicability of the proposed Fixed Payments to securities in Tapes A and B, and to set the credits higher for the Tape A

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12 Securities Exchange Act Release No. 34-92150 (June 10, 2021), 86 FR 32090, 32091 n.9 (June 16, 2021) ("SR-MEMX-2021-07") ("As proposed, the term 'DLI Target Securities'' means a list of securities designated as such, the universe of which will be determined by the Exchange and published on the Exchange's website. The Exchange anticipates that the initial DLI Target Securities list will include between 275 and 300 securities. The DLI Target Securities list will always include at least 75 securities and may be periodically updated by the Exchange, provided that the Exchange will not remove a security from the DLI Target Securities list without at least 30 days' prior notice to Members as published on the Exchange's website (unless the security is no longer eligible for trading on the Exchange)."

securities, insofar as the Exchange seeks to incentivize member organizations to quote at the NBBO on the Exchange in such securities and improve the market therefor.

The Exchange believes that the proposed amended Fixed Payments set forth by the Enhanced Market Quality Program are an equitable allocation and are not unfairly discriminatory because the Exchange will offer the same Fixed Payment rates to all similarly situated member organizations. Moreover, the proposed qualification criteria requires a member organization to quote significantly at the NBBO in securities that trade extensively, therefore contributing to market quality in a meaningful way on the Exchange. Any member organization may quote at the NBBO at the level required by the qualification criteria of the Enhanced Market Quality Program. The Exchange notes that it has a similar Qualified Market Maker Program in which member organizations are required to quote at the NBBO more than a certain amount of time during regular market hours.[13] For these reasons, the Exchange believes that the proposed amended Enhanced Market Quality Program Fixed Payments and qualification criteria are an equitable allocation and are not unfairly discriminatory.

The Exchange also believes that it is equitable and not unfairly discriminatory to apply the Enhanced Market Quality Program only to Tape A and Tape B securities, and then only to the top 1,500 symbols in each Tape by total value traded during the second month prior to the current month, and to set the Fixed Payment rates higher for the Tape A securities than Tape B securities, because the Exchange has limited resources available to it for incentive programs and the Exchange believes that the most effective application of such limited resources is to improve the market quality for the most actively traded Tape A and Tape B securities, as proposed.

13 See Qualified Market Maker Program, Equity 7, Section 3(c).

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 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 in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed changes to the Exchange's Program do 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 proposed amended Program will continue to provide member organizations with the opportunity to receive incentive payments if they improve the market by providing significant quoting at the NBBO in a large number of securities, while limiting the universe of such securities to those which the Exchange believes will do most to improve market quality.

In terms of intra-market 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 because the program is open to all member organizations on the same terms.

In sum, the proposed amendments to the Program are designed to render it more effective in improving the quality of the Exchange for securities that are likely to attract the greatest trading interest; however, 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 member organizations 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.[14]

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.

14 15 U.S.C. 78s(b)(3)(A)(ii).

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-2021-64 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-2021-64. 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-2021-64 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.[15]

J. Matthew DeLesDernier
Assistant Secretary

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15 17 CFR 200.30-3(a)(12).