

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94219; File No. SR-Phlx-2022-05)

February 10, 2022

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fee Schedule, 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 February 1, 2022, 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 its fee schedule, 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 Exchange proposes to amend its pricing schedule, at Equity 7, Section 3, to adopt a new \$0.0029 per share executed fee for a member organization that removes liquidity from the Exchange to the extent that the member organization: (i) adds a daily average of at least 2 million shares of liquidity in all securities from the Exchange during the month; (ii) increases its average daily volume added to the Exchange by 50% or more during the month relative to the month of January 2022; (iii) increases its average daily volume added to and removed from the Exchange by 100% or more during the month relative to the month of January 2022; and (iv) adds and removes a daily average of at least 10 million shares of liquidity in all securities from the Exchange during the month. The propose fee represents a discount relative to the existing fee of \$0.0030 per share executed.³

The Exchange proposes to add this new discounted fee tier to provide an incentive for member organizations to engage in a significant amount of activity on the Exchange as to increase the extent that they do so relative to a recent baseline month. If the proposal is effective in achieving these objectives, then overall activity on the Exchange will increase, and the quality of the market will improve, to the benefit of all participants.

³ The Exchange proposes to make a conforming change to the existing \$0.0030 per share executed fee to reflect the fact that, going forward, it will apply to all other orders that remove liquidity from the Exchange to the extent that a member organization does not meet the criteria for its orders to qualify for the new \$0.0029 per share executed fee.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ 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 Proposal is Reasonable and is an Equitable Allocation of Fees

The Exchange's proposed change to its schedule of fees is 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 fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, 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'...."⁶

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

⁶ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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.”⁷

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules.⁸ Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to increase its market share relative to its competitors.

The Exchange believes that it is reasonable and equitable to adopt the new \$0.0029 per share executed fee. The Exchange seeks to increase the extent of overall activity in the market. It is reasonable and equitable to address this need by allocating its limited resources to offer member organizations a discounted fee, relative to the existing \$0.0030 per share executed removal fee, to incent member organizations that remove liquidity from the Exchange to engage in significant activity overall activity on the Exchange, and to increase the extent to which they

⁷ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁸ The Exchange perceives no regulatory, structural, or cost impediments to market participants shifting order flow away from it. In particular, the Exchange notes that such shifts in liquidity and market share occur within the context of market participants’ existing duties of Best Execution and obligations under the Order Protection Rule under Regulation NMS.

do so relative to a baseline month. If the proposal is effective in achieving this purpose, then the quality of the Exchange's market will improve, to the benefit of all participants.

The Proposal is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange intends for its proposal to increase the extent to which member organizations add to and remove liquidity from the Exchange. Increased activity on the Exchange helps to maintain and improve its market quality. Although member organizations that will benefit directly from this proposal are those that are able to add and remove liquidity in the threshold volumes and to grow their activity by the threshold percentages, any improvement in market quality that the proposal facilitates will ultimately benefit all market participants.

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. As noted above, all member organizations of the Exchange will benefit from an increase in activity on the exchange. Moreover, member organizations are free to trade on other venues to the extent they believe that the discounted fee provided is not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes.

Intermarket Competition

The Exchange believes that its proposed new fee 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 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.

The proposed discounted fee is 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. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues which comprises more than 40% of industry volume in recent months.

In sum, the Exchange intends for the proposed fee to incent member organizations that remove liquidity from the Exchange to also engage in heightened activity on the Exchange and to thereby contribute to market quality, which is reflective of fierce competition for order flow noted above; however, if the proposed fee is unattractive to market participants, it is likely that

the Exchange will either fail to increase its market share or even lose market share as a result. Accordingly, the Exchange does not believe that the proposed new fee 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.⁹

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

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2022-05 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-2022-05. 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-2022-05 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.¹⁰

J. Matthew DeLesDernier
Assistant Secretary

¹⁰ 17 CFR 200.30-3(a)(12).