

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- 94882; File No. SR-Phlx-2022-20)

May 10, 2022

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Equity 7, Section 3 to Add a New Transaction Credit

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 May 2, 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 Equity 7, Section 3 to add a new transaction credit, 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 purpose of the proposed rule change is to amend Equity 7, Section 3 to amend the Exchange's schedule of credits to add a new growth credit for displayed orders.

Pursuant to Equity 7, Section 3, the Exchange presently provides a series of credits to member organizations that enter displayed orders/quotes that execute on the Exchange. The Exchange presently offers the following credits to member organizations that add displayed liquidity to the Exchange: (i) \$0.0035 per share executed for Quotes/Orders entered by a member organization that provides 0.10% or more of total Consolidated Volume³ during the month; (ii) \$0.0034 per share executed for Quotes/Orders entered by a member organization that provides 0.05% or more of total Consolidated Volume during the month and removes 0.02% of total Consolidated Volume during the month; (iii) 0.0030 per share executed for Quotes/Orders entered by a member organization that provides a daily average of at least 1 million shares of liquidity in all securities on the Exchange during the month and increases its average daily volume of Quotes/Orders added to the Exchange by 100% or more during the month relative to the month of October 2021; and (iv) \$0.0020 per share executed for all other quotes/orders.

³ Pursuant to Equity 7, Section 3, the term "Consolidated Volume" means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member organization's trading activity, the date of the annual reconstitution of the Russell Investments Indexes is excluded from both total Consolidated Volume and the member organization's trading activity.

The Exchange proposes to establish a new growth credit that will reward a member organization with a credit of \$0.0032 per share executed to the extent that it adds a daily average of at least 2 million shares of liquidity in all securities on the Exchange during the month and increases its average daily volume of quotes/orders added to the Exchange by 75% or more during the month relative to the month of March 2022.

The proposed new growth credit will provide an additional incentive to member organizations to add and increase the extent to which they add liquidity to the Exchange. Insofar as the proposed growth credit will require a qualifying member organization to provide double the daily average number of shares of liquidity on the Exchange as it must to qualify for the existing \$0.0030 per share executed growth tier credit, the Exchange believes it is reasonable for the amount of the proposed credit to be larger, at \$0.0032 per share executed. To the extent that the proposed new credit succeeds in increasing liquidity on the Exchange, the Exchange hopes that additional liquidity will improve the quality of the market and help to grow it over time.

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 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

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

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.”⁶

Likewise, in NetCoalition v. Securities and Exchange Commission⁷ (“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’....”⁸

The Exchange believes that its proposal to add a new growth credit tier of \$0.0032 per share executed is reasonable, equitable, and not unfairly discriminatory. The Exchange assesses a particular need to increase the extent to which its member organizations add liquidity to the Exchange as a means of improving market quality. The proposal serves that purpose by adding a new credit to reward member organizations that add a substantial amount of liquidity to the Exchange, and which grow the extent to which they add such liquidity by a substantial percentage relative to a baseline month of March 2022. Although the proposal will benefit net

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁷ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

⁸ 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)).

adders of liquidity, the Exchange believes that this is equitable and not unfairly discriminatory because all market participants stand to benefit to the extent that the proposal is successful in increasing liquidity on the Exchange and improving market quality. Insofar as the proposed growth credit will require a qualifying member organization to provide double the daily average number of shares of liquidity on the Exchange as it must to qualify for the existing \$0.0030 per share executed growth tier credit, the Exchange believes it is reasonable, equitable, and not unfairly discriminatory for the amount of the proposed credit to be larger, at \$0.0032 per share executed.

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

The proposed new growth credit 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 credit to incent member organizations to add liquidity to the Exchange and to thereby contribute to market quality, which is reflective of fierce competition for order flow noted above; however, if the change proposed herein 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 change 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
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2022-20 on the subject line.

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2022-20. 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-2022-20 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).