



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91159; File No. SR-Phlx-2021-09]

### **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**

February 18, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 10, 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, 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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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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 make a change to its Qualified Market Maker (“QMM”) Program. The QMM Program provides supplemental incentives to member organizations that meet certain quality standards in acting as market makers for securities on the Exchange.

Specifically, the Exchange proposes to adjust upward the percentage of time for which a member organization must quote at the national best bid and offer (“NBBO”) during market hours to qualify as a QMM as set forth in Equity 7, Section 3(c)(1). Currently, a member organization must quote at the NBBO at least 10 percent of the time during market hours in an average of at least 400 securities per day during a month to qualify as a QMM. The Exchange proposes to increase the percentage to 15 percent.

The Exchange proposes to increase the threshold percentage of time in which a member organization must quote at the NBBO during a month to qualify as a QMM as a means of encouraging member organizations to increase liquidity adding activity, increase quoting at the NBBO, enhance price discovery, and improve the overall quality of the equity markets. The Exchange believes that QMM activity on the Exchange is already robust enough to accommodate the establishment of a higher qualification threshold without compromising the ability of existing QMMs to maintain their current statuses in the program.

The Exchange also proposes to make conforming changes to Equity 7, Section 3(c)(5) to add the proposed 15 percent NBBO requirement.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>3</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>4</sup> 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

The Exchange's proposed changes to its QMM Program are 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’ ....”<sup>5</sup>

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

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<sup>3</sup> 15 U.S.C. 78f(b).

<sup>4</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>5</sup> 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)).

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.”<sup>6</sup>

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. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.<sup>7</sup>

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.<sup>8</sup> Within the foregoing context, the proposal represents a reasonable attempt by the Exchange to increase its market share relative to its competitors.

The Exchange’s proposal to increase the threshold percentage of time in which a member organization must quote at the NBBO during a month in order to qualify for the QMM designation pursuant to Equity 7, Section 3(c)(1), will encourage member organizations to increase liquidity adding activity, enhance price discovery, and improve the overall quality of the equity markets. The Exchange believes that it is appropriate to periodically reassess and recalibrate the baselines for its QMM qualifications when participant activity is adequate to support doing so. In this instance, QMM activity on the Exchange is robust enough to

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

<sup>7</sup> See Cboe EDGX U.S. Equities Exchange Fee Schedule, available at [https://markets.cboe.com/us/equities/membership/fee\\_schedule/edgx/](https://markets.cboe.com/us/equities/membership/fee_schedule/edgx/).

<sup>8</sup> 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.

accommodate the establishment of a higher qualification threshold without compromising the ability of existing QMMs to maintain their current statuses in the program.

#### The Proposal is an Equitable Allocation

The Exchange believes its proposal allocates its QMM qualifications fairly among its market participants. The Exchange also believes that its proposal to amend the qualification criteria for the QMM Program is an equitable allocation because it will bolster the effectiveness of the QMM program for all market participants, which is an important contributor to the quality of the Nasdaq market, by ensuring that qualified market participants are contributing to increased liquidity adding activity, enhanced price discovery, and improvements to the overall quality of the equity markets.

#### The Proposal is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. As an initial matter, the Exchange believes that nothing about its QMM qualification criteria is inherently unfair; instead, it is a rational pricing model that is well-established and ubiquitous in today's economy among firms in various industries – from co-branded credit cards to grocery stores to cellular telephone data plans – that use it to reward the loyalty of their best customers that provide high levels of business activity and incent other customers to increase the extent of their business activity. It is also a pricing model that the Exchange and its competitors have long employed with the assent of the Commission. It is fair because it incentivizes customer activity that increases liquidity, enhances price discovery, and improves the overall quality of the equity markets.

The Exchange intends for its proposal to increase participation in its QMM program, which in turn would improve market quality for all member organizations on the Exchange.

The Exchange's proposal to raise the QMM qualification requirement at Equity 7, Section 3(c)(1), is not unfairly discriminatory because although any member organization that currently qualifies as a QMM will need to quote at the NBBO for a higher percentage of the time

than they would need to do now, this is fair because meeting the heightened requirement will improve market quality and enhance price discovery.

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 members of the Exchange will benefit from an increase in the addition of liquidity by those that choose to meet the qualifications. Members may grow their businesses so that they have the capacity to qualify as a QMM. Moreover, members are free to trade on other venues to the extent they believe that the qualification criteria provided are 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.

Moreover, the Exchange's proposal to modify its QMM program will not burden intramarket competition because the QMM Program, as modified, will continue to provide all member organizations with an opportunity to qualify as a QMM if they improve the market by providing significant quoting at the NBBO in a large number of securities which the Exchange believes will improve market quality.

Intermarket Competition

Addressing whether the proposed fee could impose a burden on competition on other SROs that is not necessary or appropriate, the Exchange believes that its proposed modifications to its QMM qualification standards 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 make adjustments 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 sum, the Exchange intends for the modified QMM Program to increase member organizations incentives to quote securities at the NBBO for at least 15 percent of the day, which stands to improve the quality of the Exchange's market and its attractiveness to participants; however, if the proposal 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 modification to the QMM qualifications 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.<sup>9</sup>

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

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<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2021-09 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-2021-09. 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-2021-09 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.<sup>10</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>10</sup> 17 CFR 200.30-3(a)(12).