



SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-99083; File No. SR-PHLX-2023-40]

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Partial Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Partial Amendment No. 1, to Amend Equity 4, Rules 3301A and 3301B to Establish New “Contra Midpoint Only” and “Contra Midpoint Only with Post-Only” Order Types and to Make Other Corresponding Changes to the Rulebook

December 5, 2023.

On August 28, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Equity 4, Rules 3301A and 3301B³ to establish new “Contra Midpoint Only” (“CMO”) and “Contra Midpoint Only with Post-Only” (“CMO+PO”) order types and to make other corresponding changes to the Phlx Rulebook. The proposed rule change was published for comment in the Federal Register on September 8, 2023.⁴ On September 26, 2023, pursuant to section 19(b)(2) of the Exchange Act,⁵ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁶ On November 2, 2023, the Exchange filed partial Amendment No.1 to the proposed rule change.⁷ The

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ References herein to Phlx Rules in the 3000 Series shall mean rules in Phlx Equity 4.

⁴ See Securities Exchange Act Release No. 98280 (Sept. 1, 2023), 88 FR 62129 (“Notice”).

⁵ 15 U.S.C. 78s(b)(2).

⁶ See Securities Exchange Act Release No. 98528, 88 FR 67846 (Oct. 2, 2023). The Commission designated December 7, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

⁷ In partial Amendment No. 1, the Exchange (i) modified an example that illustrates the operation of the CMO order type; (ii) added in Rule 3301A(7)(B) that a user may enter a CMO using OUCH, RASH, and FIX; and (iii) added in Rule 3301A(8) that FIX, in addition to OUCH and RASH, may be used to enter a CMO+PO. When it submitted

Commission has received three comment letters on the proposed rule change, and the Exchange submitted a response to comments when it filed partial Amendment No. 1.⁸

The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by partial Amendment No. 1, from interested persons and is instituting proceedings pursuant to section 19(b)(2)(B) of the Act⁹ to determine whether to approve or disapprove the proposed rule change, as modified by partial Amendment No. 1.

I. Description of the Proposal, as Modified by Partial Amendment No. 1

The Exchange proposes to amend Equity 4, Rule 3301A(b) to establish “CMO” and “CMO+PO” as new order types on the Exchange. The Exchange states that a CMO is a Non-Displayed Order Type priced at the midpoint between the National Best Bid and the National Best Offer (the “NBBO” and the midpoint of the NBBO, the “Midpoint”).¹⁰ The Exchange states it will remove a CMO resting on the Order Book upon entry of certain types of incoming Orders that are likely to result in unfavorable executions, including because the incoming Orders are likely to indicate price movements that would be more favorable to the resting CMO user than the prevailing price.¹¹ According to the Exchange, the CMO provides protection to the resting CMO user against executions at the prevailing Midpoint price that the user may deem unfavorable.¹² The Exchange states that once the System removes a CMO under these circumstances, it would submit a new CMO at the then-current Midpoint price automatically on

Amendment No. 1, the Exchange also submitted it as a comment letter to the filing. See Letter from Brett Kitt, Associate Vice President and Principal and Associate General Counsel, Nasdaq, Inc., to Vanessa Countryman, Secretary, Commission, dated November 2, 2023 (“PHLX Response Letter”), available at: <https://www.sec.gov/comments/sr-phlx-2023-40/srphlx202340-293100-713082.pdf>.

⁸ Comments and the Exchange’s response to comments are available at: <https://www.sec.gov/comments/sr-phlx-2023-40/srphlx202340-299539-740902.pdf>.

⁹ 15 U.S.C. 78s(b)(2)(B).

¹⁰ See Notice, supra note 4, at 62130.

¹¹ See id.

¹² See id.

behalf of the user.¹³ The Exchange states that when it removes a CMO from its Order Book, it would not send a cancellation message, thus limiting the potential for information leakage.¹⁴

According to the Exchange, a CMO+PO is like a CMO, except that it provides for “post-only” functionality, meaning that like a Midpoint Peg Post-Only Order,¹⁵ a CMO+PO will execute upon entry only in circumstances where economically beneficial to the party entering the Order.¹⁶ The Exchange states that the CMO and CMO+PO are Order Types that it has developed to provide market participants with options to make their own determinations on various trade-offs that exist when executing their strategies in the markets (e.g., the amount of liquidity they can obtain in the near term versus the potential for market movement relative to the Midpoint price).¹⁷ The Exchange states that some participants may value avoiding immediate executions in order to wait for a better price while others would rather obtain the liquidity instead of waiting.¹⁸

The Exchange states that a CMO is a non-displayed Order Type with the Midpoint Pegging Attribute that will be priced and ranked in time order at the Midpoint and that a user may cancel a CMO at any time. According to the Exchange, the System will remove a CMO Order automatically if a CMO is resting at the Midpoint on the Exchange Book, an incoming Order is priced through the price of the CMO, the CMO would otherwise trade against the incoming Order,¹⁹ and one or more of the following conditions apply, which the Exchange anticipates are indicative of a pending price shift in favor of the CMO user: the incoming Order

¹³ See id.

¹⁴ See id. at 62130 n.4.

¹⁵ See id. at 62130. See also Rule 3301A(b)(6).

¹⁶ See Notice, supra note 4, at 62130.

¹⁷ See id.

¹⁸ See id.

¹⁹ See id. The Exchange states, as an example, that the incoming Order is filled fully by resting interest with price/time priority ahead of the resting CMO Order, then the System will not remove the CMO Order from the Order Book. See id. at 62130 n.9.

is Displayed and its size is greater than that of the resting CMO;²⁰ or the incoming Order is not Displayed, it is priced at or better than the far side of the NBBO, and its size is greater than that of the resting CMO.²¹

The Exchange provides the following two examples to illustrate the concept. In the first example, the National Best Bid is \$10.00 and the National Best Offer is \$11.00 and Participant A enters Order 1, which is a CMO to buy 100 shares of X that is priced at \$10.50, the midpoint of the NBBO. While Order 1 is resting on the Exchange Book, Participant B enters Order 2, which is a Displayed Order to sell 200 shares of X at \$10.40. The Exchange explains that in this instance, Order 2 is larger than Order 1 and that if Order 1 was not a CMO and it had executed against Order 2 at \$10.50, then Participant A would have missed out on the favorable impact of Order 2 shifting the midpoint of the NBBO lower to \$10.20. The Exchange states that, to avoid the outcome, the System would remove Order 1 from the Exchange Book and resubmit it as Order 3, priced at \$10.20. If Participant C then enters Order 4 to sell 100 shares of X at \$10.20, Order 3 would execute against Order 4 at \$10.20, thus providing Participant A with price improvement.²²

The Exchange provides a second example, in which the National Best Bid is \$10.00 and the National Best Offer is \$11.00, and Participant A again enters Order 1, which is a CMO to buy 100 shares of X that is priced at \$10.50. While Order 1 is resting on the Exchange Book, Participant B enters Order 2, which this time is a Non-Displayed Order to sell 200 shares at

²⁰ See id. at 62130. The Exchange states that in this scenario, the Exchange observes that the incoming Order has the potential to cause the NBBO to shift, such that removal of the CMO will be preferable to allowing the CMO to execute at a Midpoint price that may be stale. The System will then automatically re-submit a new CMO on behalf of the user after removing the original CMO. See id.

²¹ See id. at 62130. The Exchange states that in this scenario, the incoming Order may not cause a shift in the NBBO, due to its hidden nature, but because it is priced aggressively at the far side of the NBBO, it still offers a CMO user an opportunity for an execution that is more favorable than the prevailing midpoint price. CMO functionality enables a participant to avail itself of this opportunity. See id.

²² See id. at 62130-31.

\$10.00. CMO functionality would activate for Order 1 both because Order 2 is larger than Order 1 and because Order 2 is priced at the far side of the NBBO. The System would resubmit Order 1 as Order 3, priced at \$10.50. Order 3 would then execute at \$10.00, again providing Participant A with price improvement relative to the prevailing midpoint price. The Exchange states it would permit Participant A to receive the benefit of Order 2, which is priced aggressively at the far side of the NBBO, even though Order 2 is a non-displayed Order that would not shift the NBBO or the midpoint.²³

Additionally, the Exchange states that because a CMO inherently possesses the Midpoint Pegging Attribute, it will behave in accordance with Rule 3301B(d), which governs Orders with Midpoint Pegging.²⁴ According to the Exchange, a user may enter a CMO (and a CMO+PO) using RASH or OUCH or FIX.²⁵ Unlike other Orders with the Midpoint Pegging Attribute, however, CMOs cannot be assigned a Routing Attribute, such that provisions of the Midpoint Pegging Rule that govern Midpoint Pegged Orders with Routing do not apply to CMOs.²⁶ The Exchange states that a CMO will not be accepted outside of Market Hours, and a CMO remaining unexecuted at the end of Market Hours will be cancelled by the System.²⁷ Further, the Exchange states that the System will cancel CMOs when a trading halt is declared, and the System will reject any CMOs entered during a trading halt.²⁸

²³ See PHLX Response Letter, supra note 7, at 7. The Exchange further states there also may be scenarios where use of CMO might not ultimately benefit market participants, such as where the amount of price improvement associated with use of CMO is outweighed by the fee a participant would incur when its CMO is deemed to remove liquidity from the Exchange Book. See Notice, supra note 4, at 62131 n.10.

²⁴ See Notice, supra note 4, at 62131.

²⁵ See PHLX Response Letter, supra note 7, at 7-8.

²⁶ See Notice, supra note 4, at 62131.

²⁷ See id.

²⁸ See id. In addition, the Exchange also proposes to amend the Exchange's Rule governing Midpoint Pegging, at Rule 3301B(d), to add language stating that "Orders with Midpoint Pegging will be cancelled by the System when a trading halt is declared, and any Orders with Midpoint Pegging entered during a trading halt will be rejected." The Exchange states that such language exists in a corresponding rule of the rulebook of the Exchange's sister exchange, the Nasdaq Stock Market, LLC (Nasdaq Rule 4703(d)), but was

A CMO user may opt to apply the Minimum Quantity, Trade Now, or Discretion Order Attributes and a Time-In-Force to a CMO.²⁹ The Exchange states that CMO+PO will possess all the characteristics and attributes of a CMO, as well as those of a Managed Midpoint Peg Post-Only Order, as set forth in Rule 3301A(b)(6), with certain exceptions.³⁰ Like a Midpoint Peg Post-Only Order, a CMO+PO is a Non-Displayed Order that is priced at the Midpoint and executes upon entry only in circumstances where economically beneficial to the party entering the Order, and the price of the CMO+PO will be updated repeatedly to equal the midpoint between the NBBO, provided, however, that the CMO+PO will not be priced higher (lower) than its limit price.³¹ According to the Exchange, if the Midpoint between the NBBO becomes higher than (lower than) the limit price of a CMO+PO to buy (sell), the price of the CMO+PO will stop updating and the CMO+PO will post (with a Non-Display Attribute) at its limit price, but will resume updating if the Midpoint becomes lower than (higher than) the limit price of the CMO+PO to buy (sell).³² Similarly, if a CMO+PO is on the Exchange Book and subsequently the NBBO is crossed, or if there is no NBBO, the Order will be removed from the Exchange Book and will be re-entered at the new Midpoint once there is a valid NBBO that is not crossed.³³ The Exchange states that CMO+PO receives a new timestamp each time its price is changed, and CMO+POs will be cancelled if they remain on the Exchange Book at the end of Market Hours.³⁴

mistakenly omitted from Rule 3301B(d). See id. at 62131 n.13.

²⁹ See id. at 62131.

³⁰ See id.

³¹ See id. Also like a Midpoint Peg Post-Only Order, a CMO+PO may not possess the Discretion or Routing Order Attributes, and a CMO+PO must be priced at more than \$1 per share. See id.

³² See id.

³³ See id.

³⁴ See id. According to the Exchange, CMO+PO entered prior to the beginning of Market Hours will be rejected, and a CMO+PO will be cancelled by the System when a trading halt is declared, and any CMO+PO entered during a trading halt will be rejected. See id. at 62131 n.14

The Exchange states that CMO and CMO+PO executions will be reported to Securities Information Processors and provided in the Exchange's proprietary data feed without any new or special indication.³⁵ Further, as part of the surveillance the Exchange currently performs, CMOs and CMO+POs will be subject to real-time surveillance to determine if they are being abused by market participants.³⁶ The Exchange states that it plans to implement CMO and CMO+PO within thirty days after Commission approval of the proposal and will make the CMO and CMO+PO available to all members and to all securities upon implementation.³⁷ The Exchange plans to propose a fee structure for the CMO and CMO+PO in a subsequent Commission rule filing.³⁸

II. Proceedings to Determine Whether to Approve or Disapprove SR-PHLX-2023-40, as Modified by Partial Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to section 19(b)(2)(B) of the Act³⁹ to determine whether the proposed rule change, as modified by partial Amendment No.1, should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change and the comments received thereon. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages

³⁵ See id. at 62132.

³⁶ See id. The Exchange states that it is committed to determining whether there is opportunity or prevalence of behavior that is inconsistent with normal risk management behavior. The Exchange further states that manipulative abuse is subject to potential disciplinary action under the Exchange's Rules, and other behavior that is not necessarily manipulative but nonetheless frustrates the purposes of the CMO or CMO+PO may be subject to penalties or other participant requirements to discourage such behavior, should it occur. See id. In addition, the Exchange states punitive fees or other participant requirements tied to CMO and CMO+PO usage will be implemented by rule filing under section 19(b) of the Act, 15 U.S.C. 78s(b), should the Exchange determine that they are necessary to maintain a fair and orderly market. See id. at 62132 n.15.

³⁷ See id. at 62132. The Exchange states it will announce the implementation date by Equity Trader Alert. See id.

³⁸ See id. at 62132 n.16.

³⁹ 15 U.S.C. 78s(b)(2)(B).

interested persons to provide additional comment on the proposed rule change, as modified by partial Amendment No. 1, to inform the Commission’s analysis of whether to approve or disapprove the proposed rule change, as modified by partial Amendment No. 1.

Pursuant to section 19(b)(2)(B) of the Act,⁴⁰ the Commission is providing notice of the grounds for possible disapproval under consideration. As noted above, the Commission received three comments on the proposal and the Exchange simultaneously filed a response to comments along with partial Amendment No. 1.⁴¹ Of note, one commenter raises unfair discrimination concerns, stating that the commenter is not aware of another exchange order type that would discriminate against orders to access liquidity in the specific way the CMO and CMO+PO order types do and that CMO would introduce a new form of segmentation without any indication that investors would stand to benefit.⁴² Another commenter states that it is troubled by the asymmetric information provided to the CMO order sender, as non-public information is provided to the CMO order sender when the CMO order is removed that no other participant will have.⁴³ Similarly, another commenter states that CMO provides ample opportunities for information leakage, particularly when a user is able to detect the presence of a large order by observing executions on the exchange while the CMO order is on the order book.⁴⁴

⁴⁰ Id.

⁴¹ See supra note 7.

⁴² See Letter from John Ramsay, Chief Market Policy Officer, Investors Exchange LLC, dated September 28, 2023 (“IEX Letter”) at 2-3.

⁴³ See Letter from Joanna Mallers, Secretary, FIA Principal Traders Group, dated November 17, 2023 at 2. This commenter states that the originator of the CMO order knows that the contra side order is larger than the CMO order because trades occurred that would have executed against the resting CMO order had the size of the contra side order been equal to or smaller than the resting CMO order’s size. See id. The commenter expresses concern that CMO order sender could discern that the opposing, unexecuted order exists, and profit from that information without the need to trade with it. See id. See also Letter from Joseph Saluzzi, Partner, Themis Trading LLC, dated September 29, 2023 at 2 (stating that the Exchange needs to provide a more detailed explanation of how it plans on removing CMO orders without leaking information, as according to the commenter, the originator of the CMO order is still going to need to be notified that its order was removed).

⁴⁴ See IEX Letter at 3-4. The commenter provides the following example where a CMO to

The Exchange replied to these comments with its own comment letter and by filing partial Amendment No. 1.⁴⁵ The Exchange states, among other things, that CMO is not intended to benefit market makers at the expense of large incoming institutional investors' orders, and instead, it is designed to encourage market participants, including institutional investors, to rest and seek midpoint liquidity on the Exchange, rather than off-exchange, by reducing the probability of trading when market prices are likely to shift.⁴⁶ The Exchange further states that there is ample precedent for order types like CMO.⁴⁷ The Exchange refutes the comments that it would be novel for the exchange to alter orders without sending corresponding messages of such alterations.⁴⁸ Further, the Exchange states that precedents exist for the Commission permitting an exchange to utilize proprietary data to determine the behavior of one of its order types.⁴⁹ Regarding the information leakage concerns, the Exchange states that when the CMO fails

buy 100 shares is resting at the midpoint, when the NBBO for that stock is at \$10.00-\$11.00. If the exchange reports an execution, to which the user is not a party, for 100 shares at \$10.00, the CMO user can deduce that an order in that symbol larger than its own has arrived (otherwise, it would have traded with the order). It can also compare the size of the execution to the size of its CMO order to determine that the order has a remaining size that has not been executed on the exchange. The commenter further states that the user will receive this information as quickly as it could have received a cancellation message and that this is information that no other participant is in a position to have (other than possibly another CMO user with an order in the same symbol at the same time). See id.

⁴⁵ See PHLX Response Letter, supra note 7, at 2.

⁴⁶ See id. at 1.

⁴⁷ See id. at 1-2 (stating, as an example, that minimum quantity orders also enable users to avoid trading with incoming orders when they are too small and NYSE Arca Inc.'s Passive Liquidity Select Order, which the Commission approved, did not interact with an incoming order that was larger than the size of the Passive Liquidity Select Order). The commenter also states that IEX's D-Limit and D-Peg order types avoid trading when its system believes that market prices will shift via a complex formula that attempts to predict pending price movements. See id. at 1.

⁴⁸ See id. at 3 (stating that the Commission already permits the Exchange and Nasdaq to engage in the same process of informal order removal and resubmission without dissemination of cancellation messages, for example, in handling Managed Midpoint Peg Post-Only Orders and Midpoint Extended Life Order and Imbalance-Only order types).

⁴⁹ See id. at 3 (providing examples of Nasdaq's late Limit on Close and Imbalance-Only order types).

execute, it does not reveal the details of the incoming order, including its size, its time-in-force, or whether the order is still available after the trade, and any information to be gleaned from this scenario would be knowable to all market participants at the time it is published on the SIP and the other market data feeds.⁵⁰ Therefore, the Exchange states CMO user would have no information advantage over the rest of the market.⁵¹

The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal, as modified by partial Amendment No. 1, with sections 6(b)(5)⁵² and 6(b)(8) of the Exchange Act.⁵³ section 6(b)(5) of the Exchange Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. section 6(b)(8) of the Exchange Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with sections 6(b)(5) and section 6(b)(8), or any other provision of the Exchange Act, and the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval

⁵⁰ See id.

⁵¹ See id.

⁵² 15 U.S.C. 78f(b)(5).

⁵³ 15 U.S.C. 78f(b)(8).

that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵⁴

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-PHLX-2023-40 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-2023-40. This file number should be included on the subject line if email 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 (<https://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the

⁵⁴ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR- PHLX-2023-40 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁵

Sherry R. Haywood,

Assistant Secretary.

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⁵⁵ 17 CFR 200.30-3(a)(57).