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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79074; File No. SR-Phlx-2016-92]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing of Partial Amendment Nos. 1, 2 and 3, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Partial Amendment Nos. 1, 2 and 3, to System Functionality Necessary to Implement the Regulation NMS Plan to Implement a Tick Size Pilot Program

October 7, 2016

I. Introduction

On September 7, 2016, NASDAQ PHLX LLC (“Exchange” or “Phlx”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt paragraph (d) and Commentary .12 to Phlx Rule 3317 to change System³ functionality necessary to implement the Regulation NMS Plan to Implement a Tick Size Pilot Program (“Plan” or “Pilot”).⁴ The Exchange is also proposing amendments to Phlx

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The term “PSX” or “System” is defined as the automated system for order execution and trade reporting owned and operated by Phlx. See Phlx Rule 3301(a).

⁴ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (“Approval Order”). Unless otherwise specified, capitalized terms used in this rule filing are defined as set forth in the Plan.

Rule 3317(a) and (c) to clarify certain exceptions to the Trade-at Prohibition.⁵ The proposed rule change was published for comment in the Federal Register on September 20, 2016.⁶ The Commission received two comment letters in response to the Notice.⁷ On September 29, 2016, the Exchange filed Partial Amendment No. 1 to the proposed rule change.⁸ On October 4, 2016, the Exchange filed Partial Amendment No. 2 to the proposed rule change.⁹ On October 7, 2016, the Exchange filed Partial Amendment No. 3 to the proposed rule change.¹⁰

⁵ Phlx Rule 3317(c)(3)(D)(i) defines the “Trade-at Prohibition” as the prohibition against executions by a Trading Center of a sell order for a Pilot Security at the price of a Protected Bid or the execution of a buy order for a Pilot Security at the price of a Protected Offer during regular trading hours. See also Plan Section VI(D).

⁶ Securities Exchange Act Release No. 78835 (September 14, 2016), 81 FR 64552 (“Notice”).

⁷ See Letters to Brent J. Fields, Secretary, Commission, from Elizabeth K. King, General Counsel and Corporate Secretary, New York Stock Exchange, Inc.; Eric Swanson, EVP, General Counsel and Secretary, BATS Global Markets, Inc.; Thomas A. Wittman, EVP, Global Head of Equities, Nasdaq, Inc., dated September 9, 2016 (“Comment Letter No. 1”) and from Eric Swanson, EVP, General Counsel and Secretary, BATS Global Markets, Inc., dated September 12, 2016 (“Comment Letter No. 2”).

⁸ In Partial Amendment No. 1, the Exchange proposes to change references in the rule text from “added to the Exchange Book” to “ranked on the Exchange Book” as applicable for Price to Comply Orders, Non-Displayed Orders, Post-Only Orders, and Orders with Reserve Size. The Exchange also proposes to clarify that in certain cases Price to Comply Orders, not attributable Post-Only Orders, and certain Orders with Reserve Size may be ranked on the Exchange Book at the midpoint of the National Best Bid or Offer (“NBBO”). Finally, the Exchange proposes three amendments related to the operation of Reserve Size for Test Group Three Pilot Securities: (i) change references from “Reserve Order” to “Order with Reserve Size”; (ii) clarify that the Reserve Size attribute is only available for Price to Comply Orders and Price to Display Orders entered via the RASH or FIX protocols; and (iii) clarify the handling of Orders with Reserve Size in scenarios where such Orders are entered at a price that locks a Protected Quotation on an away market center.

⁹ In Partial Amendment No. 2, the Exchange proposes to delete certain rule text to remove the proposed re-pricing functionality for resting Price to Comply Orders, resting Non-Displayed Orders, and resting Post-Only Orders entered via OUCH or FLITE protocols for Test Group Three Pilot Securities. The Exchange explained that its systems were re-programmed for Test Group Three Pilot Securities to permit resting Price to Comply Orders, resting Non-Displayed Orders, and resting Post-Only Orders entered via OUCH

This order provides notice of filing of Partial Amendment Nos. 1, 2 and 3, and approves the proposal, as modified by Partial Amendment Nos. 1, 2 and 3, on an accelerated basis.

II. Description of the Amended Proposal

The Exchange's proposed rule change provides for changed functionality to certain Order Types¹¹ and Order Attributes¹² applicable to Pilot Securities to implement the Plan. Proposed Phlx Rule 3317(d) would specify the order handling, executing, re-pricing, and displaying for the following Order Types in Pilot Securities: (i) Price to Comply Orders; (ii) Non-Displayed Orders; (iii) Post-Only Orders; (iv) Market Maker Peg Orders; and (v) Midpoint Peg Post-Only Orders. The following Order Attributes would also be amended: (i) Midpoint Pegging; (ii) Reserve Size; and (iii) Good-till-Cancelled. In addition, amended Phlx Rule 3317(d)(1) specifies that any Order Type in a security of any of the Test Groups that requires a price and does not

or FLITE protocols to repeatedly re-price in response to changes to the NBBO and/or the Exchange's best Bid or Offer ("BBO"). The Exchange noted that it is currently re-programming its systems to remove the proposed functionality. Further, the Exchange stated that if it appears that the multiple re-pricing functionality will remain operational by October 17, 2016, the Exchange will file a proposed rule change with the Commission and provide notice to market participants sufficiently in advance of that date. The proposed rule change and notice to market participants will describe the current operation of the systems and timing of re-programming. In any event, the Exchange states that the removal of this functionality shall be completed no later than November 30, 2016. In addition, the Exchange proposes to modify the Block Size Order exception to the Trade-at Prohibition. Finally, the Exchange is making certain non-substantive, clarifying amendments.

¹⁰ In Partial Amendment No. 3, the Exchange clarifies that it would not apply the Trade-at Prohibition outside of Regular Trading Hours.

¹¹ An "Order Type" is a standardized set of instructions associated with an order that define its behavior with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the System. See Phlx Rule 3301(e).

¹² An "Order Attribute" is a further set of variable instructions that may be associated with an Order to further define how it will behave with respect to pricing, execution, and/or posting to the Exchange Book when submitted to the System. See Phlx Rule 3301(e). The availability of, and interaction between, Order Types and Order Attributes is described in Phlx Rules 3301A and 3301B.

qualify for an exception, will not be accepted if it is in a minimum price increment (“MPI”) other than \$0.05.¹³

The Exchange also proposes to amend the definition of the term “Trade-at Intermarket Sweep Order” (“TA ISO”) and one of the TA ISO exceptions to the Trade-at Prohibition.¹⁴ Finally, the Exchange is proposing to modify the Block Size Order exception to the Trade-at Prohibition and add a related commentary.¹⁵

A. Amendments to Order Type Functionality

1. Price to Comply Orders¹⁶

The Exchange proposes that a Price to Comply Order in a Test Group Pilot Security would operate consistent with current Phlx Rule 3301A(b)(1) except as provided below. Specifically, if a Price to Comply Order for a Test Group Three Pilot Security partially executes on entry and the remainder would lock the Protected Quotation of another market center, the unexecuted portion of the Order would be cancelled. In addition, if a Price to Comply Order for a Test Group Three Pilot Security to buy (sell) is not executable against any orders residing on the Exchange Book and its limit price would lock or cross the Protected Quotation of another market center, the Order would display at one MPI below (above) the Protected Quotation and be ranked at the current midpoint of the NBBO on the Exchange Book.¹⁷

¹³ Proposed Phlx Rule 3317(d)(1) clarifies that the System will use \$0.05 as the MPI when re-pricing or rounding by the System.

¹⁴ See proposed Phlx Rule 3317(a)(1)(D)(ii) and proposed Phlx Rule 3317(c)(3)(D)(iii)(j).

¹⁵ See proposed Phlx Rule 3317(c)(3)(D)(iii)(c)(C) and Phlx Rule 3317, proposed Commentary .12.

¹⁶ See proposed Phlx Rule 3317(d)(2). See also Partial Amendment No. 2.

¹⁷ See Partial Amendment No. 1.

2. Non-Displayed Orders¹⁸

The Exchange proposes that a Non-Displayed Order in a Test Group Pilot Security would operate consistent with current Phlx Rule 3301A(b)(3) except as provided below. Specifically, a resting Non-Displayed Order in a Test Group Three Pilot Security could not execute at the price of a Protected Quotation of another market center unless the incoming Order qualifies for an exception to the Trade-at Prohibition.¹⁹ In addition, for Test Group Three Pilot Securities, if the limit price of a buy (sell) Non-Displayed Order would lock or cross a Protected Quotation of another market center, the Order would be ranked on the Exchange Book at either one MPI below (above) the National Best Offer (“NBO”) ((National Best Bid) (“NBB”)) or at the midpoint of the NBBO, whichever is higher (lower).²⁰ Further, for a Non-Displayed Order in a Test Group Three Pilot Security entered via RASH or FIX, if after being posted to the Exchange Book the NBBO changes such that the Order would not be executable at its posted price due to the requirements of Regulation NMS or the Plan, the Non-Displayed Order to buy (sell) would be re-priced to either one MPI below (above) the NBO (NBB) or the midpoint of the NBBO, whichever is higher (lower) and receive a new timestamp. In the same scenario, if the Non-Displayed Order was entered via OUCH or FLITE, instead of re-pricing, the Order would be cancelled back to the Participant.

3. Post-Only Orders²¹

The Exchange proposes that Post-Only Orders will operate consistent with current Phlx Rule 3301A(b)(4) except as provided below. Specifically, for a not attributable Post-Only Order

¹⁸ See proposed Phlx Rule 3317(d)(3). See also Partial Amendment No. 2.

¹⁹ See Phlx Rule 3317(c)(3)(D).

²⁰ See Partial Amendment No.1.

²¹ See proposed Phlx Rule 3317(d)(4). See also Partial Amendment No. 2.

for a Test Group Three Pilot Security if the limit price to buy (sell) would lock or cross a Protected Quotation of another market center, the Order would display at one MPI below (above) the Protected Quotation and would be ranked at the current midpoint of the NBBO on the Exchange Book.²²

4. Market Maker Peg Orders²³

The Exchange proposes that a Market Maker Peg Order in a Test Group Pilot Security will operate consistent with current Phlx Rule 3301A(b)(5) except the displayed price of such an Order would be rounded up for bids (down for offers) to the nearest MPI (i.e., \$0.05) if it would otherwise display at an increment smaller than the MPI.

5. Midpoint Peg Post-Only Orders²⁴

The Exchange proposes that a Midpoint Peg Post-Only Order in a Test Group Pilot Security will operate consistent with current Phlx Rule 3301A(b)(6) and may execute at the midpoint of the NBBO in an increment other than the MPI.

B. Amendments to Order Attribute Functionality

1. Midpoint Pegging²⁵

The Exchange proposes that an Order with a Midpoint Pegging attribute in a Test Group Pilot Security will operate consistent with current Phlx Rule 3301B(d). The Exchange also specifies that such Orders may execute at the midpoint of the NBBO in an increment other than the MPI.

²² See Partial Amendment No. 1.

²³ See proposed Phlx Rule 3317(d)(5).

²⁴ See proposed Phlx Rule 3317(d)(6).

²⁵ See proposed Phlx Rule 3317(d)(7).

2. Reserve Size²⁶

The Exchange proposes that an Order with Reserve Size in a Test Group Pilot Security will operate consistent with current Phlx Rule 3301B(h) except as described below. Specifically, a resting Order with Reserve Size in a Test Group Three Pilot Security (i.e., a Price to Comply Order or a Price to Display Order entered via RASH or FIX) may not execute the non-displayed Reserve Size at the price of a Protected Quotation of another market center unless the incoming Order qualifies for an exception to the Trade-at Prohibition.²⁷ If an Order with Reserve Size for a Test Group Three Pilot Security is partially executed upon entry and the remainder would lock a Protected Quotation of another market center, the unexecuted portion of the Order would be cancelled. If a Price to Comply Order with Reserve Size to buy (sell) a Test Group Three Pilot Security is not executable against previously posted Orders on the Exchange Book, and has a limit price that would lock or cross a Protected Quotation of another market center, the displayed portion of the Order would display one MPI below (above) the Protected Quotation and the displayed and non-displayed portions of the Order would be ranked at the current midpoint of the NBBO on the Exchange Book. If a Price to Display Order with Reserve Size is not executable against any previously posted Orders on the Exchange Book and its limit price would lock or cross a Protected Quotation of another market center, then the displayed portion of the Order would be displayed and ranked one MPI below (above) the Protected Quotation and the non-displayed portion of the Order would be ranked at the midpoint of the NBBO. If after being

²⁶ See proposed Phlx Rule 3317(d)(8). See also Partial Amendment No. 1.

²⁷ See Phlx Rule 3317(c)(3)(D).

posted to the Exchange Book, the NBBO changes such that an Order with Reserve Size was not executable at its ranked price due to the requirements of Regulation NMS or the Plan, the Order would adjust as described above.

3. Good-till-Cancelled²⁸

The Exchange proposes that an Order with a Time-in-Force of Good-till-Cancelled in a Test Group Pilot Security will operate consistent with current Phlx Rule 3301B(a)(3) except such Order would be adjusted based on a \$0.05 increment.

C. Amendments to Certain Trade-at Prohibition Exceptions

1. TA ISO²⁹

The Exchange proposes to add the phrase “or Intermarket Sweep Orders” (“ISO”) to the definition of TA ISO as well as to the related TA ISO exception to the Trade-at Prohibition³⁰ to clarify that ISOs may be routed to execute against the full displayed size of the Protected Quotation that was traded at.

2. Block Size Order exception for the Trade-at Prohibition³¹

Currently, Phlx Rule 3317(c)(3)(D)(iii)(c) provides an exception to the Trade-at Prohibition for Block Size Orders.³² The Exchange proposes in Commentary .12 that for purposes of qualifying for the exception Orders must have a size of 5,000 shares or more and the resulting execution upon entry is for a size of 5,000 shares or more in aggregate. In addition, the

²⁸ See proposed Phlx Rule 3317(d)(9).

²⁹ See proposed Phlx Rule 3317(a)(1)(D)(ii).

³⁰ See proposed Phlx Rule 3317(c)(3)(D)(iii)(j).

³¹ See proposed Phlx Rule 3317(c)(3)(D)(iii)(c)(C) and Phlx Rule 3317, proposed Commentary .12.

³² The plan defines Block Size as “an order (1) of at least 5,000 shares or (2) for a quantity of stock having a market value of at least \$100,000. See Plan Section I(F).

Exchange proposes to amend the Block Size Order exception to the Trade-at Prohibition to allow execution on multiple Trading Centers to comply with Regulation NMS.³³

III. Summary of Comments Received³⁴

Both comment letters express support for the proposal and suggest that the Commission should approve the proposal. In Comment Letter No. 1, the commenters stated that if the proposal is approved as proposed, then the Exchange would be able to meet the implementation date. Further, in Comment Letter No. 1, the commenters stated their belief that the requirements from the Commission have been unclear. In Comment Letter No. 2, the commenter questioned the Commission staff's authority.

IV. Discussion and Commission's Findings

After careful review of the proposed rule change, as modified by Partial Amendment Nos. 1, 2 and 3, and the comment letters, the Commission finds that the proposal, as modified by Partial Amendment Nos. 1, 2 and 3, is consistent with the requirements of the Act, Rule 608 of Regulation NMS,³⁵ and the rules and regulations thereunder that are applicable to a national securities exchange.³⁶ Specifically, the Commission finds that the rule change is consistent with Section 6(b)(5) of the Act,³⁷ which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the

³³ See proposed Phlx Rule 3317(c)(3)(D)(iii)(c). See also Partial Amendment No. 2.

³⁴ See supra note 7.

³⁵ 17 CFR 242.608.

³⁶ In approving this rule change, the Commission has considered the rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³⁷ 15 U.S.C. 78f(b)(5).

mechanism of a free and open market and a national market system, and to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As noted in the Approval Order, the Plan is by design, an objective, data-driven test to evaluate how a wider tick size would impact trading, liquidity, and market quality of securities of smaller capitalization companies. In addition, the Plan is designed with three Test Groups and a Control Group, to allow analysis and comparison of incremental market structure changes on the Pilot Securities and is designed to produce empirical data that could inform future policy decisions. As such, any proposed changes targeted at particular Test Groups during the Pilot Period should be necessary for compliance with the Plan.

The Exchange proposes to modify its handling of certain Order Types and Order Attributes during the Pilot Period. First, the Exchange proposes to clarify that it will not accept Orders in a Test Group Pilot Security in an increment other than \$0.05 unless there is an applicable exception to the MPI. Second, the Exchange proposes to clarify that the displayed price of Market Maker Peg Orders for any Test Group Pilot Security would be rounded to the nearest MPI and that Good-till-Cancelled Orders for a Test Group Pilot Security would be adjusted based on the \$0.05 increment. Finally, the Exchange proposes to clarify that Midpoint Peg Post-Only Orders and Orders with Midpoint Pegging Attribute in a Test Group Pilot Security may execute at the midpoint of the NBBO in an increment other than the MPI.

The Exchange also proposes to modify the handling of certain Orders and Order Attributes in Test Group Three Pilot Securities, including: (i) Price to Comply Orders; (ii) Non-

Displayed Orders; (iii) Post-Only Orders; and (iv) Orders with Reserve Size. The proposed changes are intended to facilitate compliance with the Trade-at Prohibition.³⁸

Finally, the Exchange proposes to amend provisions related to two exceptions to the Trade-at Prohibition. First, the Exchange proposes to amend the definition of TA ISO to reflect that ISOs may be routed to the full displayed size of a Protected Quotation that is traded-at and to make the corresponding change to the applicable Trade-at Prohibition exception. Second, the Exchange proposes to amend the Trade-at Prohibition exception for Block Size Orders to allow such Orders to be executed on multiple Trading Centers. Further, the Exchange proposes that for purposes of the Block Size Order exception to the Trade-at Prohibition, the Order must have a size of 5,000 shares and the resulting execution upon entry must have a size of 5,000 shares or more in aggregate.³⁹

The Commission believes that the proposed changes are reasonably designed to comply with the Plan. Further, the Commission believes that the proposed changes that target particular Test Groups are necessary for compliance with the Plan.⁴⁰ Accordingly, the Commission finds

³⁸ In Partial Amendment No. 3, the Exchange clarified that it would not apply the Trade-at Prohibition outside of Regular Trading Hours. The Commission notes that this is consistent with the Plan. See Plan Section I(LL).

³⁹ See also Exchange Rule 3317(c)(3)(D)(iii)(c).

⁴⁰ The Commission notes that the Exchange originally proposed to modify the operation of Post to Comply Orders, Non-Displayed Orders, and Post Only Orders entered via OUCH and FLITE for Test Group Three Pilot Securities only. In Partial Amendment No. 2, the Exchange proposes to remove the proposed functionality. Thus, the Commission believes that the proposal, as modified, is consistent with the Plan. The Exchange has committed to make the system changes necessary to implement Partial Amendment No. 2. If it appears that the system changes will not be completed by October 17, 2016, the date on which the Participants will begin implementation of Test Group 3, the Exchange will file a proposed rule change with the Commission to propose any necessary changes to the Exchange's rules and provide notice to market participants sufficiently in advance of this date to adequately inform market participants of the current operation of the Exchange's system. See Partial Amendment No. 2.

that these changes are consistent with Section 6(b)(5) of the Act⁴¹ and Rule 608 of Regulation NMS⁴² because they implement the Plan and clarify Exchange Rules.

For these reasons, the Commission finds that the proposed rule change, as modified by Partial Amendment Nos. 1, 2 and 3, is consistent with the requirements of the Act⁴³ and Rule 608 of Regulation NMS.⁴⁴

V. Solicitation of Comments on Partial Amendment Nos. 1, 2 and 3 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposal, as modified by Partial Amendment Nos. 1, 2 and 3, 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-2016-92 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-2016-92. 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

⁴¹ 15 U.S.C. 78f(b)(5).

⁴² 17 CFR 242.608.

⁴³ 15 U.S.C. 78f(b)(5).

⁴⁴ 17 CFR 242.608.

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 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2016-92 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VI. Accelerated Approval of Proposed Rule Change, as Modified by Partial Amendment Nos. 1, 2 and 3

The Commission finds good cause to approve the proposed rule change, as modified by Partial Amendment Nos. 1, 2 and 3, prior to the thirtieth day after the date of publication of notice of the proposed rule change, as modified by Partial Amendment Nos. 1, 2 and 3 in the Federal Register. As described above, the Exchange proposes to amend its rules to comply with the Plan. The Commission notes that the Pilot started implementation on October 3, 2016, and accelerated approval of the proposal would ensure that the rules of the Exchange would be in place during implementation. Accordingly, the Commission finds good cause, pursuant to

Section 19(b)(2) of the Exchange Act,⁴⁵ to approve the proposed rule change, as modified by Partial Amendment Nos. 1, 2 and 3, on an accelerated basis.

VII. Conclusion

IT IS THEREFORE ORDERED THAT, pursuant to Section 19(b)(2) of the Exchange Act,⁴⁶ that the proposed rule change (SR-Phlx-2016-92), as modified by Partial Amendment Nos. 1, 2 and 3, be and hereby is approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁷

Robert W. Errett
Deputy Secretary

⁴⁵ 15 U.S.C. 78s(b)(2).

⁴⁶ Id.

⁴⁷ 17 CFR 200.30-3(a)(12).

