

**NASDAQ PHLX LLC
LETTER OF ACCEPTANCE, WAIVER AND CONSENT
NO. 2018059146504**

TO: Nasdaq Phlx LLC
c/o Department of Enforcement
Financial Industry Regulatory Authority (“FINRA”)

RE: Goldman Sachs & Co. LLC, Respondent
Member Firm
CRD No. 361

Pursuant to Rule 9216 of Nasdaq Phlx LLC (“Phlx”) Code of Procedure,¹ Goldman Sachs & Co. LLC (“Goldman” or the “firm” or “Respondent”) submits this Letter of Acceptance, Waiver and Consent (“AWC”) for the purpose of proposing a settlement of the alleged rule violations described below. This AWC is submitted on the condition that, if accepted, Phlx will not bring any future actions against the firm alleging violations based on the same factual findings described herein.

I.

ACCEPTANCE AND CONSENT

- A. The firm hereby accepts and consents, without admitting or denying the findings, and solely for the purposes of this proceeding and any other proceeding brought by or on behalf of Phlx, or to which Phlx is a party, prior to a hearing and without an adjudication of any issue of law or fact, to the entry of the following findings by Phlx:

BACKGROUND

Goldman has been a Phlx member since October 2010. It is a full-service broker-dealer engaged in market making, execution services, and underwriting. The firm is headquartered in New York, New York and has approximately 8,500 registered individuals among its headquarters and approximately 70 branches. Goldman does not have any relevant disciplinary history.

SUMMARY

From October 2015, through April 2018, Goldman, through the operation of an automated hedging logic for its Synthetic Product Group (“SPG”), mismarked as “long” approximately 60 million short sale orders totaling more than 14 billion shares. Nearly eight million of those orders, totaling more than a billion shares, were executed. Due to the inaccurate “long” mark, 12,335 of the executed orders were executed at or below the

¹ The Nasdaq Stock Market LLC Rules General 5 Section 9000 et. al. are incorporated by reference into Phlx Rule General 5, Section 3, and are thus Phlx Rules and thereby applicable to Phlx members, member organizations, persons associated with member organizations, and other persons subject to the Exchange’s jurisdiction.

national best bid while a short sale circuit breaker was in effect. These mismarked orders also caused the firm to maintain inaccurate books and records.

FACTS AND VIOLATIVE CONDUCT

1. This matter originated from a FINRA examination.

Goldman erroneously marked and routed certain sell orders.

2. Rule 200(g) of Regulation SHO of the Securities Exchange Act of 1934 (“Exchange Act”) requires broker-dealers to “mark all sell orders of any equity security as ‘long,’ ‘short,’ or ‘short exempt.’” The broker-dealer selling an equity security may mark an order as “long” only if it is deemed to own the security being sold and either (i) the security to be delivered is in the physical possession or control of the broker or dealer; or (ii) it is reasonably expected that the security will be in the physical possession or control of the broker or dealer no later than the settlement of the transaction. A violation of Rule 200(g) also constitutes a violation of Phlx Rule 707.
3. PSX Rule 3301A(a) provides that “[p]articipants may express their trading interest in PSX by entering Orders. PSX offers a range of Order Types that behave in the manner specified for each particular Order Type. Each Order Type may be assigned certain Order Attributes that further define its behavior. All Order Types and Order Attributes operate in a manner that is reasonably designed to comply with the requirements of Rules 610 and 611 under Regulation NMS. Each Order must designate whether it is to effect a buy, a long sale, a short sale, or an exempt short sale.”²
4. Phlx Rule 707 (through PSX Rule 3202) provides that “[e]very member, member organization, or person associated with or employed by a member or member organization shall not engage in conduct inconsistent with just and equitable principles of trade.”³
5. PSX Rule 3202 provides that certain Phlx Rules shall be applicable to market participants trading on PSX, including Rule 707, Rule 748, and Rule 760.
6. From October 2015 through April 2018, Goldman mismarked 59,981,252 short sell orders as long, of which 1,365,337 were sent to PSX. These orders represented less than one percent of Goldman’s total principal sell orders during this time period. The orders were auto-generated to promptly hedge SPG’s synthetic risk exposure resulting from its execution of equity swap transactions with clients. The mismarked orders were caused by Goldman’s implementation of an upgrade to the relevant automated trading software that was intended to simplify this order flow. Goldman inadvertently failed to

² As of January 22, 2021, PSX Rule 3301A(a) was renumbered to Phlx Rule Equity 4, Section 3301A(a).

³ As of January 22, 2021, Phlx Rule 707 was renumbered to Phlx Rule General 9, Section 1(c).

include a single line of code that was designed to copy the long or short mark from a parent sell order and affix it to the instantaneously created child sell order(s) that were routed to the market. While the parent orders were accurately marked as short sales and a locate was obtained for each, the child orders did not receive the short sale order mark of the parent order due to the missing line of code. The firm immediately fixed this coding error after being notified by FINRA in April 2018.

7. Separately, Goldman misapplied order marking logic to sell orders routed to the firm by a foreign affiliate in a manner that resulted in certain of those orders being inaccurately marked short. A sample of six months of data revealed that approximately 670 orders of that foreign affiliate were broken up into child orders and sent to various market centers with the incorrect short sale indicator, including 964 sent to PSX, resulting in 26,377 executions.⁴ Goldman corrected this error after being notified by FINRA in October 2019.
8. By marking short sell orders as long, Goldman violated Regulation SHO Rule 200(g) and PSX Rule 3301A(a) and Phlx Rule 707 (through PSX Rule 3202).
9. By marking short sell orders as long, Goldman also violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, and Phlx Rule 760 relating to maintaining accurate order memoranda.
10. Section 17(a) of the Exchange Act and Rule 17a-3(a)(7)(i) thereunder require broker-dealers to make and keep current memoranda for trade executions that include the terms and conditions of the order. Implicit in these provisions is the requirement that such memoranda be accurate.
11. Phlx Rule 760 (through PSX Rule 3202) provides that “[e]very member and member organization shall make, keep current and preserve such books and records as the Exchange may prescribe and as may be prescribed by the Securities Exchange Act of 1934 and the rules and regulations thereunder. No member or member organization shall refuse to make available to the Exchange such books, records or other information as may be called for under the rules or as may be requested in connection with an investigation by the Exchange.”
12. Goldman mismarked and routed 59,981,252 short sale orders as long; 1,365,337 of those orders were sent to Phlx. Of those 59,981,252 orders, 7,866,996 were executed, including 243,765 executed on Phlx. The firm maintained inaccurate memoranda with respect to the correct short sale order marking for each of the 7,866,996 sales.

⁴ The sample data set was drawn from the time period January 2018 through June 2019.

13. As a result, Goldman violated Section 17(a) of the Exchange Act and Rule 17a-3(a)(7)(i) thereunder, and Phlx Rules 760 and 707 (through PSX Rule 3202).

Goldman failed to establish and maintain a supervisory system reasonably designed to comply with Rule 200(g) and Phlx rules relating to accurate order memoranda.

14. Phlx Rule 748(h) (through PSX Rule 3202) provides that “[e]ach member or member organization shall establish, maintain, and enforce written supervisory procedures, and a system for applying such procedures, to supervise the types of business(es) in which the member or member organization engages in and to supervise the activities of all registered representatives, employees, and associated persons. The written supervisory procedures and the system for applying such procedures shall reasonably be designed to prevent and detect, insofar as practicable, violations of the applicable securities laws and regulations, including the By-Laws and Rules of the Exchange.”⁵
15. Goldman failed to establish and maintain a supervisory system reasonably designed to achieve compliance with Rule 200(g) and rules relating to accurate order memoranda. Although Goldman had a report that was designed to surveil for order marking accuracy, that report reviewed the accuracy of the order marks of parent orders, but did not confirm that the proper marking of the parent order carried over to the child orders. This deficiency resulted in Goldman’s failure to detect that it had mismarked approximately 60 million short sale orders as long, 1,365,337 of which were routed to Phlx, during an approximately 29-month period and the execution of 12,355 short sale transactions for 1,596,375 shares at or below the national best bid while a short sale circuit breaker was in effect. It also resulted in Goldman creating and maintaining over seven million inaccurate order memoranda.
16. In May 2019, Goldman enhanced its order marking surveillance report to capture child orders as well as parent orders. In September 2019, the firm also added an additional control designed to detect and prevent the routing of inaccurately marked short sale orders (i.e., orders marked long that should be marked short).
17. By failing to have supervisory reviews reasonably designed to ensure the mismarked orders were appropriately marked long or short consistent with Regulation SHO and order marking and books and records requirements, Goldman violated Phlx Rules 748(h) and 707 (through PSX Rule 3202).

⁵ As of February 3, 2020, Phlx Rule 748 was renumbered to Phlx Rule General 9, Section 20.

B. Respondent also consents to the imposition of the following sanctions:

A censure, and a \$87,100 fine (resolved simultaneously with similar matters for a total fine of \$3,000,000).⁶

Respondent specifically and voluntarily waives any right to claim that it is unable to pay, now or at any time hereafter, the monetary sanction imposed in this matter.

Respondent agrees to pay the monetary sanction upon notice that this AWC has been accepted and that such payment is due and payable. Respondent has submitted a Payment Information form showing the method by which it proposes to pay the fine imposed.

The sanctions imposed herein shall be effective on a date set by FINRA staff.

II.

WAIVER OF PROCEDURAL RIGHTS

Respondent specifically and voluntarily waives the following rights granted under Phlx's Code of Procedure:

- A. To have a Formal Complaint issued specifying the allegations against the firm;
- B. To be notified of the Formal Complaint and have the opportunity to answer the allegations in writing;
- C. To defend against the allegations in a disciplinary hearing before a hearing panel, to have a written record of the hearing made and to have a written decision issued; and
- D. To appeal any such decision to the Exchange Review Council and then to the U.S. Securities and Exchange Commission and a U.S. Court of Appeals.

Further, Respondent specifically and voluntarily waives any right to claim bias or prejudgment of the Chief Regulatory Officer, the Exchange Review Council, or any member of the Exchange Review Council, in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including acceptance or rejection of this AWC.

Respondent further specifically and voluntarily waives any right to claim that a person violated the ex parte prohibitions of Rule 9143 or the separation of functions prohibitions of Rule 9144,

⁶ The balance of the fine will be allocated to Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Investors Exchange LLC, The Nasdaq Stock Market LLC, Nasdaq BX, Inc., New York Stock Exchange LLC, NYSE Arca, Inc., NYSE American LLC, and FINRA.

in connection with such person's or body's participation in discussions regarding the terms and conditions of this AWC, or other consideration of this AWC, including its acceptance or rejection.

III.

OTHER MATTERS

Respondent understands that:

- A. Submission of this AWC is voluntary and will not resolve this matter unless and until it has been reviewed and accepted by FINRA's Department of Enforcement and the Exchange Review Council, the Review Subcommittee, or the Office of Disciplinary Affairs ("ODA"), pursuant to Phlx Rule 9216;
- B. If this AWC is not accepted, its submission will not be used as evidence to prove any of the allegations against the Respondent; and
- C. If accepted:
 - 1. This AWC will become part of the Respondent's permanent disciplinary record and may be considered in any future actions brought by Phlx or any other regulator against the Respondent;
 - 2. Phlx may release this AWC or make a public announcement concerning this agreement and the subject matter thereof in accordance with Phlx Rule 8310 and IM-8310-3;⁷ and
 - 3. Respondent may not take any action or make or permit to be made any public statement, including in regulatory filings or otherwise, denying, directly or indirectly, any finding in this AWC or create the impression that the AWC is without factual basis. Respondent may not take any position in any proceeding brought by or on behalf of Phlx, or to which Phlx is a party, that is inconsistent with any part of this AWC. Nothing in this provision affects the Respondent's right to take legal or factual positions in litigation or other legal proceedings in which Phlx is not a party.
- D. Respondent may attach a Corrective Action Statement to this AWC that is a statement of demonstrable corrective steps taken to prevent future misconduct. Respondent understands that it may not deny the charges or make any statement that is inconsistent with the AWC in this Statement. This Statement does not constitute factual or legal findings by Phlx, nor does it reflect the views of Phlx or its staff.

⁷ Phlx Rule 8310 and IM-8310-3 are now found at Nasdaq Rule General 5 Sections 8310 and IM-8310-3 and are incorporated by reference into Phlx Rule General 5, Section 2.

The undersigned, on behalf of the firm, certifies that a person duly authorized to act on its behalf has read and understands all of the provisions of this AWC and has been given a full opportunity to ask questions about it; that the firm has agreed to the AWC's provisions voluntarily; and that no offer, threat, inducement, or promise of any kind, other than the terms set forth herein and the prospect of avoiding the issuance of a Complaint, has been made to induce the firm to submit it.

April 3, 2023

Date

Goldman Sachs & Co. LLC,
Respondent

By: David Markowitz

Name: David Markowitz

Title: Global Co-Head of Litigation and
Regulatory Proceedings

Reviewed by:

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Counsel for Respondent

Accepted by Phlx:

April 4, 2023

Date

Steven M. Tanner

Steven M. Tanner

Senior Counsel

Department of Enforcement

Signed on behalf of Phlx, by delegated
authority from the Director of ODA