

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77811; File No. SR-Phlx-2016-57)

May 11, 2016

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Related to Customer Rebates

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, 2016, NASDAQ PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“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 Section B, entitled “Customer Rebate Program.”

The text of the proposed rule change is available on the Exchange’s website at <http://nasdaqomxphlx.cchwallstreet.com/>, 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 Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 the Exchange’s Pricing Schedule at Section B, entitled “Customer Rebate Program.” Specifically, the Exchange is proposing to exclude options overlying NDX³ and MNX⁴ from receiving a Customer⁵ rebate.

Currently, the Exchange has a Customer Rebate Program consisting of five tiers that pay Customer rebates on three Categories, A,⁶ B⁷ and C⁸ of transactions.⁹ A Phlx member qualifies

³ NDX represents options on the Nasdaq 100 Index traded under the symbol NDX (“NDX”).

⁴ MNX represents options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX (“MNX”).

⁵ The term “Customer” applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation which is not for the account of a broker or dealer or for the account of a “Professional” (as that term is defined in Rule 1000(b)(14)).

⁶ Category A rebates are paid to members executing electronically-delivered Customer Simple Orders in Penny Pilot Options and Customer Simple Orders in Non-Penny Pilot Options in Section II symbols.

⁷ Category B rebates are paid on Customer PIXL Orders in Section II symbols that execute against non-Initiating Order interest. In the instance where member organizations qualify for Tier 4 or higher in the Customer Rebate Program, Customer PIXL Orders that execute against a PIXL Initiating Order are paid a rebate of \$0.14 per contract. Rebates on Customer PIXL Orders are capped at 4,000 contracts per order for Simple PIXL Orders.

⁸ Category C rebates are paid to members executing electronically-delivered Customer Complex Orders in Penny Pilot Options and Non-Penny Pilot Options in Section II symbols. Rebates are paid on Customer PIXL Complex Orders in Section II symbols that execute against non-Initiating Order interest. Customer Complex PIXL Orders that execute against a Complex PIXL Initiating Order are not paid a rebate under any circumstances. The Category C Rebate is paid [sic] when an electronically-delivered Customer Complex Order, including Customer Complex PIXL Order, executes against another electronically-delivered Customer Complex Order. Rebates on Customer PIXL Orders are capped at 4,000 contracts per order leg for Complex PIXL Orders.

⁹ See Section B of the Pricing Schedule.

for a certain rebate tier based on the percentage of total national customer volume in multiply-listed options that it transacts monthly on Phlx. The Exchange calculates Customer volume in Multiply Listed Options by totaling electronically-delivered and executed volume, excluding volume associated with electronic Qualified Contingent Cross (“QCC”) Orders,¹⁰ as defined in Exchange Rule 1080(o).¹¹ The Exchange pays the following rebates:¹²

Customer Rebate Tiers	Percentage Thresholds of National Customer Volume in Multiply-Listed Equity and ETF Options Classes, excluding SPY Options (Monthly)	Category A	Category B	Category C
Tier 1	0.00% - 0.60%	\$0.00	\$0.00	\$0.00
Tier 2	Above 0.60% - 1.10%	\$0.10	\$0.10	\$0.17
Tier 3	Above 1.10% - 1.60%	\$0.15	\$0.12	\$0.17
Tier 4	Above 1.60% - 2.50%	\$0.20	\$0.16	\$0.22

¹⁰ A QCC Order is comprised of an originating order to buy or sell at least 1,000 contracts, or 10,000 contracts in the case of Mini Options, that is identified as being part of a qualified contingent trade, as that term is defined in Rule 1080(o)(3), coupled with a contra-side order or orders totaling an equal number of contracts. See Rule 1080(o).

¹¹ Members and member organizations under common ownership may aggregate their Customer volume for purposes of calculating the Customer Rebate Tiers and receiving rebates. Common ownership means members or member organizations under 75% common ownership or control. See the Preface of the Pricing Schedule.

¹² SPY is included in the calculation of Customer volume in Multiply Listed Options that are electronically-delivered and executed for purposes of the Customer Rebate Program, however, the rebates do not apply to electronic executions in SPY. Additionally, the Exchange pays a \$0.02 per contract Category A and B rebate and a \$0.03 per contract Category C rebate in addition to the applicable Tier 2 and 3 rebate to a Specialist or Market Maker or its member or member organization affiliate under Common Ownership provided the Specialist or Market Maker has reached the Monthly Market Maker Cap, as defined in Section II. See Section B of the Pricing Schedule.

Tier 5	Above 2.50%	\$0.21	\$0.17	\$0.22
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Today, options overlying NDX and MNX are included in the total volume to qualify a market participant for a Customer Rebate. The Exchange is proposing to continue to permit the electronically-delivered and executed volume associated with options overlying NDX and MNX to be included in the calculation of total market volume. The Exchange proposes to exclude options overlying NDX and MNX as eligible to receive a Customer Rebate in any Category.

In calculating electronically-delivered and executed Customer volume in Multiply Listed Options, the numerator of the equation will remain unchanged and will continue to include all electronically-delivered and executed Customer volume in Multiply Listed Options, including NDX and MNX. The denominator of that equation will also remain unchanged and will continue to include national customer volume in multiply-listed equity and ETF options volume. By including options overlying NDX and MNX in the computation for Customer Rebates, members will continue to receive the benefit of those transactions toward calculating their eligible rebate tiers and earning a rebate on all qualifying transactions.

At this time, the Exchange proposes to not pay Customer Rebates on options overlying NDX and MNX because of the exclusivity of these options. NDX and MNX are Phlx proprietary index options which currently trade on Phlx and one other options exchange. Therefore, the Exchange would not pay rebates on options overlying NDX and MNX as part of the Customer Rebate Program. The Exchange believes members will continue to be afforded an opportunity to achieve new Customer Rebate Program tiers or maintain their current level of Customer Rebate Program tiers.

2. Statutory Basis

The proposal is consistent with Section 6(b) of the Act,¹³ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁴ 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 or system which the Exchange operates or controls, 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 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.”¹⁵

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁶ the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹⁷ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹⁸

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

¹⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37497 [sic], 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁶ See Securities Exchange Act Release No. 51808 (June 9, 2005) [sic] at 534-535.

¹⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005) [sic] at 534.

¹⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005) [sic] at 537.

Further, “[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’”¹⁹ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

It is reasonable to no longer pay Customer Rebates on options overlying NDX and MNX in any Category (A, B or C) because these proprietary index options only trade on two options markets at this time. The original intent of the Customer Rebate Program was to pay rebates on electronically-delivered Multiply-Listed Options. By definition, these indices qualify as Multiply-Listed Options because they trade on more than one options exchange. These proprietary index options trade on Phlx and one other options exchange. The Exchange does not desire to pay rebates on options overlying NDX and MNX because of their exclusivity. Despite the fact that technically these options trade on more than one venue, other exchanges cannot list these options. The Exchange believes it is reasonable to continue to count options overlying NDX and MNX in the total volume to qualify a market participant for a Customer Rebate, however, options overlying NDX and MNX will no longer be paid the Customer rebates in any Category because of the exclusivity of this option. Market participants would continue to benefit from NDX and MNX options volume in terms of qualifying for Customer Rebate Tiers. The

¹⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005) [sic] at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21) [sic].

Exchange believes that not paying Customer Rebates on options overlying NDX and MNX further aligns these products with other Singly Listed Options as compared to Multiply-Listed Options.

It is equitable and not unfairly discriminatory to no longer pay Customer Rebates on options overlying NDX and MNX in any Category because the Exchange would apply its calculation to determine the eligibility and payment of Customer rebates in a uniform manner. The Exchange's proposal to no longer pay Customer Rebates on options overlying NDX and MNX in any Category is equitable and not unfairly discriminatory because the Exchange would no longer pay Customer Rebates on any transaction with options overlying either NDX or MNX to any market participant. Also, any market participant is eligible to earn a Customer Rebate.

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. In terms of inter-market competition, 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 fees 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, that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The Exchange's proposal to no longer pay Customer Rebates on options overlying NDX

and MNX in any Category does not impose an undue burden on intra-market competition because the Exchange would apply the calculation of Customer rebates and would pay rebates on qualifying orders in a uniform manner. No market participant would be paid a Customer Rebate in options overlying NDX or MNX. All market participants may participate in the Customer Rebate Program. Members would continue to benefit from the inclusion of options overlying NDX and MNX in the total volume to qualify a market participant for a Customer Rebate.

Also, the Exchange's proposal to no longer pay Customer Rebates on options overlying NDX and MNX in any Category does not impose an undue burden on inter-market competition because there is only one other exchange that transacts options overlying NDX and MNX through a contractual agreement with the Exchange. That venue may choose to also not pay rebates on options overlying NDX or MNX. Other venues may not list these proprietary indices.

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.²⁰

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.

²⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2016-57 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-2016-57. 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; 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-2016-57 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.²¹

Robert W. Errett
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).