

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89256; File No. SR-Phlx-2020-33)

July 8, 2020

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx's Pricing Schedule to Waive Certain Fees

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 June 25, 2020, 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 Phlx's Pricing Schedule at Options 7, Section 8, "Membership Fees" and Options 7, Section 9, "Other Member Fees." Phlx also proposes other technical amendments to various sections of Options 7.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on July 1, 2020.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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, 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

Phlx proposes to amend its pricing within Options 7, Section 8, "Membership Fees" and Options 7, Section 9, "Other Member Fees." Phlx also proposes to update the name of the "Penny Pilot Program" within Options 7. Each change will be described below.

Options 7, Section 8

Phlx proposes to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to waive the Floor Lead Market Maker and Floor Market Maker³ Permit Fee of \$6,000, for the months of July and August 2020, for those members and member organizations who paid the Floor Lead Market Maker and Floor Market Maker Permit Fee in

³ A "Floor Market Maker" is a Market Maker who is neither an SQT or an RSQT.

March 2020 and were not otherwise registered as a Streaming Quote Trader⁴ or Remote Streaming Quote Trader⁵ in March 2020.

Open outcry on the Exchange's Trading Floor was closed on March 17, 2020⁶ and did not re-open until June 3, 2020.⁷ At the time that open outcry trading became unavailable in March 2020, Floor Lead Market Makers and Floor Market Makers were unable to transact business on the Phlx Trading Floor. The Exchange assessed these members and member organizations the monthly Floor Lead Market Maker and Floor Market Maker Fee of \$6,000 during the time period when open outcry trading was unavailable. The Exchange seeks to waive the Floor Lead Market Maker and Floor Market Maker Permit Fee, for the months of July and August 2020, for those members and member organizations that paid the Floor Lead Market Maker and Floor Market Maker Permit Fee in March 2020, and were not otherwise registered as a Streaming Quote Trader or as a Remote Streaming Quote Trader in March 2020. This waiver of the Floor Lead Market Maker and Floor Market Maker Permit Fee, for the months of July and August

⁴ A "Streaming Quote Trader" or "SQT" means a Market Maker who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the trading floor of the Exchange. An SQT may only submit quotes in classes of options in which the SQT is assigned. See Options 1, Section 1(b)(54).

⁵ A "Remote Streaming Quote Trader" or "RSQT" means a Market Maker that is a member affiliated with an Remote Streaming Quote Trader Organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. A qualified RSQT may function as a Remote Lead Market Maker upon Exchange approval. An RSQT is also known as a Remote Market Maker ("RMM") pursuant to Options 2, Section 11. A Remote Streaming Quote Organization ("RSQTO") or Remote Market Maker Organization ("RMO") are Exchange member organizations that have qualified pursuant to Options 2, Section 1. See Options 1, Section 1(b)(49).

⁶ See Options Trader Alert #2020 – 07.

⁷ See Options Trader Alert #2020 – 08.

2020, is intended to relieve Floor Lead Market Makers and Floor Market Makers, who do not otherwise stream quotes, of these fees for two months to ensure that these market makers continue to provide liquidity to the Trading Floor.

The Exchange proposes to remove obsolete rule text, which was relevant in June 2020, regarding fee waivers for the Floor Broker Permit Fee, the Clerk Fee and the Streaming Quote Trader (“SQT”) Fees, which are no longer available. The Exchange also proposes to remove obsolete rule text related to an electronic Permit Fee credit that was offered in June 2020 and is no longer available.

Options 7, Section 9

The Exchange proposes to remove obsolete rule text, which was relevant in June 2020, regarding a fee waiver for the Floor Facility Fee, which is no longer available.

Penny Pilot

The Exchange proposes to amend the description of Penny Symbols to replace the term “Penny Pilot Program” with “Penny Interval Program,” and replace the terms “Penny Pilot Options” and “Penny Pilot” with “Penny Symbol.” On April 1, 2020, the Commission approved the amendment to the OLPP to make permanent the Pilot Program (the “OLPP Program”).⁸ The Exchange recently filed a proposal to amend Phlx Options 3, Section 3 to conform the rule to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (the “OLPP”).⁹ The Exchange’s proposal amended Phlx Options 3, Section 3 to refer to a Penny Interval Program instead of a Penny Pilot Program. The proposed amendments conform the name of the program and also

⁸ See Securities Exchange Act Release No. 88532 (April 1, 2020), 85 FR 19545 (April 7, 2020) (File No. 4-443) (“Approval Order”).

⁹ See SR-Phlx-2020-32 (not yet published).

amend other references by removing the term “pilot options” and instead referring to Penny or Non-Penny Symbols. Specifically, the Exchange proposes to amend Options 7, Section 1; Options 7, Section 4; and Options 7, Section 6.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ 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 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.”¹²

Likewise, in NetCoalition v. Securities and Exchange Commission¹³ (“NetCoalition”) 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

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹³ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

approach.¹⁴ 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.”¹⁵

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’....”¹⁶ 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.

Options 7, Section 8

Phlx’s proposal to amend Options 7, Section 8, “Membership Fees,” at Part A, “Permit and Registration Fees,” to waive the Floor Lead Market Maker and Floor Market Maker Permit Fee,¹⁷ for the months of July and August 2020, provided a member or member organization (1) paid the Floor Lead Market Maker or Floor Market Maker Permit Fee in March 2020; and (2) was not otherwise registered as a Streaming Quote Trader or as a Remote Streaming Quote Trader in March 2020, is reasonable. Open outcry on the Exchange’s Trading Floor was closed

¹⁴ See NetCoalition, at 534 - 535.

¹⁵ Id. at 537.

¹⁶ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹⁷ Phlx assesses a Floor Lead Market Maker and Floor Market Maker Permit Fee of \$6,000.

on March 17, 2020¹⁸ and did not re-open until June 3, 2020.¹⁹ At the time that open outcry trading became unavailable in March 2020, certain Floor Lead Market Makers and Floor Market Makers were unable to transact business on the Phlx Trading Floor. The Exchange assessed these members and member organizations the monthly Floor Lead Market Maker and Floor Market Maker Fee of \$6,000 during the time period that open outcry was unavailable for trading. The Exchange seeks to waive the Floor Lead Market Maker and Floor Market Maker Permit Fee, for the months of July and August 2020, for those members and member organizations that paid the Floor Lead Market Maker and Floor Market Maker Permit Fee in March 2020, and were not otherwise registered as a Streaming Quote Trader or as a Remote Streaming Quote Trader in March 2020. This waiver of the Floor Lead Market Maker and Floor Market Maker Permit Fee, for the months of July and August 2020, is intended to relieve Floor Lead Market Makers and Floor Market Makers, who do not otherwise stream quotes, of these fees for two months to ensure that these market makers continue to provide liquidity to the Trading Floor.

Phlx's proposal to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to waive the Floor Lead Market Maker and Floor Market Maker Permit Fee,²⁰ for the months of July and August 2020, provided a member or member organization (1) paid the Floor Lead Market Maker or Floor Market Maker Permit Fee in March 2020; and (2) was not otherwise registered as a Streaming Quote Trader or as a Remote Streaming Quote Trader in March 2020, is equitable and not unfairly discriminatory. The Exchange is proposing to waive fees for members and member organizations that solely conducted a business within

¹⁸ See Options Trader Alert #2020 – 07.

¹⁹ See Options Trader Alert #2020 – 08.

²⁰ Phlx assesses a Floor Lead Market Maker and Floor Market Maker Permit Fee of \$6,000.

open outcry trading and did not otherwise conduct an electronic business during the time period that open outcry trading was unavailable. Floor Lead Market Makers and Floor Market Makers are by definition not Streaming Quote Traders²¹ or Remote Streaming Quote Traders. Some members and member organizations are registered to transact a market making business both on the Trading Floor and also electronically. The Exchange proposes to compensate members and member organizations who conducted a market making business on the Trading Floor in March 2020, and did not conduct an electronic business, because these members and member organizations were not able to transact any business on Phlx from March 17, 2020 through June 3, 2020, when open outcry trading was unavailable. Floor Lead Market Makers and Floor Market Maker have certain trading obligations, pursuant to Options 8, Section 27,²² and incur certain infrastructure costs to provide liquidity on the Exchange's Trading Floor. The Exchange will uniformly apply the waiver to all members and member organizations who only conducted a market making business on Phlx's Trading Floor in March 2020 as a Floor Lead Market Maker or Floor Market Maker, and did not otherwise act in a market making capacity electronically on Phlx.

The Exchange's proposal to remove obsolete rule text, which was relevant in June 2020, regarding fee waivers for the Floor Broker Permit Fee, the Clerk Fee and the SQT Fees, as well

²¹ The Exchange notes that Streaming Quote Traders were able to register as Remote Market Makers, pursuant to Options 2, Section 11, during the period of time that the Trading Floor was unavailable. In addition, the Exchange waived Streaming Quote Trader Fees from April 2020 through June 2020. See Securities Exchange Act Release Nos. 88525 (March 31, 2020), 85 FR 19185 (April 6, 2020) (SR-Phlx-2020-12); and 89041 (June 10, 2020), 85 FR 36438 (June 16, 2020) (SR-Phlx-2020-28).

²² Phlx Options 8, Section 27(f) provides, "(f) A Floor Market Maker is required to trade either (a) 1,000 contracts and 300 transactions, or (b) 10,000 contracts and 100 transactions, on the Exchange each quarter. Transactions executed in the trading crowd where the contra-side is an ROT are not included."

as an electronic Permit Fee credit, which fee waivers and credit are no longer available, is reasonable, equitable and not unfairly discriminatory.

Options 7, Section 9

The Exchange's proposal to remove obsolete rule text, which was relevant in June 2020, regarding a fee waiver for the Floor Facility Fee, which is no longer available, is reasonable, equitable and not unfairly discriminatory.

Penny Pilot

The Exchange's proposal to amend rule text relating to the Penny Pilot Program to replace the term "Penny Pilot Program" with "Penny Interval Program," and replace the terms "Penny Pilot Options" and "Penny Pilot" with "Penny Symbol" is reasonable, equitable and not unfairly discriminatory. The proposed amendments conform the name of the program and also amend other references by removing the term "pilot options" and instead referring to Penny or Non-Penny Symbols. Specifically, the Exchange proposes to amend Options 7, Section 1; Options 7, Section 4; and Options 7, Section 6.

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.

Inter-market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. 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 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.

Intra-market Competition

Options 7, Section 8

Phlx's proposal to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to waive the Floor Lead Market Maker and Floor Market Maker Permit Fee,²³ for the months of July and August 2020, provided a member or member organization (1) paid the Floor Lead Market Maker or Floor Market Maker Permit Fee in March 2020; and (2) was not otherwise registered as a Streaming Quote Trader or as a Remote Streaming Quote Trader in March 2020, does not impose an undue burden on competition. The Exchange is proposing to waive fees for members and member organizations that solely conducted a business within open outcry trading and did not otherwise conduct an electronic business during the time period that open outcry trading was unavailable. Floor Lead Market Makers and Floor Market Makers are by definition not Streaming Quote Traders²⁴ or Remote Streaming Quote Traders. Some members and member organizations are registered to transact a market making business both on the Trading Floor and also electronically. The Exchange proposes to compensate

²³ Phlx assesses a Floor Lead Market Maker and Floor Market Maker Permit Fee of \$6,000.

²⁴ The Exchange notes that Streaming Quote Traders were able to register as Remote Market Makers, pursuant to Options 2, Section 11, during the period of time that the Trading Floor was unavailable. In addition, the Exchange waived Streaming Quote Trader Fees from April 2020 through June 2020. See Securities Exchange Act Release Nos. 88525 (March 31, 2020), 85 FR 19185 (April 6, 2020) (SR-Phlx-2020-12); and 89041 (June 10, 2020), 85 FR 36438 (June 16, 2020) (SR-Phlx-2020-28).

members and member organizations who conducted a market making business on the Trading Floor in March 2020, and did not conduct an electronic business, because these members and member organizations were not able to transact any business on Phlx from March 17, 2020 through June 3, 2020, when open outcry trading was unavailable. Floor Lead Market Makers and Floor Market Maker have certain trading obligations, pursuant to Options 8, Section 27,²⁵ and incur certain infrastructure costs to provide liquidity on the Exchange's Trading Floor. The Exchange will uniformly apply the waiver to all members and member organizations who only conducted a market making business on Phlx's Trading Floor in March 2020 as a Floor Lead Market Maker or Floor Market Maker, and did not otherwise act in a market making capacity electronically on Phlx.

The Exchange's proposal to remove obsolete rule text, which was relevant in June 2020, regarding fee waivers for the Floor Broker Permit Fee, the Clerk Fee and the SQT Fees, as well as an electronic Permit Fee credit, which fee waivers and credit are no longer available, does not impose an undue burden on competition.

Options 7, Section 9

The Exchange's proposal to remove obsolete rule text, which was relevant in June 2020, regarding a fee waiver for the Floor Facility Fee, which is no longer available, does not impose an undue burden on competition.

Penny Pilot

The Exchange's proposal to amend rule text relating to the Penny Pilot Program to

²⁵ Phlx Options 8, Section 27(f) provides, "(f) A Floor Market Maker is required to trade either (a) 1,000 contracts and 300 transactions, or (b) 10,000 contracts and 100 transactions, on the Exchange each quarter. Transactions executed in the trading crowd where the contra-side is an ROT are not included."

replace the term “Penny Pilot Program” with “Penny Interval Program,” and replace the terms “Penny Pilot Options” and “Penny Pilot” with “Penny Symbol” does not impose an undue burden on competition. The proposed amendments conform the name of the program and also amend other references by removing the term “pilot options” and instead referring to Penny or Non-Penny Symbols. Specifically, the Exchange proposes to amend Options 7, Section 1; Options 7, Section 4; and Options 7, Section 6.

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.²⁶

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.

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:

²⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2020-33 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-2020-33. 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-2020-33 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.²⁷

J. Matthew DeLesDernier
Assistant Secretary

²⁷ 17 CFR 200.30-3(a)(12).