

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-93295; File No. SR-Phlx-2021-57)

October 12, 2021

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7, Section 4, Multiply Listed Options Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on October 6, 2021, 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 and II, 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 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).”

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

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.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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 at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).” The Exchange proposes to amend the way it calculates qualifying Qualified Contingent Cross or “QCC” Orders for purposes of paying a QCC rebate.

Today, the Exchange assesses a \$0.20 per contract QCC Transaction Fee to Lead Market Makers<sup>3</sup>, Market Makers<sup>4</sup>, Firms<sup>5</sup>, and Broker-Dealers<sup>6</sup>. Customers<sup>7</sup> and Professionals<sup>8</sup> are not assessed a QCC Transaction Fee. QCC Transaction Fees apply to electronic QCC Orders, as defined in Options 3, Section 12,<sup>9</sup> and Floor QCC Orders, as defined in Options 8, Section 30(e) (collectively “Combined QCC Orders”).

Today, the Exchange pays rebates on all qualifying executed Combined QCC Orders, except where the transaction is either: (i) Customer-to-Customer; (ii) Customer-to-Professional,

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<sup>3</sup> The term “Lead Market Maker” applies to transactions for the account of a Lead Market Maker (as defined in Options 2, Section 12(a)). A Lead Market Maker is an Exchange member who is registered as an options Lead Market Maker pursuant to Rule Options 2, Section 12(a). An options Lead Market Maker includes a Remote Lead Market Maker which is defined as an options Lead Market Maker in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Options 2, Section 11. See Options 7, Section 1.

<sup>4</sup> The term “Market Maker” is defined in Options 1, Section 1(b)(28) as a member of the Exchange who is registered as an options Market Maker pursuant to Options 2, Section 12(a). A Market Maker includes SQTs and RSQTs as well as on and Floor Market Makers. See Options 7, Section 1.

<sup>5</sup> The term “Firm” applies to any transaction that is identified by a member or member organization for clearing in the Firm range at OCC. See Options 7, Section 1.

<sup>6</sup> The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1.

<sup>7</sup> 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 (“OCC”) which is not for the account of a broker or dealer or for the account of a “Professional” (as that term is defined in Options 1, Section 1(b)(45)). See Options 7, Section 1.

<sup>8</sup> The term “Professional” applies to transactions for the accounts of Professionals, as defined in Exchange Rule 1000(b)(43) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Options 7, Section 1.

<sup>9</sup> QCC Orders within Options 3, Section 12 are submitted electronically. The Exchange proposes to add the word “electronic” before QCC Orders in several places within Options 7, Section 4 for clarity.

(iii) Professional-to-Professional or (iv) a dividend, merger, short stock interest or reversal or conversion strategy execution, pursuant to the below QCC rebate schedule, up to a maximum of \$550,000 in a given month.

**QCC Rebate Schedule**

<b>Tier</b>	<b>Threshold</b>	<b>Rebate per Contract</b>
Tier 1	0 to 99,999 contracts in a month	\$0.00
Tier 2	100,000 to 299,999 contracts in a month	\$0.05
Tier 3	300,000 to 499,999 contracts in a month	\$0.07
Tier 4	500,000 to 699,999 contracts in a month	\$0.08
Tier 5	700,000 to 999,999 contracts in a month	\$0.09
Tier 6	Over 1,000,000 contracts in a month	\$0.11

Today, the Exchange aggregates volume from all executed Combined QCC Orders and excludes QCC transactions where the transaction is either: (i) Customer-to-Customer; (ii) Customer-to-Professional; (iii) Professional-to-Professional; or (iv) a dividend, merger, short stock interest or reversal or conversion strategy execution (as defined in Options 7, Section 4).

At this time, the Exchange proposes to amend the way it calculates qualifying Combined QCC Orders for purposes of paying a QCC rebate. With this proposal, the Exchange would aggregate volume from all executed Combined QCC Orders, including Customer-to-Customer, Customer-to-Professional, and Professional-to-Professional transactions for purposes of determining the QCC rebate tier threshold. The Exchange would continue to exclude dividend, merger, short stock interest or reversal or conversion strategy executions from the QCC rebate tier qualification.

The Exchange believes that this amendment will encourage market participants to execute additional Customer-to-Customer, Customer-to-Professional, and Professional-to-Professional Combined QCC Orders for purposes of qualifying for a higher QCC rebate tier.<sup>10</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>11</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>12</sup> 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 proposed changes to Phlx's Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: "[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

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<sup>10</sup> The Exchange also proposes two technical amendments to Options 7, Section 4. First, the Exchange proposes to change a "," to a ";" after "(ii) Customer-to-Professional." Second, the Exchange proposes to add a ";" after "(iii) Professional-to-Professional."

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4) and (5).

possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>13</sup>

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.”<sup>14</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange’s proposal to amend the way it calculates qualifying Combined QCC Orders for purposes of paying a QCC rebate is reasonable. The proposed amendment to qualify for a QCC rebate is intended to incentivize market participants to execute a greater amount of Customer-to-Customer, Customer-to-Professional, and Professional-to-Professional Combined

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<sup>13</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

<sup>14</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

QCC Orders on Phlx to qualify for a higher QCC rebate tier. While the Exchange would continue not to pay a QCC rebate for Customer-to-Customer, Customer-to-Professional, and Professional-to-Professional Combined QCC Orders, market participants would benefit by executing these orders by potentially qualifying for higher QCC rebate tiers. Today, Customer-to-Customer, Customer-to-Professional, and Professional-to-Professional Combined QCC Orders are not counted in the tier qualification calculation for QCC rebates but would be counted with this proposal. Also, today, dividend, merger, short stock interest or reversal or conversion strategy executions are not counted in the tier qualification calculation for QCC rebates and would continue to not be counted.

The Exchange's proposal to amend the way it calculates qualifying Combined QCC Orders for purposes of paying a QCC Rebate is equitable and not unfairly discriminatory. The Exchange uniformly would apply the proposed QCC tier qualification to all market participants when paying QCC rebates on Combined QCC Orders for all qualifying transactions executed on Phlx.

Amending rule text within Options 7, Section 4 to add the word "electronic" before QCC Orders in several places within Options 7, Section 4, where the reference applies to QCC Orders as defined in Options 3, Section 12, is reasonable, equitable and not unfairly discriminatory because the amendments will bring additional clarity to the rule text.

**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

The Exchange's proposal to amend the way it calculates qualifying Combined QCC Orders for purposes of paying a QCC Rebate does not impose an undue burden on competition. The Exchange uniformly would apply the proposed QCC tier qualification to all market participants when paying QCC rebates on Combined QCC Orders for all qualifying transactions executed on Phlx.

Amending rule text within Options 7, Section 4 to add the word "electronic" before QCC Orders in several places within Options 7, Section 4, where the reference applies to QCC Orders as defined in Options 3, Section 12, does not impose an undue burden on competition because the amendments will bring additional clarity to the rule text.

#### 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 is effective upon filing pursuant to Section 19(b)(3)(A)<sup>15</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>16</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>17</sup> of the Act 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:

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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2021-57 on the subject line.

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<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

<sup>17</sup> 15 U.S.C. 78s(b)(2)(B).

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-2021-57. 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 Web site (<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-2021-57 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.<sup>18</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).