

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-95280; File No. SR-Phlx-2022-29)

July 14, 2022

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

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 June 30, 2022, 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 4, Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY and broad-based index options symbols listed within Options 7, Section 5.A).

While the changes proposed herein are effective upon filing, the Exchange has designated that the amendments be operative on July 1, 2022.

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 Schedule at Options 7, Section 4, Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY and broad-based index options symbols listed within Options 7, Section 5.A). Specifically, Phlx proposes to remove the rule text within note 1 of Options 7, Section 4 which provides a discount.

Today, Phlx assesses the following electronic Penny Symbol Options Transaction Charges: \$0.00 per contract to Customer;<sup>3</sup> \$0.48 per contract<sup>4</sup> to Professionals;<sup>5</sup> \$0.22 per

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<sup>3</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(c).

<sup>4</sup> Electronic Complex Orders will be assessed \$0.40 per contract. See note 2 within Options 7, Section 4 of the Pricing Schedule.

<sup>5</sup> The term “Professional” applies to transactions for the accounts of Professionals, as defined in Options 1, Section 1(b)(45) 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(c).

contract to Lead Market Makers<sup>6</sup> and Maker Makers;<sup>7</sup> \$0.48 per contract<sup>8</sup> for Broker-Dealers;<sup>9</sup> and \$0.48 per contract<sup>10</sup> for Firms.<sup>11</sup> Today, Phlx assesses the following electronic non-Penny Symbol Options Transaction Charges: \$0.00 per contract to Customer; \$0.75 per contract<sup>12</sup> to

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<sup>6</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 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(c). The term “Floor Lead Market Maker” is a member who is registered as an options Lead Market Maker pursuant to Options 2, Section 12(a) and has a physical presence on the Exchange’s trading floor. See Options 8, Section 2(a)(3).

<sup>7</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 Floor Market Makers. See Options 7, Section 1(c). The term “Floor Market Maker” is a Market Maker who is neither an SQT or an RSQT. A Floor Market Maker may provide a quote in open outcry. See Options 8, Section 2(a)(4).

<sup>8</sup> Electronic Complex Orders will be assessed \$0.40 per contract. See note 2 within Options 7, Section 4 of the Pricing Schedule.

<sup>9</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(c).

<sup>10</sup> Electronic Complex Orders will be assessed \$0.40 per contract. See note 2 within Options 7, Section 4 of the Pricing Schedule.

<sup>11</sup> The term “Firm” applies to any transaction that is identified by a member or member organization for clearing in the Firm range at The Options Clearing Corporation. See Options 7, Section 1(c).

<sup>12</sup> Any member or member organization under Common Ownership with another member or member organization or an Appointed OFP of an Affiliated Entity that qualifies for Customer Rebate Tiers 4 or 5 in Options 7, Section 2 of the Pricing Schedule will be assessed \$0.65 per contract. See note 3 within Options 7, Section 4 of the Pricing Schedule.

Professionals; \$0.25 per contract<sup>13</sup> to Lead Market Makers and Maker Makers; \$0.75 per contract<sup>14</sup> for Broker-Dealers; and \$0.75 per contract<sup>15</sup> for Firms.

Today, Phlx assesses an electronic Firm Penny and non-Penny Options Transactions Charges of \$0.45 per contract for simple orders in symbols AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF. Phlx proposes to remove the \$0.45 per contract Options Transaction Charge for simple orders applicable to AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF and reserve note 1 of Options 7, Section 4 of the Pricing Schedule. The Exchange notes that the symbols listed within note 1 of Options 7, Section 4 of the Pricing Schedule are all Penny Symbols and would, therefore, with this proposal be assessed an Options Transaction Charge of \$0.48 per contract for simple orders in symbols AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF.

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<sup>13</sup> Any member or member organization under Common Ownership with another member or member organization or an Appointed MM of an Affiliate Entity that qualifies for Customer Rebate Tiers 4 or 5 in Options 7, Section 2 of the Pricing Schedule will be assessed \$0.23 per contract. See note 4 within Options 7, Section 4 of the Pricing Schedule.

<sup>14</sup> Any member or member organization under Common Ownership with another member or member organization or an Appointed OFP of an Affiliated Entity that qualifies for Customer Rebate Tiers 4 or 5 in Options 7, Section 2 of the Pricing Schedule will be assessed \$0.65 per contract. See note 3 within Options 7, Section 4 of the Pricing Schedule.

<sup>15</sup> Any member or member organization under Common Ownership with another member or member organization or an Appointed OFP of an Affiliated Entity that qualifies for Customer Rebate Tiers 4 or 5 in Options 7, Section 2 of the Pricing Schedule will be assessed \$0.65 per contract. See note 3 within Options 7, Section 4 of the Pricing Schedule.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>16</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>17</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 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>18</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>19</sup> (“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 approach.<sup>20</sup> 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 . . .

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<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>18</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>19</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>20</sup> See NetCoalition, at 534 - 535.

. to be made available to investors and at what cost.”<sup>21</sup>

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’ ....”<sup>22</sup> 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.

The Exchange believes that it is reasonable to eliminate the electronic Firm Penny and non-Penny Options Transactions Charges of \$0.45 per contract for simple orders in symbols AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF. By eliminating note 1 within Options 7, Section 4 of the Pricing Schedule, the Exchange would assess a Firm Options Transaction Charge of \$0.48 per contract in simple orders for all Penny Symbols, which includes symbols AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF. Since the aforementioned symbols are all Penny Symbols, eliminating note 1 within Options 7, Section 4 would not cause any Firm to be assessed the electronic non-Penny Options Transaction Charge of \$0.75 per contract for simple orders in symbols AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF. While the Exchange is removing this discount for these symbols, the Exchange believes that its Options Transaction Charges remain competitive.

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<sup>21</sup> Id. at 537.

<sup>22</sup> 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)).

The Exchange believes that it is equitable and not unfairly discriminatory to eliminate the electronic Firm Penny and non-Penny Options Transactions Charges of \$0.45 per contract for simple orders in symbols AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF and, instead, assess these symbols an electronic Firm Options Transaction Charge of \$0.48 per contract for simple orders similar to other Penny Symbols. Customers would continue to pay no electronic Penny Symbol Options Transaction Charge. Customer liquidity benefits all market participants by providing more trading opportunities which attracts market makers. An increase in the activity of these market participants (particularly in response to pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Lead Market Makers and Market Makers would continue to pay a \$0.22 per contract electronic Penny Symbol Options Transaction Charge, which is lower than the \$0.48 per contract electronic Penny Symbol Options Transaction Charge paid by Professionals, Broker-Dealers and Firms. Lead Market Makers and Market Makers add value through continuous quoting and are subject to additional requirements and obligations unlike other market participants.<sup>23</sup> Incentivizing Lead Market Makers Market Makers to provide greater liquidity benefits all market participants through the quality of order interaction. The Exchange believes that it is equitable and not unfairly discriminatory to assess AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF an electronic Firm Penny Options Transactions Charge of \$0.48 per contract in simple orders similar to all other Penny Symbols. With this proposal, the electronic Firm, Professional and Broker-Dealer Options Transaction Charge for simple orders would be the same for all Penny Symbols.

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<sup>23</sup> See Phlx Options 2, Section 5.

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. 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 proposed amendment does not impose an undue burden on intra-market competition. The Exchange believes that eliminating the electronic Firm Penny and non-Penny Options Transactions Charges of \$0.45 per contract for simple orders in symbols AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF and, instead, assessing these symbols an electronic Firm Options Transaction Charge of \$0.48 per contract for simple orders, similar to other Penny Symbols, does not create an undue burden on competition. Customers would continue to pay no electronic Penny Symbol Options Transaction Charge. Customer liquidity benefits all market participants by providing more trading opportunities which attracts market makers. An increase in the activity of these market participants (particularly in response to

pricing) in turn facilitates tighter spreads which may cause an additional corresponding increase in order flow from other market participants. Lead Market Makers and Market Makers would continue to pay a \$0.22 per contract electronic Penny Symbol Options Transaction Charge, which is lower than the \$0.48 per contract electronic Penny Symbol Options Transaction Charge paid by Professionals, Broker-Dealers and Firms. Lead Market Makers and Market Makers add value through continuous quoting and are subject to additional requirements and obligations unlike other market participants.<sup>24</sup> Incentivizing Lead Market Makers Market Makers to provide greater liquidity benefits all market participants through the quality of order interaction. Assessing AAPL, BAC, EEM, FB, FXI, IWM, QQQ, TWTR, VXX and XLF an electronic Firm Penny Options Transactions Charge of \$0.48 per contract in simple orders, similar to all other Penny Symbols, does not impose an undue burden on competition. With this proposal, the electronic Firm, Professional and Broker-Dealer Options Transaction Charge for simple orders would be the same for all Penny Symbols.

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.<sup>25</sup>

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

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<sup>24</sup> See Phlx Options 2, Section 5.

<sup>25</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

(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:

##### 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-2022-29 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-2022-29. 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. 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-2022-29 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>26</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).