

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82442; File No. SR-Phlx-2017-108)

January 4, 2018

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule

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 December 21, 2017, 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 in the following respects: (i) modify the Simple Order rebate applicable to Specialists³ and Market Makers⁴ for

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The term "Specialist" applies to transactions for the account of a Specialist (as defined in Exchange Rule 1020(a)). A Specialist is an Exchange member who is registered as an options specialist pursuant to Rule 1020(a). An options Specialist includes a Remote Specialist which is defined as an options specialist in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Rule 501.

⁴ The term "ROT, SQT and RSQT" applies to transactions for the accounts of Registered Option Traders ("ROTs"), Streaming Quote Traders ("SQTs"), and Remote Streaming Quote Traders ("RSQTs"). For purposes of the Pricing Schedule, the term "Market Maker" will be utilized to describe fees and rebates applicable to ROTs, SQTs and RSQTs. RSQTs may also be referred to as Remote Market Makers ("RMMs").

adding liquidity in SPY;⁵ (ii) establish a new \$0.05 per contract surcharge for Customers⁶ whose SPY Complex Orders execute against simple Market Maker or Specialist orders resting on the Simple Order Book; (iii) reduce the per contract credit that certain member organizations are entitled to receive when routing away more than 5,000 Customer contracts per day in a given month; and (iv) increase permit fees for Floor Brokers and Floor Specialists and Market Makers.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqphlx.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, 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 in the following respects: (i) modify the Simple Order rebate applicable to Specialists and Market

⁵ Options overlying Standard and Poor's Depository Receipts/SPDRs ("SPY") are based on the SPDR exchange-traded fund ("ETF"), which is designed to track the performance of the S&P 500 Index.

⁶ 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 Rule 1000(b)(14)).

Makers for adding liquidity in SPY; (ii) establish a new \$0.05 per contract surcharge for Customers whose SPY Complex Orders execute against simple Market Maker or Specialist orders resting on the Simple Order Book; (iii) reduce the per contract credit that certain member organizations are entitled to receive when routing away more than 5,000 Customer contracts per day in a given month; and (iv) increase permit fees for Floor Brokers and Floor Specialists and Market Makers.

Simple Order Rebate for Adding Liquidity in SPY

The Exchange first proposes to amend Section I.A. of the Exchange's Pricing Schedule, which sets forth a schedule of rebates and fees for adding and removing liquidity in SPY with respect to Simple Orders. Presently, the Pricing Schedule provides that Customers and Specialists are entitled to a rebate to the extent that they add a requisite amount of electronically executed Simple Order contracts per day in a given month in SPY. The existing rebate varies on a five tier basis, which each tier corresponding to a range of average daily volumes ("ADV") of Simple Order contracts in SPY added per month. The Exchange now proposes to add a sixth tier to this Pricing Schedule. Specifically, it proposes to amend Tier 4 by adjusting the applicable ADV range from 20,000 to 49,999 to 20,000 to 34,999 contracts per day in SPY in a month and by decreasing the applicable per contract rebate from \$0.31 to \$0.27 per contract. The Exchange also proposes to establish a new Tier 5, which will provide for a \$0.30 per contract rebate that Customers and Specialists will receive for adding an ADV of between 35,000 and 49,999 contracts per day in SPY in a month. Finally, the Exchange proposes to rename the existing Tier 5 as Tier 6. The rebate applicable to the new Tier 6 will remain \$0.35 per contract for an ADV of greater than 49,999 contracts per day in SPY in a month.

The Exchange proposes the foregoing amendments, which will reduce the rebate amount from that which applies to existing Tier 4 to that which will apply to new Tiers 4 and 5, so as to provide a greater incentive to Specialists and Market Makers to seek to qualify for the top tier of rebates (new Tier 6). The Exchange also proposes to split the existing Tier 4 into two tiers to provide for a more graduated transition among tiers in the Pricing Schedule.

Customer Complex Order Surcharge

Second, the Exchange proposes to amend Section I.B of the Pricing Schedule, which sets forth a schedule of rebates and fees for adding and removing liquidity in SPY with respect to Complex Orders. Presently, the Pricing Schedule charges Customers no fees for adding or removing Complex Orders in SPY even as it charges fees to other categories of member organizations for doing the same, including Market Makers and Specialists.

Customers submit Complex Orders to the Exchange because often, Customers are able to execute such Complex Orders immediately by executing the individual components thereof through interactions with Market Maker and Specialist quotes that rest on the Exchange's Simple Order Book. These Customers benefit from not having to wait for counterparties that are willing to execute against their Complex Orders in the Complex Order Book.

Going forward, the Exchange proposes to impose a \$0.05 per contract surcharge on Customers that execute Complex Orders against Market Maker or Specialist quotes resting on the Simple Order Book. The Exchange proposes this surcharge to reduce the costs to it of such transactions. Not only does the Exchange receive no fees from Customers for engaging in these transactions, but the Exchange also pays rebates to the Market Makers and Specialists whose quotes execute against the Customers' Complex Orders. Pursuant to Section I.A. of the Exchange's Pricing Schedule, these rebates range from \$0.15 to \$0.35 per contact.

Routing Credit

Third, the Exchange proposes to amend Section V of its Pricing Schedule, which sets forth the fees it charges to Customers and Non-Customers for routing orders away from the Exchange. Presently, Section V pays a credit (equal to a Fixed Fee plus \$0.05 per contract)⁷ to a member organization that qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule and that routes away more than 5,000 Customer contracts per day in a given month. The Exchange proposes to decrease the amount of the per contract portion of the credit from \$0.05 to \$0.01 per contract. The Exchange proposes to decrease the amount of this credit because it no longer wishes to provide substantial subsidies to member organizations that route Customer orders away from the Exchange.

Permit Fees

Finally, the Exchange proposes to amend Section VI of the Pricing Schedule, which sets forth the Exchange's membership fees. Specifically, the Exchange proposes to increase its monthly Permit Fees for Floor Brokers, Floor Specialists and Market Makers. The Exchange presently charges Floor Brokers a monthly Permit Fee of \$3,000 and it now proposes to increase that fee to \$4,000 per month. The Exchange presently charges Floor Specialists and Market Makers a monthly Permit Fee of \$4,500 and it now proposes to increase that Fee to \$6,000 per month. The Exchange proposes to increase the amounts of these Permit Fees to recoup its financial investment in building a new Trading Floor for the Exchange as well as the costs associated with developing and deploying new and more advanced technologies for use on the new Trading Floor by Floor Brokers, Floor Specialists, and Market Makers.

⁷ If the away market transaction fee is \$0.00 or the away market pays a rebate, then the Exchange provides the member organization with a credit equal to the applicable Fixed Fee only.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁸ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁹ 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.”¹⁰

Likewise, in NetCoalition v. Securities and Exchange Commission¹¹ (“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.¹² 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

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4) and (5).

¹⁰ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹¹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹² See NetCoalition, at 534 - 535.

... to be made available to investors and at what cost.”¹³

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’....”¹⁴ 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.

Simple Order Rebate for Adding Liquidity in SPY

The Exchange believes that its proposal is reasonable to decrease the amounts of its mid-tier rebates to Market Makers and Specialists that add liquidity in SPY because the Exchange seeks to provide a greater incentive to Market Makers and Specialists to increase their ADVs of contracts in SPY so as to qualify for the top rebate tier, which will be new Tier 6. The Exchange believes that this proposal is an equitable allocation and is not unfairly discriminatory because the same decrease in rebates will apply to all similarly situated Market Makers and Specialists. Further, Market Makers and Specialists and Market Makers have obligations to the market and regulatory requirements, which normally do not apply to other market participants.¹⁵ They have obligations to make continuous markets, engage in a course of dealings reasonably calculated to

¹³ Id. at 537.

¹⁴ 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)).

¹⁵ See Rule 1014 titled “Obligations and Restrictions Applicable to Specialists and Registered Options Traders.”

contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with a course of dealings. The differentiation as between Specialists and Market Makers and all other market participants recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Customer Complex Order Surcharge

The Exchange believes that its proposal is reasonable to impose a \$0.05 per contract surcharge on Customers that execute Complex Orders against Market Maker or Specialist Quotes that rest on the Simple Order Book. Specifically, the Exchange believes that it is reasonable for it to impose this surcharge as a means to reduce the Exchange's costs associated with these transactions because each such transaction costs the Exchange between \$0.15 and \$0.35 per contract in rebates to Market Makers and Specialists. Moreover, it is reasonable to impose this surcharge on Customers because Customers benefit the most from being able to achieve immediate executions of their Complex Orders in the relevant scenario. The Exchange believes that the surcharge is minimal and will not be substantial enough to eliminate or even significantly diminish the benefits to Customers of being able to achieve immediate executions in this manner. Finally, the Exchange notes that all other account categories – Professionals, Firms, Broker-Dealers, Specialists, and Market Makers – pay higher fees (between \$0.43 and \$0.50 per contract) for removing liquidity from the Complex Order Book than Customers would pay under the proposal when they execute their Complex Orders against Simple Orders of Market Makers and Specialists that are resting on the Simple Order Book.

The Exchange believes that the proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will uniformly apply the fee to all similarly situated Customers. Moreover, Customers may avoid this new surcharge by executing their Complex Orders in the Exchange's Complex Order Book or by sending them to other trading venues where the transaction costs to them will be less expensive. Even with this surcharge, Customers are assessed the least amount per contract for executions in SPY. As noted herein, Customers are not assessed fees for adding and removing liquidity for SPY Complex Orders. The Exchange believes that assessing Customers lower fees is equitable and not unfairly discriminatory because Customer orders bring valuable liquidity to the market, which liquidity benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Routing Credit

The Exchange believes that its proposal is reasonable to reduce the amount of the credit it presently provides to certain member organizations that route away more than 5,000 Customer orders per day in a given month. Although the Exchange wishes to continue providing incentives to member organizations to utilize its routing service, it seeks to reduce the incentive for member organizations to route orders to away markets. Despite the reduction, the Exchange believes the credit remains competitive.

The Exchange believes that the proposal is an equitable allocation and is not unfairly discriminatory because the same reduced credit will uniformly be assessed on all member organizations when routing orders.

Permit Fees

Finally, the Exchange believes that its proposal is reasonable to increase its monthly Permit Fees for Floor Brokers and Floor Specialists and Market Makers. The Exchange has made substantial investments in building a new state-of-the-art Trading Floor for the Exchange as well as developing and deploying new and more advanced technologies for use on the new Trading Floor to the benefit of Floor Brokers, Floor Specialists, and Market Makers. The increased Permit Fees are a reasonable way for the Exchange to recoup some of these investments. Moreover, it is reasonable for the Exchange to recoup these investments from those members and member organizations that utilize the new Trading Floor and associated technologies.

The Exchange believes that the proposal is an equitable allocation and is not unfairly discriminatory because the same reduced credit will uniformly apply uniformly to all situated Floor Brokers, Specialists, and Market Makers that utilize the Trading Floor. Likewise, the Exchange does not believe that its proposal to increase Permit Fees will unduly burden competition because Floor Brokers, Market Makers, and Specialists may choose to utilize the Exchange's electronic environment or become members of other exchanges' trading floors if they conclude that the Exchange's Permit Fees are prohibitively expensive.

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, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

In this instance, the proposed changes to the charges assessed and the credits and rebates available do not impose a burden on competition because the Exchange's execution services are completely voluntary and subject to extensive competition both from other exchanges and from off-exchange venues. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

Simple Order Rebate for Adding Liquidity in SPY

The Exchange's proposal to decrease the amounts of its mid-tier rebates to Market Makers and Specialists that add liquidity in SPY does not impose an undue burden on competition because Market Makers and Specialists and Market Makers have obligations to the market and regulatory requirements, which normally do not apply to other market participants.¹⁶ They have obligations to make continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with a course of dealings. The

¹⁶ See Rule 1014 titled "Obligations and Restrictions Applicable to Specialists and Registered Options Traders."

differentiation as between Specialists and Market Makers and all other market participants recognizes the differing contributions made to the liquidity and trading environment on the Exchange by these market participants. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Customer Complex Order Surcharge

The Exchange's proposal to impose a \$0.05 per contract surcharge on Customers that execute Complex Orders against Market Maker or Specialist Quotes that rest on the Simple Order Book does not impose an undue burden on competition because Customers may avoid this new surcharge by executing their Complex Orders in the Exchange's Complex Order Book or by sending them to other trading venues where the transaction costs to them will be less expensive. Even with this surcharge, Customers are assessed the least amount per contract for executions in SPY. As noted herein, Customers are not assessed fees for adding and removing liquidity for SPY Complex Orders. The Exchange believes that assessing Customers lower fees is equitable and not unfairly discriminatory because Customer orders bring valuable liquidity to the market, which liquidity benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Routing Credit

The Exchange's proposal to reduce the amount of the credit it presently provides to certain member organizations that route away more than 5,000 Customer orders per day in a

given month does not impose an undue burden on competition because the reduced credit will uniformly be assessed on all member organizations when routing orders.

Permit Fees

The Exchange's proposal to increase its monthly Permit Fees for Floor Brokers and Floor Specialists and Market Makers does not impose an undue burden on competition because the permit fees will be uniformly assessed to all Floor Brokers, Specialists, and Market Makers that utilize the Trading Floor. Likewise, the Exchange does not believe that its proposal to increase Permit Fees will unduly burden competition because Floor Brokers, Market Makers, and Specialists may choose to utilize the Exchange's electronic environment or become members of other exchanges' trading floors if they conclude that the Exchange's Permit Fees are prohibitively expensive.

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.¹⁷

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.

¹⁷ 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-2017-108 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-2017-108. 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-2017-108, 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.¹⁸

Eduardo A. Aleman
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).