

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88525; File No. SR-Phlx-2020-12)

March 31, 2020

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Waive Certain Trading Floor Fees as Well as Adopt a Trading Floor Credit

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 March 20, 2020, 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 Phlx’s Pricing Schedule. Specifically, the Exchange proposes to amend certain fees within Options 7, Section 8, “Membership Fees” and Options 7, Section 9, “Other Member Fees” as well as propose a credit.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In light of the recent closure of open outcry trading on the Phlx Trading Floor as of March 17, 2020,³ Phlx proposes to waive certain floor-related fees within Options 7, Section 8, “Membership Fees” and Options 7, Section 9, “Other Member Fees.” Additionally, Phlx proposes to credit Phlx Trading Floor member organizations a fee for Clerks.⁴ Each proposal is discussed below.

Options 7, Section 8, Membership Fees and Section 9, Other Member Fees

Today, the Exchange assesses certain fees related to the Phlx Trading Floor within Options 7, Section 8. Among those fees, the Exchange assesses a Permit Fee of \$4,000 per month to Floor Brokers.⁵ The Exchange also assesses a Clerk Fee⁶ of \$100 per month. Finally,

³ See Options Trader Alert #2020 – 7.

⁴ The term “Clerk” means any registered on-floor person employed by or associated with a member or member organization who is not a member and is not eligible to effect transactions on the Options Floor as a Lead Market Maker, Floor Market Maker, or Floor Broker. An Inactive Nominee is deemed a Clerk. See Options 8, Section 12(a).

⁵ See Phlx Rules at Options 7, Section 8A.

⁶ The Clerk Fee is imposed on any registered on-floor person employed by or associated with a member or member organization pursuant to Options 3, Section 19, including Inactive Nominees pursuant to Options 8, Section 7. The Clerk Fee is not imposed on permit holders. See Phlx Rules at Options 7, Section 8A.

the Exchange assesses Streaming Quote Trader (“SQT”)⁷ Fees within Options 8, Section 8B.

The SQT Fees are tiered fees. Phlx’s 7 tier SQT Fees are as follows:

Number of Option Class Assignments	SQT Fees
Tier 1: Up to 200 classes	\$0.00 per calendar month
Tier 2: Up to 400 classes	\$2,200 per calendar month
Tier 3: Up to 600 classes	\$3200.00 per calendar month
Tier 4: Up to 800 classes	\$4200.00 per calendar month
Tier 5: Up to 1000 classes	\$5200.00 per calendar month
Tier 6: Up to 1200 classes	\$6200.00 per calendar month
Tier 7: All equity issues	\$7,200 per calendar month

In calculating the number of option class assignments for SQT Fees, equity options including ETFs and ETNs are counted. Currencies and indexes are not counted in the number of option class assignments.

The Exchange proposes to waive the Floor Broker Permit Fee, the Clerk Fee and the SQT Fees during the month of April 2020 and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020. The Exchange is waiving these fees based on the recent closure of open outcry trading on the Phlx Trading Floor. The Exchange notes, with respect to SQTs, that these participants may only submit quotations while physically present on the Trading Floor, therefore the closure of open outcry trading prevents SQTs from quoting.

⁷ The term “Streaming Quote Trader” is defined in Options 1, Section 1(b)(54) as 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. See Options 7, Section 1. Further, Options 1, Section 1(b)(54) provides that an 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.

Today, the Exchange assesses certain fees related to the Phlx Trading Floor within Options 7, Section 9. Among those fees, the Exchange assesses a Floor Facility Fee of \$330 per month, which is applicable Clerks (excluding Inactive Nominees pursuant to Options 8, Section 7), Floor Brokers, Market Makers (including SQTs) and individual Lead Market Makers). The Exchange proposes to waive the Floor Facility Fee within Options 7, Sections 8 and 9 due to the closure of open outcry trading on the Phlx Trading Floor.

Credits for Clerks

The Exchange proposes to pay a credit to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020. The Exchange proposes to pay each member organization a credit of \$5,000 per Clerk that is registered as of April 1, 2020 for the month of April 2020. Phlx will also pay the aforementioned credit for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 and the Clerk is registered as of May 1, 2020. The Exchange is proposing this credit for each registered Clerk to offer Phlx Trading Floor member organizations certain relief to continue to maintain its business operations.

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.

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(4) and (5).

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 . . . 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

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.

¹³ Id. at 537.

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.

Section 8, Membership Fees

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee during the month of April 2020 and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 is reasonable as open outcry on the Phlx Trading Floor is not available.¹⁵ The Exchange's proposal to waive these fees, which apply to transacting an options business on the Trading Floor, is intended to alleviate costs for member organizations while these member organizations are unable to transact options in open outcry on the Phlx Trading Floor.

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee during the month of April 2020 and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 is equitable and not unfairly discriminatory as the Exchange will apply these proposed waivers uniformly to all member organizations on the Trading Floor. Phlx continues to permit electronic trading and therefore fees associated with electronic trading have not been waived.

Credits for Clerks

The Exchange's proposal to pay a credit in April 2020 (and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 and the Clerk is registered

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 The Exchange announced that as of March 17, 2020 open outcry trading was not available. See Options Trader Alert #2020 – 7.

as of May 1, 2020) to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020 (and potentially May 1, 2020) is reasonable. For the month of April 2020 (and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 and the Clerk is registered as of May 1, 2020), Phlx proposes to pay each member organization a credit of \$5,000 per Clerk, which the firm has registered as of April 1, 2020 (and potentially May 1, 2020), to provide relief to member organizations that are currently unable to transact options in open outcry on the Phlx Trading Floor. Phlx is proposing this credit to assist member organizations to continue to maintain their business operations during April 2020, and potentially May 2020 based on whether open outcry trading is available in May 2020.

The Exchange's proposal to pay a credit in April 2020 (and potentially May 2020) to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020 (and potentially May 1, 2020) is equitable and not unfairly discriminatory. The Exchange proposes to pay all member organizations a credit for each Clerk the firm has registered as of April 1, 2020 (and potentially May 1, 2020) in a uniform manner. The Exchange believes that paying a credit to member organizations for each Clerk would alleviate some of the financial burden for each member organization. A Clerk is any registered on-floor person employed by or associated with a member or member organization who is not a member and is not eligible to effect transactions on the Options Floor as a Lead Market Maker, Floor Market Maker, or Floor Broker. As such, Clerks are employees of Phlx Trading Floor member organizations that would not otherwise be able to transact an options business as a Lead Market Maker, Floor Market Maker, or Floor Broker. The Exchange believes that paying a credit to member organizations for each Clerk registered as of April 1, 2020 (and potentially

May 1, 2020) will assist member organizations in continuing to employ Clerks during the closure of open outcry trading.

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 proposed amendments do not impose an undue burden on intra-market competition.

Section 8, Membership Fees

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee during the month of April 2020, and for the month of May 2020, in the event that open outcry trading is unavailable as of May 1, 2020 does not impose an undue burden on competition as the Exchange will apply these proposed waivers uniformly to all member

organizations on the Trading Floor. Phlx continues to permit electronic trading and therefore fees associated with electronic trading have not been waived.

Credits for Clerks

The Exchange's proposal to pay a credit in April 2020 (and potentially May 2020) to Trading Floor member organizations based on the number of Clerks those member organizations have registered as of April 1, 2020 (and potentially May 1, 2020) does not impose an undue burden on competition. The Exchange proposes to pay all member organizations a credit for each Clerk the firm has registered as of April 1, 2020 (and potentially May 1, 2020) in a uniform manner. The Exchange believes that paying a credit to member organizations for each Clerk would alleviate some of the financial burden for each member organization. Clerks are any registered on-floor person employed by or associated with a member or member organization who is not a member and is not eligible to effect transactions on the Options Floor as a Lead Market Maker, Floor Market Maker, or Floor Broker. As such, Clerks are employees of Phlx Trading Floor member organizations that would not otherwise be able to transact an options business as a Lead Market Maker, Floor Market Maker, or Floor Broker. The Exchange believes that paying a credit to member organizations for each Clerk registered as of April 1, 2020 (and potentially May 1, 2020) will assist member organizations in continuing to employ Clerks during the closure of open outcry trading.

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.¹⁶

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:

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-2020-12 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-2020-12. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2020-12 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.¹⁷

J. Matthew DeLesDernier
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).