

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-90880; File No. SR-Phlx-2021-03)

January 8, 2021

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Proposed Rule Change to Modify Phlx Options 8, Section 26, “Trading Halts, Business Continuity and Disaster Recovery”

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 January 7, 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, 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 modify Phlx Options 8, Section 26, “Trading Halts, Business Continuity and Disaster Recovery” to permit a Virtual Trading Crowd in the event that the Trading Floor is unavailable.

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.

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

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

<sup>2</sup> 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

Phlx proposes to modify Phlx Options 8, Section 26, “Trading Halts, Business Continuity and Disaster Recovery.” This proposal creates an additional contingency within Phlx’s Business Continuity Plan (“BCP”) to prepare for potential closure of its physical Trading Floor in light of COVID-19. Specifically, the Exchange proposes to amend Options 8, Section 26(g) to permit Phlx to operate a newly proposed Virtual Trading Crowd in the event the physical Trading Floor is unavailable.

Background

Currently, Options 8, Section 26(g) describes certain actions the Exchange may take as part of its BCP, if its Trading Floor became inoperable, so that it may maintain fair and orderly markets if unusual circumstances were to occur which may impact the Exchange’s ability to conduct its options floor business. Specifically, in the event of loss of the Trading Floor, if the physical location<sup>3</sup> designated as the “Trading Floor” becomes unavailable Phlx will enact its BCP and designate the Philadelphia Navy Yard as its “Back-Up Trading Floor.” Further, in the event that the Back-Up Trading Floor becomes unavailable or inoperable, the Exchange will only operate its electronic market and will not operate a Trading Floor. The Exchange will operate

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<sup>3</sup> Phlx’s physical Trading Floor is located at 2929 Walnut Street, Philadelphia, PA.

only its electronic market until the Exchange's Trading Floor facility is operational. Open outcry trading will not be available in the interim.<sup>4</sup>

Phlx's Trading Floor closed on March 17, 2019,<sup>5</sup> as a result of precautions taken with respect to COVID-19.<sup>6</sup> The Exchange continued to operate in an all-electronic configuration during this time period. Since that time, Phlx has been exploring alternatives to permit open outcry trading in the event of an extended closure related to COVID-19 or potentially a second closure in 2020 and/or 2021 given the uncertainty related to the ongoing pandemic. Phlx notes that an all-electronic trading environment cannot fully replicate open outcry trading, and therefore, the Exchange continues to evaluate potential enhancements that it believes would permit trading, in the event the Trading Floor is inoperable, to more closely replicate its trading environment that exists during normal operations.<sup>7</sup>

Phlx proposes to amend Options 8, Section 26(g)(2) to provide,

*Back-up Trading Floor Unavailable.* In the event that the Back-Up Trading Floor becomes inoperable, or the Exchange otherwise determines not to operate its Back-Up Trading Floor the Exchange will operate its electronic market and may elect to enact a Virtual Trading Crowd pursuant to subsection (g)(3).

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<sup>4</sup> This Rule does not preclude the Exchange from conducting business, in the event the Trading Floor and Back-Up Trading Floor are rendered inoperable, pursuant to Options 4, Section 10. Current Options 4, Section 10, Backup Trading Arrangements, outlines rules applicable to hosting Phlx at another exchange in the event Phlx is disabled.

<sup>5</sup> See Options Trader Alert #2020 – 07. Phlx's Trading Floor did not re-open until June 3, 2020. See Options Trader Alert #2020 – 08.

<sup>6</sup> On March 11, 2020, the World Health Organization characterized COVID-19 as a pandemic and to slow the spread of the disease, federal and state officials implemented social-distancing measures, placed significant limitations on large gatherings, limited travel, and closed non-essential businesses.

<sup>7</sup> Certain aspects of open outcry trading, particularly the ability for persons to negotiate pricing and to facilitate executions of larger orders in a trading crowd as well as the handling of high-risk and complicated strategies, are not easily replicated in electronic markets.

Today, Options 8, Section 26(g)(2) provides that if the Back-Up Trading Floor becomes inoperable, the Exchange will only operate its electronic market and will not operate a Trading Floor. Further, the rule provides the Exchange will operate only its electronic market until the Exchange's Trading Floor facility is operational. Open outcry trading will not be available in the interim.

At this time, the Exchange desires to adopt a virtual option in the event the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor.<sup>8</sup> Specifically, Phlx's proposal would permit certain aspects of open outcry trading, which are normally conducted in-person on the Trading Floor, to be conducted in a virtual trading crowd ("Virtual Trading Crowd"). This proposal is intended to enhance Phlx's BCP by offering an alternative which comports with shelter-in-place and social distancing guidelines and would provide institutional investors with a means to execute orders that are unable to meet guidelines of the electronic market.<sup>9</sup> Specifically, this proposal would further enhance the Exchange's trading environment when the Trading Floor is unavailable, the Back-up Trading Floor is inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor, by permitting market participants that generally operate on the physical Trading Floor to continue to interact in a substantially similar

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<sup>8</sup> The proposed rule regarding the Virtual Trading Crowd is located in the Exchange's broader rule regarding disaster recovery and business continuity, as the Exchange currently only plans to use the Virtual Trading Crowd for business continuity purposes if the physical Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. If the Exchange were to determine to use the Virtual Trading Crowd in more permanent manner, it would submit a separate rule filing.

<sup>9</sup> For example, there are certain aspects of trading where the rules differ electronically and on the Trading Floor. Complex Orders are traded differently electronically versus on the Trading Floor based on Exchange rules.

manner as they do on the Trading Floor. Specifically, the Exchange proposes to further amend Options 7, Section 26(g) to permit it to make available an audio and video communication program to serve as a “Virtual Trading Crowd” if the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. The Exchange would create “Virtual Trading Crowds,” in each of which the Exchange will determine which options class(es) will be available for trading. This is similar to the Exchange’s authority with respect to open outcry trading on the Trading Floor.<sup>10</sup> Phlx members will access a Virtual Trading Crowd via “zones.”<sup>11</sup> Multiple classes may trade in a single Virtual Trading Crowd available for trading in a single zone. This is similar to the physical Trading Floor today. The Exchange may determine to have only one zone or several zones as necessary to ensure a fair and orderly market. The Exchange will assign each Floor Market Maker to a zone and Floor Brokers may determine in which zone(s) they will be present. This is similar to the arrangement on the Exchange’s physical Trading Floor. Unlike Cboe, Phlx has a requirement that each trading crowd have a Floor Market Maker present.<sup>12</sup> Phlx ensures that this requirement is met by assigning Floor Market Makers to a trading crowd.<sup>13</sup> If a Floor Market Maker hears a Floor Broker located in another trading crowd represent an order, the

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<sup>10</sup> See Options 8, Section 25(l) which provides, “In the interest of fair and orderly markets, the Exchange may adopt policies affecting the location of members in the trading crowd on a crowd-by-crowd basis.”

<sup>11</sup> A “zone” is a virtual room representing a Virtual Trading Crowd. For example, each trading crowd will have its own zoom password-protected log-in.

<sup>12</sup> See Options 8, Section 28, “...An Options Floor Broker shall ascertain that at least one Floor Market Maker is present at the trading post prior to representing an order for execution....”

<sup>13</sup> The Exchange notes that as a result of COVID-19, the Exchange implemented various safety protocols including socially distancing floor members by assigning spaces to all floor market participants on the physical Trading Floor.

Floor Market Maker may attempt to trade with that order. The Exchange intends that the concept of a zone replicate a crowd on the physical Trading Floor.

Phlx proposes to replicate the open outcry features on the physical Trading Floor within a Virtual Trading Crowd. The Exchange will use a communication program that has audio, video, and “chat” functionality.<sup>14</sup> Floor members would log into the Virtual Trading Crowd, as described in more detail below, and would communicate trades within the conferencing feature. This will allow the same communication capabilities floor members generally have on the physical Trading Floor so that they may conduct open outcry trading in the Virtual Trading Crowd in the same manner as they do on the physical Trading Floor.

All Options 8 Rules will apply to open outcry trading in the Virtual Trading Crowd, in the same manner as they apply to open outcry trading on the physical Trading Floor, except as otherwise provided for in proposed Options 8, Section 26(g)(3)(E). The proposed changes are described below. The Exchange proposes to adopt a new Options 8, Section 26(g)(3) to permit the Exchange to make available an audio and video communication program to serve as a “Virtual Trading Crowd” if the physical Trading Floor is not available.

Proposed Options 8, Section 26(g)(3)(A) lists certain terms in the Rules related to open outcry trading on the physical Trading Floor that will be deemed to refer to corresponding terms related to trading in the Virtual Trading Crowd. Specifically,

- References in the Rules to the “floor,” “Trading Floor,” and “Exchange floor” (and any other terms with the same meaning) will be deemed to refer to the “Virtual Trading Crowd”; and

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<sup>14</sup> Currently available programs with this functionality include Zoom, Webex, Microsoft Teams, and others.

- References in the Rules to “physical presence” or “on-floor” or “floor” (and any other terms with the same meaning) will be deemed to refer to “presence” in a Virtual Trading Crowd.

The proposal does not amend or replace any aspects of Phlx’s Options Floor Based Management System (“FBMS”) or order execution functionalities.<sup>15</sup> Today, FBMS is designed to execute orders entered by Floor Brokers,<sup>16</sup> including multi-leg orders up to 15 legs, after representation in the trading crowd. When a Floor Broker submits an order for execution through FBMS, the order will be executed based on market conditions at the time of execution and in accordance with Phlx rules. FBMS execution functionality checks the Order Book to ensure compliance with priority rules. Orders that do not comply with priority and trade-through rules will not be executed. All FBMS order and transaction data that would normally be available from the physical Trading Floor would continue to be captured by FBMS and the System. These compliance checks, which are crucial to ensuring compliance with Exchange rules, will continue with the Virtual Trading Crowd model.

Access to the Virtual Trading Crowd will be substantially similar to access to the physical Trading Floor. Only members registered to access Phlx’s Trading Floor would be permitted to participate. The Exchange is not proposing to amend its membership requirements

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<sup>15</sup> FBMS, an order management system, is the gateway for the electronic execution of equity, equity index and U.S. dollar-settled foreign currency option orders represented by Floor Brokers on the Exchange’s Options Floor. Floor Brokers contemporaneously upon receipt of an order and prior to the representation of such an order in the trading crowd, record all options orders represented by such Floor Broker to FBMS, which creates an electronic audit trail. The execution of orders to Phlx’s electronic trading system also occurs via FBMS. The FBMS application is available on hand-held tablets and stationary desktops.

<sup>16</sup> The term “Floor Broker” means an individual who is registered with the Exchange for the purpose, while on the Options Floor, of accepting and handling options orders. See Options 8, Section 2(2).

with respect to virtual open outcry trading. Currently, admission to the physical Trading Floor is limited to members and member organizations, Exchange employees, clerks employed by members and member organizations, Inactive Nominees, and Exchange visitors that receive authorized admission to the Trading Floor pursuant to Exchange policy, and any other persons that the Exchange authorizes admission to the Trading Floor.<sup>17</sup> Persons and entities may apply to become a Phlx member by complying with the membership requirements noted within Phlx General 3, Membership and Access. Proposed Options 8, Section 26(g)(3)(B) provides, “Admission to the Virtual Trading Crowd is limited to members and member organizations, Clerks, Exchange employees, and any other persons the Exchange authorizes admission to the Virtual Trading Crowd.”

The Exchange proposes to limit the number of members, per member organization, that may participate in a Virtual Trading Crowd based on the ability of Phlx to accommodate members within the remote conferencing feature in an orderly fashion. The Exchange would limit personnel in a fair and equitable manner ensuring there is fair and equal representation from each member and member organization. This proposal would allow each of the trading crowds that exist on Phlx’s physical Trading Floor to participate in this “Virtual Trading Crowd” in one or more separate zones as described above.

While clerks may access the Virtual Trading Crowd, they may only perform the same functions for their associated member organizations in connection with open outcry trading in the Virtual Trading Crowd as they do for open outcry trading on the physical Trading Floor. The Exchange understands permitting access to Clerks to access the Virtual Trading Crowd will provide them with access to the information that they normally have access to on the physical

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<sup>17</sup> See General 3, Section 1, Options 8, Sections 5 -9, and Options 8, Sections 11 and 12.

Trading Floor, which will make it more efficient for them to perform their tasks. Also, the Exchange would not permit visitors into the Virtual Trading Crowd as the Exchange believes that allowing these types of persons to have access to the Virtual Trading Crowd is unnecessary as these persons are not essential to the functioning of the Virtual Trading Crowd. As is the case with the physical Trading Floor, the Exchange will provide access to the Virtual Trading Crowd to members the Exchange has approved to perform a Trading Floor function (including Floor Brokers and Floor Market Makers).

While floor members would not be required to display badges, pursuant to Options 8, Section 39 at Regulation 3, in the Virtual Trading Crowd, as the size of the view on the communication program may not permit badges to be visible, members would be required to join the Virtual Trading Crowd in a manner that clearly identifies the member or member's employee.

Pursuant to proposed Options 3, Section 26(g)(3)(E)(8)(a), prior to speaking on remote conferencing, each member must announce themselves each time.<sup>18</sup> As specified within proposed Options 8, Section 26(g)(3)(E)(2), members must join via a computer and either (a) computer audio; (b) cell phone; or (c) hard-wired phone, as determined by Nasdaq. Phlx will send a password-protected invitation to each floor participant permitted access to the Virtual Trading Crowd. This invitation will permit each permitted participant to access the Virtual Trading Crowd in a safe and secure manner. Any floor member may access any zone within the Virtual Trading Crowd, although Floor Market Makers will be required to be present in their assigned zone if present within the Virtual Trading Crowd. Any unidentified attendee will be

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<sup>18</sup> Members would also be visible on video, however the Exchange will still require members to announce themselves.

removed from the Virtual Trading Crowd. The Exchange will have an audit trail of the telephone numbers that have joined each remote conferencing session in order to ensure that only members join the remote conferencing feature. Every member in the Virtual Trading Crowd must provide Market Operations with a contact number where Market Operations will be able to reach them during the trading day. The contact number may not be the same number that is being used to connect to the Virtual Trading Crowd. Floor members are responsible for maintaining updated contact information. This number must be updated immediately if it changes. Nasdaq staff must be able to reach a member if there is an issue with trading.<sup>19</sup> Nasdaq non-regulatory staff would be responsible for the operation of the remote conferencing feature, which includes monitoring members to ensure that only floor members and member's employees are admitted into remote conferencing and are properly identified.

As specified within proposed Options 3, Section 26(g)(3)(E)(1), every member and the member's employees in the Virtual Trading Crowd must consent to video and audio recording in order to participate in the Virtual Trading Crowd. Members and members' employees will be asked to provide this consent, as well as other consents, before being permitted to join the Virtual Trading Crowd. For example, member organizations would be required to execute an addendum to the Nasdaq Services Agreement regarding their use of the remote conferencing feature in addition to consenting to voice recording.

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<sup>19</sup> The conferencing room would be password protected and equipped with audio, video and text capabilities. Attendance control requirements would be in place. Private chat features will not be permitted on the platform. Unknown callers would be removed from the conferencing room. Nasdaq non-regulatory staff would be in control of the conference room.

Today, pursuant to Options 8, Section 38, floor members must register their means of communication with the Exchange.<sup>20</sup> Pursuant to proposed Options 8, Section 26(g)(3)(E)(4), members and member organizations may use any equipment to access the Virtual Trading Crowd and do not need to register devices they use while in the Virtual Trading Crowd. Floor members and member organizations would be permitted remote access to FBMS when the Virtual Trading Floor is enacted.<sup>21</sup> The Exchange proposes to provide within Options 8, Section 26(g)(3)(C) that, "...Notwithstanding Options 8, Section 28(g) and Options 8, Section 30(e), members and member organizations would be permitted remote access to the Options Floor Based Management System ("FBMS") when the Virtual Trading Floor is enacted for the purpose of executing transactions which require exposure in open outcry." Floor members must use Exchange-provided FBMS, to the extent applicable, while transacting in the Virtual Trading Crowd. As noted above, prior to using a communications device for business purposes on the Trading Floor of the Exchange, members and member organizations must register the

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<sup>20</sup> Options 8, Section 38(a) provides, "No member or member organization shall establish or maintain any private wire connection, private radio, television or wireless system, between the Exchange Trading Floor and a nonmember without application to and approval by the Exchange. Every such means of communication shall be registered with the Exchange. Notice of the discontinuance of any such means of communication shall be promptly given to the Exchange."

<sup>21</sup> At the time of the Phlx Trading Floor closure in March 2020, the Exchange permitted Floor Brokers, who otherwise had no means of trading on Phlx in an electronic environment, to utilize FBMS remotely, solely for the purpose of submitting limit orders to the electronic limit order book pursuant to Options 8, Section 28(g), or submitting a Floor Qualified Contingent Cross Order to the System pursuant to Options 8, Section 30(e). See Options Trader Alert #2020 – 8.

Recently, the Exchange filed a proposal to amend Options 8, Section 28(g) and Options 8, Section 30(e) to continue to allow Floor Brokers the ability to submit limit orders to the electronic limit order book and Floor Qualified Contingent Cross Orders to the System via FBMS remotely, notwithstanding the existence of BCP measures. See SR-Phlx-2021-01. This recent proposal did not permit FBMS to be utilized remotely for the purpose of executing transactions which require exposure in open outcry.

communications device in a form and manner prescribed by the Exchange. Because individuals in the Virtual Trading Crowd will not be on the Exchange's premises (and thus will not be using Exchange-provided bandwidth to be shared with all market participants and do not pose the same security risks), the proposed rule change will not require members and member organizations to register devices they use while in the Virtual Trading Crowd. Options 8, Section 38 will otherwise apply in the same manner to the Virtual Trading Crowd as it does to the physical Trading Floor (to the extent the context requires). This includes requirements related to audit trail and record retention, prohibition on using any device for the purpose of recording activities in the Virtual Trading Crowd or maintaining an open line of continuous communication whereby a person not located in the trading crowd may continuously monitor the activities in the trading crowd, and the prohibition on using devices to disseminate quotes or last sale reports.

Surveillance staff will be present in each Virtual Trading Crowd to monitor the activity of each participant, who must be present by video, and to observe participant behavior. The Exchange will continue to surveil options transactions, as it does today, to identify transactions which are violative of Phlx Rules.<sup>22</sup> Phlx surveils for transactions which have been executed on its market to determine if those transactions utilized information which would have been available in open outcry trading and was not yet public or otherwise ascertainable due to the execution of a transaction. The Exchange notes that in both the electronic market and on the trading floor, members and member organizations must ensure that they have procedures reasonably designed to prevent the misuse of material, non-public information by employees.<sup>23</sup> Further, the Exchange proposes to provide within proposed Options 8, Section 26(g)(3)(E)(8)(g) that "A member may

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<sup>22</sup> See Phlx Options 9, Section 1; and Options 9, Section 5. See also Options 3, Section 22(d).

<sup>23</sup> See Phlx General 9, Section 21.

not permit any unauthorized other person to gain audio or video access to the Virtual Trading Crowd. A member shall not record any trading sessions,” to make clear that the Exchange will enforce the prohibitions of Options 8, Section 38 with respect to the remote conferencing aspects as well. Finally, the Exchange represents that it has the proper security infrastructure in place to offer FBMS remotely and securely to floor participants.

Today, members on the physical Trading Floor only verbalize their interest to trade against a represented order, so not requiring bids and offers to be included in a chat conforms to current practice on the Trading Floor. However, given potential limitations of communication software (such as limitations on how many people may be heard at the same time in a Virtual Trading Crowd or potential buffering or echoing), the Exchange believes it may be appropriate to require members to use a chat tool in the communication program to indicate their interest in participating in a trade so that the representing Floor Broker is able to know the market from the trading crowd and fairly allocate the trade pursuant to the Rules.<sup>24</sup> The Exchange would require members to utilize the chat function if Surveillance determines that increased volume or activity in the Virtual Trading Crowd warrant mandatory use of the chat feature for members to maintain a fair and orderly market. Chats will be visible to all participants in a zone and will not be permitted directly between individual participants (i.e., the Exchange will disable direct messaging functionality within the communication program). The Exchange believes the flexibility to impose this requirement in a Virtual Trading Crowd is appropriate, as these limitations may ultimately not interfere with a Floor Broker’s ability to hear all interest

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<sup>24</sup> The Exchange would issue an Options Trader Alert announcing any determination to require bids and offers to be expressed in a chat within the communication program pursuant to proposed Options 8, Section 26(g)(3)(D). The Exchange will provide such notice with sufficient advance notice.

(particularly in Virtual Trading Crowd) and thus the additional requirement may potentially slow down executions. Flexibility will permit the Exchange to balance system limitations with the additional burden of a new workflow step for each class, some of which have different open outcry trading environments than others.

The Exchange will retain records of the chats as well as consents, and any other records related to the Virtual Trading Crowds that are subject to the Exchange's record retention obligations under the Exchange Act.

Pursuant to Options 3, Section 26(g)(3)(E)(8)(b), if a member experiences a technical issue accessing the remote conferencing, the Exchange will not be responsible for unexecuted trades. Also, pursuant to Options 3, Section 26(g)(3)(E)(8)(c), Floor Market Maker quotes will be considered firm in the event the Floor Market Maker is disconnected from the Virtual Trading Crowd and the parties have a meeting of the minds with respect to the terms of the transaction. A "Meeting of the Minds" means the contra-side(s) verbally confirmed participation in the trade. In the event that a Floor Market Maker is disconnected from the Virtual Trading Crowd, a Floor Market Maker quote would not be considered firm if the quote were provided and the parties did not have a Meeting of the Minds with respect to the terms of the transaction.

Today, Floor Market Maker quotes are considered firm when announced in open outcry<sup>25</sup>

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<sup>25</sup> See Options 8, Section 22(c) Public Outcry - Pursuant to Options 8, Section 24 (this citation is being amended in this rule change from Section 35 to the correct Section 24) at Supplementary Material .01, bids and offers must be made in an audible tone of voice. A member shall be considered "in" on a bid or offer, while he remains at the post, unless he shall distinctly and audibly say "out." A member bidding and offering in immediate and rapid succession shall be deemed "in" until he shall say "out" on either bid or offer. Once the trading crowd has provided a quote, it will remain in effect until: (A) a reasonable amount of time has passed, or (B) there is a significant change in the price of the underlying security, or (C) the market given in response to the request has been improved. In the case of a dispute, the term "significant change" will be interpreted on a case-by-case basis by an Options Exchange Official based upon the extent of the recent

and once accepted the transaction may be effectuated within FBMS. A Floor Market Maker may declare he or she is “out” prior to a Meeting of the Minds occurring in open outcry and the Floor Broker submitting the trade into FBMS.<sup>26</sup> Today, a Floor Market Maker that experiences issues with internet connection,<sup>27</sup> makes an error or otherwise is unaware of recent news in a particular option, would be held to a quote verbalized in open outcry. In the event that the negotiation continues and the terms change, the Floor Market Maker would not be held to the new terms without additional acceptance of those terms. In the event that the transaction is not effectuated in FBMS, the trade would not stand. To that end, the Exchange believes continuing to require quotes to remain firm once the parties have arrived at a Meeting of the Minds with respect to the terms of the transaction creates fair and equitable expectations for members trading in the Virtual Trading Crowd.

Today, FLEX transactions are permitted on the Trading Floor in accordance with Options 3, Section 34. With this proposal, FLEX Trade tickets must be sent by email to the Phlx Correction Post pursuant to proposed Options 8, Section 26(g)(3)(E)(8)(d). This proposal would allow the Exchange to receive these in a timely manner.

The Exchange notes within proposed Options 8, Section 26(g)(3)(E)(8)(e) that a break-out room may be utilized to declare a dispute or otherwise notify an Options Floor Official of any required notifications. The Exchange would establish a break-out room within the remote conferencing for each dispute. This would provide an effective manner in which to

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trading in the option and, in the case of equity and index options, in the underlying security, and any other relevant factors.

<sup>26</sup> Id at 25.

<sup>27</sup> The Exchange notes that today members are responsible for the operation of their own equipment while on the Trading Floor.

communicate disputes and maintain a record of those disputes.

Pursuant to proposed Options 8, Section 26(g)(3)(E)(8)(f) disruptive or unnecessary conversations or comments in the remote conferencing or on chat feature will not be permitted. This type of behavior would subject a member to disciplinary action. Today, disruptive behavior on the Trading Floor is subject to Options 8, Section 39 at Regulation 4.<sup>28</sup>

As noted above, the Exchange may determine to make the Virtual Trading Crowd available if the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. Proposed Options 8, Section 26(g)(3) provides that “The Exchange may elect to permit open outcry trading to take place in a Virtual Trading Crowd if the Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor.” These amendments to the Options 8 Rules are intended to make trading in a Virtual Trading Crowd similar to open outcry trading when open outcry trading is not available by replicating certain features of open outcry trading in the Virtual Trading Crowd. The Virtual Trading Crowd will permit open outcry trading to continue in a separate environment if the physical Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. Therefore, trading opportunities that are generally only available in open outcry trading will continue to be available in the Virtual Trading Crowd.

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<sup>28</sup> Options 8, Section 39, Regulation 4(a) provides, “Members and associated persons shall not conduct themselves in a disorderly manner on the trading floor or on the premises immediately adjacent to the trading floor. Further, members, participants and associated persons shall not conduct themselves in an indecorous manner that is disruptive to the conduct of business on the trading floor, including but not limited to the use of profanity.”

All trading in the Virtual Trading Crowd will occur in the same manner, including priority and allocation rules.<sup>29</sup> The Exchange will make the same order types and instructions available in the Virtual Trading Crowd as it makes available on the physical Trading Floor.<sup>30</sup> Floor Brokers will be subject to the responsibilities in each environment.<sup>31</sup> Additionally, members and member organizations participating in the Virtual Trading Crowd will be subject to the same regulatory requirements as they are on the physical Trading Floor.<sup>32</sup> Orders must be systematized, and represented, and transactions reported, in connection with the Virtual Trading Crowd floor in the same manner as they are when trading on the physical Trading Floor.<sup>33</sup> Therefore, the audit trail for open outcry trading in the Virtual Trading Crowd will capture the same information that it does for open outcry trading on the physical Trading Floor.

#### *Surveillance*

Phlx Surveillance staff would remotely surveil transactions in the Virtual Trading Crowd, in real-time. Specifically, there would be an Options Floor Official present in each Virtual Trading Crowd. Nasdaq Surveillance would conduct real-time surveillance for violations of Phlx rules, as is the case with physical open outcry. Floor Surveillance Procedures would be updated to account for the conferencing and chat requirements, as well as any changes to surveil a Virtual Trading Crowd. All surveillance patterns would be operable and function normally.

The Exchange also proposes to re-number current Options 3, Section 26(g)(3) as (4). The Exchange notes that this proposal does not amend the manner in which fees or other pricing

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<sup>29</sup> See Options 8, Sections 25 and 30.

<sup>30</sup> See Options 8, Section 32.

<sup>31</sup> See Options 8, Sections 18 and 28.

<sup>32</sup> See Options 8 generally.

<sup>33</sup> See Options 8 generally.

incentives, such as caps, apply to floor participants. Any transaction originating from open outcry on the Trading Floor is considered a floor transaction and would continue to be considered a floor transaction for purposes of the Virtual Trading Crowd. With offering FBMS remotely, the Exchange does not propose to amend the manner in which fees are assessed or rebates are paid for purposes of Options 7 pricing to Floor Brokers.

The Exchange has conducted several town halls with floor members in which the Exchange presented the functionality of the Virtual Trading Crowd and has made the Virtual Trading Crowd available for testing so that the Exchange will be ready to implement it if necessary. The Exchange has received positive feedback from floor members regarding the Virtual Trading Crowd and will continue to make updates as necessary and appropriate in response to comments it receives to make the Virtual Trading Crowd replicate the open outcry trading experience on the physical Trading Floor as much as possible. The Exchange believes this will provide the opportunity for as seamless a rollout as possible if circumstances cause the Exchange to make the Virtual Trading Crowd available.

#### Technical Amendments

The Exchange proposes to amend Options 8, Section 22, Execution of Options Transactions on the Trading Floor, to correct two citations in Options 8, Sections 22(b) and (c). The citations to Options 8, Section 35 should be to Options 8, Section 24. These corrections will ensure the rule text is accurate.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>34</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>35</sup> in particular, in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In particular, the Exchange believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, as it will permit open outcry trading to continue in the event the Exchange's Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. As discussed above, there are certain features of open outcry trading that are difficult to replicate in an electronic trading environment. The Exchange has observed, and understands from various market participants, that they have had difficulty executing certain orders, such as larger orders and high-risk and complicated strategies, in an all-electronic trading configuration without the element of human interaction to negotiate pricing for these orders. The proposed rule change would provide an environment in which this interaction would be available despite the potential unavailability of the physical Trading Floor. The Exchange believes the proposed rule change may facilitate continued trading of these orders if and when the physical Trading

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<sup>34</sup> 15 U.S.C. 78f(b).

<sup>35</sup> 15 U.S.C. 78f(b)(5).

Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. As a result, the Exchange believes providing continuous access to open outcry trading when the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor will remove impediments to a free and open market and will ultimately benefit investors, particularly those desiring to execute high-risk and complex trading strategies.

The Virtual Trading Crowd would have the same capability to utilize FBMS as the primary Trading Floor today with the availability of remote FBMS.<sup>36</sup> The Exchange also believes the proposed rule change will promote just and equitable principles of trade as open outcry trading in a Virtual Trading Crowd will occur in accordance with the same trading rules and be subject to the same regulatory requirements that apply to open outcry trading on the physical Trading Floor, all of which have previously been filed with the Commission. The proposed rule change will merely permit this open outcry trading to occur in a virtual setting rather than a physical setting (which may be appropriate for health and safety purposes). For the Virtual Trading Crowd, open outcry trading will occur while market participants operate remotely as they do when they trade electronically. Open outcry trading on a physical Trading Floor or in a Virtual Trading Crowd will be subject to the same priority and allocation rules as open trading on the physical Trading Floor, as set forth in Options 8, Sections 25 and 30.

As is the case for open outcry trading on a physical Trading Floor, open outcry trading in a Virtual Trading Crowd is consistent with Section 11(a) of the Act, as Rule 5.85(a)(2)(E) (which will apply to open outcry trading in a Virtual Trading Crowd) requires members and

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<sup>36</sup> See note 15 above.

member organizations relying on Section 11(a)(1)(G) of the Act and Rule 11a1-1(T) thereunder (the so called “G exemption rule”) as an exemption must yield priority to any bid (offer) at the same price of Public Customer orders and broker-dealer orders resting in the Order Book, as well as any other bid (offer) that has priority over those broker-dealer orders under this Rule.

The Exchange further believes the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest by permitting the Exchange to establish zones. As discussed above, the zones are intended to replicate the physical Trading Floor’s organization and will permit floor members to interact in a substantially similar way as they do on the physical Trading Floor. The zones will also encourage interaction of a reasonable number of people within the communication program. While the zones will include additional functionality that is not otherwise available on the physical Trading Floor, such as the chat functionality, the Exchange believes the creation of zones and inclusion of this functionality will create a virtual environment that promotes fair and orderly trading given the potential limitations of communication software.

The Exchange will make the same order types and instructions available in a Virtual Trading Crowd as it makes available on a physical Trading Floor pursuant to Options 8, Section 32. Floor Brokers will be subject to the responsibilities set forth in Options 8, Sections 18 and 28 in a Virtual Trading Crowd, as they are on a physical Trading Floor. Additionally, members and member organizations participating in a Virtual Trading Crowd will be subject to the same regulatory requirements in a Virtual Trading Crowd as they are on a physical Trading Floor, including those set forth generally within Options 8. Orders must be systematized and represented, and transactions reported, in connection with a Virtual Trading Crowd in the same

manner as they are when trading on a physical Trading Floor. The Exchange will retain records of the chats as well as consents, and any other records related to the Virtual Trading Crowd that are subject to the Exchange's record retention obligations under the Exchange Act.

Pursuant to Options 3, Section 26(g)(3)(E)(8)(c), Floor Market Maker quotes will be considered firm in the event the Floor Market Maker is disconnected from the Virtual Trading Crowd and the parties have a Meeting of the Minds with respect to the terms of the transaction. A "Meeting of the Minds" means the contra-side(s) verbally confirmed participation in the trade. In the event that a Floor Market Maker is disconnected from the Virtual Trading Crowd, a Floor Market Maker quote would not be considered firm if the quote were provided and the parties did not have a Meeting of the Minds with respect to the terms of the transaction. Today, Floor Market Maker quotes are considered firm when announced in open outcry<sup>37</sup> and once accepted the transaction may be effectuated within FBMS. A Floor Market Maker may declare he or she is "out" prior to a Meeting of the Minds occurring in open outcry and the Floor Broker submitting the trade into FBMS.<sup>38</sup> Today, a Floor Market Maker that experiences issues with

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<sup>37</sup> See Options 8, Section 22(c) Public Outcry - Pursuant to Options 8, Section 35 at Supplementary Material .01, bids and offers must be made in an audible tone of voice. A member shall be considered "in" on a bid or offer, while he remains at the post, unless he shall distinctly and audibly say "out." A member bidding and offering in immediate and rapid succession shall be deemed "in" until he shall say "out" on either bid or offer. Once the trading crowd has provided a quote, it will remain in effect until: (A) a reasonable amount of time has passed, or (B) there is a significant change in the price of the underlying security, or (C) the market given in response to the request has been improved. In the case of a dispute, the term "significant change" will be interpreted on a case-by-case basis by an Options Exchange Official based upon the extent of the recent trading in the option and, in the case of equity and index options, in the underlying security, and any other relevant factors.

<sup>38</sup> Id at 25.

internet connection,<sup>39</sup> makes an error or otherwise is unaware of recent news in a particular option, would be held to a quote verbalized in open outcry. In the event that the negotiation continues and the terms change, the Floor Marker Maker would not be held to the new terms without additional acceptance of those terms. In the event that the transaction is not effectuated in FBMS, the trade would not stand. To that end, the Exchange believes continuing to require quotes to remain firm once the parties have arrived at a Meeting of the Minds with respect to the terms of the transaction is consistent with the Act as it creates fair and equitable expectations for members trading in the Virtual Trading Crowd as a Meeting of the Minds was arrived out between the parties, each of whom had an opportunity to participate in the trade.

The audit trail for open outcry trading in a Virtual Trading Crowd will capture the same information that it does for open outcry trading on a physical Trading Floor. The FBMS execution checks for compliance with priority and trade-through rules remain intact. The Exchange's proposal only seeks to replace the open outcry negotiations with a Virtual Trading Crowd. FBMS compliance checks were adopted to protect investor and the general public by automated enforcement of priority and trade-through rules. The Exchange would continue to cancel orders that failed to meet these compliance checks, as is the case today. These compliance checks ensure that allocation rules are complied with and that the proposed execution would not cause Phlx to trade-through an away market. Surveillance staff would remotely surveil transactions in a Virtual Trading Crowd, in real-time. Specifically, there would be an Options Floor Official present in each Virtual Trading Crowd. Nasdaq Surveillance would conduct real-time surveillance for violations of Phlx rules, as is the case with physical open

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<sup>39</sup> The Exchange notes that today members are responsible for the operation of their own equipment while on the Trading Floor.

outcry. Floor Surveillance Procedures would be updated to account for the conferencing and chat requirements, as well as any changes to surveil a Virtual Trading Crowd. All surveillance patterns would be operable and function normally. The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote fair and orderly trading. The Exchange believes it will promote just and equitable principles of trading for all open outcry trading to occur in substantially the same manner, whether it occurs while market participants are in the same physical setting or in remote settings being connected through a technological solution.

Controls and security features are proposed to ensure that the appropriate market participants are participating in trades and to minimize any disruptions. Nasdaq non-surveillance staff would be responsible for the operation of the remote conferencing feature, which includes monitoring members to ensure that only floor members and members' employees are admitted into remote conferencing and are properly identified. Member organizations would be required to execute an addendum to the Nasdaq Services Agreement regarding their use of the remote conferencing feature in addition to consenting to voice recording.

In addition, the Exchange believes the proposed rule change will not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as all individuals authorized to act on the physical Trading Floor (both member organizations authorized at the time the physical Trading Floor becomes unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor and any member organization that becomes authorized after the physical Trading Floor becomes unavailable) will be provided with access to the Virtual Trading Crowd. Additionally, the proposed rule change to permit the Exchange to elect a Virtual Trading Crowd if the physical

Trading Floor is unavailable will provide individuals unable to trade on the physical Trading Floor as a result of certain restrictions to participate in open outcry trading remotely.

Surveillance staff will be present in each Virtual Trading Crowd to monitor the activity of each participant, who must be present by video, and to observe participant behavior. The Exchange will continue to surveil options transactions, as it does today, to identify transactions which are violative of Phlx Rules.<sup>40</sup> Phlx surveils for transactions which have been executed on its market to determine if those transactions utilized information which would have been available in open outcry trading and was not yet public or otherwise ascertainable due to the execution of a transaction. The Exchange notes that in both the electronic market and on the trading floor, members and member organizations must ensure that they have procedures reasonably designed to prevent the misuse of material, non-public information by employees.<sup>41</sup>

The Exchange has conducted several town halls with floor members in which the Exchange presented the functionality of the Virtual Trading Crowd and has made the Virtual Trading Crowd available for testing so that the Exchange will be ready to implement it if necessary. The Exchange has received positive feedback from floor members regarding the Virtual Trading Crowd and will continue to make updates as necessary and appropriate in response to comments it receives to make the Virtual Trading Crowd replicate the open outcry trading experience on the physical Trading Floor as much as possible. The Exchange believes this will provide the opportunity for as seamless a rollout as possible if circumstances cause the Exchange to make the Virtual Trading Crowd available.

Finally, this proposal does not amend the manner in which fees or other pricing

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<sup>40</sup> See Phlx Options 9, Section 1; and Options 9, Section 5. See also Options 3, Section 22(d).

<sup>41</sup> See Phlx General 9, Section 21.

incentives, such as caps, apply to floor participants. Any transaction originating from open outcry on the Trading Floor is considered a floor transaction. With offering FBMS remotely, the Exchange has not amended the manner in which fees are assessed or rebates are paid for purposes of Options 7 pricing to floor participants.

#### Technical Amendments

The Exchange's proposal to update citations to Options 8, Section 35 to Options 8, Section 24 are consistent with the Act as these non-substantive amendments will ensure the rule text is accurate.

#### 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. The Exchange does not believe that the proposed rule change will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act, as all member organizations authorized by the Exchange, or that become authorized by the Exchange, to transact on the Trading Floor will receive access to the Virtual Trading Crowd.

The Exchange does not believe that the proposed rule change will impose any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act, as it relates solely to the location of open outcry trading on the Exchange. The proposed rule change will merely permit open outcry trading that generally occurs while market participants are located in the same physical setting to occur while market participants are in a remote setting, connected by a technological solution (as electronic trading does).

The Exchange believes that the proposed rule change will relieve any burden on, or otherwise promote, competition. The Exchange believes the proposed rule change will provide

market participants with continuous access to open outcry trading when the physical Trading Floor is unavailable, the Back-Up Trading Floor becomes inoperable or the Exchange otherwise determines not to operate the Back-Up Trading Floor. The Exchange believes this may facilitate continued, competitive price negotiations and trading of orders that the Exchange understands are more difficult to execute in an all-electronic trading environment without human interaction. Additionally, the proposed rule change will provide customer orders represented for open outcry execution with access to the same pool of liquidity when the Trading Floor is unavailable to which those orders would have access when the Trading Floor is operating in its normal state. Maintenance of this level of liquidity at all times, even when the Trading Floor is unavailable, may promote competition by providing these customer orders with increased liquidity than may otherwise be available, and thus increased execution opportunities and price discovery. Every Floor Market Maker and Floor Broker is permitted access to FBMS.

With respect to inter-market competition, the Exchange notes that each options market has a business continuity plan. Because the options markets are physically located in different regions of the United States, the conditions under which a business continuity plan is deployed may differ, based on regional differences. In addition, any options exchange with a trading floor could amend its rules to adopt similar business continuity plans that engaged similar controls.

#### Technical Amendments

The Exchange's proposal to update citations to Options 8, Section 35 to Options 8, Section 24 do not impose an undue burden on competition as these non-substantive amendments will ensure the rule text is accurate.

#### 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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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-2021-03 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-2021-03. 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-2021-03 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>42</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>42</sup> 17 CFR 200.30-3(a)(12).