

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97618; File No. SR-Phlx-2023-19)

May 30, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7 to Establish Pricing for Index Options on the Nasdaq-100 ESG Index

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 May 16, 2023, 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 at Options 7 to adopt pricing for index options on the Nasdaq-100 ESG Index, as described further below.

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 proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Exchange recently received approval to list index options on the Nasdaq-100 ESG Index (“NDXESG options”).³ The Nasdaq-100 ESG Index is a broad based, modified ESG Risk Rating Score-adjusted market-capitalization-weighted index that is designed to measure the performance of the companies in the Nasdaq-100 Index (“NDX”) that meet specific environmental, social and governance (“ESG”) criteria.⁴ The Nasdaq-100 ESG Index at all times consists of a selection of securities in NDX.⁵ These options would trade under the symbol “EXGN.”

Options 7, Section 5

The Exchange now proposes to amend its Pricing Schedule at Options 7, Section 5 to adopt pricing for NDXESG options. Specifically, the Exchange proposes to establish transaction fees for NDXESG that are identical to the transaction fees for NDX and NDXP. The Exchange proposes to amend Section 5.A of Options 7 to assess the following fees Options Transaction

³ See Securities Exchange Act Release No. 97506 (May 15, 2023) (Sr-Phlx-2023-09) (Order Granting Approval of Proposed Rule Change to Permit the Listing and Trading of Options on the Nasdaq-100 ESG Index) (not yet published).

⁴ Companies are evaluated and weighted on the basis of their business activities, controversies and ESG Risk Ratings.

⁵ See https://indexes.nasdaqomx.com/docs/methodology_NDXESG.pdf.

Charges: \$0.00 for Customer⁶ orders, \$0.75 per contract for Professional,⁷ Lead Market Maker,⁸ Market Maker,⁹ Broker-Dealer¹⁰ and Firm¹¹ orders. Similar to NDX and NDXP, a surcharge of \$0.25 per contract will be assessed to Non-Customers who transact EXGN.

Other Changes to Options 7

By way of background, the proprietary products listed within Options 7, Section 5.A, NDX, NDXP, XND, and VOLQ, are commonly excluded from a variety of pricing programs.

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 Options 1, Section 1(b)(45)).

⁷ The term “Professional” applies to transactions for the accounts of Professionals, as defined in Options 1, Section 1(b)(45) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Options 7, Section 1(c).

⁸ The term “Lead Market Maker” applies to transactions for the account of a Lead Market Maker (as defined in Options 2, Section 12(a)). A Lead Market Maker is an Exchange member who is registered as an options Lead Market Maker pursuant to Options 2, Section 12(a). An options Lead Market Maker includes a Remote Lead Market Maker which is defined as an options Lead Market Maker in one or more classes that does not have a physical presence on an Exchange floor and is approved by the Exchange pursuant to Options 2, Section 11. See Options 7, Section 1(c). The term “Floor Lead Market Maker” is a member who is registered as an options Lead Market Maker pursuant to Options 2, Section 12(a) and has a physical presence on the Exchange’s trading floor. See Options 8, Section 2(a)(3).

⁹ The term “Market Maker” is defined in Options 1, Section 1(b)(28) as a member of the Exchange who is registered as an options Market Maker pursuant to Options 2, Section 12(a). A Market Maker includes SQTs and RSQTs as well as Floor Market Makers. See Options 7, Section 1(c). The term “Floor Market Maker” is a Market Maker who is neither an SQT or an RSQT. A Floor Market Maker may provide a quote in open outcry. See Options 8, Section 2(a)(4).

¹⁰ The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. See Options 7, Section 1(c).

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

The Exchange notes that the reason for such exclusion is because the Exchange has expended considerable resources developing and maintaining its proprietary products. NDXESG would be excluded from the same pricing once it is added to the list of proprietary products within Options 7, Section 5.A as NDXESG is also a proprietary product. Each exclusion is discussed below.

Today, the Customer Rebates in Options 7, Section 2 of the Pricing Schedule are not paid on broad-based index options symbols listed within Options 7, Section 5.A. However, broad-based index options symbols listed within Options 7, Section 5.A. will count toward the volume requirement to qualify for a Customer Rebate Tier. The Exchange proposes to apply the Customer Rebate program in the same manner for NDXESG.

Today, Options 7, Section 4 pricing for electronic orders (both simple and complex orders) excludes broad-based index options symbols listed within Options 7, Section 5.A. Also, broad-based index options symbols listed within Options 7, Section 5.A are excluded from a variety of fee programs in Options 7, Section 4 including, the “Monthly Market Maker Cap,”¹²

¹² Lead Market Makers and Market Makers are subject to a “Monthly Market Maker Cap” of \$500,000 for: (i) electronic Option Transaction Charges, excluding surcharges and excluding options overlying broad-based index options symbols listed within Options 7, Section 5.A; and (ii) QCC Transaction Fees (as defined in Exchange Options 3, Section 12 and Floor QCC Orders, as defined in Options 8, Section 30(e)). See Options 7, Section 4.

“Monthly Firm Fee Cap,”¹³ facilitation orders pursuant to Options 8, Section 30,¹⁴ BD-Customer Facilitation,¹⁵ “Strategy Caps,” and Marketing Fees.

Broad-based index options symbols listed within Options 7, Section 5.A. are not subject to Options 7, Section 6.A. PIXL¹⁶ Pricing.

Today, broad-based index options symbols listed within Options 7, Section 5.A are not assessed the FLEX transaction fees set forth in Options 7, Section 6.B, because broad-based index options symbols listed within Options 7, Section 5.A are not considered Eligible Contracts.

¹³ Firms are subject to a \$200,000 “Monthly Firm Fee Cap”. Firm Floor Option Transaction Charges and QCC Transaction Fees, in the aggregate, for one billing month that exceed the Monthly Firm Fee Cap per member or member organization, when such members or member organizations are trading in their own proprietary account, are subject to a reduced transaction fee of \$0.02 per capped contract unless there is no fee or the fee is waived. See Options 7, Section 4.

¹⁴ The Firm Floor Options Transaction Charges are waived for members executing facilitation orders pursuant to Options 8, Section 30 when such members are trading in their own proprietary account (including Cabinet Options Transaction Charges). The Firm Floor Options Transaction Charges are waived for the buy side of a transaction if the same member or its affiliates under Common Ownership represents both sides of a Firm transaction when such members are trading in their own proprietary account. See Options 7, Section 4.

¹⁵ Broker-Dealer Floor Options Transaction Charges (including Cabinet Options Transaction Charges) are waived for members executing facilitation orders pursuant to Options 8, Section 30 when such members would otherwise incur this charge for trading in their own proprietary account contra to a Customer (“BD-Customer Facilitation”), if the member’s BD-Customer Facilitation average daily volume (including both FLEX and non-FLEX transactions) exceeds 10,000 contracts per day in a given month. See Options 7, Section 4.

¹⁶ A member may electronically submit for execution an order it represents as agent on behalf of a Public Customer, broker-dealer, or any other entity (“PIXL Order”) against principal interest or against any other order it represents as agent (an “Initiating Order”) provided it submits the PIXL Order for electronic execution into the PIXL Auction (“Auction”) pursuant to Options 3, Section 13.

2. Statutory Basis

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

Options 7, Section 5

The Exchange believes it is reasonable to assess the proposed Options Transaction Charge and Non-Customer surcharge as discussed above for EXGN because the proposed pricing reflects the exclusive and proprietary nature of this product. Similar to NDX and NDXP the Exchange continues to expend resources to build and list proprietary products. Further, the Exchange notes that with its products, market participants are offered an opportunity to transact in NDX, NDXP, XND, or EXGN or separately execute options overlying PowerShares QQQ Trust (“QQQ”).¹⁹ Offering such proprietary products provides market participants with a variety of choices in selecting the product they desire to utilize in order to transact in the Nasdaq-100 Index. These transaction fees enable Phlx to innovate and offer new proprietary products, which in turn incentivizes growth and competition for the innovation of additional products in the options industry. Further, the Exchange believes that the proposed rates for EXGN are reasonable because the proposed fees are identical to fees assessed for NDX and NDXP.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(4) and (5).

¹⁹ QQQ is an exchange-traded fund based on the same Nasdaq-100 Index as NDX, NDXP, and XND.

The Exchange believes that the proposed rates for EXGN are equitable and not unfairly discriminatory because the Exchange will assess this fee uniformly to all Non-Customers. The Exchange similarly believes that the proposed \$0.25 per contract surcharge is equitable and not unfairly discriminatory because it will apply uniformly to all Non-Customers. The Exchange believes it is equitable and not unfairly discriminatory to assess no transaction fees to Customers for EXGN 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 Lead Market Makers 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.

Other Fee Programs

Excluding EXGN from the same pricing programs as all other proprietary products within Options 7, Section 5.A is reasonable because the Exchange seeks to treat EXGN in the same manner as other proprietary products. More specifically, NDX, NDXP, and XND, and now EXGN, represent similar options on the same underlying Nasdaq-100 Index.

It is reasonable to not pay Customer Rebates on EXGN in any rebate category because this index option will be exclusively listed on Phlx only. The original intent of the Customer Rebate Program was to pay rebates on electronically-delivered multiply-listed options. By definition, EXGN will not be a multiply-listed option, and the Exchange does not desire to pay rebates on EXGN because of the exclusivity of this option. While the Exchange will not pay any Customer Rebates on EXGN transactions, the Exchange also believes it is reasonable to count EXGN in the total volume to qualify a market participant for these rebates as market participants would be incentivized to transact in EXGN to qualify for the Customer Rebate Tiers. The

Exchange believes that its proposal to not pay Customer Rebates on EXGN, but to count EXGN volume toward the volume requirement to qualify for a rebate tier is equitable and not unfairly discriminatory because the Exchange would apply the rebate program as described uniformly for all market participants. Any market participant is eligible to earn a Customer Rebate.

The Exchange believes that the proposed updates in Options 7, Section 4 in connection with the application of certain fee programs to EXGN are reasonable, equitable, and not unfairly discriminatory. Particularly, the Exchange believes that it is reasonable to exclude EXGN from the Non-Penny complex surcharge in note 7 of Options 7, Section 4, the Monthly Market Maker Cap, the Monthly Firm Fee Cap, the Floor Options Transaction Charge waivers, the Strategy Caps, and the Marketing Fees in the same manner in which NDX and NDXP are currently excluded from the same programs today. The Exchange believes it is appropriate to update these fee programs in a manner that similarly situates EXGN with NDX and NDXP as these are all proprietary products that are based on the Nasdaq-100 Index. In addition, similar to NDX and NDXP, the Exchange seeks to exclude EXGN from programs that cap or waive transaction fees for market participants. As it relates to the Marketing Fee, the Exchange believes it is reasonable to exclude EXGN from this fee, similar to NDX and NDXP today, because the purpose of the Marketing Fee is to generate more Customer order flow to the Exchange. Because EXGN will be an exclusively listed product on Phlx, the Exchange does not believe that applying a Marketing Fee is necessary for this product. The Exchange's proposal to exclude EXGN from the various fee programs in Options 7, Section 4 as discussed above is equitable and not unfairly discriminatory because the programs will uniformly exclude all market participant orders in EXGN. The Exchange notes that its proposal does not alter any of the existing fee programs, but

instead merely proposes to exclude EXGN in those programs in the same way that NDX and NDXP are currently excluded.

The Exchange's proposal to exclude EXGN from PIXL pricing in Options 7, Section 6.A is reasonable because the Exchange intends to assess the same fees across the board for EXGN transactions. This will align the pricing structure for EXGN with NDX and NDXP. The proposed changes are equitable and not unfairly discriminatory because the Exchange will uniformly exclude EXGN from PIXL pricing for all market participants, and instead uniformly charge them the Options 7, Section 5.A pricing.

The Exchange believes that its proposal to assess FLEX EXGN options the Options Transaction Charges and Non-Customer options surcharge in Options 7, Section 5.A is reasonable because the Exchange intends to assess the same fees across the board for EXGN transactions. Specifically, the Exchange will apply the proposed EXGN options surcharge of \$0.25 per contract to Non-Customers in FLEX EXGN options. Further, the Exchange will apply the proposed EXGN Options Transaction Charges of \$0.75 per contract (Non-Customer) and \$0.00 per contract (Customer) to FLEX EXGN options. FLEX NDX and NDXP options are likewise assessed the same Options Transaction Charge and Non-Customer options surcharge that NDX and NDXP options are assessed today. The Exchange's proposal is equitable and not unfairly discriminatory because the Exchange will uniformly apply these fees to FLEX EXGN options to all similarly situated market participants.

The Exchange believes it is reasonable to exclude EXGN from Eligible Contracts for purposes of qualifying for a MARS Payment in the same manner in which NDX and NDXP are currently excluded today. The Exchange believes it is appropriate to update its MARS program in a manner that similarly situates EXGN with its other proprietary products, NDX and NDXP,

which are all based on the Nasdaq-100 Index. The Exchange believes that its proposal is equitable and not unfairly discriminatory because the Exchange will uniformly exclude EXGN from MARS for all market participants.

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. The Exchange notes that with its products, market participants are offered an opportunity to transact in NDX, NDXP, XND, or EXGN, or separately execute options overlying QQQ. Offering these products provides market participants with a variety of choices in selecting the product they desire to utilize to transact in the Nasdaq-100 Index.

Further, 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 because the proposed EXGN pricing will apply uniformly to all similarly situated market participants. Specifically, all Non-Customers will be assessed a uniform Options Transaction Charge and options surcharge while Customers receive free executions. As discussed above, Customer liquidity benefits all market participants by providing more trading opportunities, which attracts other market participants, thus facilitating tighter spreads and increased order flow.

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.²⁰

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-2023-19 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-2023-19. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

²⁰ 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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

subject to copyright protection. All submissions should refer to File Number SR-Phlx-2023-19 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.²¹

Sherry R. Haywood
Assistant Secretary

²¹ 17 CFR 200.30-3(a)(12).