

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-97666; File No. SR-Phlx-2023-23)

June 7, 2023

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 1, 2023, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx’s Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).”

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 amend its Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).” Specifically, Phlx proposes to amend its Floor Transaction (Open Outcry) Floor Broker Incentive Program.

Today, the Exchange offers an incentive program for Floor Brokers<sup>3</sup> that is designed to attract order flow to Phlx’s trading floor for execution in open outcry. Today, the Exchange pays Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates on qualifying volume at each threshold level per the below schedule.

<b>Qualifying Contracts</b>	<b>Per Contract Rebate</b>
0 -5,000,000	\$0.03
5,000,001-10,000,000	\$0.06
Greater than 10,000,000	\$0.09

By way of example, a Floor Broker that executes floor transactions in a given month totaling 10,500,000 contracts is paid \$0.03 for the first 5,000,000 floor transaction contracts (\$150,000), \$0.06 for the next 5,000,000 floor transaction contracts (\$300,000), and \$0.09 for the

<sup>3</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 Phlx Options 7, Section 1(c).

final 500,000 floor transaction contracts (\$45,000) for a total rebate of \$495,000 for that month. Further, as an additional clarifying example, if a Floor Broker executes a floor transaction in the amount of 1,000,000 contracts, represents both sides of the floor transaction, and executes the floor transaction as a crossing transaction pursuant to Options 8, Section 30(a) for 700,000 of the 1,000,000 contracts, then trades the remaining 300,000 contracts with the trading crowd, the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebate for this transaction will be paid on the qualifying floor transaction volume of 1,000,000 contracts. The Exchange caps rebates for the Floor Transaction (Open Outcry) Floor Broker Incentive Program at \$1,000,000 per member or member organization in a given month.

Today, the following floor transactions are not subject to the rebates offered within the Floor Transaction (Open Outcry) Floor Broker Incentive Program: (1) Floor QCC Orders, as defined in Options 8, Section 30(e);<sup>4</sup> (2) dividend, merger, short stock interest, reversal and conversion, jelly roll and box spread strategy executions as defined in this Options 7, Section 4; (3) Firm Floor Options Transactions Charges 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); and (4) Customer-to-Customer transactions.

At this time, the Exchange proposes to amend the rebates that will be paid on qualifying volume at each threshold level. The Exchange proposes to increase the rebate from \$0.03 to \$0.05 per contract for qualifying contracts from 1 – 5,000,000. The Exchange proposes to increase the rebate from \$0.06 to \$0.08 per contract for qualifying contracts from 5,000,001 to 10,000,000.

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<sup>4</sup> Today, Floor QCC Orders are not transacted in open outcry. The Exchange proposes to include Floor QCC Orders in the list of exclusions to remind members and member organizations that Floor QCC Orders will not be paid the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebate.

Finally, the Exchange proposes to increase rebate from \$0.09 to \$0.11 per contract for qualifying contracts greater than 10,000,000. The Exchange is not amending qualifying floor transactions that are subject to the rebates. The Exchange would make corresponding changes to the example beneath the rebate table in Options 7, Section 4.

The Exchange believes that the Floor Transaction (Open Outcry) Floor Broker Incentive Program will continue to attract greater order flow to Phlx's trading floor.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>6</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>7</sup>

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

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>7</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>8</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>9</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>10</sup>

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ . . . .”<sup>11</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange’s proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) is reasonable because the Exchange believes that these rebates will serve to continue to incentivize Floor Brokers to execute a greater

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<sup>8</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>9</sup> See NetCoalition, at 534 - 535.

<sup>10</sup> Id. at 537.

<sup>11</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

number of orders in the Exchange's trading crowd. Any market participant may send an order to a Phlx Floor Broker for execution on Phlx's trading floor. The Exchange notes that other Phlx floor members<sup>12</sup> may interact with orders exposed in open outcry on the Exchange's trading floor.

The Exchange's proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) is equitable and not unfairly discriminatory as the Exchange would uniformly calculate all qualifying volume and uniformly pay rebates associated with the Floor Transaction (Open Outcry) Floor Broker Incentive Program up to \$1,000,000 in rebates a month.

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

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<sup>12</sup> Floor members include all members who have acquired a permit to trade on Phlx's trading floor.

Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

#### Intra-market Competition

The proposed amendments do not impose an undue burden on intra-market competition. In terms of intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. The proposed Floor Broker Incentive Program rebates should encourage Floor Brokers to send additional order flow to Phlx to obtain rebates and lower their costs. Any market participant may send an order to a Phlx Floor Broker for execution on Phlx's trading floor. The Exchange believes that the additional liquidity will enhance the quality of the Exchange's market and increase certain trading opportunities on the Exchange's trading floor for floor members.

The Exchange's proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) does not impose an undue burden on competition as the Exchange would uniformly calculate all qualifying volume and uniformly pay rebates associated with the Floor Transaction (Open Outcry) Floor Broker Incentive Program up to \$1,000,000 in rebates a month.

#### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>13</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2023-23 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.

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to file number SR-Phlx-2023-23. This file number should be included on the subject line if email 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 a.m. and 3 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-2023-23 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Sherry R. Haywood**

*Assistant Secretary*

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<sup>14</sup> 17 CFR 200.30-3(a)(12).