

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77402; File No. SR-Phlx-2016-21)

March 18, 2016

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rebates and Fees for Adding and Removing Liquidity in SPY

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on March 10, 2016, NASDAQ PHLX LLC (“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 the Phlx Pricing Schedule at Section I, entitled “Rebates and Fees for Adding and Removing Liquidity in SPY,” specifically related to PIXL³ executions in options overlying SPY.⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ PIXLSM is the Exchange’s price improvement mechanism known as Price Improvement XL or PIXL. 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 (except as provided in Rule 1080(n)(i)(E)) it represents as agent (“Initiating Order”), provided it submits the PIXL order for electronic execution into the PIXL Auction pursuant to Rule 1080. See Exchange Rule 1080(n).

⁴ Options overlying Standard and Poor’s Depository Receipts/SPDRs (“SPY”) are based on the SPDR exchange-traded fund, which is designed to track the performance of the S&P 500 Index.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqomxphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend language in the Pricing Schedule at Section I, entitled "Rebates and Fees for Adding and Removing Liquidity in SPY," related to PIXL executions in SPY.

Background

SR-Phlx-2013-61

Effective June 3, 2013, the Exchange filed a rule change⁵ to adopt new pricing specific to options overlying Standard and Poor's Depository Receipts/SPDRs ("SPY").⁶ The Exchange adopted "Make/Take" pricing for SPY in both Simple and Complex Orders. The Exchange

⁵ See Securities Exchange Act Release No. 69768 (June 14, 2013), 78 FR 37250 (June 20, 2013) (SR-Phlx-2013-61) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Various Sections of the Exchange's Pricing Schedule).

⁶ SPY options are based on the SPDR exchange-traded fund ("ETF"), which is designed to track the performance of the S&P 500 Index.

adopted SPY PIXL Pricing at that time. The Exchange adopted the following rule text concerning PIXL Orders:

‘When the PIXL Order is contra to other than the Initiating Order, the PIXL Order will be assessed \$0.00 per contract, unless the order is a Customer, in which case the Customer will receive a rebate of \$0.38 per contract. All other contra parties to the PIXL Order, other than the Initiating Order, will be assessed a Fee for Removing Liquidity of \$0.38 per contract or will receive the Rebate for Adding Liquidity.’

In that rule change, the Exchange noted that it was adopting PIXL Pricing to “...assess Initiating Orders in SPY options \$0.05 per contract for all market participants. In addition, when the PIXL Order is contra to the Initiating Order, a Customer PIXL Order will be assessed \$0.00 per contract and all non-Customer market participants will be assessed a \$0.38 per contract fee when contra to the Initiating Order. Also, when a PIXL Order is contra to other than the Initiating Order, the PIXL Order will be assessed \$0.00 per contract, unless the order is a Customer, in which case the Customer will receive a rebate of \$0.38 per contract. All other contra parties to the PIXL Order, other than the Initiating Order, will be assessed a reduced Fee for Removing Liquidity of \$0.38 per contract or will receive the Rebate to Add Liquidity.” The Exchange added a footnote in that filing, footnote 21, to further describe the phrase “other than an Initiating Order,” as, for example, a PIXL Auction Responder or a resting order or quote that was on the Phlx book prior to the auction. In that proposal, the Exchange reasoned, “The Exchange believes it is reasonable that all other contra parties to the PIXL Order, other than the Initiating Order, will be equally assessed a reduced Fee for Removing Liquidity of \$0.38 per contract when removing or they will receive the Rebate for Adding Liquidity if adding because the Exchange desires to equally provide all market participants the same incentivizes to encourage them to transact a greater number of SPY PIXL Orders.”

The Exchange also reasoned that “[a]lso, the Exchange proposes to uniformly assess all market participants a fee when a Customer rebate would be paid to enable the Exchange to offer the rebate. The Exchange believes that widening the differential as between the Initiating Order Fee and the contra party to the PIXL Order (\$0.05 vs. \$0.38) as compared to the cost to transact a PIXL Order today (\$0.05 or \$0.07 per contract vs. \$0.30) does not misalign the cost of these transactions depending on the market participant because the Exchange would now not assess a fee in the case that PIXL Order is contra to other than the Initiating Order, which is not a Customer, and would pay the Customer a rebate in the case where the contra party is a Customer.”

The Exchange assessed all contra-parties to the SPY PIXL Order, other than the Initiating Order, a fee of \$0.38 per contract as a result of this rule change.

SR-Phlx-2015-25

On March 11, 2015, the Exchange filed a rule change to amend the SPY PIXL pricing established by SR-Phlx-2013-61.⁷ In that filing, the Exchange proposed to amend the following rule text, “All other contra parties to the PIXL Order, other than the Initiating Order, will be assessed a Fee for Removing Liquidity of \$0.38 per contract or will receive the Rebate for Adding Liquidity”⁸ to add the term “Non-Customer” to the sentence and increase the Fee for Removing Liquidity from \$0.38 to \$0.42 per contract. The term Non-Customer was being

⁷ See Securities Exchange Act Release No. 74531 (March 19, 2015), 80 FR 15850 (March 25, 2015) (SR-Phlx-2015-25) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Pricing Schedule’s Preface and Sections I, II and IV).

⁸ The quoted text is the original text which was amended by SR-Phlx-2015-25.

introduced in this rule change into the Pricing Schedule.⁹ The Exchange at that time stated in the purpose section to SR-Phlx-2015-25,

‘The Exchange also proposes to amend PIXL fees in SPY in Section I of the Pricing Schedule. Today, when a PIXL Order is contra to other than the Initiating Order, the PIXL Order will be assessed \$0.00 per contract, unless the order is a Customer, in which case the Customer will receive a rebate of \$0.38 per contract. All other contra parties to the PIXL Order, other than the Initiating Order, will be assessed a Fee for Removing Liquidity of \$0.38 per contract or will receive the Rebate for Adding Liquidity. The Exchange is proposing to increase the amount that all other contra parties to the PIXL Order, other than the Initiating Order, will be assessed to remove liquidity from \$0.38 to \$0.42 per contract. These contra parties will continue to be entitled to receive the Rebate for Adding Liquidity, as is the case today. Despite, the increase [the Exchange] believes that its current SPY PIXL fees remain competitive.’

Footnote 13 in that rule change indicated that 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 (except as provided in Rule 1080(n)(i)(E)) it represents as agent (“Initiating Order”) provided it submits the PIXL order for electronic execution into the PIXL Auction (“Auction”) pursuant to Rule 1080. Non-Initiating Order interest could be a PIXL Auction Responder or a resting order or quote that was on the Phlx book prior to the auction.

As a result of the amendments to SR-Phlx-2015-25, the Exchange’s current rule text does not address the amount a Customer would be assessed if the Customer was a contra-party responder to a SPY PIXL Order, other than the Initiating Order. Today, no fee is assessed to the Customer contra party to a SPY PIXL Order.

⁹ The term “Non-Customer” applies to transactions for the accounts of Specialists, Market Makers, Firms, Professionals, Broker-Dealers and JBOs.

Proposal

The Exchange proposes to assess a Customer contra party to a PIXL Order a Fee for Removing Liquidity of \$0.42 per contract, similar to all other contra parties to a SPY PIXL Order. The Exchange's proposal would increase the Customer Fee for Removing Liquidity, when the Customer is a contra party to the PIXL Order, other than the Initiating Order, from \$0.00 to \$0.42 per contract.

The Exchange proposes to (i) add the word "PIXL" in the first sentence to clarify the type of order being discussed; and (ii) remove the reference to "other Non-Customer" in the second sentence, to assess the \$0.42 per contract Fee for Removing to Liquidity to all participants, including a Customer and make the second sentence its own paragraph. The proposed rule text would be as follows, "When the PIXL Order is contra to other than the Initiating Order, the PIXL Order will be assessed \$0.00 per contract, unless the PIXL Order is a Customer, in which case the Customer will receive a rebate of \$0.38 per contract." Separately, in another paragraph, the proposed rule text would be as follows, "All contra parties to the PIXL Order that are not the Initiating Order will be assessed a Fee for Removing Liquidity of \$0.42 per contract or will receive the Rebate for Adding Liquidity." The Exchange is also adding some clarifying language in this sentence to make clear that the contra parties are not [sic] the Initiating Order.

To further explain this amendment and the role of the contra party, during a PIXL Auction, a paired order may be entered into the auction consisting of a PIXL Order and an Initiating Order. If during the auction, non-Initiating Order interest¹⁰ executes against the PIXL Order, the Exchange would assess a Fee for Removing Liquidity of \$0.42 per contract or will

¹⁰ Non-Initiating Order interest could be a PIXL Auction Responder or a resting order or quote that was on the Phlx book prior to the auction.

receive the Rebate for Adding Liquidity, regardless of the capacity of the contra party. The contra party in this example may be a Customer order.¹¹

The Exchange proposes to correct a typographical error in this section to capitalize “non-Customer” to state “Non-Customer” to properly refer to the defined term. The Exchange also proposes to remove extraneous parentheticals from Section I in the Simple Order Rebate for Adding Liquidity in the Specialist and Market Maker pricing.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹² in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act¹³ 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 or system which the Exchange operates or controls, 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, for example, the Commission indicated that market forces should generally determine the price of non-core market data because national market system regulation “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁴ Likewise, in

¹¹ This contra party Customer order would be different than the original Customer PIXL Order.

¹² 15 U.S.C. § 78f(b).

¹³ 15 U.S.C. § 78f(b)(4) and (5).

¹⁴ Securities Exchange Act Release No. 51808 at 37499 (June 9, 2005) (“Regulation NMS Adopting Release”).

NetCoalition v. Securities and Exchange Commission¹⁵ (“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.¹⁶ 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.”¹⁷

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’”¹⁸ 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 amount that Customer contra parties to a PIXL Order that were not the Initiating Order will be assessed to remove liquidity from \$0.00 to \$0.42 per contract is reasonable because despite the increase in the fee, the Exchange believes this pricing will continue to incentivize market participants to transact a greater number of SPY options. Customers will continue to receive a rebate of \$0.38 per contract when the PIXL Order is a Customer order and is contra to other than the Initiating Order. The Exchange’s proposal to

¹⁵ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁶ See NetCoalition, at 534.

¹⁷ Id. at 537.

¹⁸ Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

increase the Fee for Removing Liquidity for Customer contra-parties to the PIXL Order in SPY that are not the Initiating Order from \$0.00 to \$0.42 per contract remains lower than the \$0.43 per contract Simple Order Fee for Removing Liquidity that is assessed for Simple Orders in SPY.¹⁹ Today, all other market participants that are not the Initiating Order, other than a Customer, who execute against the PIXL Order, are assessed a Fee for Removing Liquidity of \$0.42 per contract. The Exchange believes that it should assess the Customer a fee similar to other market participants. The Exchange notes that today, a Customer is assessed a \$0.43 per contract Simple Order Fee for Removing Liquidity in SPY. The proposed \$0.42 per contract Customer Fee for Removing Liquidity for Customer contra-parties to the PIXL Order which are not the Initiating Order in SPY would continue to be lower than the Simple Order Fee for Removing Liquidity.

SPY options are currently the most actively traded options class and therefore the Exchange believes that incentivizing Customers to remove liquidity in SPY options by continuing to offer a lower rate as compared to Simple Order Fees for Removing Liquidity in SPY will benefit all market participants by providing incentives for price improvement, such as this reduction in the Fee for Removing Liquidity. Despite the increase, the Exchange believes the Fee for Removing Liquidity will continue to encourage a greater number of market participants to remove Customer liquidity in SPY on Phlx because the proposed rate of \$0.42 per contract is lower than the \$0.43 per contract Simple Order Fee for Removing Liquidity that is assessed for Simple Orders in SPY. Customer orders bring valuable liquidity to the market which liquidity benefits other market participants.

¹⁹ See Section I of the Pricing Schedule. Customers are assessed a \$0.43 per contract Simple Order Fee for Removing Liquidity in SPY while Non-Customers are assessed a \$0.47 per contract Simple Order Fee for Removing Liquidity in SPY.

The Exchange's proposal to increase the amount that Customer contra parties to the PIXL Order that are not the Initiating Order will be assessed to remove liquidity from \$0.00 to \$0.42 per contract is equitable and not unfairly discriminatory because the Exchange will be assessing the same Fees for Removing Liquidity for SPY PIXL options to all market participants that are contra parties to the PIXL Order in SPY, other than the Initiating Order. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. A higher percentage of SPY Orders in PIXL leads to increased auctions and better opportunities for price improvement.

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to correct the typographical error to properly refer to a defined term, remove extraneous parentheticals from Section I and make other clarifying language. These rule changes are non-substantive.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust

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

The proposed increase to the amount that Customer contra parties to the PIXL Order that are not the Initiating Order will be assessed to remove liquidity does not impose a burden on inter-market competition, because the Exchange is competing with other options markets which offer price improvement mechanisms. A higher percentage of SPY Orders in PIXL leads to increased auctions and better opportunities for price improvement for all market participants. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

The Exchange's proposal to amend the Fee for Removing Liquidity applicable to Customers that are contra to a SPY PIXL Order, other than the Initiating Order, does not impose any undue burden on intra-market competition as all market participants will be assessed the same fee of \$0.42 per contract to remove liquidity as other contra party market participants. Customer orders bring valuable liquidity to the market, which liquidity benefits all market participants. This proposal also corrects a discrepancy in the rule text which does not currently address fees for Customer responders.

The Exchange's proposal to correct a typographical error to properly refer to a defined term, remove extraneous parentheticals from Section I and make other clarifying language does not impose any undue burden on intra-market competition as these rule changes are non-substantive.

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-2016-21 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.

²⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File Number SR-Phlx-2016-21. 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-Phlx-2016-21 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

Robert W. Errett
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).