

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89041; File No. SR-Phlx-2020-28)

June 10, 2020

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx Pricing Schedule at Options 7, Section 8, Membership Fees and Options 7, Section 9, Other Member Fees

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 28, 2020, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Phlx’s Pricing Schedule at Options 7, Section 8, “Membership Fees” and Options 7, Section 9, “Other Member Fees.”

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on June 1, 2020.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Phlx proposes to amend its pricing within Options 7, Section 8, “Membership Fees” and Options 7, Section 9, “Other Member Fees.” Each change will be described below.

Credit

Phlx proposes to amend Options 7, Section 8, “Membership Fees,” at Part A, “Permit and Registration Fees,” to offer a credit of \$3,400, for the month of June 2020, to any member or member organization on the Trading Floor if that member or member organization was eligible for the \$2,300 reduced Permit Fee as a result of having executed at least 100 options in a Phlx house account for the months of February and March 2020, and paid the \$4,000 Permit Fee in April and May 2020. Open outcry on the Exchange’s Trading Floor was closed on March 17, 2020³ and will not re-open until June 1, 2020.⁴ The Exchange proposes to issue the \$3,400 credit to those members or member organizations on the Trading Floor who demonstrated they did execute at least 100 options in a Phlx house account, for the months of February and March

³ See Options Trader Alert #2020 – 07.

⁴ See Options Trader Alert #2020 – 08.

2020, in order to qualify for the reduced Permit Fee of \$2,300. The Exchange believes that these members and member organizations may have also qualified for the credit in April or May 2020, if open outcry trading was available.

The Exchange proposes to credit those qualifying members and member organizations the difference (\$1,700 a month) as between the \$4,000 a month Permit Fee and the reduced Permit Fee of \$2,300 a month, for the months of April and May 2020 when open outcry was not available, provided the member or member organization is able to demonstrate that they qualified for the credit in February and March 2020.

This credit would not be offered to Floor Brokers,⁵ Floor Lead Market Makers, or Floor Market Makers,⁶ who are not eligible today for a reduced Permit Fee. Also, the credit would not be offered to member organizations who transact an electronic options business, as those member organizations remain able to transact at least 100 options in a Phlx house account.⁷

Waivers

Today, the Exchange waives certain fees related to the Phlx Trading Floor within Options 7, Section 8. Specifically, for the months of April and May 2020, the Exchange waived the Floor Broker Permit Fee of \$4,000 per month to Floor Brokers.⁸ The Exchange also waived the Clerk Fee⁹ of \$100 per month. Finally, the Exchange waived the Streaming Quote Trader

⁵ See Options 7, Section 8A. Phlx assesses a Floor Broker Permit Fee of \$4,000 per month. Additionally, the Exchange proposes to waive the Floor Broker Permit Fee for the month of June 2020 as described below.

⁶ See Options 7, Section 8A. Phlx assesses a Floor Lead Market Maker and Floor Market Maker Permit Fee of \$6,000 per month.

⁷ Remote Lead Market Makers and Remote Market Makers access the market electronically and are therefore excluded.

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

⁹ The Clerk Fee is imposed on any registered on-floor person employed by or associated with a member or member organization pursuant to Options 3, Section 19, including

(“SQT”)¹⁰ Fees within Options 8, Section 8B. The SQT Fees are tiered fees.¹¹ Phlx’s 7 tier SQT Fees¹² are as follows:

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

The Exchange waived the Floor Broker Permit Fee, the Clerk Fee and the SQT Fees, during the months of April and May 2020, to account for the closure of open outcry trading. As noted herein, the Trading Floor will remain closed until June 1, 2020.¹³ The Exchange proposes to continue to waive these fees for the month of June 2020 to account for the fact that the Trading Floor has been closed since March 17, 2020.¹⁴ Also, the Exchange proposes to remove

Inactive Nominees pursuant to Options 8, Section 7. The Clerk Fee is not imposed on permit holders. See Phlx Rules at Options 7, Section 8A.

¹⁰ The term “Streaming Quote Trader” is defined in Options 1, Section 1(b)(54) as a Market Maker who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. See Options 7, Section 1. Further, Options 1, Section 1(b)(54) provides that an SQT means a Market Maker who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the trading floor of the Exchange. An SQT may only submit quotes in classes of options in which the SQT is assigned.

¹¹ The Exchange notes, with respect to SQTs, that these participants may only submit quotations while physically present on the Trading Floor.

¹² In calculating the number of option class assignments for SQT Fees, equity options including ETFs and ETNs are counted. Currencies and indexes are not counted in the number of option class assignments.

¹³ See note 4 above.

¹⁴ See note 3 above.

obsolete language, which was relevant in April and May 2020 regarding a credit, which is no longer being offered.

Options 7, Section 9

Today, the Exchange waives certain fees related to the Phlx Trading Floor within Options 7, Section 9. Specifically, the Exchange waived the Floor Facility Fee of \$330 per month, which is applicable Clerks (excluding Inactive Nominees pursuant to Options 8, Section 7), Floor Brokers, Market Makers (including SQTs) and individual Lead Market Makers), for the months of April and May 2020. The Exchange proposes to continue to waive the Floor Facility Fee for the month of June 2020 to account for the fact that the Trading Floor has been closed since March 17, 2020.¹⁵

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁷ 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

¹⁵ Id.

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4) and (5).

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.”¹⁸

Likewise, in NetCoalition v. Securities and Exchange Commission¹⁹ (“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.²⁰ 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.”²¹

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’”²² 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.

Options 7, Section 8

¹⁸ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁹ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

²⁰ See NetCoalition, at 534 - 535.

²¹ Id. at 537.

²² 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)).

Phlx's proposal to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to offer a credit of \$3,400, for the month of June 2020, to any member or member organization on the Trading Floor, if that member or member organization was eligible for the \$2,300 reduced Permit Fee as a result of having executed at least 100 options in a Phlx house account for the months of February and March 2020, is reasonable. Open outcry trading was closed on March 17, 2020,²³ and will not re-open until June 1, 2020.²⁴ The Exchange proposes to issue the \$3,400 credit to those members or member organizations on the Trading Floor who demonstrated they executed at least 100 options in a Phlx house account for the months of February and March 2020, and paid the \$4,000 Permit Fee in April and May 2020, in order to qualify for the reduced Permit Fee of \$2,300. The Exchange believes that these members and member organizations may have also qualified for the credit in April or May 2020, if open outcry trading were available. The Exchange proposes to credit those qualifying member and member organizations on the Trading Floor the difference (\$1,700 per month) as between the \$4,000 a month Permit Fee and the reduced Permit Fee of \$2,300 a month for the two full months (April and May 2020) when open outcry trading was closed. The Exchange believes it is reasonable to pay the difference based on whether the member or member organization qualified in both the two full prior months, when open outcry trading was unavailable. This credit would not apply to Floor Brokers,²⁵ Floor Lead Market Makers, or Floor Market Makers, as these

²³ See note 3 above.

²⁴ See note 4 above.

²⁵ The Floor Broker Permit Fee was waived in April and May 2020. The Exchange proposes herein to also waive that fee for June 2020.

members do not have the ability to qualify for a reduced Permit Fee today. The credit would also not apply to members accessing Phlx electronically.²⁶

Phlx's proposal to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to offer a credit of \$3,400, for the month of June 2020, to any member or member organization on the Trading Floor, if that member or member organization was eligible for the \$2,300 reduced Permit Fee as a result of having executed at least 100 options in a Phlx house account for the months of February and March 2020 and paid the \$4,000 Permit Fee in April and May 2020, is equitable and not unreasonably discriminatory. The Exchange proposes to uniformly offer all Trading Floor members and member organizations who currently pay the \$4,000 Permit Fee, a credit of \$3,400, provided they executed at least 100 options in a Phlx house account for the months of February and March 2020, and paid the \$4,000 Permit Fee in April and May 2020. The Exchange notes that it is equitable and not unfairly discriminatory to not offer the credit to Floor Brokers, Floor Lead Market Makers, or Floor Market Makers as these members do not have the ability to qualify for a reduced Permit Fee today.²⁷ Also, it is equitable and not unfairly discriminatory to not offer the credit to member organizations who transact an electronic options business, as those member organizations remain able to transact at least 100 options in a Phlx house account.²⁸

Fee Waivers

²⁶ Remote Lead Market Makers and Remote Market Makers access the market electronically and are therefore excluded.

²⁷ The Floor Broker Permit Fee is proposed to be waived for the month of June 2020.

²⁸ Remote Lead Market Makers and Remote Market Makers access the market electronically and are therefore excluded.

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee, during the month of June 2020, is reasonable as open outcry on the Phlx Trading Floor has not been available since March 17, 2020.²⁹ The Exchange's proposal to waive these fees, which apply to transacting an options business on the Trading Floor, is intended to alleviate costs for member organizations in consideration of their inability to transact options in open outcry on the Phlx Trading Floor since March 17, 2020.

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

Obsolete Text

The Exchange's proposal to remove obsolete language from Options 7, Section 8, related to an obsolete credit is reasonable, equitable and not unfairly discriminatory as the credit is no longer applicable. No member or member organization may obtain the credit.

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

²⁹ See note 3 above.

operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Intra-market Competition

Phlx's proposal to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to offer a credit of \$3,400, for the month of June 2020, to any member or member organization on the Trading Floor, if that member or member organization was eligible for the \$2,300 reduced Permit Fee as a result of having executed at least 100 options in a Phlx house account for the months of February and March 2020, and paid the \$4,000 Permit Fee in April and May 2020, does not impose an undue burden on competition. The Exchange would uniformly offer all Trading Floor members and member organizations who currently pay the \$4,000 Permit Fee, a credit of \$3,400, provided they executed at least 100 options in a Phlx house account for the months of February and March 2020, and paid the \$4,000 Permit Fee in April and May 2020. The Exchange notes that it does not impose an undue burden on competition to not offer the credit to Floor Brokers, Floor Lead Market Makers, or Floor Market Makers as these members do not have the ability to qualify for a reduced Permit Fee today.³⁰ Also, it does not impose an undue burden on competition to not offer the credit to member

³⁰ The Floor Broker Permit Fee is proposed to be waived for the month of June 2020.

organizations who transact an electronic options business, as those member organizations remain able to transact at least 100 options in a Phlx house account.³¹

The Exchange's proposal to waive the Floor Broker Permit Fee, the Clerk Fee, SQT Fee and the Floor Facility Fee during the month of June 2020 does not impose an undue burden on competition as the Exchange will apply these proposed waivers uniformly to all member organizations on the Trading Floor. Phlx continues to permit electronic trading and therefore fees associated with electronic trading have not been waived.

The Exchange's proposal to remove obsolete language from Options 7, Section 8, related to an obsolete credit, does not impose an undue burden on competition as the credit is no longer applicable. No member or member organization may obtain the credit.

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.³²

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,

³¹ Remote Lead Market Makers and Remote Market Makers access the market electronically and are therefore excluded.

³² 15 U.S.C. 78s(b)(3)(A)(ii).

the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2020-28 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2020-28. 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-2020-28 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.³³

J. Matthew DeLesDernier
Assistant Secretary

³³ 17 CFR 200.30-3(a)(12).