

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91418; File No. SR-Phlx-2021-16)

March 26, 2021

Self-Regulatory Organizations; Nasdaq PHLX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx's Pricing Schedule at Options 7, Section 6, Part D to Reduce the Phlx Options Regulatory Fee

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 March 16, 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 and II, 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 6, Part D to reduce the Phlx Options Regulatory Fee or "ORF".

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on April 1, 2021.

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.

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

<sup>2</sup> 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

Currently, Phlx assesses an ORF of \$0.0050 per contract side as specified in Phlx's Pricing Schedule at Options 7, Section 6, Part D. The Exchange proposes to reduce the ORF from \$0.0050 per contract side to \$0.0042 per contract side as of April 1, 2021, in order to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

*Collection of ORF*

Currently, Phlx assesses its ORF for each customer option transaction that is either: (1) executed by a member organization<sup>3</sup> on Phlx; or (2) cleared by a Phlx member organization at

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<sup>3</sup> The term "member organization" means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a member organization by virtue of (i) admission to membership given to it by the Membership Department pursuant to the provisions of General 3, Sections 5 and 10 or the By-Laws or (ii) the transitional rules adopted by the Exchange pursuant to Section 6-4 of the By-Laws. References herein to officer or partner, when used in the context of a member organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a member organization. See General 1, Section 1(17).

The Options Clearing Corporation (“OCC”) in the customer range,<sup>4</sup> even if the transaction was executed by a non-member organization of Phlx, regardless of the exchange on which the transaction occurs.<sup>5</sup> If the OCC clearing member is a Phlx member organization, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA<sup>6</sup>); and (2) if the OCC clearing member is not a Phlx member organization, ORF is collected only on the cleared customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member organization.<sup>7</sup>

In the case where a member organization both executes a transaction and clears the transaction, the ORF is assessed to and collected from that member organization. In the case where a member organization executes a transaction and a different member organization clears the transaction, the ORF is assessed to and collected from the member organization who clears the transaction and not the member organization who executes the transaction. In the case where a non-member organization executes a transaction at an away market and a member organization clears the transaction, the ORF is assessed to and collected from the member organization who

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<sup>4</sup> Participants must record the appropriate account origin code on all orders at the time of entry in order. The Exchange represents that it has surveillances in place to verify that member organizations mark orders with the correct account origin code.

<sup>5</sup> The Exchange uses reports from OCC when assessing and collecting the ORF.

<sup>6</sup> CMTA or Clearing Member Trade Assignment is a form of “give-up” whereby the position will be assigned to a specific clearing firm at OCC.

<sup>7</sup> By way of example, if Broker A, a Phlx member organization, routes a customer order to CBOE and the transaction executes on CBOE and clears in Broker A’s OCC Clearing account, ORF will be collected by Phlx from Broker A’s clearing account at OCC via direct debit. While this transaction was executed on a market other than Phlx, it was cleared by a Phlx member organization in the member organization’s OCC clearing account in the customer range, therefore there is a regulatory nexus between Phlx and the transaction. If Broker A was not a Phlx member organization, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on Phlx nor was it cleared by a Phlx member organization.

clears the transaction. In the case where a member executes a transaction on Phlx and a non-member organization clears the transaction, the ORF is assessed to the member organization that executed the transaction on Phlx and collected from the non-member organization who cleared the transaction. In the case where a member organization executes a transaction at an away market and a non-member organization clears the transaction, the ORF is not assessed to the member organization who executed the transaction or collected from the non-member organization who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the member organization executing the trade at an away market.

#### *ORF Revenue and Monitoring of ORF*

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member<sup>8</sup> and member organization customer options business including performing routine surveillances, investigations, examinations,

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<sup>8</sup> The term "member" means a permit holder which has not been terminated in accordance with the By-Laws and these Rules of the Exchange. A member is a natural person and must be a person associated with a member organization. Any references in the rules of the Exchange to the rights or obligations of an associated person or person associated with a member organization also includes a member. See General 1, Section 1(16).

financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third party service provider costs to support the day to day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 42% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 58% of total regulatory costs for 2021.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members and member organizations, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

#### Proposal

Based on the Exchange's most recent review, the Exchange is proposing to reduce the amount of ORF that will be collected by the Exchange from \$0.0050 per contract side to \$0.0042 per contract side. The Exchange issued an Options Trader Alert on February 8, 2021 indicating the proposed rate change for April 1, 2021.<sup>9</sup>

The proposed decrease is based on recent options volumes which included an increase in retail investors. With respect to options volume, the Exchange experienced a significant increase particularly in the fourth quarter of 2020. For example, total options contract volume in November 2020 was 71% higher than the total options contract volume in November 2019.<sup>10</sup>

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<sup>9</sup> See Options Trader Alert 2021-9.

<sup>10</sup> See data from OCC at: <https://www.businesswire.com/news/home/20201202005584/en/OCC-November-2020->

Below is industry data from OCC<sup>11</sup> which illustrates the significant increase in volume during the fourth quarter of 2020.

	<b>October</b>	<b>November</b>	<b>December</b>	<b>Q4 2020</b>
<b>Total</b>	633,365,184	673,660,858	753,568,354	2,060,594,396
<b>Customer</b>	587,707,301	630,297,252	708,037,956	1,926,042,509
<b>Total ADV</b>	28,789,326.55	33,683,042.90	34,253,107.00	32,196,787.44
<b>Customer ADV</b>	26,713,968.23	31,514,862.60	32,183,543.45	30,094,414.20

With respect to customer options volume across the industry, total customer options contract average daily volume in December 2020 was 88.6% higher than total customer average daily volume in December 2019.<sup>12</sup>

There can be no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate results in revenue that is running in excess of the Exchange's estimated regulatory costs for the year.<sup>13</sup> Particularly, as noted above, the options market has seen a substantial increase in volume in 2020, due in large part to the extreme volatility in the marketplace as a result of the COVID-19 pandemic. This unprecedented spike in volatility

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[Total-Volume-Up-71-Percent-From-a-Year-Ago.](#)

<sup>11</sup> See data from OCC at: [https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type.](https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type)

<sup>12</sup> See data from OCC at: [https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type.](https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type)

<sup>13</sup> The Exchange notes that notwithstanding the excess ORF revenue collected to date, it has not used such revenue for non-regulatory purposes.

resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to decrease the ORF in order to ensure that it no longer exceeds its regulatory costs for the year. Particularly, the Exchange believes that decreasing the ORF when combined with all of the Exchange's other regulatory fees and fines, would allow the Exchange to continue covering a material portion of its regulatory costs, while eliminating excess ORF revenue collected and, in the future, lessening the potential for generating excess revenue that may otherwise occur using the current rate.<sup>14</sup>

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying<sup>15</sup> its members and member organizations via an Options Trader Alert.<sup>16</sup>

The Exchange also proposes to amend Options 7, Section 6D of the Phlx Pricing Schedule to make clear that the ORF is assessed to member organizations. The Exchange inadvertently utilized the term "member" within the rule text instead of "member organization" and in one place neglected to note "member organization" next to the term "member". A

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<sup>14</sup> The Exchange notes that its regulatory responsibilities with respect to member and member organization compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

<sup>15</sup> The Exchange will provide members and member organizations with such notice at least 30 calendar days prior to the effective date of the change.

<sup>16</sup> The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange's projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expenses.

member organization is the entity transacting business as a broker or a dealer in securities on Phlx whereas a member is the permit holder.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>17</sup> Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act<sup>18</sup>, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, member organizations, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>19</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee change is reasonable because customer transactions will be subject to a lower ORF fee than the current rate and the adjustment will eliminate excess ORF revenue. Moreover, the proposed reduction is necessary in order for the Exchange to no longer collect revenue, in combination with other regulatory fees and fines, in excess of its anticipated regulatory costs which is consistent with the Exchange’s practices.

The Exchange had designed the ORF to generate revenues that would be less than the amount of the Exchange’s regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of

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<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(4).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it would continue to collect revenue in excess of its regulatory costs. Indeed, the Exchange notes that when taking into account the recent options volume, which included an increase in customer options transactions, it estimates the ORF will generate revenues that would cover more than the approximated Exchange's projected regulatory costs. Moreover, when coupled with the Exchange's other regulatory fees and revenues, the Exchange estimates ORF to generate over 100% of the Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to decrease the ORF amount from \$0.0050 to \$0.0042 per contract side.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all member organizations on all their transactions that clear in the customer range at the OCC.<sup>20</sup> The Exchange believes the ORF ensures fairness by assessing higher fees to those members and member organizations that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into

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<sup>20</sup> If the OCC clearing member is a Phlx member organization, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a Phlx member organization, ORF is collected only on the cleared customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member organization.

customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., member and member organization proprietary transactions) of its regulatory program.

Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its members and member organizations, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG")<sup>21</sup> the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its members and member organizations.

The Exchange's proposal to amend Options 7, Section 6D of the Phlx Pricing Schedule to make clear that the ORF is assessed to member organizations and note "member organization" next to the term "member" in one place is reasonable, equitable and not unfairly discriminatory.

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<sup>21</sup> ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

The proposed amendments will bring greater clarity to the ORF rule text by utilizing the defined terms “member” and “member organization” correctly.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

The Exchange’s proposal to amend Options 7, Section 6D of the Phlx Pricing Schedule to make clear that the ORF is assessed to member organizations and note “member organization” next to the term “member” in one place does not impose an undue burden on competition. The proposed amendments will bring greater clarity to the ORF rule text by utilizing the defined terms “member” and “member organization” correctly.

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 is effective upon filing pursuant to Section 19(b)(3)(A)<sup>22</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>23</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>24</sup> of the Act to determine whether the proposed rule change 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 No. SR-Phlx-2021-16 on the subject line.

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<sup>22</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>23</sup> 17 CFR 240.19b-4(f)(2).

<sup>24</sup> 15 U.S.C. 78s(b)(2)(B).

Paper Comments:

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

All submissions should refer to File No. SR-Phlx-2021-16. 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, D.C. 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 No. SR-Phlx-2021-16, 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>25</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>25</sup> 17 CFR 200.30-3(a)(12).