

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94453; File No. SR-Phlx-2022-10)

March 17, 2022

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Open Outcry Options Transaction Charges

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, 2022, 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 Exchange originally filed the proposed pricing changes on March 1, 2022 (SR-PHLX-2022-09). On March 10, 2022, the Exchange withdrew that filing and submitted this filing.

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.

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 Schedule within 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 increase the Lead Market

Maker³ and Market Maker⁴ Floor⁵ Options Transaction Charges⁶ in multiply-listed Penny and non-Penny Symbols and pay a Floor Broker⁷ a rebate when these parties are contra each other in certain open outcry transactions.

³ 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 Phlx’s Pricing Schedule at Options 7, Section 1(c).

⁴ 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 Phlx’s Pricing Schedule at Options 7, Section 1(c).

The term “Streaming Quote Trader” or “SQT” 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 Phlx’s Pricing Schedule at Options 7, Section 1(c). The term “Remote Streaming Quote Trader” or “RSQT” is defined in Options 1, Section 1(b)(49) as a Market Maker that is a member affiliated with an RSQTO with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. A Remote Streaming Quote Trader Organization or “RSQTO,” which may also be referred to as a Remote Market Making Organization (“RMO”), is a member organization in good standing that satisfies the RSQTO readiness requirements in Options 2, Section 1(a). See Phlx’s Pricing Schedule at Options 7, Section 1(c).

⁵ The term “floor transaction” is a transaction that is effected in open outcry on the Exchange’s Trading Floor. See Phlx’s Pricing Schedule at Options 7, Section 1(c).

⁶ Floor transaction fees apply to any “as of” or “reversal” adjustments for manually processed trades originally submitted electronically or through FBMS. See Phlx’s Pricing Schedule at Options 7, Section 4, footnote 8.

The Floor Based Management System or “FBMS” is an order management system and the gateway for the electronic execution of equity, equity index and U.S. dollar-settled foreign currency option orders represented by Floor Brokers on the Exchange’s Options Floor. Floor Brokers contemporaneously upon receipt of an order and prior to the representation of such an order in the trading crowd, record all options orders represented by such Floor Broker to FBMS, which creates an electronic audit trail. The execution of orders to Phlx’s electronic trading system also occurs via FBMS. The FBMS application is available on hand-held tablets and stationary desktops.

⁷ 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’s Pricing Schedule at Options 7, Section 1(c).

Today, the Exchange assesses Options Transaction Charges in Multiply Listed options, including options overlying equities, ETFs, ETNs and indexes and excluding options in SPY.⁸ The Exchange currently assesses the following Floor Options Transaction Charges in multiply-listed Penny and non-Penny Symbols: \$0.05 per contract for a Professional,⁹ \$0.35 per contract for a Lead Market Maker and Market Maker, and \$0.25 per contract for a Broker-Dealer¹⁰ and Firm.¹¹ Customers¹² are not assessed an Options Transaction Charge in multiply-listed Penny or non-Penny Symbols.

The Exchange proposes to increase the Floor Lead Market Maker and Floor Market Maker Options Transaction Charges in Penny and non-Penny Symbols from \$0.35 to \$0.50 per

⁸ Transactions in SPY originating on the Exchange floor will be subject to the Multiply Listed Options Fees (see Multiply Listed Options Fees in Options 7, Section 4). However, if one side of the transaction originates on the Exchange floor and any other side of the trade was the result of an electronically submitted order or a quote, then these fees will apply to the transactions which originated on the Exchange floor and contracts that are executed electronically on all sides of the transaction. The one side of the transaction which originates on the Exchange floor will count toward the volume which qualifies a participant for the Simple Order Rebate for Adding Liquidity for Lead Market Makers and Market Makers in SPY. See Options 7, Section 3, Part C.

⁹ 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 Phlx’s Pricing Schedule at Options 7, Section 1(c).

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 Phlx’s Pricing Schedule at 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 (“OCC”). See Phlx’s Pricing Schedule at Options 7, Section 1(c).

¹² The term “Customer” applies to any transaction that is identified by a member or member organization for clearing in the Customer range at 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)). See Phlx’s Pricing Schedule at Options 7, Section 1(c).

contract and pay a Floor Broker¹³ a new \$0.15 per contract rebate when a Floor Broker executes an order contra a Floor Lead Market Maker or Floor Market Maker in open outcry in multiply-listed Penny or non-Penny Symbols. The aforementioned pricing will not apply to singly listed options,¹⁴ index options,¹⁵ FLEX Options,¹⁶ strategy transactions,¹⁷ and Floor Qualified Contingent Cross Orders.¹⁸

The Exchange believes that assessing a Floor Lead Market Maker and a Floor Market Maker an increased fee of \$0.15 per contract (increase from \$0.35 to \$0.50 per contract) and paying a Floor Broker a rebate of \$0.15 per contract will incentivize Floor Brokers to attract a greater number of orders to Phlx's Trading Floor and allow Floor Lead Market Makers and Floor Market Makers to interact with those orders.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among

¹³ Today, Floor Brokers are not assessed any Options Transaction Charges.

¹⁴ Singly Listed Options are subject to pricing within Options 7, Section 5C.

¹⁵ Index Options are subject to pricing within Options 7, Section 5A, and B. Today, Options Transaction Charges in non-Penny Options exclude NDX, NDXP and XND.

¹⁶ FLEX Options are subject to pricing within Options 7, Section 6B.

¹⁷ Strategy transactions include dividend, merger, short stock interest, reversal and conversion, jelly roll and box spread strategies as described within Options 7, Section 4.

¹⁸ Floor Qualified Contingent Cross ("QCC") Orders, as described within Options 8, Section 30(e), are subject to pricing noted within Options 7, Section 4. Floor QCC Orders do not qualify as floor transactions as they are not executed in open outcry.

¹⁹ 15 U.S.C. 78f(b).

²⁰ 15 U.S.C. 78f(b)(4) and (5).

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.”²¹

Likewise, in NetCoalition v. Securities and Exchange Commission²² (“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.²³ 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.”²⁴

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

²¹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

²² NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

²³ See NetCoalition, at 534 - 535.

²⁴ Id. at 537.

granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”²⁵ 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 Lead Market Maker and the Floor Market Maker Options Transaction Charges in multiply-listed Penny and non-Penny Symbols from \$0.35 to \$0.50 per contract and pay a Floor Broker a new \$0.15 per contract rebate when a Floor Broker executes an order contra a Floor Lead Market Maker or a Floor Market Maker in open outcry in multiply-listed Penny or non-Penny Symbols is reasonable. The Exchange desires to offer a \$0.15 per contract rebate to the executing Floor Broker to attract additional order flow to the Phlx Trading Floor. A similar flat rebate is offered to Floor Brokers on BOX Exchange LLC (“BOX”).²⁶ The proposed rebate would be directed to the Floor Broker and not to the Floor Lead Market Maker or the Floor Market Maker who is assessed an Options Transaction Charge. In other words, the rebate is paid to the Floor Broker who executed the order in open outcry contra the Floor Lead Market Maker or the Floor Market Maker. The rebate would be paid from revenues obtained by assessing Floor Lead Market Makers and Floor Market Makers the

²⁵ 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)).

²⁶ Today, BOX pays Floor Brokers a \$0.075 per contract rebate for all Broker Dealer and Market Maker QOO Orders presented on the Trading Floor and a \$0.05 per contract rebate for all Professional Customer QOO Orders presented on the Trading Floor. Unlike BOX who pays a \$0.05 per contract rebate for both sides of the QOO Order, the Exchange would pay a Floor Broker a rebate of \$0.15 per contract for orders in open outcry contra Floor Lead Market Makers and Floor Market Makers in multiply-listed Penny and non-Penny Symbols. See BOX’s Fee Schedule at Section III. BOX’s rebate does not apply to Public Customer executions, executions subject to the Strategy QOO Order Fee Cap, or Broker Dealer executions where the Broker Dealer is facilitating a Public Customer. See BOX’s Fee Schedule at Section II.

proposed \$0.50 per contract Options Transaction Charge instead of the current \$0.35 per contract Options Transaction Charge.²⁷ The Exchange believes it is reasonable to only apply the rebate to Floor Brokers and not to Floor Lead Market Makers and Floor Market Makers. Floor Lead Market Makers and Floor Market Makers only represent their own interest on the Trading Floor and therefore do not need a similar incentive. Unlike Floor Lead Market Makers and Floor Market Makers, Floor Brokers act as agents in representing orders on the Exchange's Trading Floor. Participants who desire to have an order executed on Phlx's Trading Floor would provide that order to a Floor Broker to be represented on the Trading Floor. Floor Lead Market Makers and Floor Market Makers may interact with orders represented by the Floor Broker in open outcry on the Trading Floor. Finally, Floor Lead Market Makers and Floor Market Makers may choose to conduct their business on a Trading Floor or in an electronic market, unlike Floor Brokers, who have a business model that is naturally tied to the physical trading space. While this proposal increases the Floor Options Transaction Charges for Floor Lead Market Makers and Floor Market Makers in open outcry in multiply-listed Penny or non-Penny Symbols when a Floor Broker executes an order contra a Floor Lead Market Maker or a Floor Market Maker, the Exchange believes that the ability to attract a greater amount of order flow on the Exchange's Trading Floor will allow Floor Lead Market Makers and Floor Market Makers to participate in a greater number of open outcry transactions.

Today, market participants may send order flow to the Trading Floor by either investing in technology, systems and personnel to participate on the Trading Floor, or utilizing the services of a Floor Broker. Offering the proposed rebate to Floor Brokers will allow Floor Brokers to

²⁷ BOX assesses its Market Makers a manual transaction fee of \$0.35 per contract in Penny and Non-Penny Interval Classes. See BOX's Fee Schedule at Section II.

price their services at a level that would enable them to attract additional order flow to the Exchange. To the extent Floor Brokers are able to attract additional orders; they will gain important information that would allow them to solicit future orders for participation in other trades. This will in turn, benefit other Exchange participants through additional liquidity on the Trading Floor with which they may interact. Finally, the Exchange believes that the rebate will promote competition by allowing Floor Brokers to competitively price their services and for the Exchange to remain competitive with other exchanges.

The Exchange's proposal to increase the Floor Lead Market Maker and the Floor Market Maker Options Transaction Charges in multiply-listed Penny and non-Penny Symbols from \$0.35 to \$0.50 per contract and pay a Floor Broker a new \$0.15 per contract rebate when a Floor Broker executes an order contra a Floor Lead Market Maker or a Floor Market Maker in open outcry in multiply-listed Penny or non-Penny Symbols is equitable and not unfairly discriminatory. The Exchange believes it is equitable and not unfairly discriminatory to only apply the rebate to Floor Brokers and not to Floor Lead Market Makers and Floor Market Makers. Floor Lead Market Makers and Floor Market Makers only represent their own interest on the Trading Floor and therefore do not need a similar incentive. Unlike Floor Lead Market Makers and Floor Market Makers, Floor Brokers act as agents in representing orders on the Exchange's Trading Floor. They serve a valuable function in open outcry in allowing market participants to have their orders represented in this venue without the need to be a member of the Exchange.²⁸ Further, Floor Lead Market Makers and Floor Market Makers benefit from having access to interact with orders that are made available in open outcry on the Trading Floor. Floor

²⁸ Participants who desire to have an order executed on Phlx's Trading Floor would provide that order to a Floor Broker to be represented on the Trading Floor.

Lead Market Makers and Floor Market Makers may choose to conduct their business on a Trading Floor or in an electronic market, unlike Floor Brokers, who have a business model that is naturally tied to the physical trading space. The Exchange believes that it is equitable and not unfairly discriminatory to assess Floor Lead Market Makers and Floor Market Makers a higher Options Transaction Charge because they have the benefit of trading on the Trading Floor or in an electronic venue if they so choose. The proposed \$0.50 Options Transaction Charge for Floor Lead Market Makers and Floor Market Makers and the \$0.15 per contract rebate for Floor Brokers will be uniformly assessed and paid, respectively, to all Floor Lead Market Makers, Floor Market Makers, and Floor Brokers participating in open outcry trades in multiply-listed Penny and non-Penny symbols.

The Exchange believes that its proposal to not pay a rebate when an order is executed electronically or for orders that are singly listed options, index options, FLEX Options, strategy transactions, and Floor QCC Orders is reasonable, equitable and not unfairly discriminatory as pricing for these types of transactions are specified separately from Floor Options Transaction Charges within Options 7, Section 4 of the Pricing Schedule.

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 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.

Moreover, the proposal is designed to encourage Floor Brokers to attract a greater amount of order flow to Phlx's Trading Floor. To the extent that the proposed change attracts additional order flow to Phlx's Trading Floor, this increased order flow would continue to make the Exchange a more competitive venue for order execution.

Intra-market Competition

The proposed amendments do not impose an undue burden on intra-market competition.

The Exchange's proposal to increase the Floor Lead Market Maker and the Floor Market Maker Options Transaction Charges in multiply-listed Penny and non-Penny Symbols from \$0.35 to \$0.50 per contract and pay a Floor Broker a new \$0.15 per contract rebate when a Floor Broker executes an order contra a Floor Lead Market Maker or a Floor Market Maker in open outcry in multiply-listed Penny or non-Penny Symbols does not impose an undue burden on competition. Only applying a rebate to Floor Brokers and not to Floor Lead Market Makers and Floor Market Makers does not impose an undue burden on competition because Floor Lead Market Makers and Floor Market Makers only represent their own interest on the Trading Floor and therefore do not need a similar incentive. Unlike Floor Lead Market Makers and Floor Market Makers, Floor Brokers act as agents in representing orders on the Exchange's Trading

Floor. They serve a valuable function in open outcry in allowing market participants to have their orders represented in this venue without the need to be a member of the Exchange. Further, Floor Lead Market Makers and Floor Market Makers benefit from having access to interact with orders that are made available in open outcry on the Trading Floor. Floor Lead Market Makers and Floor Market Makers may choose to conduct their business on the Trading Floor or in an electronic market, unlike Floor Brokers, who have a business model that is naturally tied to the physical trading space. The Exchange believes that assessing Floor Lead Market Makers and Floor Market Makers a higher Options Transaction Charge does not impose an undue burden on competition because they have the benefit of trading on a Trading Floor or in an electronic venue if they so choose. The proposed \$0.50 Options Transaction Charge for Floor Lead Market Makers and Floor Market Makers and the \$0.15 per contract rebate for Floor Brokers will be uniformly assessed and paid, respectively, to all Floor Lead Market Makers, Floor Market Makers, and Floor Brokers participating in open outcry trades in multiply-listed Penny and non-Penny symbols.

The Exchange believes that its proposal to not pay a rebate when an order is executed electronically or for orders that are singly listed options, index options, FLEX Options, strategy transactions, and Floor QCC Orders does not impose an undue burden on competition as pricing for these types of transactions are specified separately from Floor Options Transaction Charges within Options 7, Section 4 of the Pricing Schedule.

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.²⁹

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-2022-10 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-2022-10. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

²⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2022-10 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.³⁰

J. Matthew DeLesDernier
Assistant Secretary

³⁰ 17 CFR 200.30-3(a)(12).