

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 27	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4		File No.* SR - 2017 - * 61	Amendment No. (req. for Amendments *)	
Filing by NASDAQ PHLX LLC Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934					
Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	Rule <input type="checkbox"/> 19b-4(f)(1) <input type="checkbox"/> 19b-4(f)(4) <input checked="" type="checkbox"/> 19b-4(f)(2) <input type="checkbox"/> 19b-4(f)(5) <input type="checkbox"/> 19b-4(f)(3) <input type="checkbox"/> 19b-4(f)(6)		
Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010 Section 806(e)(1) * <input type="checkbox"/>			Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934 Section 3C(b)(2) * <input type="checkbox"/>		
Exhibit 2 Sent As Paper Document <input checked="" type="checkbox"/>		Exhibit 3 Sent As Paper Document <input checked="" type="checkbox"/>			
<b>Description</b> Provide a brief description of the action (limit 250 characters, required when Initial is checked *).  Proposal to amend the Exchange Pricing Schedule to (i) increase the NDX Options Transaction Charges; (ii) exclude NDX transactions from the Exchange Monthly Firm Fee Cap; and (iii) exempt NDX transactions from the Exchange waiver of Options Transaction Charges.					
<b>Contact Information</b> Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.  First Name * Brett Last Name * Kitt Title * Senior Associate General Counsel E-mail * Brett.Kitt@nasdaq.com Telephone * (301) 978-8132 Fax <input type="text"/>					
<b>Signature</b> Pursuant to the requirements of the Securities Exchange Act of 1934,  has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized. (Title *) Date 07/31/2017 By Edward S. Knight (Name *) Executive Vice President and General Counsel  NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.  edward.knight@nasdaq.com					

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) NASDAQ PHLX LLC (“Phlx” or “Exchange”), 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> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the Exchange’s Pricing Schedule to: (i) increase the Options Transaction Charge for Specialists and Market Makers who engage in NDX transactions on the Exchange Floor; (ii) exclude NDX transactions from the Exchange’s Monthly Firm Fee Cap that otherwise applies to the monthly transaction fees that market participants incur when trading on the Exchange; and (iii) exempt NDX transactions from the Exchange’s waiver of Options Transaction Charges for certain facilitation orders.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on August 1, 2017.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”) on August 15, 2016. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

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

<sup>2</sup> 17 CFR 240.19b-4.

Questions and comments on the proposed rule change may be directed to:

Brett M. Kitt  
Senior Associate General Counsel  
Nasdaq, Inc.  
(301) 978-8132.

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

a. Purpose

The Exchange proposes to make three changes to Section II of its Pricing Schedule. First, the Exchange proposes to increase its Options Transaction Charge for Specialists and Market Makers that engage in NDX transactions on the Exchange Floor. Last March, the Exchange increased its Options Transaction Charges from \$0.25 to \$0.75 per contract for all categories of market participants transacting in NDX, except for Specialists and Market Makers which transact in NDX on the Floor and Customers.<sup>3</sup> At that time, the Exchange decided not to raise its \$0.35 per contract Option Transaction Charge for Specialists and Market Makers transacting in NDX on the Floor because it sought to incentivize Specialists and Market Makers to continue to make markets in the NDX product on the Floor. However, the Exchange has decided to discontinue this incentive program and, as such, the Exchange now seeks to increase the Transaction Charge to \$0.75 per contract. This proposal will harmonize the schedule of NDX Options Transaction Charges for all non-Customer market participants in all circumstances in which they trade in NDX on the Exchange in that it will charge them the

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<sup>3</sup> See Securities Exchange Act Release No. 34-80244 (March 13, 2017), 82 FR 14388 (March 20, 2017). The categories of market participants that incur an Options Transaction Charge of \$0.75 per contract when they transact in NDX include Professionals (both electronic and Floor trading), Specialists and Market Makers (electronic trading only), Broker-Dealers (both electronic and Floor Trading), and Firms (both electronic and Floor trading).

same per contract fee and will do so for both Floor-based and electronic transactions (except that the Exchange will continue to refrain from imposing an Options Transaction Charge on Customers that engage in NDX transactions). Moreover, the fee increase will permit the Exchange to recoup its operational costs for listing NDX, which is a proprietary product of the Exchange.

Second, the Exchange proposes to exempt NDX Options Transaction Charges from the \$75,000 Monthly Firm Fee Cap that it otherwise applies to member organizations that trade on the Exchange in their own proprietary accounts. The Exchange bases this proposal upon a similar exemption that CBOE applies from its \$75,000 monthly transaction fee cap for its proprietary options index products, including VIX and SPX.<sup>4</sup>

Third, the Exchange proposes to exclude NDX Options Transactions from several waivers that it otherwise grants to certain categories of market participants of its Floor Options Transaction Charges. Specifically, the Exchange will not waive Firm Floor Options Transaction Charges for members that execute NDX facilitation orders when such members trade in their own proprietary account (including Cabinet Options Transaction Charges). Also, the Exchange will not waive Firm Floor Options

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<sup>4</sup> See Chicago Board Options Exchange, Inc., Fees Schedule (July 11, 2017), at n.22 (“For all non-facilitation business executed in AIM or open outcry, or as a QCC or FLEX transaction, transaction fees for Clearing Trading Permit Holder Proprietary and/or their Non-Trading Permit Holder Affiliates (as defined in footnote 11) in all products except Underlying Symbol List A (34), excluding binary options, in the aggregate, are capped at \$75,000 per month per Clearing Trading Permit Holder. As CBOE assesses no Clearing Trading Permit Holder Proprietary transaction fees for facilitation orders (other than Underlying Symbol List A (34), excluding binary options) (as described in footnote 11), such trades will not count towards the cap. Surcharge fees do not count towards the cap.”); *id.* at n.34 (defining “Underlying Symbol List A” to include SPX and VIX).

Transaction Charges for the buy side of an NDX transaction if the same member or its affiliates under Common Ownership represents both sides of a Firm transaction when such members are trading in their own proprietary account. Lastly, the Exchange will not waive the Broker-Dealer Floor Options Transaction Charge (including Cabinet Options Transaction Charges) for members that execute NDX facilitation in their own proprietary account contra to a Customer ("BD-Customer Facilitation"), where the member's BD-Customer Facilitation average daily volume (including both FLEX and non-FLEX transactions) exceeds 10,000 contracts per day in a given month. The Exchange intends for these exclusions to help it recoup its costs of developing and maintaining NDX as a proprietary product. Again, moreover, this proposal is consistent with an exclusion for proprietary products that CBOE applies to fee waivers involving facilitation orders.<sup>5</sup>

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>7</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve

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<sup>5</sup> See *id.* (noting that CBOE excludes its proprietary products from its \$0.00 charge for facilitation orders).

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

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (5).

the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>8</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>9</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>10</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>11</sup>

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ . . .”<sup>12</sup> Although the court

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<sup>8</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>9</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>10</sup> See NetCoalition, at 534 - 535.

<sup>11</sup> Id. at 537.

<sup>12</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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 believes that its proposal to increase its Option Transaction Charges for Specialists and Market Makers transacting in NDX on the Floor is reasonable because the Exchange already charges Specialists and Market Makers \$0.75 per contract for electronic transactions involving NDX as well the same amount for Professionals, Broker-Dealers, and Firms that engage in NDX transactions both electronically and on the Floor. The proposal, in other words, will bring the Exchange's Pricing Schedule for Option Transaction Charges into harmony, except for Customers. The Exchange also believes that its proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same Options Transaction Charges to all similarly situated market participants, except for Customers.

The Exchange believes that its decision to refrain from assessing to Customers Options Transaction Charges for NDX is equitable and not unfairly discriminatory because Customer orders bring valuable liquidity to the market, which benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in these in the activity of these market participants, in turn, facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

The Exchange also believes that its proposal to exempt NDX from the Monthly Firm Fee Cap on Options Transaction Charges is reasonable because CBOE employs a similar exemption from its monthly option transaction fee cap for transactions in its



proprietary products.<sup>13</sup> This proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members.

Finally, the Exchange believes that its proposal is reasonable to exclude NDX from the waivers of Options Transaction Charges that it otherwise grants in certain circumstances involving the execution of facilitation orders. Again, the Exchange's proposal is similar to that which CBOE employs with respect to facilitation orders involving its proprietary products. The Exchange also believes this proposal is reasonable insofar as the Exchange incurs costs associated with the development and maintenance of NDX as a proprietary product and the exclusion from the fee waiver will help it to recoup those costs. Furthermore, the Exchange believes that this proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee waiver exclusion to all similarly situated members.

4. 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

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<sup>13</sup> See Chicago Board Options Exchange, Inc., Fees Schedule, supra.

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.

In this instance, the proposed increase to the Options Transaction Charge for Specialists and Market Makers engaging in Floor-based MDX transactions does not impose a burden on competition because the increase will result in the Exchange uniformly assessing a \$0.75 per contract Options Transaction charge for all market participants, except Customers, regardless of whether the transaction is submitted electronically or on the Floor.

The Exchange believes that assessing Customers no transaction fees for NDX does not impose an undue burden on intramarket competition because Customer orders bring valuable liquidity to the market, which benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in these in the activity of these market participants, in turn, facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

The Exchange does not believe that its proposals to exempt NDX from its Monthly Firm Fee Cap and to exclude NDX transactions from its fee waivers for certain facilitation transactions will impose a burden competition. These proposals are similar to CBOE's practices with respect to its proprietary products.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>14</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The Exchange bases its proposal, in part, on the Chicago Board Options Exchange, Incorporated Fee Schedule.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

11. Exhibits

1. Notice of Proposed Rule Change for publication in the Federal Register.
5. Text of the proposed rule change.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-Phlx-2017-61)

August \_\_, 2017

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule

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 July 31, 2017 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 the Exchange's Pricing Schedule to: (i) increase the Options Transaction Charge for Specialists and Market Makers who engage in NDX transactions on the Exchange Floor; (ii) exclude NDX transactions from the Exchange's Monthly Firm Fee Cap that otherwise applies to the monthly transaction fees that market participants incur when trading on the Exchange; and (iii) exempt NDX transactions from the Exchange's waiver of Options Transaction Charges for certain facilitation orders.

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on August 1, 2017.

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

<sup>2</sup> 17 CFR 240.19b-4.

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.

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 make three changes to Section II of its Pricing Schedule. First, the Exchange proposes to increase its Options Transaction Charge for Specialists and Market Makers that engage in NDX transactions on the Exchange Floor. Last March, the Exchange increased its Options Transaction Charges from \$0.25 to \$0.75 per contract for all categories of market participants transacting in NDX, except for Specialists and Market Makers which transact in NDX on the Floor and Customers.<sup>3</sup> At that time, the Exchange decided not to raise its \$0.35 per contract Option Transaction Charge for Specialists and Market Makers transacting in NDX on the Floor because it

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<sup>3</sup> See Securities Exchange Act Release No. 34-80244 (March 13, 2017), 82 FR 14388 (March 20, 2017). The categories of market participants that incur an Options Transaction Charge of \$0.75 per contract when they transact in NDX include Professionals (both electronic and Floor trading), Specialists and Market Makers (electronic trading only), Broker-Dealers (both electronic and Floor Trading), and Firms (both electronic and Floor trading).

sought to incentivize Specialists and Market Makers to continue to make markets in the NDX product on the Floor. However, the Exchange has decided to discontinue this incentive program and, as such, the Exchange now seeks to increase the Transaction Charge to \$0.75 per contract. This proposal will harmonize the schedule of NDX Options Transaction Charges for all non-Customer market participants in all circumstances in which they trade in NDX on the Exchange in that it will charge them the same per contract fee and will do so for both Floor-based and electronic transactions (except that the Exchange will continue to refrain from imposing an Options Transaction Charge on Customers that engage in NDX transactions). Moreover, the fee increase will permit the Exchange to recoup its operational costs for listing NDX, which is a proprietary product of the Exchange.

Second, the Exchange proposes to exempt NDX Options Transaction Charges from the \$75,000 Monthly Firm Fee Cap that it otherwise applies to member organizations that trade on the Exchange in their own proprietary accounts. The Exchange bases this proposal upon a similar exemption that CBOE applies from its \$75,000 monthly transaction fee cap for its proprietary options index products, including VIX and SPX.<sup>4</sup>

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<sup>4</sup> See Chicago Board Options Exchange, Inc., Fees Schedule (July 11, 2017), at n.22 (“For all non-facilitation business executed in AIM or open outcry, or as a QCC or FLEX transaction, transaction fees for Clearing Trading Permit Holder Proprietary and/or their Non-Trading Permit Holder Affiliates (as defined in footnote 11) in all products except Underlying Symbol List A (34), excluding binary options, in the aggregate, are capped at \$75,000 per month per Clearing Trading Permit Holder. As CBOE assesses no Clearing Trading Permit Holder Proprietary transaction fees for facilitation orders (other than Underlying Symbol List A (34), excluding binary options) (as described in footnote 11), such trades will not count towards the cap. Surcharge fees do not count towards the cap.”); *id.* at n.34 (defining “Underlying Symbol List A” to include SPX and VIX).

Third, the Exchange proposes to exclude NDX Options Transactions from several waivers that it otherwise grants to certain categories of market participants of its Floor Options Transaction Charges. Specifically, the Exchange will not waive Firm Floor Options Transaction Charges for members that execute NDX facilitation orders when such members trade in their own proprietary account (including Cabinet Options Transaction Charges). Also, the Exchange will not waive Firm Floor Options Transaction Charges for the buy side of an NDX transaction if the same member or its affiliates under Common Ownership represents both sides of a Firm transaction when such members are trading in their own proprietary account. Lastly, the Exchange will not waive the Broker-Dealer Floor Options Transaction Charge (including Cabinet Options Transaction Charges) for members that execute NDX facilitation in their own proprietary account contra to a Customer ("BD-Customer Facilitation"), where the member's BD-Customer Facilitation average daily volume (including both FLEX and non-FLEX transactions) exceeds 10,000 contracts per day in a given month. The Exchange intends for these exclusions to help it recoup its costs of developing and maintaining NDX as a proprietary product. Again, moreover, this proposal is consistent with an exclusion for proprietary products that CBOE applies to fee waivers involving facilitation orders.<sup>5</sup>

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>7</sup> in

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<sup>5</sup> See *id.* (noting that CBOE excludes its proprietary products from its \$0.00 charge for facilitation orders).

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

<sup>7</sup> 15 U.S.C. 78f(b)(4) and (5).



particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>8</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>9</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>10</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>11</sup>

Further, “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and

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<sup>8</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>9</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>10</sup> See NetCoalition, at 534 - 535.

<sup>11</sup> Id. at 537.

the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ....”<sup>12</sup> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes that its proposal to increase its Option Transaction Charges for Specialists and Market Makers transacting in NDX on the Floor is reasonable because the Exchange already charges Specialists and Market Makers \$0.75 per contract for electronic transactions involving NDX as well the same amount for Professionals, Broker-Dealers, and Firms that engage in NDX transactions both electronically and on the Floor. The proposal, in other words, will bring the Exchange’s Pricing Schedule for Option Transaction Charges into harmony, except for Customers. The Exchange also believes that its proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same Options Transaction Charges to all similarly situated market participants, except for Customers.

The Exchange believes that its decision to refrain from assessing to Customers Options Transaction Charges for NDX is equitable and not unfairly discriminatory because Customer orders bring valuable liquidity to the market, which benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in these in the activity of these market participants, in turn, facilitates tighter spreads, which

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<sup>12</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

may cause an additional corresponding increase in order flow from other market participants.

The Exchange also believes that its proposal to exempt NDX from the Monthly Firm Fee Cap on Options Transaction Charges is reasonable because CBOE employs a similar exemption from its monthly option transaction fee cap for transactions in its proprietary products.<sup>13</sup> This proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly situated members.

Finally, the Exchange believes that its proposal is reasonable to exclude NDX from the waivers of Options Transaction Charges that it otherwise grants in certain circumstances involving the execution of facilitation orders. Again, the Exchange's proposal is similar to that which CBOE employs with respect to facilitation orders involving its proprietary products. The Exchange also believes this proposal is reasonable insofar as the Exchange incurs costs associated with the development and maintenance of NDX as a proprietary product and the exclusion from the fee waiver will help it to recoup those costs. Furthermore, the Exchange believes that this proposal is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee waiver exclusion to all similarly situated members.

**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

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<sup>13</sup> See Chicago Board Options Exchange, Inc., Fees Schedule, supra.

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.

In this instance, the proposed increase to the Options Transaction Charge for Specialists and Market Makers engaging in Floor-based MDX transactions does not impose a burden on competition because the increase will result in the Exchange uniformly assessing a \$0.75 per contract Options Transaction charge for all market participants, except Customers, regardless of whether the transaction is submitted electronically or on the Floor.

The Exchange believes that assessing Customers no transaction fees for NDX does not impose an undue burden on intramarket competition because Customer orders bring valuable liquidity to the market, which benefits other market participants. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in these in the activity of these market participants, in turn, facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

The Exchange does not believe that its proposals to exempt NDX from its Monthly Firm Fee Cap and to exclude NDX transactions from its fee waivers for certain facilitation transactions will impose a burden competition. These proposals are similar to CBOE's practices with respect to its proprietary products.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>14</sup>

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

IV. Solicitation of Comments

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

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2017-61 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-2017-61. 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 Web site (<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-2017-61 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>15</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

Deleted text is [bracketed]. New text is underlined.

**NASDAQ PHLX Rules**

**THE EXCHANGE CALCULATES FEES ON A TRADE DATE BASIS.**

**POLICY FOR AMENDING BILLING INFORMATION: CORRECTIONS SUBMITTED AFTER TRADE DATE AND PRIOR TO THE ISSUANCE OF AN INVOICE BY THE EXCHANGE MUST BE SUBMITTED TO THE EXCHANGE IN WRITING AND MUST BE ACCOMPANIED BY SUPPORTING DOCUMENTATION. ONLY MEMBERS MAY SUBMIT TRADE CORRECTIONS.**

**ALL BILLING DISPUTES MUST BE SUBMITTED TO THE EXCHANGE IN WRITING AND MUST BE ACCOMPANIED BY SUPPORTING DOCUMENTATION. ALL DISPUTES MUST BE SUBMITTED NO LATER THAN SIXTY (60) DAYS AFTER RECEIPT OF A BILLING INVOICE, EXCEPT FOR DISPUTES CONCERNING NASDAQ PSX FEES, PROPRIETARY DATA FEED FEES AND CO-LOCATION SERVICES FEES. THE EXCHANGE CALCULATES FEES ON A TRADE DATE BASIS. ONLY MEMBERS MAY SUBMIT BILLING DISPUTES.**

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**NASDAQ PHLX LLC PRICING SCHEDULE**

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**II. Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed)**

	Customer	Professional	Specialist and Market Maker	Broker-Dealer	Firm				
	Electronic	Floor	Electronic	Floor	Electronic	Floor			
<b>Options Transaction Charge (Penny Pilot)<sup>6</sup></b>	\$0.00	\$0.48 <sup>2</sup>	\$0.25	\$0.22	\$0.35	\$0.48 <sup>2</sup>	\$0.25	\$0.48 <sup>1, 2</sup>	\$0.25



<b>Options Transaction Charge (non-Penny Pilot)<sup>7</sup>, excluding NDX</b>	\$0.00	\$0.75 <sup>3</sup>	\$0.25	\$0.25 <sup>4</sup>	\$0.35	\$0.75 <sup>3</sup>	\$0.25	\$0.75 <sup>1, 3</sup>	\$0.25
<b>Options Transactions Charge NDX<sup>5</sup></b>	\$0.00	\$0.75	\$0.75	\$0.75	[\$0.35] <u>\$0.75</u>	\$0.75	\$0.75	\$0.75	\$0.75
<b>Options Surcharge in BKK</b>	N/A	\$0.10	\$0.10	\$0.10	\$0.10	\$0.10	\$0.10	\$0.10	\$0.10
<b>Cabinet Options</b>	\$0.00	N/A	\$0.10	N/A	\$0.10	N/A	\$0.10	N/A	\$0.10

- These fees are per contract.

<sup>1</sup> No change.

<sup>2</sup> No change.

<sup>3</sup> No change.

<sup>4</sup> No change.

<sup>5</sup> No change.

<sup>6</sup> No change.

<sup>7</sup> No change.

- The Cabinet Fees above are not in addition to the Options Transaction Charges.

• QCC Transaction Fees for a Specialist, Market Maker, Firm and Broker-Dealer are \$0.20 per contract. Customers and Professionals are not assessed a QCC Transaction Fee. QCC Transaction Fees apply to QCC Orders, as defined in Exchange Rule 1080(o), and Floor QCC Orders, as defined in 1064(e). A rebate, as specified in the below QCC Rebate Schedule, will be paid for all qualifying executed QCC Orders, as defined in Exchange Rule 1080(o) and Floor QCC Orders, as defined in 1064(e), except where the transaction is either: (i) Customer-to-Customer; (ii) Customer-to-Professional, (iii)

Professional-to-Professional or (iv) a dividend, merger, short stock interest or reversal or conversion strategy execution (as defined in Section II).

### **QCC Rebate Schedule**

<b>Tier</b>	<b>Threshold</b>	<b>Rebate per Contract</b>
Tier 1	0 to 99,999 contracts in a month	\$0.00
Tier 2	100,000 to 299,999 contracts in a month	\$0.05
Tier 3	300,000 to 499,999 contracts in a month	\$0.07
Tier 4	500,000 to 699,999 contracts in a month	\$0.08
Tier 5	700,000 to 999,999 contracts in a month	\$0.09
Tier 6	Over 1,000,000 contracts in a month	\$0.11

The maximum QCC Rebate to be paid in a given month will not exceed \$550,000.

• Specialists and Market Makers are subject to a "Monthly Market Maker Cap" of \$500,000 for: (i) electronic Option Transaction Charges, excluding surcharges; and (ii) QCC Transaction Fees (as defined in Exchange Rule 1080(o) and Floor QCC Orders, as defined in 1064(e)). The trading activity of separate Specialist and Market Maker member organizations will be aggregated in calculating the Monthly Market Maker Cap if there is Common Ownership between the member organizations. All dividend, merger, short stock interest, reversal and conversion, jelly roll and box spread strategy executions (as defined in this Section II) will be excluded from the Monthly Market Maker Cap. Specialists or Market Makers that (i) are on the contra-side of an electronically-delivered and executed Customer order, excluding responses to a PIXL auction; and (ii) have reached the Monthly Market Maker Cap will be assessed fees as follows:

### **Fee per contract**

\$0.05 per contract Fee for Adding Liquidity in Penny Pilot Options

\$0.18 per contract Fee for Removing Liquidity in Penny Pilot Options

\$0.18 per contract in Non-Penny Pilot Options

\$0.18 per contract in a non-Complex electronic auction, including the Quote Exhaust auction and, for purposes of this fee, the opening process. A Complex electronic auction includes, but is not limited to, the Complex Order Live Auction ("COLA").

Transactions which execute against an order for which the Exchange broadcast an order exposure alert in an electronic auction will be subject to this fee.

- Firms are subject to a maximum fee of \$75,000 ("Monthly Firm Fee Cap"). Firm Floor Option Transaction Charges and QCC Transaction Fees, as defined in this section above, in the aggregate, for one billing month will not exceed the Monthly Firm Fee Cap per member organization when such members are trading in their own proprietary account. All dividend, merger, and short stock interest strategy executions (as defined in this Section II) will be excluded from the Monthly Firm Fee Cap. NDX Options Transactions will be excluded from the Monthly Firm Fee Cap. Reversal and conversion, jelly roll and box spread strategy executions (as defined in this Section II) will be included in the Monthly Firm Fee Cap. QCC Transaction Fees are included in the calculation of the Monthly Firm Fee Cap. Member organizations must notify the Exchange in writing of all accounts in which the member is not trading in its own proprietary account. The Exchange will not make adjustments to billing invoices where transactions are commingled in accounts which are not subject to the Monthly Firm Fee Cap.
- The Firm Floor Options Transaction Charges will be waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members are trading in their own proprietary account (including Cabinet Options Transaction Charges). The Firm Floor Options Transaction Charges will be waived for the buy side of a transaction if the same member or its affiliates under Common Ownership represents both sides of a Firm transaction when such members are trading in their own proprietary account. In addition, the Broker-Dealer Floor Options Transaction Charge (including Cabinet Options Transaction Charges) will be waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members would otherwise incur this charge for trading in their own proprietary account contra to a Customer ("BD-Customer Facilitation"), if the member's BD-Customer Facilitation average daily volume (including both FLEX and non-FLEX transactions) exceeds 10,000 contracts per day in a given month. NDX Options Transactions will be excluded from each of the waivers set forth in the above paragraph.

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