

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81362; File No. SR-Phlx-2017-61)

August 9, 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"),¹ and Rule 19b-4 thereunder,² 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.

¹ 15 U.S.C. 78s(b)(1).

² 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.³ 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

³ 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).

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.⁴

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

⁴ 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).

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.⁵

2. Statutory Basis

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

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

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

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.”⁸

Likewise, in NetCoalition v. Securities and Exchange Commission⁹ (“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.¹⁰ 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.”¹¹

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’ . . .”¹² Although the court and the SEC were discussing the

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

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

¹⁰ See NetCoalition, at 534 - 535.

¹¹ Id. at 537.

¹² 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)).

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.¹³ This

¹³ See Chicago Board Options Exchange, Inc., Fees Schedule, supra.

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 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.¹⁴

¹⁴ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2017-61 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Brent J. Fields, 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 website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those

that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-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.¹⁵

Eduardo A. Aleman
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).