

Required fields are shown with yellow backgrounds and asterisks.

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"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<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	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
Section 3C(b)(2) * <input type="checkbox"/>	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

Proposed rule change to amend the Exchange provisions for excluding a day from its volume calculations for purposes of determining pricing tiers.

Contact Information

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 * Sun Last Name * Kim

Title * Associate General Counsel

E-mail * Sun.Kim@nasdaq.com

Telephone * (212) 231-5106 Fax

Signature

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 11/14/2018 Global Chief Legal and Policy Officer

By Edward S. Knight

(Name *)

edward.knight@nasdaq.com

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.

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”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change to amend the Exchange’s provisions for excluding a day from its volume calculations for purposes of determining pricing tiers.

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 September 26, 2018. 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.

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

Sun Kim
Associate General Counsel
Nasdaq, Inc.
212-231-5106

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

a. Purpose

The purpose of the proposed rule change is to amend the Exchange's provisions for excluding a day from its volume calculations for purposes of determining pricing tiers, as further discussed below.

Background

To avoid penalizing members when aberrant low volume days result from systems or other issues at the Exchange, or where the Exchange closes early for holiday observance, the Exchange currently has language in its Pricing Schedule allowing it to exclude certain days from its average daily volume ("ADV") calculations or calculations that are based on a percentage of industry volume. Currently, Section 1(b) of the Exchange's Pricing Schedule provides that for Phlx options, any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation or calculation based on a percentage of industry volume; provided that the Exchange will only remove the day for members that would have a lower ADV or percentage of industry volume with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and the denominator of the calculation.³ The proviso language in Section 1(b) (hereinafter, the "better of rule") ensures that members would only have the day removed

³ The Exchange removes the day from both the numerator and denominator to ensure that members benefit from this rule as removing the day from the numerator only (i.e., the member's volume) without removing it from the denominator (i.e., industry volume) would penalize the member.

when doing so is beneficial for the member. As such, the Exchange only applies the better of rule to ADV calculations and calculations based on a percentage of industry volume, and not for other volume-based pricing where members would not benefit from having the day excluded (e.g., straight volume accumulations).

In a recent review of the rule, the Exchange determined that it would be beneficial to further expand upon and provide additional detail regarding how the Exchange applies this rule.

Proposal

The Exchange first proposes to delete the lead-in “For Phlx Options” in Section 1(b) of Options 7, and retitle this section as “Removal of Days for Purposes of Pricing Tiers.” The fees for Phlx options and PSX equities are no longer included in the same pricing schedule, and the Exchange therefore believes that the current clarifying lead-in is no longer necessary.⁴ The Exchange also proposes to adopt the following language to replace current rule text in Section 1(b):

(1)(A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options tier calculations only pursuant to paragraph (3) below.

(2) The Exchange may exclude the following days (“Unanticipated Events”) from the options tier calculations only pursuant to paragraph (3) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange instructs members in writing to route their orders to other markets, (C) the Exchange is inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

⁴ See Securities Exchange Act Release No. 84495 (October 29, 2018), 83 FR 55210 (November 2, 2018) (SR-Phlx-2018-66).

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member's monthly options tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event;

(B) the Exchange may exclude from the calculation based on a percentage of industry volume any Scheduled Early Close or Unanticipated Event; and

(C) the Exchange may exclude from any other applicable options tier calculation provided for in its Schedule of Fees (together with (3)(A) and (3)(B), "Tier Calculations") any Scheduled Early Close or Unanticipated Event;

provided, in each case, that the Exchange will only remove the day for members that would have a lower Tier Calculation with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and the denominator of the calculation.

The proposed rule change: (i) expands upon the existing scenarios where the Exchange may remove a day to adopt two additional situations related to Exchange systems disruptions, (ii) categorizes the scenarios into days that are known in advance (i.e., days in proposed paragraph (1), including Scheduled Early Closes) and days that are not (i.e., Unanticipated Events in proposed paragraph (2)), (iii) clarifies how each scenario would apply to the options tier calculations in the Pricing Schedule, (iv) adds a "catch-all" provision for other volume based options tier calculations set forth in its Pricing Schedule, but are not specified within paragraphs (3)(A) and (3)(B), to clarify how the Exchange would exclude days for other such Tier Calculations going forward, and (v) generally adds more detail to clarify the application of the better of rule. As it relates to Unanticipated Events, the Exchange will inform all members if any such day will be excluded from its Tier Calculations through a publicly published alert. The

Exchange notes that it is not proposing any changes to the existing rebates or to the current tier calculation thresholds required to achieve each rebate tier.

Exchange Systems Disruptions

The Exchange proposes to adopt two additional scenarios as “Unanticipated Events” that the Exchange may determine to exclude from its Tier Calculations. First, the Exchange proposes to exclude days where the Exchange is inaccessible to members during the 30-minute period before the opening of trade (i.e., between 9:00 a.m. to 9:30 a.m. Eastern Time) due to an Exchange system disruption, even if the Exchange does not instruct members to route away to other markets. As discussed above, the Exchange’s current ability to remove days from its calculations of ADV and industry volume percentages is limited to days where the market is not open for the entire trading day, and where the Exchange instructs members to route away to other markets. This allows the Exchange to exclude days, for example, where the Exchange honors a market-wide trading halt declared by another market, closes early for holiday observance, or instructs members to route away to other markets because of a systems issue in the morning, which ultimately does not carry over into the trading day. The Exchange notes, however, that it may not always instruct members to route away. For instance, the Exchange may be inaccessible to members in the morning due to a systems disruption but the Exchange resolves the issue shortly before 9:30 a.m. and as a result, the Exchange does not instruct members to route away. In such cases, the Exchange is not permitted to exclude the day from its ADV calculation or calculation based on a percentage of industry volume. The Exchange generally experiences a high volume of member participation within the 30-minute window leading up to the opening of trade from members who submit eligible interest be included in the Exchange’s opening process. As a result, days where members

are precluded from submitting eligible interest during this 30-minute time period due to an Exchange systems disruption, even if the issue is ultimately resolved by the Exchange before the market opens (and members therefore are not instructed to route away), are likely to have lower trading volume. Including such days in calculations of ADV or percentage of industry volume will therefore make it more difficult for members to achieve particular pricing tiers for that month. Accordingly, excluding such days from the monthly tier calculations will diminish the likelihood of a cost increase occurring because a member is not able to reach a pricing tier on that date that it would reach on other trading days during the month.

Second, the Exchange proposes to exclude days where there is an Exchange system disruption that lasts for more than 60 minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time), even if such disruption would not be categorized as a complete outage of the Exchange's system. Such a disruption may occur where a certain options series traded on the Exchange is unavailable for trading due to an Exchange systems issue, or where the Exchange may be able to perform certain functions with respect to accepting and processing orders, but may have a failure to another significant process, such as routing to other market centers, that would lead members who rely on such processes to avoid using the Exchange until the Exchange's entire system was operational. The Exchange believes that certain system disruptions that are not complete system outages could preclude some members from submitting orders to the

Exchange. The Exchange notes that this proposal is consistent with the rules of other options exchanges.⁵

The Exchange believes that the two scenarios proposed above are reasonable and equitable because the intent of the current rule has always been to avoid penalizing members that might otherwise qualify for certain tiered pricing but that because of aberrant low volume days resulting, for instance, from Exchange systems disruptions, did not participate on the Exchange to the extent they might have otherwise participated.

In addition, to avoid penalizing members that step up and trade on a day with artificially low volume, the Exchange currently only removes days for members that would have a lower ADV calculation or calculation based on a percentage of industry volume with the day included (i.e., the better of rule). The Exchange believes that applying the better of rule to the proposed system disruption-related scenarios would be similarly helpful as it would ensure that members that continue to execute a large volume of contracts on such days are not inadvertently disadvantaged when the Exchange removes a systems disruption-related day from its calculations of ADV or industry volume percentages.

The Exchange also proposes that if a systems disruption-related day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and denominator of the calculation.

Removing the day from both the numerator and denominator of the calculation will

⁵ See, e.g., BATS BZX Options Exchange Fee Schedule (defining an “Exchange System Disruption” as any day that the exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours); and NYSE Arca Options Fee Schedule (defining an “Exchange System Disruption” as a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours).

ensure that members benefit from this rule as removing the day from the numerator only (i.e., the member's volume) without removing it from the denominator (i.e., industry volume) would penalize the member. The Exchange takes the same approach for removing days from such calculations under the current rule.

Categories of Excluded Days

In light of the foregoing proposal to adopt two additional situations that the Exchange may exclude from its pricing tier calculations, the Exchange seeks to restructure the existing rule by separating out the different scenarios between days that are known in paragraph (1) and days that are not in paragraph (2), and define the latter as Unanticipated Events.

For planned days, the Exchange proposes to further distinguish between days that the Exchange announces in advance that it will not be open for trading in paragraph (1)(A) (e.g., Thanksgiving), and Scheduled Early Closes in paragraph (1)(B) (e.g., the trading day after Thanksgiving). The Exchange notes that it currently considers Scheduled Early Closes as a subset of days that the market is not open for the entire trading day. The Exchange believes it would be more clear to distinguish Scheduled Early Closes in paragraph (1) as a day that is planned for in advance, and separately consider days that are not open for the entire trading day as Unanticipated Events in paragraph (2)(A). As proposed, (2)(A) would continue to cover unplanned days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market. The other scenarios that will be categorized as Unanticipated Events in paragraph (2) are the two systems-related disruptions proposed above, and days that the Exchange instructs members in writing to route their orders to

other markets, which is an existing scenario covered under the current rule as described above.

Exclusion of Days by Tier Calculation

The Exchange proposes to further amend the existing rule to specify how the days in paragraphs (1) and (2) will be excluded from its tier calculations. As discussed above, the Exchange currently removes the days set forth in paragraphs (1)(B), (2)(A), and (2)(B) from its calculations of ADV and industry volume percentages only for members that would have a lower ADV or percentage of industry volume with the day included. The Exchange is not changing how it currently excludes these days from these calculations. And as further discussed above, the Exchange is proposing to adopt the same principle-based approach for excluding the system disruption-related days in paragraphs (2)(C) and (2)(D). As such, proposed paragraph (3) will specify for the ADV calculation and calculation based on a percentage of industry volume that the Exchange may exclude any Scheduled Early Close or Unanticipated Event, subject, in each case, to the better of rule.

As it relates to days where the Exchange announces in advance that it will not be open for trading, the Exchange notes that it will exclude those days from all options tier calculations set forth in its Pricing Schedule. This is also the case today since no trading activity occurs on those days, and the Exchange is only clarifying its current practice within the proposed rule text in paragraph (1)(A).

Catch-all Provision

The proposal also adds a “catch-all” provision in paragraph (3)(C) that would apply to other applicable options tier calculations that are set forth in its Pricing Schedule (“Tier Calculations”), but are not specified within paragraphs (3)(A) and (3)(B) (i.e., not

an ADV calculation or calculation based on a percentage of industry volume). This catch-all provision is to provide the Exchange with flexibility to apply the better of rule going forward to all pricing programs administered by the Exchange that are based on volume calculations.⁶ Specifically, the Exchange may exclude any Scheduled Early Close or Unanticipated Event from such other Tier Calculations only if the member will have a lower Tier Calculation with the day included. This is the same principle-based approach that the Exchange currently takes for its ADV calculation and calculation based on a percentage of industry volume, and is similarly intended to ensure that days are removed from a member's volume calculations only if doing so would be beneficial for the member.

Clarifying Changes

The Exchange proposes to add further detail throughout the rule text to bring greater transparency as to how the Exchange will apply the better of rule when removing days from its tier calculations. The Exchange proposes to make clear that it will only remove days pursuant to the better of rule by specifying in paragraphs (1)(B) and (2) that such days may be excluded from the Tier Calculations only pursuant to paragraph (3). Paragraph (3) will then provide that if a day is to be excluded as a result of paragraph (1)(B) or (2), the Exchange will be required to exclude the day from any member's monthly options tier calculations as detailed within paragraph (3) (i.e., excluding a Scheduled Early Close or Unanticipated Event from a specified tier calculation only for members that would have a lower tier calculation with the day included). With the

⁶ As such, the proposed language will not apply to straight volume accumulations, and the Exchange will continue to not exclude days from such calculations, as is current practice, since members do not benefit when a day is removed from straight volume accumulations.

proposed changes, the Exchange seeks to clarify current practice by expressing that it will exclude days from any member's tier calculations in a uniform manner to ensure that days are removed only in situations where the member benefits. Currently, the Exchange looks at each potential excluded day in a month and calculates for every member their ADV or industry volume percentage based on their trading volume on that day. If any member would have a lower ADV or percentage of industry volume with the particular day included, the Exchange will exclude that day for that member. As such, the proposed changes specify that the Exchange will apply the better of rule in a uniform manner for all members, and that there is no arbitrary selection of "winners" or "losers" when the Exchange excludes days. Lastly, the Exchange proposes to make two technical changes within the better of rule; first, to clarify that the rule applies in each case of the tier calculations specified in paragraph (3), and second, to use the defined term "Tier Calculations" instead of "ADV or percentage of industry volume" to reflect the changes proposed herein.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ 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.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

The Exchange believes that the proposed rule change is reasonable and equitable as it provides a framework for removing days from the Exchange's volume calculations that the Exchange believes is beneficial to members. The proposed rule change would permit the Exchange to remove a day from its Tier Calculations in more circumstances, and ensures that the Exchange will only do so in circumstances where beneficial for the member due to the member executing a lower ADV or percentage of industry volume during the excluded day. The Exchange believes it is reasonable and equitable to exclude a day from its tier calculations when the Exchange's system experiences a disruption during the 30-minute period prior to the opening of trade that renders the Exchange inaccessible to members as this preserves the Exchange's intent behind adopting volume-based pricing. Without this change, members that are precluded from submitting eligible interest during the 30-minute window before the opening of trade may be negatively impacted, even if the Exchange resolves the issue before the market opens and as a result, does not instruct members to route away. The proposed change to exclude such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a volume tier calculation on that date that it would reach on other trading days during the month. Furthermore, while the Exchange may have resolved the systems disruption from its perspective prior to the opening of trade, a member may now have issues managing their orders with the Exchange as a result of the original disruption, causing a downstream ripple effect.

Similarly, excluding a day where the Exchange's system experiences a disruption that lasts for more than 60 minutes intra-day is reasonable and equitable because the proposal seeks to avoid penalizing members that might otherwise qualify for certain

tiered pricing but that, because of an Exchange systems disruption, did not participate on the Exchange to the extent they might have otherwise participated. The Exchange believes that certain systems disruptions could preclude some members from submitting orders to the Exchange even if such issue is not actually a complete systems outage. Other options exchanges similarly exclude exchange systems disruptions from their pricing tiers.⁹

In addition, the Exchange believes that it is reasonable and equitable to apply the better of rule to both systems disruption-related scenarios. Without these changes, members that step up and trade significant volume on excluded trading days may be negatively impacted, resulting in an effective cost increase for those members. The proposal would align the Exchange's approach to how it applies this rule today for days where the market is not open for the entire trading day or where the Exchange instructs members to route away. Furthermore, removing the proposed days from both the numerator and denominator of a calculation based on a percentage of industry volume is reasonable and equitable as this treatment ensures that the member actually benefits from having the day removed. Again, this would align the Exchange's current approach to how it removes days from such calculations.

In light of the Exchange's proposal to adopt the two additional scenarios related to systems disruptions, the Exchange is making related, restructuring changes to the existing language in Options 7, Section 1(b) to bring greater transparency to the application of its rule. Specifically, the Exchange is distinguishing between planned and unplanned days in paragraphs (1) and (2), defining the latter as Unanticipated Events, and

⁹ See footnote 5 above.

stipulating how the Exchange will exclude such days pursuant to this rule. Categorizing days in this manner will clarify the application of its rule in light of the Exchange's proposal to expand the rule to adopt additional days that may be excluded from its tier calculations. Similarly, the Exchange believes that the proposed changes to specify how each of the days in paragraphs (1) and (2) will be excluded from its tier calculations will bring greater transparency to the application of the rule by clearly delineating the various circumstances in which the rule will apply. Providing in paragraph (1)(A) that the Exchange will always exclude from its tier calculations days that it announces in advance it will not be open for trading will clarify current practice. Providing in paragraph (3) that the Exchange may exclude any Scheduled Early Close or Unanticipated Event from the specified tier calculations, subject to the better of rule, will make clear that the Exchange will take a consistent approach when excluding days for purposes of its volume based pricing tiers. Furthermore, the clean-up changes specifying that the days in paragraphs (1)(B) and (2) may be excluded only pursuant to paragraph (3), and requiring the Exchange to exclude such days pursuant to the specifications in paragraph (3) will likewise make clear that the Exchange will take a consistent approach with respect to excluding days from its tier calculations. As discussed above, these modifications will clarify that the Exchange will apply the better of rule in a uniform manner to all members, and that there is no arbitrary selection of "winners" or "losers." The Exchange also believes that the two technical changes proposed in the better of rule to reflect the changes proposed herein will likewise bring greater clarity to its rule. For the foregoing reasons, the Exchange believes that the proposed changes to clarify and restructure its existing rule are reasonable and equitable.

Furthermore, the Exchange believes that the proposed changes to adopt a catch-all provision in paragraph (3)(C) to other Tier Calculations not already specified in the rule to allow the Exchange to apply the better of rule going forward to all pricing programs based on other volume calculations is reasonable and equitable for the same reasons as allowing the Exchange to apply the better of rule for calculations based on ADV and industry volume percentages. The Exchange notes that aberrant low volume days resulting from, for instance, an Unanticipated Event, impacts all volume-based calculations, and allowing the Exchange to exclude such days from any volume-based tier calculation if the member would have a lower tier calculation with the day excluded will further protect members from being inadvertently penalized.

Finally, the Exchange further believes that the proposed rule change is not unfairly discriminatory because it will apply equally to all members. While the Exchange currently has rules in place for removing a day from its pricing, the Exchange believes that the proposed changes will benefit all members by providing more circumstances to remove a day, and ensuring that days are removed only in situations where the member benefits.

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. The proposed rule change is designed to protect members from the possibility of a cost increase by excluding days when overall member participation might be significantly lower than a typical trading day. The Exchange believes that the proposed modifications to its tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. The Exchange operates in a highly

competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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,¹⁰ 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.

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

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

The proposed rule change with respect to the Exchange systems disruption that lasts for more than 60 minutes during regular trading hours is similar to language in the fee schedules of BATS BZX Options and NYSE Arca Options.¹¹

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.

11. Exhibits

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

¹¹ See footnote 5 above.

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-Phlx-2018-73)

November __, 2018

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Provisions for Excluding Days for Purposes of Pricing Tiers

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 November 14, 2018, 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 provisions for excluding a day from its volume calculations for purposes of determining pricing tiers.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 purpose of the proposed rule change is to amend the Exchange's provisions for excluding a day from its volume calculations for purposes of determining pricing tiers, as further discussed below.

Background

To avoid penalizing members when aberrant low volume days result from systems or other issues at the Exchange, or where the Exchange closes early for holiday observance, the Exchange currently has language in its Pricing Schedule allowing it to exclude certain days from its average daily volume ("ADV") calculations or calculations that are based on a percentage of industry volume. Currently, Section 1(b) of the Exchange's Pricing Schedule provides that for Phlx options, any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation or calculation based on a percentage of industry volume; provided that the Exchange will only remove the day for members that would have a lower ADV or percentage of industry volume with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the

numerator and the denominator of the calculation.³ The proviso language in Section 1(b) (hereinafter, the “better of rule”) ensures that members would only have the day removed when doing so is beneficial for the member. As such, the Exchange only applies the better of rule to ADV calculations and calculations based on a percentage of industry volume, and not for other volume-based pricing where members would not benefit from having the day excluded (e.g., straight volume accumulations).

In a recent review of the rule, the Exchange determined that it would be beneficial to further expand upon and provide additional detail regarding how the Exchange applies this rule.

Proposal

The Exchange first proposes to delete the lead-in “For Phlx Options” in Section 1(b) of Options 7, and retitle this section as “Removal of Days for Purposes of Pricing Tiers.” The fees for Phlx options and PSX equities are no longer included in the same pricing schedule, and the Exchange therefore believes that the current clarifying lead-in is no longer necessary.⁴ The Exchange also proposes to adopt the following language to replace current rule text in Section 1(b):

(1)(A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options tier calculations only pursuant to paragraph (3) below.

³ The Exchange removes the day from both the numerator and denominator to ensure that members benefit from this rule as removing the day from the numerator only (i.e., the member’s volume) without removing it from the denominator (i.e., industry volume) would penalize the member.

⁴ See Securities Exchange Act Release No. 84495 (October 29, 2018), 83 FR 55210 (November 2, 2018) (SR-Phlx-2018-66).

(2) The Exchange may exclude the following days (“Unanticipated Events”) from the options tier calculations only pursuant to paragraph (3) below, specifically any day that: (A) the market is not open for the entire trading day, (B) the Exchange instructs members in writing to route their orders to other markets, (C) the Exchange is inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member’s monthly options tier calculations as follows:

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event;

(B) the Exchange may exclude from the calculation based on a percentage of industry volume any Scheduled Early Close or Unanticipated Event; and

(C) the Exchange may exclude from any other applicable options tier calculation provided for in its Schedule of Fees (together with (3)(A) and (3)(B), “Tier Calculations”) any Scheduled Early Close or Unanticipated Event;

provided, in each case, that the Exchange will only remove the day for members that would have a lower Tier Calculation with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and the denominator of the calculation.

The proposed rule change: (i) expands upon the existing scenarios where the Exchange may remove a day to adopt two additional situations related to Exchange systems disruptions, (ii) categorizes the scenarios into days that are known in advance (i.e., days in proposed paragraph (1), including Scheduled Early Closes) and days that are not (i.e., Unanticipated Events in proposed paragraph (2)), (iii) clarifies how each scenario would apply to the options tier calculations in the Pricing Schedule, (iv) adds a “catch-all” provision for other volume based options tier calculations set forth in its Pricing Schedule, but are not specified within paragraphs (3)(A) and (3)(B), to clarify

how the Exchange would exclude days for other such Tier Calculations going forward, and (v) generally adds more detail to clarify the application of the better of rule. As it relates to Unanticipated Events, the Exchange will inform all members if any such day will be excluded from its Tier Calculations through a publicly published alert. The Exchange notes that it is not proposing any changes to the existing rebates or to the current tier calculation thresholds required to achieve each rebate tier.

Exchange Systems Disruptions

The Exchange proposes to adopt two additional scenarios as “Unanticipated Events” that the Exchange may determine to exclude from its Tier Calculations. First, the Exchange proposes to exclude days where the Exchange is inaccessible to members during the 30-minute period before the opening of trade (i.e., between 9:00 a.m. to 9:30 a.m. Eastern Time) due to an Exchange system disruption, even if the Exchange does not instruct members to route away to other markets. As discussed above, the Exchange’s current ability to remove days from its calculations of ADV and industry volume percentages is limited to days where the market is not open for the entire trading day, and where the Exchange instructs members to route away to other markets. This allows the Exchange to exclude days, for example, where the Exchange honors a market-wide trading halt declared by another market, closes early for holiday observance, or instructs members to route away to other markets because of a systems issue in the morning, which ultimately does not carry over into the trading day. The Exchange notes, however, that it may not always instruct members to route away. For instance, the Exchange may be inaccessible to members in the morning due to a systems disruption but the Exchange resolves the issue shortly before 9:30 a.m. and as a result, the Exchange does not instruct members to route away. In such cases, the Exchange is not permitted to exclude the day

from its ADV calculation or calculation based on a percentage of industry volume. The Exchange generally experiences a high volume of member participation within the 30-minute window leading up to the opening of trade from members who submit eligible interest be included in the Exchange's opening process. As a result, days where members are precluded from submitting eligible interest during this 30-minute time period due to an Exchange systems disruption, even if the issue is ultimately resolved by the Exchange before the market opens (and members therefore are not instructed to route away), are likely to have lower trading volume. Including such days in calculations of ADV or percentage of industry volume will therefore make it more difficult for members to achieve particular pricing tiers for that month. Accordingly, excluding such days from the monthly tier calculations will diminish the likelihood of a cost increase occurring because a member is not able to reach a pricing tier on that date that it would reach on other trading days during the month.

Second, the Exchange proposes to exclude days where there is an Exchange system disruption that lasts for more than 60 minutes during regular trading hours (i.e., 9:30 a.m. to 4:00 p.m. Eastern Time), even if such disruption would not be categorized as a complete outage of the Exchange's system. Such a disruption may occur where a certain options series traded on the Exchange is unavailable for trading due to an Exchange systems issue, or where the Exchange may be able to perform certain functions with respect to accepting and processing orders, but may have a failure to another significant process, such as routing to other market centers, that would lead members who rely on such processes to avoid using the Exchange until the Exchange's entire system was operational. The Exchange believes that certain system disruptions that are

not complete system outages could preclude some members from submitting orders to the Exchange. The Exchange notes that this proposal is consistent with the rules of other options exchanges.⁵

The Exchange believes that the two scenarios proposed above are reasonable and equitable because the intent of the current rule has always been to avoid penalizing members that might otherwise qualify for certain tiered pricing but that because of aberrant low volume days resulting, for instance, from Exchange systems disruptions, did not participate on the Exchange to the extent they might have otherwise participated.

In addition, to avoid penalizing members that step up and trade on a day with artificially low volume, the Exchange currently only removes days for members that would have a lower ADV calculation or calculation based on a percentage of industry volume with the day included (i.e., the better of rule). The Exchange believes that applying the better of rule to the proposed system disruption-related scenarios would be similarly helpful as it would ensure that members that continue to execute a large volume of contracts on such days are not inadvertently disadvantaged when the Exchange removes a systems disruption-related day from its calculations of ADV or industry volume percentages.

The Exchange also proposes that if a systems disruption-related day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and denominator of the calculation.

⁵ See, e.g., BATS BZX Options Exchange Fee Schedule (defining an “Exchange System Disruption” as any day that the exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours); and NYSE Arca Options Fee Schedule (defining an “Exchange System Disruption” as a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours).

Removing the day from both the numerator and denominator of the calculation will ensure that members benefit from this rule as removing the day from the numerator only (i.e., the member's volume) without removing it from the denominator (i.e., industry volume) would penalize the member. The Exchange takes the same approach for removing days from such calculations under the current rule.

Categories of Excluded Days

In light of the foregoing proposal to adopt two additional situations that the Exchange may exclude from its pricing tier calculations, the Exchange seeks to restructure the existing rule by separating out the different scenarios between days that are known in paragraph (1) and days that are not in paragraph (2), and define the latter as Unanticipated Events.

For planned days, the Exchange proposes to further distinguish between days that the Exchange announces in advance that it will not be open for trading in paragraph (1)(A) (e.g., Thanksgiving), and Scheduled Early Closes in paragraph (1)(B) (e.g., the trading day after Thanksgiving). The Exchange notes that it currently considers Scheduled Early Closes as a subset of days that the market is not open for the entire trading day. The Exchange believes it would be more clear to distinguish Scheduled Early Closes in paragraph (1) as a day that is planned for in advance, and separately consider days that are not open for the entire trading day as Unanticipated Events in paragraph (2)(A). As proposed, (2)(A) would continue to cover unplanned days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market. The other scenarios that will be categorized as Unanticipated Events in paragraph (2) are the two systems-related disruptions proposed above, and days that the Exchange instructs members in writing to route their orders to

other markets, which is an existing scenario covered under the current rule as described above.

Exclusion of Days by Tier Calculation

The Exchange proposes to further amend the existing rule to specify how the days in paragraphs (1) and (2) will be excluded from its tier calculations. As discussed above, the Exchange currently removes the days set forth in paragraphs (1)(B), (2)(A), and (2)(B) from its calculations of ADV and industry volume percentages only for members that would have a lower ADV or percentage of industry volume with the day included. The Exchange is not changing how it currently excludes these days from these calculations. And as further discussed above, the Exchange is proposing to adopt the same principle-based approach for excluding the system disruption-related days in paragraphs (2)(C) and (2)(D). As such, proposed paragraph (3) will specify for the ADV calculation and calculation based on a percentage of industry volume that the Exchange may exclude any Scheduled Early Close or Unanticipated Event, subject, in each case, to the better of rule.

As it relates to days where the Exchange announces in advance that it will not be open for trading, the Exchange notes that it will exclude those days from all options tier calculations set forth in its Pricing Schedule. This is also the case today since no trading activity occurs on those days, and the Exchange is only clarifying its current practice within the proposed rule text in paragraph (1)(A).

Catch-all Provision

The proposal also adds a “catch-all” provision in paragraph (3)(C) that would apply to other applicable options tier calculations that are set forth in its Pricing Schedule (“Tier Calculations”), but are not specified within paragraphs (3)(A) and (3)(B) (i.e., not

an ADV calculation or calculation based on a percentage of industry volume). This catch-all provision is to provide the Exchange with flexibility to apply the better of rule going forward to all pricing programs administered by the Exchange that are based on volume calculations.⁶ Specifically, the Exchange may exclude any Scheduled Early Close or Unanticipated Event from such other Tier Calculations only if the member will have a lower Tier Calculation with the day included. This is the same principle-based approach that the Exchange currently takes for its ADV calculation and calculation based on a percentage of industry volume, and is similarly intended to ensure that days are removed from a member's volume calculations only if doing so would be beneficial for the member.

Clarifying Changes

The Exchange proposes to add further detail throughout the rule text to bring greater transparency as to how the Exchange will apply the better of rule when removing days from its tier calculations. The Exchange proposes to make clear that it will only remove days pursuant to the better of rule by specifying in paragraphs (1)(B) and (2) that such days may be excluded from the Tier Calculations only pursuant to paragraph (3). Paragraph (3) will then provide that if a day is to be excluded as a result of paragraph (1)(B) or (2), the Exchange will be required to exclude the day from any member's monthly options tier calculations as detailed within paragraph (3) (i.e., excluding a Scheduled Early Close or Unanticipated Event from a specified tier calculation only for members that would have a lower tier calculation with the day included). With the

⁶ As such, the proposed language will not apply to straight volume accumulations, and the Exchange will continue to not exclude days from such calculations, as is current practice, since members do not benefit when a day is removed from straight volume accumulations.

proposed changes, the Exchange seeks to clarify current practice by expressing that it will exclude days from any member's tier calculations in a uniform manner to ensure that days are removed only in situations where the member benefits. Currently, the Exchange looks at each potential excluded day in a month and calculates for every member their ADV or industry volume percentage based on their trading volume on that day. If any member would have a lower ADV or percentage of industry volume with the particular day included, the Exchange will exclude that day for that member. As such, the proposed changes specify that the Exchange will apply the better of rule in a uniform manner for all members, and that there is no arbitrary selection of "winners" or "losers" when the Exchange excludes days. Lastly, the Exchange proposes to make two technical changes within the better of rule; first, to clarify that the rule applies in each case of the tier calculations specified in paragraph (3), and second, to use the defined term "Tier Calculations" instead of "ADV or percentage of industry volume" to reflect the changes proposed herein.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ 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.

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

The Exchange believes that the proposed rule change is reasonable and equitable as it provides a framework for removing days from the Exchange's volume calculations that the Exchange believes is beneficial to members. The proposed rule change would permit the Exchange to remove a day from its Tier Calculations in more circumstances, and ensures that the Exchange will only do so in circumstances where beneficial for the member due to the member executing a lower ADV or percentage of industry volume during the excluded day. The Exchange believes it is reasonable and equitable to exclude a day from its tier calculations when the Exchange's system experiences a disruption during the 30-minute period prior to the opening of trade that renders the Exchange inaccessible to members as this preserves the Exchange's intent behind adopting volume-based pricing. Without this change, members that are precluded from submitting eligible interest during the 30-minute window before the opening of trade may be negatively impacted, even if the Exchange resolves the issue before the market opens and as a result, does not instruct members to route away. The proposed change to exclude such days will diminish the likelihood of a cost increase occurring because a member is not able to reach a volume tier calculation on that date that it would reach on other trading days during the month. Furthermore, while the Exchange may have resolved the systems disruption from its perspective prior to the opening of trade, a member may now have issues managing their orders with the Exchange as a result of the original disruption, causing a downstream ripple effect.

Similarly, excluding a day where the Exchange's system experiences a disruption that lasts for more than 60 minutes intra-day is reasonable and equitable because the proposal seeks to avoid penalizing members that might otherwise qualify for certain

tiered pricing but that, because of an Exchange systems disruption, did not participate on the Exchange to the extent they might have otherwise participated. The Exchange believes that certain systems disruptions could preclude some members from submitting orders to the Exchange even if such issue is not actually a complete systems outage. Other options exchanges similarly exclude exchange systems disruptions from their pricing tiers.⁹

In addition, the Exchange believes that it is reasonable and equitable to apply the better of rule to both systems disruption-related scenarios. Without these changes, members that step up and trade significant volume on excluded trading days may be negatively impacted, resulting in an effective cost increase for those members. The proposal would align the Exchange's approach to how it applies this rule today for days where the market is not open for the entire trading day or where the Exchange instructs members to route away. Furthermore, removing the proposed days from both the numerator and denominator of a calculation based on a percentage of industry volume is reasonable and equitable as this treatment ensures that the member actually benefits from having the day removed. Again, this would align the Exchange's current approach to how it removes days from such calculations.

In light of the Exchange's proposal to adopt the two additional scenarios related to systems disruptions, the Exchange is making related, restructuring changes to the existing language in Options 7, Section 1(b) to bring greater transparency to the application of its rule. Specifically, the Exchange is distinguishing between planned and unplanned days in paragraphs (1) and (2), defining the latter as Unanticipated Events, and

⁹ See footnote 5 above.

stipulating how the Exchange will exclude such days pursuant to this rule. Categorizing days in this manner will clarify the application of its rule in light of the Exchange's proposal to expand the rule to adopt additional days that may be excluded from its tier calculations. Similarly, the Exchange believes that the proposed changes to specify how each of the days in paragraphs (1) and (2) will be excluded from its tier calculations will bring greater transparency to the application of the rule by clearly delineating the various circumstances in which the rule will apply. Providing in paragraph (1)(A) that the Exchange will always exclude from its tier calculations days that it announces in advance it will not be open for trading will clarify current practice. Providing in paragraph (3) that the Exchange may exclude any Scheduled Early Close or Unanticipated Event from the specified tier calculations, subject to the better of rule, will make clear that the Exchange will take a consistent approach when excluding days for purposes of its volume based pricing tiers. Furthermore, the clean-up changes specifying that the days in paragraphs (1)(B) and (2) may be excluded only pursuant to paragraph (3), and requiring the Exchange to exclude such days pursuant to the specifications in paragraph (3) will likewise make clear that the Exchange will take a consistent approach with respect to excluding days from its tier calculations. As discussed above, these modifications will clarify that the Exchange will apply the better of rule in a uniform manner to all members, and that there is no arbitrary selection of "winners" or "losers." The Exchange also believes that the two technical changes proposed in the better of rule to reflect the changes proposed herein will likewise bring greater clarity to its rule. For the foregoing reasons, the Exchange believes that the proposed changes to clarify and restructure its existing rule are reasonable and equitable.

Furthermore, the Exchange believes that the proposed changes to adopt a catch-all provision in paragraph (3)(C) to other Tier Calculations not already specified in the rule to allow the Exchange to apply the better of rule going forward to all pricing programs based on other volume calculations is reasonable and equitable for the same reasons as allowing the Exchange to apply the better of rule for calculations based on ADV and industry volume percentages. The Exchange notes that aberrant low volume days resulting from, for instance, an Unanticipated Event, impacts all volume-based calculations, and allowing the Exchange to exclude such days from any volume-based tier calculation if the member would have a lower tier calculation with the day excluded will further protect members from being inadvertently penalized.

Finally, the Exchange further believes that the proposed rule change is not unfairly discriminatory because it will apply equally to all members. While the Exchange currently has rules in place for removing a day from its pricing, the Exchange believes that the proposed changes will benefit all members by providing more circumstances to remove a day, and ensuring that days are removed only in situations where the member benefits.

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. The proposed rule change is designed to protect members from the possibility of a cost increase by excluding days when overall member participation might be significantly lower than a typical trading day. The Exchange believes that the proposed modifications to its tier calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. The Exchange operates in a highly

competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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.¹⁰

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:

¹⁰ 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. Please include File Number SR-Phlx-2018-73 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-2018-73. 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-2018-73 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.¹¹

Eduardo A. Aleman
Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

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

Nasdaq PHLX LLC Rules

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OPTIONS RULES

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Options 7 Pricing Schedule**Section 1 General Provisions**

(a) No change.

(b) [For Phlx Options]Removal of Days for Purposes of Pricing Tiers:

(1) (A) Any day that the Exchange announces in advance that it will not be open for trading will be excluded from the options tier calculations set forth in its Pricing Schedule; and (B) any day with a scheduled early market close (“Scheduled Early Close”) may be excluded from the options tier calculations only pursuant to paragraph (3) below.

(2) The Exchange may exclude the following days (“Unanticipated Events”) from the options tier calculations only pursuant to paragraph (3) below, specifically [A]any day that: (A) the market is not open for the entire trading day, [or] (B) the Exchange instructs members in writing to route their orders to other markets, (C) the Exchange is inaccessible to members during the 30-minute period before the opening of trade due to an Exchange system disruption, or (D) the Exchange’s system experiences a disruption that lasts for more than 60 minutes during regular trading hours.

(3) If a day is to be excluded as a result of paragraph (1)(B) or (2) above, the Exchange will exclude the day from any member’s monthly options tier calculations as follows:[may be excluded from the ADV calculation or calculation based on a percentage of industry volume;]

(A) the Exchange may exclude from the ADV calculation any Scheduled Early Close or Unanticipated Event;

(B) the Exchange may exclude from the calculation based on a percentage of industry volume any Scheduled Early Close or Unanticipated Event;
and

(C) the Exchange may exclude from any other applicable options tier calculation provided for in its Pricing Schedule (together with (3)(A) and

(3)(B), “Tier Calculations”) any Scheduled Early Close or Unanticipated Event;

provided, in each case, that the Exchange will only remove the day for members that would have a lower [ADV or percentage of industry volume]Tier Calculation with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and the denominator of the calculation.

* * * * *