

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 25

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. * SR 2024 - * 04

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"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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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) *

Section 806(e)(2) *

Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 3C(b)(2) *

Exhibit 2 Sent As Paper Document

Exhibit 3 Sent As Paper Document

Description

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

A proposal to amend the Exchange pricing schedule at Equity 7, Section 3(a)

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 * Katie Last Name * Hopkins

Title * Associate General Counsel

E-mail * katie.hopkins@nasdaq.com

Telephone * (301) 232-4067 Fax

Signature

Pursuant to the requirements of the Securities Exchange of 1934, Nasdaq PHLX LLC has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

Date 02/01/2024

(Title *)

By John A. Zecca (Name *)

EVP and Chief Legal Officer

NOTE: Clicking the signature block at right will initiate digitally signing the form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

 Date: 2024.02.01 13:28:11 -05'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information *

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SR-Phlx-2024-04 19b-4.doc

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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SR-Phlx-2024-04 Exhibit 1.doc

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 Advanced Notice by Clearing Agencies *

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

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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 Sent As Paper Document

Exhibit 3 - Form, Report, or Questionnaire

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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 Sent As Paper Document

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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SR-Phlx-2024-04 Exhibit 5.doc

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 proposal to amend the Exchange’s pricing schedule at Equity 7, Section 3(a), as described further below.

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”). 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:

Katie Hopkins
Associate General Counsel
Nasdaq, Inc.
301-232-4067

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 provide an additional calculation for purposes of determining whether a member qualifies for credits set forth in Equity 7, Section 3(a) that pertain to providing liquidity.

Presently, the Exchange provides its members with various credits for executing orders that add liquidity to the Exchange and charges them various fees for executing orders, that remove liquidity from the Exchange, as set forth in Equity 7, Section 3(a) of the Exchange's Rules. The charges and credits in Equity 7, Section 3(a) apply to the use of the order execution and routing services of the Nasdaq PSX System by members for all securities priced at \$1 or more that it trades. Members may qualify for tiers of discounted fees and premium credits based, in part, upon their volume on the Exchange as a percentage of total "Consolidated Volume."

Pursuant to Equity 7, Section 3(a), the term "Consolidated Volume" means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity, the following are excluded from both total Consolidated Volume and the member's trading activity: (1) the date of the annual reconstitution of the Russell Investments Indexes; (2) the dates on which stock options, stock index options, and stock index futures expire (i.e., the third Friday of March, June, September, and December); (3) the dates of the rebalance of the MSCI Equities Indexes (i.e., on a quarterly basis); (4) the dates of the rebalance of the

S&P 400, S&P 500, and S&P 600 Indexes (i.e., on a quarterly basis); and (5) the date of the annual reconstitution of the Nasdaq-100 and Nasdaq Biotechnology Indexes.

Generally, the ratio of consolidated volumes in securities priced at or above \$1 (“dollar plus volume”) relative to consolidated volumes inclusive of securities priced below a dollar is usually stable from month to month, such that “Consolidated Volume” has been a reasonable baseline for determining tiered incentives for members that execute dollar plus volume on the Exchange. However, there have been a few months where volumes in securities priced below a dollar (“sub-dollar volume”) have been elevated, thereby impacting the ratio mentioned above.

Anomalous rises in sub-dollar volume stand to have a material adverse impact on members’ qualifications for pricing tiers/incentives because such qualifications depend members upon achieving threshold percentages of volumes as a percentage of Consolidated Volume, and an extraordinary rise in sub-dollar volume stands to elevate Consolidated Volume. As a result, members may find it more difficult, if not practically impossible, to qualify for or to continue to qualify for their existing incentives during months where there are such rises in sub-dollar volumes, even if their dollar plus volumes have not diminished relative to prior months.

The Exchange believes that it would be unfair for its members that execute significant dollar plus volumes on the Exchange to fail to achieve or to lose their existing incentives for such volumes due to anomalous behavior that is extraneous to them. Therefore, the Exchange wishes to amend its Rules to help avoid extraordinary spikes in sub-dollar volumes from adversely affecting a member’s qualification of incentives for their dollar plus stock executions.

Accordingly, the Exchange proposes to amend its pricing schedule at Equity 7, Section 3(a) to state that, for purposes of calculating a member's qualifications for credits that pertain to providing liquidity set forth in Section 3(a), the Exchange will calculate a member's volume and total Consolidated Volume twice. First, the Exchange will calculate a member's volume and total Consolidated Volume as presently set forth in Equity 7, Section 3(a) (i.e., inclusive of volume that consists of executions in securities priced less than \$1). Second, the Exchange will calculate a member's volume and total Consolidated Volume exclusive of volume that consists of executions in securities priced less than \$1, while also increasing the distinct qualifying volume percentage thresholds, as set forth in Section 3(a), by 10%. Thereafter, the Exchange proposes to assess which of these two calculations would qualify the member for the most advantageous credits for the month and then it will apply those to the member.

Although the Exchange wishes to avoid extraordinary spikes in sub-dollar volumes from adversely affecting a member's qualification of incentives for their dollar plus stock executions, the Exchange proposes to include certain limits on the proposal to efficiently allocate the Exchange's limited resources for incentives. Specifically, as noted above, the Exchange proposes to limit the application of the proposed calculation excluding sub-dollar volumes to those incentives in Section 3(a) that pertain to providing liquidity. In addition, as noted above, the Exchange proposes to increase the distinct qualifying volume percentage thresholds set forth in Section 3(a) by 10% for purposes of the proposed calculation excluding sub-dollar volumes.³ The Exchange wishes to impose

³ For example, the Exchange provides a credit of \$0.0033 per share executed to members providing liquidity for orders entered by a member that provide 0.15% or more of total Consolidated Volume during the month. See Equity 7, Section 3(a). Under the proposal, in addition to calculating the member's volume and total Consolidated Volume exclusive of volume that

such limitations in order to limit the cost impact on the Exchange, while still providing some relief to members in months with extraordinary spikes in sub-dollar volumes. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ 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 Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[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

consists of executions in securities priced less than \$1, the distinct qualifying volume percentage threshold would be increased by 10%. Therefore, for purposes of this example, in order to qualify for the credit using volumes excluding sub-dollar activity, the member would need to provide 0.165% or more of total Consolidated Volume during the month (i.e., 0.15% + (10%)(0.15%)).

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

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’”⁶

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.”⁷

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules.

⁶ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

⁷ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

The Exchange believes that the proposal is reasonable and equitable because, in its absence, members may experience material adverse impacts on their ability to qualify for certain incentives during a month with an anomalous rise in sub-dollar volumes. The Exchange does not wish to penalize members that execute significant volumes on the Exchange due to anomalous and extraneous trading activities of a small number of firms in sub-dollar securities. The proposed rule would seek to provide a means for members that provide liquidity to avoid such a penalty by determining whether calculating member volume and total Consolidated Volume to include or exclude sub-dollar volume⁸ would result in Exchange members qualifying for the most advantageous credits, and then applying the calculations that would result in the incentives for providing liquidity that are most advantageous to each member. The Exchange believes it is reasonable to limit the proposal by applying the proposed calculation to incentives that pertain to providing liquidity and increasing the distinct qualifying volume percentage thresholds by 10% when using the proposed calculation excluding sub-dollar volumes because the Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives. The Exchange believes that the proposed rule change is an equitable allocation and is not unfairly discriminatory because the Exchange does not intend for the proposal to advantage any particular member and the Exchange will apply the proposed calculation to all similarly situated members.

⁸ As noted above, in considering whether a member meets qualifying credit criteria using the proposed calculation excluding sub-dollar volumes, the distinct qualifying volume percentage thresholds would be increased by 10%.

Those participants that are dissatisfied with the changes to the Exchange's schedule of credits are free to shift their order flow to competing venues that provide more favorable fees or generous incentives.

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.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage.

The Exchange intends for its proposal to help avoid pricing disadvantages due to anomalous spikes in sub-dollar volumes and is not intended to provide a competitive advantage to any particular member. The Exchange also intends for its proposal to reallocate its limited resources more efficiently and to align them with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that the proposal is not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes.

Intermarket Competition

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 credits and 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 credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited. The proposal is reflective of this competition.

Even the largest U.S. equities exchange by volume has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues, which comprises upwards of 40% of industry volume.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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,⁹ 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

Not applicable.

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.

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. _____ ; File No. SR-Phlx-2024-04)

February __, 2024

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Equity 7, Section 3(a)

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 February 1, 2024, 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 its pricing schedule at Equity 7, Section 3(a), as described further below.

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 provide an additional calculation for purposes of determining whether a member qualifies for credits set forth in Equity 7, Section 3(a) that pertain to providing liquidity.

Presently, the Exchange provides its members with various credits for executing orders that add liquidity to the Exchange and charges them various fees for executing orders, that remove liquidity from the Exchange, as set forth in Equity 7, Section 3(a) of the Exchange's Rules. The charges and credits in Equity 7, Section 3(a) apply to the use of the order execution and routing services of the Nasdaq PSX System by members for all securities priced at \$1 or more that it trades. Members may qualify for tiers of discounted fees and premium credits based, in part, upon their volume on the Exchange as a percentage of total "Consolidated Volume."

Pursuant to Equity 7, Section 3(a), the term "Consolidated Volume" means the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity, the following are excluded from both total Consolidated Volume and the member's trading activity: (1) the date of the annual reconstitution of the Russell Investments Indexes; (2) the dates on which stock options, stock index options, and stock index futures expire (i.e., the third

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Generally, the ratio of consolidated volumes in securities priced at or above \$1 (“dollar plus volume”) relative to consolidated volumes inclusive of securities priced below a dollar is usually stable from month to month, such that “Consolidated Volume” has been a reasonable baseline for determining tiered incentives for members that execute dollar plus volume on the Exchange. However, there have been a few months where volumes in securities priced below a dollar (“sub-dollar volume”) have been elevated, thereby impacting the ratio mentioned above.

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The Exchange believes that it would be unfair for its members that execute significant dollar plus volumes on the Exchange to fail to achieve or to lose their existing incentives for such volumes due to anomalous behavior that is extraneous to them. Therefore, the Exchange wishes to amend its Rules to help avoid extraordinary spikes in

sub-dollar volumes from adversely affecting a member's qualification of incentives for their dollar plus stock executions.

Accordingly, the Exchange proposes to amend its pricing schedule at Equity 7, Section 3(a) to state that, for purposes of calculating a member's qualifications for credits that pertain to providing liquidity set forth in Section 3(a), the Exchange will calculate a member's volume and total Consolidated Volume twice. First, the Exchange will calculate a member's volume and total Consolidated Volume as presently set forth in Equity 7, Section 3(a) (i.e., inclusive of volume that consists of executions in securities priced less than \$1). Second, the Exchange will calculate a member's volume and total Consolidated Volume exclusive of volume that consists of executions in securities priced less than \$1, while also increasing the distinct qualifying volume percentage thresholds, as set forth in Section 3(a), by 10%. Thereafter, the Exchange proposes to assess which of these two calculations would qualify the member for the most advantageous credits for the month and then it will apply those to the member.

Although the Exchange wishes to avoid extraordinary spikes in sub-dollar volumes from adversely affecting a member's qualification of incentives for their dollar plus stock executions, the Exchange proposes to include certain limits on the proposal to efficiently allocate the Exchange's limited resources for incentives. Specifically, as noted above, the Exchange proposes to limit the application of the proposed calculation excluding sub-dollar volumes to those incentives in Section 3(a) that pertain to providing liquidity. In addition, as noted above, the Exchange proposes to increase the distinct qualifying volume percentage thresholds set forth in Section 3(a) by 10% for purposes of

the proposed calculation excluding sub-dollar volumes.³ The Exchange wishes to impose such limitations in order to limit the cost impact on the Exchange, while still providing some relief to members in months with extraordinary spikes in sub-dollar volumes. The Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ 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 Exchange's proposed changes to its schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for equity securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for

³ For example, the Exchange provides a credit of \$0.0033 per share executed to members providing liquidity for orders entered by a member that provide 0.15% or more of total Consolidated Volume during the month. See Equity 7, Section 3(a). Under the proposal, in addition to calculating the member's volume and total Consolidated Volume exclusive of volume that consists of executions in securities priced less than \$1, the distinct qualifying volume percentage threshold would be increased by 10%. Therefore, for purposes of this example, in order to qualify for the credit using volumes excluding sub-dollar activity, the member would need to provide 0.165% or more of total Consolidated Volume during the month (i.e., 0.15% + (10%)(0.15%)).

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

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’”⁶

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.”⁷

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for equity security transaction services. The Exchange is only one of several equity venues to which market participants may direct their order flow. Competing equity exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds.

⁶ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules.

The Exchange believes that the proposal is reasonable and equitable because, in its absence, members may experience material adverse impacts on their ability to qualify for certain incentives during a month with an anomalous rise in sub-dollar volumes. The Exchange does not wish to penalize members that execute significant volumes on the Exchange due to anomalous and extraneous trading activities of a small number of firms in sub-dollar securities. The proposed rule would seek to provide a means for members that provide liquidity to avoid such a penalty by determining whether calculating member volume and total Consolidated Volume to include or exclude sub-dollar volume⁸ would result in Exchange members qualifying for the most advantageous credits, and then applying the calculations that would result in the incentives for providing liquidity that are most advantageous to each member. The Exchange believes it is reasonable to limit the proposal by applying the proposed calculation to incentives that pertain to providing liquidity and increasing the distinct qualifying volume percentage thresholds by 10% when using the proposed calculation excluding sub-dollar volumes because the Exchange has limited resources to devote to incentive programs, and it is appropriate for the Exchange to reallocate these incentives periodically in a manner that best achieves the Exchange's overall mix of objectives. The Exchange believes that the proposed rule change is an equitable allocation and is not unfairly discriminatory because the Exchange

⁸ As noted above, in considering whether a member meets qualifying credit criteria using the proposed calculation excluding sub-dollar volumes, the distinct qualifying volume percentage thresholds would be increased by 10%.

does not intend for the proposal to advantage any particular member and the Exchange will apply the proposed calculation to all similarly situated members.

Those participants that are dissatisfied with the changes to the Exchange's schedule of credits are free to shift their order flow to competing venues that provide more favorable fees or generous incentives.

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.

Intramarket Competition

The Exchange does not believe that its proposal will place any category of Exchange participant at a competitive disadvantage.

The Exchange intends for its proposal to help avoid pricing disadvantages due to anomalous spikes in sub-dollar volumes and is not intended to provide a competitive advantage to any particular member. The Exchange also intends for its proposal to reallocate its limited resources more efficiently and to align them with the Exchange's overall mix of objectives. The Exchange notes that its members are free to trade on other venues to the extent they believe that the proposal is not attractive. As one can observe by looking at any market share chart, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes.

Intermarket Competition

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 credits and 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 credits and fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which credit or fee changes in this market may impose any burden on competition is extremely limited. The proposal is reflective of this competition.

Even the largest U.S. equities exchange by volume has less than 20% market share, which in most markets could hardly be categorized as having enough market power to burden competition. Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and credit changes. This is in addition to free flow of order flow to and among off-exchange venues, which comprises upwards of 40% of industry volume.

In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

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.⁹

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2024-04 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.

⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to file number SR-Phlx-2024-04. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-Phlx-2024-04 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Sherry R. Haywood,

Assistant Secretary.

¹⁰ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

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

NASDAQ PHLX LLC RULES

* * * * *

Equity Rules

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Equity 7 Pricing Schedule

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Section 3 Nasdaq PSX Fees

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Order Execution and Routing

(a) The following charges and credits shall apply to the use of the order execution and routing services of the Nasdaq PSX System by member organizations for all securities that it trades priced at \$1 or more per share:

(1) Fees for Execution of Quotes/Orders in Nasdaq-Listed Securities, Securities Listed on the New York Stock Exchange ("NYSE") and Securities Listed on Exchanges other than Nasdaq and NYSE. As used in this rule, the term "Consolidated Volume" shall mean the total consolidated volume reported to all consolidated transaction reporting plans by all exchanges and trade reporting facilities during a month in equity securities, excluding executed orders with a size of less than one round lot. For purposes of calculating Consolidated Volume and the extent of a member's trading activity, the following shall be excluded from both total Consolidated Volume and the member's trading activity: (1) the date of the annual reconstitution of the Russell Investments Indexes; (2) the dates on which stock options, stock index options, and stock index futures expire (i.e., the third Friday of March, June, September, and December); (3) the dates of the rebalance of the MSCI Equities Indexes (i.e., on a quarterly basis); (4) the dates of the rebalance of the S&P 400, S&P 500, and S&P 600 Indexes (i.e., on a quarterly basis); and (5) the date of the annual reconstitution of the Nasdaq-100 and Nasdaq Biotechnology Indexes. For purposes of calculating a member's qualifications for credits that pertain to providing liquidity set forth in this Section 3(a), the Exchange will calculate a member's volume and total Consolidated Volume twice. First, the Exchange will calculate a member's volume and total Consolidated Volume inclusive of volume that consists of executions in securities priced less than \$1.

Second, the Exchange will calculate a member's volume and total Consolidated Volume exclusive of volume that consists of executions in securities priced less than \$1, while also increasing the distinct qualifying volume percentage thresholds, as set forth in this Section 3(a), by 10%. The Exchange will then assess which of these two calculations would qualify the member for the most advantageous credits for the month and then it will apply those to the member.

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