the capped level. In early 2009, BATS expanded its offering of free data to include depth-of-book data. Also in early 2009, NYSE Arca announced the launch of a competitive last sale product with an enterprise price of $30,000 per month. In response, NASDAQ combined the enterprise cap for the NLS products and reduced the cap to $50,000 (i.e., a reduction of $100,000 per month).

Similarly, the enterprise license being offered for NASDAQ Basic through this proposed rule change reflects a means by which the overall cost of the product is limited in accordance with the existence of competitive alternatives, including both core and proprietary data.

In this environment, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. “No one disputes that competition for order flow is ‘fierece’,” NetCoalition I at 539. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A BD that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform’s market data and reduce its own need to consume data from the disfavored platform. If a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected BDs will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data. Similarly, increases in the cost of NASDAQ Basic would impair the willingness of distributors to take a product for which there are numerous alternatives, impacting NASDAQ Basic data revenues, the value of NASDAQ Basic as a tool for attracting order flow, and ultimately, the volume of orders routed to NASDAQ and reported to the FINRA/NASDAQ TRF and the value of its other data products.

Competition has also driven NASDAQ continually to improve its data offerings and to cater to customers’ data needs. The NASDAQ Basic product itself is a product of this competition, offering a subset of core data to users that may not wish to receive or pay for all consolidated data. The existence of numerous alternatives to NASDAQ Basic, including real-time consolidated data, free delayed consolidated data, and proprietary data from other sources ensures that NASDAQ cannot set unreasonable fees, or fees that are unequally discriminatory, without losing business to these alternatives.

Accordingly, NASDAQ believes that the acceptance of the NASDAQ Basic product in the marketplace demonstrates the consistency of these fees with applicable statutory standards. Likewise, the fee changes proposed herein will be subject to these same competitive forces. If the proposed change is deemed to result in an excessive fee, only NASDAQ will suffer, since its customers will merely migrate to competitive alternatives.

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

Written comments were neither solicited nor 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) of the Act and paragraph 19(b)(4) thereunder. 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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission’s Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an email to rule-comments@sec.gov. Please include File Number SR–NASDAQ–2014–070 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–NASDAQ–2014–070. 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 the Commission’s Internet Web site (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written communications relating to the proposed rule change that are filed with the Commission, and all written comments received in opposition to or in support of the proposed rule change that are otherwise available publicly. All submissions should refer to File Number SR–NASDAQ–2014–070 and should be submitted on or before August 12, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.23

Kevin M. O’Neill,

Deputy Secretary.

[FR Doc. 2014–17144 Filed 7–21–14; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION


Self-Regulatory Organizations;
NASDAQ OMX PHLX LLC; Order Disapproving Proposed Rule Change To Offer a Rebate Based on Members’ Aggregate Customer Volume in Multiply-Listed Options Transacted on NASDAQ OMX PHLX LLC or its Affiliated Options Exchanges

July 16, 2014.

I. Introduction


II. Summary of the Proposal

Under the Phlx’s existing Customer Rebate Program in its Pricing Schedule, the Exchange pays tiered rebates to members for executions of customer order options on Phlx. The different tiers are based on a member organization’s (and its affiliates under common ownership) total monthly volume in electronically-delivered customer orders executed on Phlx as a percentage of the total national customer volume in multiply-listed options that are transacted monthly on Phlx. These rebates apply separately to both the execution of simple orders and complex orders on Phlx.

Phlx proposed amending its Customer Rebate Program in two ways. First, the Proposal would allow a Phlx member organization to aggregate its (and its affiliates under common ownership) customer volume in multiply-listed options that is electronically delivered and executed across Phlx and its two affiliated NASDAQ OMX exchanges, The NASDAQ Options Market LLC (“NOM”), and/or NASDAQ OMX BX, Inc. (“BX Options”) (collectively, the “NASDAQ OMX exchanges”), for purposes of determining whether it meets the volume tiers on Phlx. Second, the Proposal would increase the customer rebates offered for these transactions executed on Phlx by $0.02 per contract.

Phlx also argues that the Proposal would benefit investors and the national market system by reducing costs, increasing the incentives for exchanges to compete for order flow, and encouraging market participants to direct more liquidity to the Exchange.

III. Summary of Comments

As noted above, the Commission received thirteen comment letters on the proposed rule change, including five member organization for clearing in the Customer Range at The Options Clearing Corporation which is not for the account of a broker or dealer or for the account of a “Professional” (as that term is defined in Rule 1000(b)(14)).

17 Phlx also requested that the Exchange rebates be considered in the calculation of a member organization’s aggregate volume. The Commission did not adopt this proposal.

18 Phlx requested that the Commission order the NASDAQ Options Market LLC to clarify its rules so that Phlx’s own options market is subject to the same rebates as other exchanges.

19 The NASDAQ OMX exchanges are listed on the Commission’s National Market System List. See supra note 4, at 42579.

20 The NASDAQ OMX exchanges are listed on the Commission’s National Market System List. See supra note 4, at 42579.

21 See supra note 5, 7 and 11.
supplemental submissions from Phlx responding to comment letters.22 The Commission received seven comment letters opposing the proposed rule change,23 and one comment letter supporting the proposed rule change.24 Comments on the Proposal generally addressed four areas, namely whether the Proposal: (1) Is an equitable allocation of reasonable fees; (2) is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; (3) imposes a burden on competition not necessary or appropriate in furtherance of the purposes of the Act; and (4) impacts market structure and efficiency.

A. Equitable Allocation of Reasonable Dues, Fees, and Other Charges Among Members and Issuers Using Its Facility

Several commenters who do not support the Proposal argue that it is inconsistent with the statutory language of Section 6(b)(4) of the Act, which requires that the rules of a registered national exchange provide for “the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities” (emphasis added).25 One commenter asserts that such dues, fees, and other charges are intended to be allocated only with respect to the volume on the facilities of the exchange imposing such charges, not the volume executed on another exchange.26 This commenter believes that imposing a fee or charge based on some activity other than use of the fee-imposing exchange’s own facilities would be impossible to allocate in an “equitable” way and could never be “reasonable.”27 Another commenter believes that the Act’s focus on an equitable allocation of reasonable dues, fees, and other charges among its members using its facilities underscores the ArcaBook Order28 conclusion that the Commission must analyze an exchange’s rules and fees on an exchange-by-exchange basis, and argues that imposing a crossing fee, by its very nature, cannot be an equitable allocation of fees for the members of just one of the exchanges.29 This commenter believes that exchange fees tied to activity conducted on competing exchanges are impermissible regardless of whether they increase or lower the overall fees that joint exchange members may pay.30

The commenter that supports the Proposal believes that if an exchange is subject to significant competitive forces in setting the terms of its proposed fees, the exchange’s fees are presumed to be equitable, fair, reasonable and not unfairly discriminatory.31 This commenter states that reduced fees and rebates based on volume, in general, have been accepted by the Commission and have not been considered inequitable, despite the rebate benefits applying to one member class over another.32 The commenter also asserts that, while the direct benefits flow to only some members, the rebate tiers will benefit all members and customer orders by providing greater liquidity on the exchange and spreading other fees across a greater number of transactions and members.33 Furthermore, this commenter states that the Commission has approved a proposal in which rebate volume tiers are calculated based on a market participant’s aggregate activity on two markets operated by the same SRO.34 In this regard, the commenter believes that there is no distinction in differentiating between separately affiliated markets operated by the same SRO, on the one hand, and separate affiliated exchanges operated by affiliated SROs, on the other hand.35 Phlx also responds to the commenters opposing the Proposal by arguing that the phrase “persons using its facilities” in Section 6(b)(4) of the Act only refers to one category of market participant that is bound by an exchange’s rules.36 Phlx asserts that the phrase does not describe the basis on which exchange “fees may be determined, or restrict the right of an exchange to offer market participants a discount that is based in part on their trading activity on an affiliated exchange.” Moreover, Phlx argues that the proposed rebate is consistent with Section 6(b)(4) of the Act because the proposed rebate is limited to market participants who transact business on Phlx and only applies to orders executed on Phlx.38 Phlx also states its view that the Proposal should be considered “presumptively reasonable” because it provides an opportunity for market participants to receive enhanced rebates and to lower the costs passed on to investors.39

B. Unfair Discrimination Between Customer, Issuers, Brokers, or Dealers

Several commenters believe the Proposal is inconsistent with Section 6(b)(5) of the Act, which requires the rules of a national securities exchange to, among other things, not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers.”40 In particular, these commenters believe that the Proposal unfairly discriminates between Phlx members because it advantages Phlx members that are also members of NOM and/or BX Options, while disadvantaging Phlx members who are otherwise similarly situated, but who do not have such memberships.41 As a result...
result, several commenters believe that the Proposal could trigger relatively higher costs for the Phlx members who are not members on NOM and/or BX Options, but who otherwise have the same purchasing profile on Phlx as members who do hold such memberships.42

The commenter that supports the Proposal argues that the Proposal is not unfairly discriminatory, noting that the Proposal does not require a Phlx member to become a member of NOM or BX Options to meet the rebate eligibility threshold.43 In addition, this commenter believes that most Phlx members with sufficient customer order flow to reach the eligibility threshold are already members of NOM and BX Options.44 The commenter further believes that becoming a member of Phlx affiliate exchanges is not an unreasonably discriminatory burden in exchange for the greater ability to meet the volume threshold under the Proposal.45

In response to commenters opposing the Proposal, Phlx asserts that the Proposal is not unfairly discriminatory because the proposed rebate is available on equal terms to any market participant that may qualify for the rebate by executing the required volume on Phlx alone.46 Phlx argues that members have an incentive to transact volume on Phlx.

connectivity and line charges. See ISE Letter III, supra note 11, at 2. This commenter states its view that requiring members to absorb these additional costs to qualify for the rebate is not reasonable and is discriminatory, as the requirement adds significant costs to the member, but benefits Phlx and its affiliates. See id.

42 See CBOE Letter, supra note 7, at 3; and Normann Letter, supra note 11, at 5–6 (noting that a likely result of the Phlx proposal would be that “two otherwise identical customers with identical volume on Phlx, using identical services, will pay different net fees due to differences in purchasing patterns at exchanges other than Phlx.”). See id. at 6. One commenter also believes that the Proposal does not comport with rebate practices that the Commission has allowed in the past as an acceptable means of seeking to attract additional order flow. See CBOE Letter, supra note 7, at 3. Specifically, this commenter states its view that the discriminatory nature of the proposed rebate could distort a brokers’ best execution responsibilities and “present a new threat to public confidence in brokerage services and market integrity” contrary to the public interest and inconsistent with the protection of investors. Id. at 3–4.

43 See Citadel Letter, supra note 7, at 5. The commenter notes that a Phlx member may meet the eligibility threshold by transacting sufficient volume on Phlx alone. See id.

44 Phlx does not directly respond to MIAX’s example, but asserts that the MIAX example of price differentiation between two market participants who trade the same volume on Phlx does not mean that a rebate is unfairly discriminatory because “all rebates predicated on volume or some other condition differentiate between customers who meet the condition and those who do not.”56

Two commenters also note that the ArcaBook Order provides precedent to disapprove the proposed rule change.58 One commenter argues that the Proposal is inconsistent with the Act because, according to the ArcaBook Order, “the Exchange Act precludes anti-competitive tying of the liquidity pools of separately registered securities exchanges even if they are under common control.” 59 Another commenter argues that Phlx misreads the ArcaBook Order to incorrectly stand for the proposition that “as long as exchanges are subject to competitive forces, any fee is acceptable.”60 This commenter states its view that, in the ArcaBook Order, the Commission determined that it must apply the Act’s provision regarding rule and fee changes to individual exchanges, and not to exchanges as a group.61 The commenter asserts that “[s]ince the Commission has held that the Act requires exchanges to compete at the individual level, Phlx unfairly discriminates by favoring members that route order flow to its affiliated exchanges rather than to other exchanges that also offer differing market and fee structures.”62 As a result, several commenters believe that the Proposal would cause “disparate treatment” between two similarly positioned market participants on Phlx.51 MIAX offers the following example to demonstrate how it believes the Proposal would unfairly discriminate against similarly positioned market participants on Phlx: BD1 and BD2 are both same class of market participant and execute 2% of the national customer volume on Phlx.52 However, BD1 sends the balance of their customer order flow of 1% to MIAX while BD2 sends the balance of their customer order flow of 1% to NOM.53 MIAX believes that an equitable allocation of reasonable fees and dues that was not unfairly discriminatory would result in charging BD1 and BD2 the exact same fees for the identical trading activity on Phlx.49 In contrast, MIAX argues that the Proposal would result in BD1 and BD2 being charged different fees even though BD1 and BD2 are performing the same activity on Phlx.55

56 Phlx Response Letter, supra note 8, at 5. For example, Phlx points to several pricing structures that the Commission has historically approved that result in differential pricing, including, among others, volume tiers and fee caps. See id. at 5–6. However, two commenters respond that the services and/or products cited by Phlx refer to product types or offerings only on a single exchange. See Normann Letter, supra note 11, at 5–6; and ISE Letter III, supra note 11, at 7–8. See also ISE Letter II, supra note 7, at 5–6.

57 See ArcaBook Order, supra note 28.

58 See CBOE Letter, supra note 7, at 4–5; and ISE Letter III, supra note 11, at 4–7.

59 CBOE Letter, supra note 7, at 5 (citing ArcaBook Order at 74790).

60 ISE Letter II, supra note 7, at 4. The commenter believes that the ArcaBook Order “deals solely with the pricing of a monopoly or unique service by one exchange of its own market data,” which is distinguishable from the context of the proposed rebate. Id. at 5.

61 See ISE Letter III, supra note 11, at 6.

62 ISE Letter II, supra note 7, at 3. This commenter also asserts that the Proposal would create confusion for investors because Phlx’s fee schedule would not fully encompass the costs of trading on

Continued
result, this commenter argues that, while Phlx can attempt to attract order flow by adjusting the market structure and fees on Phlx, Phlx cannot base its fees on factors related to other markets.63 Phlx disagrees with commentators who assert that the ArcaBook Order demonstrates that exchanges cannot cooperate with each other on fees.64 Phlx states that the ArcaBook Order “presupposes that affiliated exchanges will at times act jointly and that they will not violate the requirements of the Exchange Act by doing so.” Phlx argues that because market participants on Phlx will benefit from the proposed rebate by achieving lower costs and because more liquidity will be directed to the Exchange, nothing in the ArcaBook Order calls the proposed rebate into question.65 Furthermore, even if the Commission accepts the interpretation of the ArcaBook Order explained by commentators, Phlx believes that the Proposal meets all relevant requirements of the Act.66 Phlx states that the Act does not forbid Phlx from preferring its own affiliated exchanges over competing exchanges.67 Phlx also believes that the Proposal does not unfairly discriminate against other exchanges that compete with Phlx and its affiliated exchanges for liquidity because single exchanges could match Phlx’s proposed rebate or employ lower prices without establishing a new exchange to compete.68 Phlx also argues that the Commission has previously permitted “materially similar pricing arrangements.”70 However, several commentators argue that the fee precedents Phlx cites are distinguishable from the current Proposal because, among other things, those fees are not based on an affiliated group of exchanges.71

One commenter argues that Phlx has not provided any support that additional volume transacted at either NXM or BX Options generates efficiencies that would justify, on efficiency grounds, the enhanced rebates.72 Additionally, the commenter states that it would expect Phlx to include “substantive analysis of efficiencies generated for Phlx that would warrant passing these efficiencies down to Phlx customers.”73 The absence of such analysis suggests to this commenter that the Proposal is “motivated by a form of price discrimination based on preferences for purchasing volume on a particular exchange, and not on efficiency grounds.”74 The commenter believes that the Proposal is likely a form of price discrimination which would result in otherwise identical Phlx customers paying different relative prices for substantially the same use of Phlx’s facilities.75 Phlx disagrees with the commenter’s conclusion that the enhanced rebate is not an efficiency-based volume discount and believes that the commenter does not contend that the Proposal constitutes unfair discrimination under the Act.76 Phlx states that the commenter’s efficiency discussion is based on the “misguided assumption that differential pricing is only justified where it results in ‘efficiencies related to the customer or transaction.’”77 However, Phlx states that the Proposal will allow Phlx to increase its trading volume and spread its substantial fixed and common costs over more trades, which will help Phlx cover its fixed and common costs to the benefit of market participants.78 Furthermore, Phlx states that the Commission has previously approved a number of similar forms of efficiency-based volume discounts that price discriminate, including cross-exchange pricing on equities exchanges,79 discounted fees for proprietary trading products linked to volume in multiply-listed products, fee caps and enterprise licenses that favor heavy users of a system over other users, and differentiated pricing for data fees.80

C. Burden on Competition Not Necessary or Appropriate

Several commentators oppose the proposed rebate because they believe it is inconsistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate” in furtherance of the Act.81 The commentators opposing the Proposal believe that an exchange with a single market structure and fee
schedule cannot fairly compete against a fee structure that leverages the execution volume and fees across affiliated options exchanges.\(^82\) One commenter asserts that the Proposal would establish a precedent that would allow existing affiliated exchange groups to leverage the execution volume across their multiple independent SROs to the detriment of options exchanges that do not have such affiliated options exchanges.\(^83\) Another commenter argues that exchange operators with multiple exchanges will be able to operate their exchanges as single, integrated fee structure, cross-subsidizing various offerings in a way that exchanges with only one market will not be able to match.\(^84\)

In response, Phlx states its belief that a single-exchange operator can compete by increasing its own volume-based rebate or offering its own differentiated products, even if those services do not precisely match those offered by Phlx or any other exchange.\(^85\) Phlx also asserts that CBOE, ISE, and NYSE each operate two or more options exchanges,\(^86\) and can adopt pricing mechanisms similar to the proposed rebate.\(^87\) Thus, Phlx argues that, even if one of the current single-exchange operators were unable to match the proposed discount, Phlx would still face competition from five other exchange operators and eight other exchanges, including three exchange operators that themselves operate multiple exchanges.\(^88\)

\(^82\) See id. Two commenters argue that the Proposal is an undue burden on competition among market participants on Phlx because Phlx members that do not have the capacity to be members of multiple options exchanges will be unable to leverage additional customer trading volume on a Phlx affiliate exchange to lower their fees. See CBOE Letter, supra note 7, at 4; and MIAX Letter, supra note 7, at 3.

\(^83\) See MIAX Letter, supra note 7, at 3.

\(^84\) See ISE Letter III, supra note 11, at 9.

\(^85\) See Phlx Response Letter II, supra note 10, at 9–10. Phlx asserts, for example, that CBOE offers larger rebates for trades for proprietary options contracts to members who meet certain volume thresholds for multiply-listed options contracts. See id. at 10. Phlx states that it cannot offer a similar pricing Proposal, since it does not execute trades for CBOE’s proprietary contracts. See id.

\(^86\) The Commission notes that CBOE, ISE, and NYSE do not themselves operate two exchanges, but are each part of separate affiliated groups of exchanges operating under common holding companies. The Commission assumes that Phlx is arguing that the parent holding companies could offer pricing mechanisms similar to the pricing mechanism in the Proposal.

\(^87\) See Phlx Response Letter II, supra note 10, at 10.

\(^88\) See Phlx Response Letter, supra note 8, at 10. Phlx states that seven exchanges have commenced operation since 2003, and all have been able to increase their market share due to the competitive nature of the options exchange marketplace. See Phlx Response Letter II, supra note 10, at 2. Phlx asserts that exchanges have proven viable even at a small scale. See id.

result, Phlx argues that the price competition from the Proposal would benefit consumers and would itself outweigh any purported harm to competing exchanges that could result from the proposed rebate.\(^89\) Phlx also argues that single market exchanges can compete with the Proposal by registering multiple exchanges and offering competing multi-exchange fees.\(^90\) However, one commenter argues that the overall cost of initiating operation of an exchange “runs into the multiple millions of dollars.”\(^91\) Furthermore, this commenter states that the cost and timing of such registrations impose “unacceptable competitive impediments.”\(^92\)

The commenter that supports the Proposal believes that the Proposal would not place any undue burden on competition.\(^93\) This commenter reasons that the Proposal should be presumed to be pro-competitive because the proposed rebate lower fees and forces competing exchanges to “innovate to maintain customers and market share.”\(^94\) The commenter notes that “not all exchanges have affiliated exchanges through which they could structure a program similar to the [pro]posal.”\(^95\) The commenter further states that not having an affiliated exchange “does not constitute an undue burden on competition, but rather a potential for its enhancement.”\(^96\)

Phlx argues that the Proposal does not constitute anti-competitive tying because Phlx member organizations are not required to use NOM or BX Options to receive the enhanced rebate.\(^97\) One commenter argues that the antitrust “tying” arguments by Phlx are irrelevant to provide a basis for approval of the Proposal because tying would be dispositive in this context only if there was a combination in the pricing of a competitive product and a monopoly product, which is not present in the Proposal.\(^98\) In response, Phlx states that the Commission routinely cites and discusses antitrust cases in support of its orders approving proposed rule changes.\(^99\) For example, Phlx points to the ArcaBook Order, where the Commission cited to an economic analysis of monopolies and pricing.\(^100\)

In its response, Phlx argues that the Proposal is simply a price cut and there is no evidence that low prices harm competition.\(^101\) Phlx asserts that the Proposal will benefit all Phlx market participants, including those who do not obtain the proposed rebates, through increased customer liquidity and tighter spreads.\(^102\) In addition, Phlx believes that market participants and investors will benefit under the Proposal because it is designed to attract Directed Orders (i.e., customer orders directed to particular market makers for execution).\(^103\)

Phlx also states that members who choose to qualify for the enhanced rebates by maintaining volume on NOM or BX Options (as opposed to shifting their volume to Phlx) according to the proposed criteria to qualify for a Phlx-only rebate) will have the flexibility to route their orders to NOM or BX Options without reducing the rebates that they accrue on Phlx.\(^104\) Additionally, Phlx explains that the Proposal offers several benefits beyond those available from a Phlx-only rebate, most notably, a significant price cut to members, additional volume, and increased flexibility for market

\(^89\) See Phlx Response Letter, supra note 7, at 4; and MIAX Letter, supra note 7, at 3.

\(^90\) See Phlx Response Letter II, supra note 10, at 4–5. One commenter asserts that firms that do not have a rebate on NOM or BX Options may lose order flow to larger firms that consolidate order flow to the rebate thresholds. See ISE Letter III, supra note 11, at 10. In response, Phlx states that this possibility exists today under any rebate program based on volume tiers. See Phlx Response Letter V, supra note 14, at 6.

\(^91\) See id. at 3.

\(^92\) See Phlx Response Letter, supra note 8, at 7–8. Phlx anticipates that the Proposal will increase its trading volume, decrease the transaction fee revenue per contract, and improve its competitive position. See Phlx Response Letter II, supra note 10, at 4.

\(^93\) See id. at 5; Phlx Response Letter III, supra note 12, at 1–2; Phlx Response Letter IV, supra note 13, at 2; and Phlx Response Letter V, supra note 14, at 4–5. One commenter asserts that firms that do not have a rebate on NOM or BX Options may lose order flow to larger firms that consolidate order flow to the rebate thresholds. See ISE Letter III, supra note 11, at 10. In response, Phlx states that this possibility exists today under any rebate program based on volume tiers. See Phlx Response Letter V, supra note 14, at 6.

\(^94\) See Phlx Response Letter II, supra note 10, at 4. According to Phlx, under current trading rules, a particular market maker (the “Directed Participant”) can execute as much as 40% of the Directed Order. See id. In practice, however, Phlx states that Directed Participants only execute around 9% of Directed Orders on average. See id. Phlx states that the remainder of the order is executed by other market participants. See id.

\(^95\) See id. at 6 and 9; and Phlx Response Letter IV, supra note 13, at 2.
participants. Phlx believes that employing bundled pricing in this manner can induce new trading and prompt members to shift volume from competing exchanges.

D. Impact on Options Market Structure

In its response to the request for additional comment in the Extension Notice, Phlx states that it does not believe the Proposal will have a material effect on the structure of the options or equities markets or lead to a change in the total number of options exchanges. Phlx believes that its competitors can respond to the Proposal in several ways, including by offering better pricing on a single exchange, which would reduce the incentive for exchanges or new entities to create additional options exchanges. Phlx also believes that the decision to open a new exchange is influenced by other factors, primarily by whether “opening a new exchange will allow them to offer a new market model that will provide a different value proposition to market participants than is available through their existing exchanges.”

Phlx notes that in the past five years, as the number of exchanges have increased, the revenue per contract of CBOE, NASDAQ and NYSE has decreased or remained relatively flat, which suggests that trading costs do not necessarily increase when additional markets open. Furthermore, Phlx believes that the enhanced rebate will not create a sufficient incentive to prompt existing exchanges or exchange groups to consolidate due to the significant transaction costs involved. Phlx argues that the decision whether to consolidate entities is driven by considerations other than those raised by the Proposal, including whether consolidation would help exchanges better serve the interest of market participants.

Moreover, Phlx believes that the Proposal should not be held to violate the Act merely because it creates an incentive for another market operator to open a new exchange. Phlx notes that the Commission has expressed concern in the past that a multiplicity of trading venues could lead to fragmentation if market participants are unable to interact with order flow on each exchange to ensure that they are obtaining the best available price. However, Phlx does not believe the Commission has ever expressed an opinion that the possibility of future order fragmentation is a sufficient reason to discourage the creation of new exchanges.

Finally, Phlx argues that the Commission’s concern over the expansion of the number of exchanges presupposes that the Proposal will be successful and encourage other exchanges to respond by offering similar enhanced rebates to investors. Phlx believes that the Proposal should not be disapproved based on the presumption that investors will respond favorably to it and encourage other exchanges to offer additional market-based incentives. Phlx reiterates its view that because the Proposal enhances competition and offers a price cut to Phlx members, it is presumptively valid under the Act and “[t]here would need to be significant countervailing evidence supporting any conclusion that the [Proposal] conflicts with the purposes underlying the Act.” Phlx believes that no such evidence exists in the Proposal and the Commission therefore should “permit market forces to determine both the optimal number of exchanges and the manner in which exchanges offer and respond to pro-competitive price discounts.”

One commenter responded to the request for additional comment in the Extension Notice arguing that the Proposal will lead to an increase in the number of exchange registrations resulting in unnecessary market fragmentation. The commenter believes that the options market structure currently reflects an appropriate balance between competition and fragmentation. The commenter believes that if the Proposal is approved, single exchange operators will view exchange registration as a defensive measure against exchange operators with multiple markets, rather than register exchanges to offer value to the market. This commenter concludes that exchange operators will register multiple exchanges just to match competitive offerings, “rather than providing any real benefit to the market,” leading to increased fragmentation without any corresponding benefit.

Furthermore, two commenters raised concern about the potential impact of the Proposal on a market-wide basis. One commenter believes that the Proposal imposes obstacles to the development of a national market system for securities and that ignoring the precedent in the ArcaBook Order would require a major change to the underlying assumptions regarding a national market system, a change that could have significant unintended consequences. This commenter states
its view that the Proposal raises important questions about the foundation of the national market system and competition in the securities markets and suggests that if the Commission ever determines to make such a change, it should be addressed either through Commission rulemaking or Congressional action—not through an individual exchange’s rule proposal. Similarly, another commenter believes that the Proposal raises significant legal and policy issues and suggests that—if a reconsideration of policy must be undertaken—such reconsideration should be conducted on a market-wide basis and not in the context of a single proposed rule change.

IV. Discussion and Commission Findings

Under Section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization. The Commission shall disapprove a proposed rule change if it does not make such a finding. The Commission’s Rules of Practice, under Rule 700(b)(3), state that the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”

After careful consideration, the Commission does not find that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission does not find that the proposed rule change is consistent with: (1) Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”; and (2) Section 6(b)(5) of the Act, which, among other things, requires that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers[].” Because either of these determinations under the Act independently necessitates disapproving the Proposal, the Commission does so.

In the Order Instituting Proceedings, the Commission highlighted the statutory provisions referenced above, and noted that the Commission intended to further assess whether this additional customer rebate on Phlx, which is based on execution volume across the NASDAQ OMX exchanges, is consistent with the statutory requirements applicable to a national securities exchange under the Act. The Commission invited interested persons to submit written views with respect to these concerns. The Commission received eleven comment letters in response to the Order Instituting Proceedings, of which five were from Phlx.

To evaluate whether a fee, such as Phlx’s proposed rebate, is consistent with the Act, the Commission applies a “market-based approach.” The Commission examines whether the exchange making the proposal is subject to significant competitive forces in setting the terms of its proposal, including the fee. If the exchange is subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the proposal unless it determines that there is a substantial countervailing basis to find that the proposal nevertheless fails to meet an applicable requirement of the Act or the rules thereunder. If the exchange is not subject to significant competitive forces in setting the terms of the proposal, the Commission will require the exchange to provide a substantial basis, other than competitive forces, to demonstrate that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.

For reasons discussed below, although we base our analysis on the assumption that Phlx is subject to significant competitive forces in setting the terms of the Proposal, there is a substantial countervailing basis to find that those terms do not meet the Act’s requirements that an exchange’s rules be equitable, fair, reasonable, and not unreasonably discriminatory: namely, the Proposal could result in two similarly situated Phlx members being charged different fees for transacting the same amount and type of customer option volume on the Phlx exchange. As discussed more fully below and as explained in the ArcaBook Order, the Commission historically has reviewed whether a proposed exchange rule is consistent with the provisions of Section 6 of the Act on an exchange-by-exchange basis—that is, an exchange’s proposed rule change is analyzed at the individual level of the registered securities exchange and not at the group level of exchanges. With respect to the first part of a market-based approach, the Commission previously has found and continues to believe that there is significant competition for order flow in the options market at the individual exchange level. This

129 15 U.S.C. 78s(b)(2)(C)(ii); and
131 Securities Exchange Act Release No. 68202 (November 9, 2012), 77 FR 68856, 68858–61 (November 16, 2012) (SR–Phlx–2012–27 and SR–Phlx–2012–54 (“Phlx Fees Order”) (applying the market-based approach in connection with a Phlx transaction fee proposal. The Commission found, pursuant to delegated authority, that the proposed rule changes were consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange.).
132 See also Securities Exchange Act Release No. 68202 (November 9, 2012), 77 FR 68856, 68858–61 (November 16, 2012) (SR–Phlx–2012–27 and SR–Phlx–2012–54 (“Phlx Fees Order”) (applying the market-based approach in connection with a Phlx transaction fee proposal. The Commission found, pursuant to delegated authority, that the proposed rule changes were consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange.).
133 See also Armed Forces Fees Order, supra note 130, at 6, 71761–02.
134 See also Securities Exchange Act Release No. 68202 (November 9, 2012), 77 FR 68856, 68858–61 (November 16, 2012) (SR–Phlx–2012–27 and SR–Phlx–2012–54 (“Phlx Fees Order”) (applying the market-based approach in connection with a Phlx transaction fee proposal. The Commission found, pursuant to delegated authority, that the proposed rule changes were consistent with the requirements of the Act and rules and regulations thereunder applicable to a national securities exchange.).
136 See ArcaBook Order, supra note 28, at 74781.
137 See also Phlx Fees Order, supra note 134, at 68858.
138 See id. at 74783; and infra notes 143–145.
139 Specifically, in the ArcaBook Order, the Commission stated:

Section 6 of the Exchange Act . . . prohibits a national securities exchange from adopting rules that are designed to permit unfair discrimination among its customers or that would impose an unnecessary or inappropriate burden on competition. All of these requirements are applied at the level of the individual registered securities exchange, not at the group level of exchanges that are under common control. In particular, a proposed exchange rule must stand or fall based, among other things, on the interests of customers, issuers, broker-dealers, and other persons using the facility of that exchange.

136 See ArcaBook Order, supra note 28, at 74781.
137 See also Phlx Fees Order, supra note 134, at 68858.
138 See ArcaBook Order, supra note 28, at 74781.
139 See id. at 74783; and infra notes 143–145.
140 Specifically, in the ArcaBook Order, the Commission stated:

Section 6 of the Exchange Act . . . prohibits a national securities exchange from adopting rules that are designed to permit unfair discrimination among its customers or that would impose an unnecessary or inappropriate burden on competition. All of these requirements are applied at the level of the individual registered securities exchange, not at the group level of exchanges that are under common control. In particular, a proposed exchange rule must stand or fall based, among other things, on the interests of customers, issuers, broker-dealers, and other persons using the facility of that exchange.

Continued
Proposal adds complexity to the first part of a market-based approach analysis because it raises a question of whether we also should analyze competition at the group level of exchanges in addition to the individual exchange level.\textsuperscript{140} The Commission does not believe it is necessary to resolve that issue here because, even assuming that the Exchange were subject to significant competitive forces at the group level under the first part of a market-based approach, the Commission believes that, under the second part of the market-based analysis, there is a substantial countervailing basis to find that the terms of the proposed rebate fail to meet the requirements of the Act.

Specifically, the Commission believes that providing a rebate for transactions on Phlx based on the aggregate amount of customer volume transacted across all three of the NASDAQ OMX exchanges would be inconsistent with Section 6(b)(4) of the Act\textsuperscript{141} because it would not provide for the equitable allocation of rebates, fees, and other charges among Phlx members and issuers and other persons using Phlx facilities. The Commission also believes that the Proposal would be inconsistent with Section 6(b)(5) of the Act\textsuperscript{142} because it would permit unfair discrimination between customers, issuers, brokers, or dealers.

As outlined above, the Proposal would allow market participants to aggregate volume across Phlx, NOM, and BX Options for purposes of determining whether they meet the volume tiers on Phlx. However, the Commission historically has reviewed whether a proposed exchange rule is consistent with the provisions of Section 6 of the Act on an exchange-by-exchange basis.\textsuperscript{143} As the Commission articulated in the ArcaBook Order, the regulatory structure of Section 6 “limits the potential for related exchanges to act jointly[,]”\textsuperscript{144} and reading the statute to require the application of (and assessment of compliance with) the requirements of Section 6 of the Act on an exchange-by-exchange basis is consistent with that purpose. While the Commission recognizes that there are other plausible approaches to the interpretation of the Act, we do not believe a sufficiently compelling case has been made for the Commission to alter its historical position at this time.

Thus, as articulated by the Commission in the ArcaBook Order, the Commission has analyzed whether this proposed rule change is consistent with the Act at the level of the individual registered securities exchange—not the group level. In applying this principle, it is notable that the Proposal could result in the Exchange charging different fees to Phlx members that are similarly situated and transact the same amount and type (electronically delivered) of customer volume on the Phlx exchange. For example, a Phlx member who transacts 2.3% of national customer volume in multiply-listed options in a month on Phlx would not qualify for the additional rebate. However, another Phlx member who also transacts 2.3% of national customer volume in multiply-listed options in a month on Phlx would transact an additional 0.5% of national customer volume in multiply-listed options in a month on NOM would qualify for the rebate. Further, given the second Phlx member’s customer volume transacted on NOM, this second Phlx member need only transact 2.0% of national customer volume in multiply-listed options in that month on Phlx to qualify for the enhanced rebate.\textsuperscript{145}

Thus, under the Proposal, a Phlx member that transacts less national customer volume in multiply-listed options in a month on Phlx than other members would qualify for the additional proposed rebate while those other Phlx members with higher national customer volume percentages on Phlx—the exchange proposing the rebate—would not qualify. The Commission does not believe that the arguments put forth by Phlx provide a basis consistent with the Act as to why this disparity is equitable or not unfairly discriminatory when analyzing the treatment of Phlx members using the Phlx exchange.

Phlx argues that the Proposal provides for the equitable allocations of fees because the proposed rebate is limited to market participants who transact business on Phlx and only applies to orders actually executed on the Phlx exchange.\textsuperscript{146} But this ignores the effect of the proposed rebate on those market participants. Because the Proposal is based in part on the activity of Phlx members outside the Phlx exchange, the Proposal could result in the Exchange charging different fees to members that are similarly situated and execute the same amount and type of customer orders on the Phlx exchange. Further, Phlx has not shown that, when analyzed at the level of the individual exchange, such differential treatment is equitable. Phlx believes that the resulting lower costs will incentivize market participants to increase the amount of customer orders sent to the Exchange, thereby enhancing the quality of its markets by narrowing quote spreads and further increasing customer volume to Phlx.\textsuperscript{147} The Commission does not believe that any of the potential benefits of this Proposal cure its inequitable effect because, when analyzing the activity of members on the Phlx exchange alone, the Proposal could result in two Phlx members that are similarly situated and transact the same amount and type of customer volume on Phlx being charged different fees.

Finally, Phlx argues that the proposed rebate is structured as a volume-based discount and is similar to the existing rebate tiers in Section B of the Pricing Schedule, which the Commission has previously accepted.\textsuperscript{148} But the

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\textsuperscript{140} See Phlx Response Letter, supra note 8, at 14; and Section III.A, supra. In addition, Phlx argues that the proposed rebate should be considered “presumptively reasonable” because it would reduce transaction costs of doing business on the Exchange, which the Exchange believes would ultimately reduce the costs passed on to investors. See Phlx Response Letter, supra note 8. See also Notice, supra note 4 at 69477. The Commission notes that it is not making a finding as to whether the proposed rebate is reasonable because the Commission finds that the Proposal is inconsistent with the Act on other grounds. See supra notes 138–143 and accompanying text.

\textsuperscript{141} Phlx Response Letter, supra note 8, at 14; and Section III.A, supra. In addition, Phlx argues that the proposed rebate should be considered “presumptively reasonable” because it would reduce transaction costs of doing business on the Exchange, which the Exchange believes would ultimately reduce the costs passed on to investors. See Phlx Response Letter, supra note 8. See also Notice, supra note 4 at 69477. The Commission notes that it is not making a finding as to whether the proposed rebate is reasonable because the Commission finds that the Proposal is inconsistent with the Act on other grounds. See supra notes 138–143 and accompanying text.

\textsuperscript{143} See ArcaBook Order, supra note 28, at 74793.

\textsuperscript{144} Id.

\textsuperscript{145} Several commenters also raised this concern and argued that it renders the Proposal inequitable. See, e.g., Normann Letter, supra note 11, at 6–9; and MIAX Letter, supra note 7, at 2. See also CBOE Letter, supra note 7, at 3 (noting that “imposition of a fee or charge by an exchange based on some activity other than use of the fee-imposing exchange’s own facilities necessarily would be impossible to allocate in an ‘equitable’ way and could never be ‘reasonable.’ ”); and ISE Letter II, supra note 7, at 2–3.

\textsuperscript{146} See Notice, supra note 4, at 69461–82.

\textsuperscript{147} See Notice, supra note 4, at 69482.

\textsuperscript{148} See Phlx Response Letter, supra note 8, at 15; and Notice, supra note 4 at 69480.
Commission believes that the Proposal is distinguishable from the volume-based tiers and discounts that currently exist on Phlx and other registered securities exchanges. Current volume-based discounts are based on the volume transacted on the registered securities exchange charging the fee and not volume transacted on a separate registered securities exchange. Thus, under current volume-based discounts, two similarly situated members executing the same amount and type of transaction volume on a registered securities exchange should be charged the same transaction fee (or given the same transaction rebate).149

Given the principle articulated by the Commission in its ArcaBook Order, and based on the record, the Commission therefore does not believe that the proposed fee structure, which as commenters noted, would allow the Exchange to charge different fees to Phlx members that are similarly situated and transact the same amount and type of customer volume on Phlx, is consistent with Section 6(b)(4) of the Act which, requires that the rules of a registered national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” Phlx also argues that the Proposal is not unfairly discriminatory under Section 6(b)(5) of the Act, asserting that because any market participant could qualify for the proposed rebate by transacting the required amount of customer volume on Phlx alone and thus market participants are not required to become members of NASDAQ OMX exchanges to qualify for the proposed rebate.150 The Commission believes that this argument fails to address, when analyzing the activity of members on the Phlx exchange alone, the result of two Phlx members that are similarly situated and transact the same amount and type of customer volume on Phlx but could be charged different fees.151

Phlx argues that market participants can easily register as members of Phlx and its affiliated exchanges at minimal cost, which will expand the pool of market participants who can receive the rebate.152 Phlx also argues that the Proposal would reduce fees and benefit market participants by way of reduced transaction costs.153 In addition, the Exchange argues that the Proposal would enhance efficient trading activity by allowing market participants to route customer orders to other NASDAQ OMX exchanges and count transactions as a result of those orders towards the proposed rebate on Phlx.154 The Exchange believes that this efficiency would improve execution quality while at the same time potentially lowering the cost for their customers.155 But the Commission does not believe that any of the potential benefits of the Proposal put forth by Phlx—such as to expand the rebate to more market participants resulting in lower costs to market participants without compromising their execution obligations, and improved market quality through increased liquidity to the Exchange156—cures its unfair discriminatory effects on Phlx-only members, who could be charged a higher fee for the same volume on Phlx than Phlx members that have multiple NASDAQ OMX exchange memberships. Thus, the Commission does not believe that Phlx has provided a sufficient basis to support the assertion that the potential discrimination among Phlx members resulting from the Proposal would not be unfair. Consequently, the Commission does not believe that the proposed fee structure is consistent with Section 6(b)(5) of the Act which, among other things, requires that the rules of a registered national securities exchange be “not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.”157

In analyzing this Proposal and in making its determination to disapprove the rule change, the Commission has considered whether the action will promote efficiency, competition, and capital formation.158 As part of this consideration, the Commission has considered comments regarding efficiency and competition, including literature cited in those comments, and how any effects on competition or efficiency could affect capital formation. For example, some commenters assert that the Proposal does not provide efficiency gains on Phlx,159 while Phlx contends that some market participants who transact customer orders on Phlx could experience efficiency gains from improved execution choices.160 Phlx contends the following effects may result from the Proposal: More efficient allocation of order flow between Phlx and its affiliated exchanges;161 more efficient use of the services associated with the substantial fixed, sunk costs shared among the three exchanges in the Nasdaq OMX group;162 more efficient price discrimination;163 increased trading volume on Phlx;164 and, in principle, a potential increase in total options exchange industry volume.165 The Commission notes that these efficiency gains, if realized, could potentially promote capital formation. Additionally, commenters assert that the Proposal would lead to adverse effects on competition by placing burdens on competing exchanges166 that may face loss of business to Phlx and on competing market participants that are not entitled to the proposed rebates for exchange services.

149 See e.g., the existing Phlx Pricing Schedule B, Customer Rebate Program. In the Notice, Phlx also discusses other examples of differences in fees and rebates for exchange services. See Notice, supra note 4, at 69477–80. The Proposal is similarly distinguishable from those examples because only under the Proposal could two similarly situated market participants who transact the same amount of the same type of volume on Phlx be charged differing levels of transaction fees by that exchange. See Phlx Response Letter, supra note 8, at 4–7; and Phlx Response Letter V, supra note 14, at 2.

150 See infra note 156.

151 See infra note 156.

152 See Phlx Response Letter, supra note 8, at 4–5.

153 See Notice, supra note 4, at 69473.

154 See Phlx Response Letter II, supra note 10, at 6 and 9; and Phlx Response Letter IV, supra note 13, at 2.

155 See Phlx Response Letter II, supra note 10, at 6 and 9; and Phlx Response Letter IV, supra note 13, at 2.

156 The Proposal potentially could lead to order flow shifting away from the Phlx exchange to other options exchanges because a member could still qualify for the rebate by aggregating the amount of customer volume that it transacts across one or more of the exchanges in the NASDAQ OMX exchange group. According to the Exchange, during the month the proposed rebate was in effect on Phlx, customer volume on Phlx experienced a modest increase; however, two of the three firms that qualified for the proposed rebate did so by shifting customer volume from rival exchanges to NOM. See Phlx Response Letter II, supra note 10, at 3–4. Phlx data shows that Phlx Member A’s customer volume on NOM increased from 0.59% on October 1, 2013 to 1.67% on November 1, 2013 and Phlx Member C’s customer volume on NOM increased from 0.58% on October 1, 2013 to 1.44% on November 1, 2013. See id.

157 Whenever pursuant to the Act the Commission is engaged in rulemaking or the review of a rule of a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).


159 See Phlx Response Letter, supra note 8, at 4.

160 See id.; and Willig and Bamberger Statement, supra note 8, at 19. See also Citadel Letter, supra note 7, at 2–3, 7.

161 See Willig and Bamberger Reply, supra note 13, at 4.

162 See Willig and Bamberger Statement, supra note 8, at 15–20; Willig and Bamberger Reply, supra note 13, at 4.

163 See Willig and Bamberger Statement, supra note 8, at 20; and Phlx Response Letter IV, supra note 13, at 2.


165 See ISE Letter III, supra note 11, at 8–9; Normann Letter, supra note 11, at 7.

166 See Phlx Response Letter, supra note 8, at 4.

167 See id.; and Willig and Bamberger Statement, supra note 8, at 19. See also Citadel Letter, supra note 7, at 2–3, 7.

168 See Willig and Bamberger Reply, supra note 13, at 4.

169 See Willig and Bamberger Statement, supra note 8, at 15–20; Willig and Bamberger Reply, supra note 13, at 4.

170 See Willig and Bamberger Statement, supra note 8, at 20; and Phlx Response Letter IV, supra note 13, at 2.


172 See ISE Letter III, supra note 11, at 3; MIAX Letter, supra note 7, at 3; and CBOE Letter, supra note 7, at 4.
SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Operation of Its Supplemental Liquidity Providers Pilot Currently Scheduled To Expire on July 31, 2014, Until the Earlier of the Securities and Exchange Commission’s Approval To Make Such Pilot Permanent or December 31, 2014

July 16, 2014.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")\(^1\) and Rule 19b–4 thereunder,\(^2\) notice is hereby given that on July 3, 2014, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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 extend the operation of its Supplemental Liquidity Providers Pilot ("SLP Pilot" or "Pilot") (see Rule 107B), currently scheduled to expire on July 31, 2014, until the earlier of the Securities and Exchange Commission’s ("Commission") approval to make such Pilot permanent or December 31, 2014. The text of the proposed rule change is available on the Exchange’s Web site at www.nyse.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 self-regulatory organization 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 those 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 parts of such statements.


\(^{2}\) The information contained herein is a summary of the “New Market Model” Pilot and the SLP Pilot. See supra note 4 for a fuller description of those pilots.

166 See CBOE Letter, supra note 7, at 4; MIAX Letter, supra note 7, at 3.
167 See Phlx Response Letter, supra note 8, at 2.
168 See SSE Letter III, supra note 11, at 3, 8–9.