

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-82968; File No. SR-Phlx-2018-27)

March 30, 2018

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Provisions for Excluding a Day From Its Volume Calculations for Purposes of Determining Volume Based Pricing

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 19, 2018, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's provisions for excluding a day from its volume calculations for purposes of determining volume based pricing.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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

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

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to amend the Exchange’s provisions for excluding a day from its volume calculations for purposes of determining volume based pricing. The Exchange is standardizing its practice for removing a day from volume calculations in the fee schedule with its affiliated options exchanges, Nasdaq ISE, LLC (“ISE”), Nasdaq GEMX, LLC (“GEMX”), and Nasdaq MRX, LLC (“MRX”) (collectively, the “Nasdaq ISE Markets”).

To avoid penalizing members when aberrant low volume days result from systems or other issues at the Exchange, or where the Exchange closes early for holiday observance, the Exchange has language in its pricing schedule allowing it to exclude certain days from its average daily volume (“ADV”) or other volume calculations. Currently, language in the Exchange’s pricing schedule provides that, for purposes of determining average daily volume or volume-based pricing, any day that the market is not open for the entire trading day will be excluded from such calculation. The Exchange proposes to adopt language for Phlx options<sup>3</sup> that is identical to language currently in place on the Nasdaq ISE Markets,<sup>4</sup> with the one exception that it would include language that clarifies how this rule applies to calculations that are based on

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<sup>3</sup> Because the Exchange is conforming its practice for options markets only, the current language will remain in place for PSX equities.

<sup>4</sup> See ISE Schedule of Fees, Preface; GEMX Schedule of Fees, Qualifying Tier Thresholds; and MRX Schedule of Fees, Member Volume Program: Qualifying Tier Thresholds.

a percentage of industry volume.<sup>5</sup> Specifically, as proposed, any day that the market is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from the ADV calculation or calculation based on a percentage of industry volume; provided that the Exchange will only remove the day for members that would have a lower ADV or percentage of industry volume with the day included. If a day is removed from a calculation based on a percentage of monthly industry volume, volume executed that day will be removed from both the numerator and the denominator of the calculation. While similar to the language currently in place on the Exchange, the proposed language: (1) provides greater flexibility to remove a day when the Exchange instructs members in writing to route their orders to other markets, (2) modifies the provision so that members will only have the day removed when doing so is beneficial for the member, (3) applies the provision to ADV calculations or calculation based on a percentage of industry volume, and not for other volume-based pricing where members would not benefit from having the day excluded, and (4) accounts for calculations based on a percentage of industry volume by removing the day from both the numerator and denominator of the calculation. Other than days where the Exchange closes early for a scheduled holiday observance, the Exchange will inform members of days that are to be excluded from its ADV calculations via system status message disseminated to all members.

The Nasdaq ISE Markets adopted the language on instructing members to route away to prevent situations where days that have artificially lower volume could not be excluded, for example, because the exchange experienced an issue in the morning that did not carry over into the trading day. Like the Nasdaq ISE Markets, the Exchange believes that it should have the flexibility to exclude days if members have been instructed to send their orders elsewhere,

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<sup>5</sup> The Nasdaq ISE Markets do not have any fees calculated based on a percentage of industry volume.

regardless of whether the issue that resulted in this instruction ultimately impacts the availability of the Exchange for trading.

In addition, to avoid penalizing members that step up and trade on a day that the Exchange is experiencing difficulties, the Nasdaq ISE Markets only remove days from their ADV calculations for members that would have a lower ADV or percentage of industry volume with the day included. This provision would also be helpful on the Exchange as it would ensure that members that continue to execute a large volume of contracts are not inadvertently disadvantaged when the Exchange removes a day from its ADV calculation.

Furthermore, the proposed language applies to ADV calculations or calculation based on a percentage of industry volume, and not for other volume-based pricing, as members do not benefit when a day is removed for straight volume accumulations. Again, the Exchange believes that the approach of the Nasdaq ISE Markets would be beneficial for the Exchange as it counts volume executed during an excluded day for purposes of straight volume accumulations. Unlike the Nasdaq ISE Markets, however, the Exchange has fees that are based on a percentage of industry volume. As such, the Exchange is including language in its rule that accounts for these calculations by explicitly mentioning that days may be removed from these calculations, and including language that explains that the day will be moved from both the numerator of the calculation and the denominator of the calculation. Removing the day from both the numerator and denominator of the calculation will ensure that members benefit from this rule as removing the day from the numerator only (i.e., the member's volume) without removing it from the denominator (i.e., industry volume) would penalize the member.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>6</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>7</sup> in 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 believes that the proposed rule change is reasonable and equitable as it provides a new framework for removing days from the Exchange's volume calculations that the Exchange believes is beneficial to members and consistent with similar provisions already in place on its affiliated options exchanges, with the one exception described above for fees based on a percentage of industry volume. The proposed rule change would allow the Exchange to remove a day from its ADV calculations in more circumstances, i.e., when the Exchange instructs members in writing to route their orders to other markets, and ensures that the Exchange will only do so in circumstances where beneficial for the member due to the member executing a lower ADV or percentage of industry volume during the excluded day. The Exchange believes that it is reasonable and equitable to exclude a day from its ADV calculations when members are instructed to route their orders to other markets as this preserves the Exchange's intent behind adopting volume-based pricing, and avoids penalizing members that follow this instruction. Similarly, the Exchange believes that it is reasonable and equitable to only exclude a day from its calculations for members that would otherwise have a lower ADV or percentage of industry volume. Without these changes, members that route away in accordance with the Exchange's instructions, or that step up and trade significant volume on excluded trading days, may be

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

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

negatively impacted, resulting in an effective cost increase for those members. In addition, the Exchange believes that it is reasonable and equitable to apply the proposed language only to ADV based volume calculations and calculation based on a percentage of industry volume as removing the day for straight volume accumulations would never be beneficial for the member as it would reduce the volume counted for the member for the month. Furthermore, the proposed language about removing the day from both the numerator and denominator of a calculation based on a percentage of industry volume is reasonable and equitable and this treatment ensures that the member actually benefits from having the day removed. Finally, the Exchange further believes that the proposed rule change is not unfairly discriminatory because it applies equally to all members. While the Exchange currently has rules in place for removing a day from its pricing, the Exchange believes that the proposed changes will benefit all members by providing broader authority to remove a day similar to that available on its affiliates, and ensuring that days are removed only in situations where the member benefits.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is designed to standardize the Exchange's practice for removing days from its ADV calculations with its affiliated options exchanges, with one exception that accounts for fees based on a percentage of industry volume. The Exchange believes that the proposed modifications to its ADV calculations are pro-competitive and will result in lower total costs to end users, a positive outcome of competitive markets. The Exchange operates in a highly competitive market in which market participants can readily direct their order flow to competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and rebates

to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed fee changes reflect this competitive environment.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>8</sup>

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

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2018-27 on the subject line.

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<sup>8</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-Phlx-2018-27. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.



All submissions should refer to File Number SR-Phlx-2018-27 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).