

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 26	SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4	File No.* SR - 2021 - * 22	Amendment No. (req. for Amendments *)
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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"/>
Pilot <input type="checkbox"/>			Rule		
Extension of Time Period for Commission Action * <input type="checkbox"/>		Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
	Section 3C(b)(2) * <input type="checkbox"/>

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

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

A proposal to amend the Exchanges Pricing Schedule at Options 7,

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Sun Last Name \* Kim  
 Title \* Associate General Counsel  
 E-mail \* Sun.Kim@nasdaq.com  
 Telephone \* (646) 420-7816 Fax

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)  
 Date 04/13/2021  
 By John Zecca  
 EVP and Chief Legal Counsel  
 john.zecca@nasdaq.com

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

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

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

Add Remove View

Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend the Exchange’s Pricing Schedule at Options 7, as described further below.

The Exchange originally filed the proposed pricing changes on April 1, 2021 (SR-Phlx-2021-20). On April 13, 2021, the Exchange withdrew that filing and submitted this filing.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors (the “Board”) on November 5, 2020. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

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

Sun Kim  
Associate General Counsel  
Nasdaq, Inc.  
646-420-7816

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

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

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

a. Purpose

The purpose of the proposed rule change is to amend the Exchange’s Pricing Schedule at Options 7. First, the Exchange proposes to amend the routing fees to Nasdaq BX Options (“BX”), which are set forth in Options 7, Section 7. Second, the Exchange proposes a non-substantive change in Options 7, Section 4 to add rule text that will make clear applicable pricing.

BX Routing Fees

Options 7, Section 7 sets forth the fees for routing contracts to markets other than Phlx. The Exchange proposes to amend the BX Routing Fee.

Currently, Non-Customers<sup>3</sup> are assessed a \$0.99 per contract Routing Fee to any options exchange. Customers<sup>4</sup> are currently assessed a Routing Fee to The Nasdaq Options Market (“NOM”) of \$0.13 per contract (“Fixed Fee”) in addition to the actual transaction fee assessed. Customers are also currently assessed a Routing Fee to BX of \$0.13 per contract. In addition, as it relates to all other options exchanges, Customers are currently assessed a Routing Fee of \$0.23 per contract (“Fixed Fee”) in addition to the actual transaction fee assessed. If the away market pays a rebate, the Routing Fee is \$0.13 per contract. Finally, the Exchange currently pays a credit (equal to the applicable

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<sup>3</sup> The term “**Non-Customer**” applies to transactions for the accounts of Lead Market Makers, Market Makers, Firms, Professionals, Broker-Dealers and JBOs.

<sup>4</sup> The term “**Customer**” applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of a broker or dealer or for the account of a “Professional” (as that term is defined in Options 1, Section 1(b)(45)).

Fixed Fee plus \$0.01 per contract)<sup>5</sup> to a member organization that qualifies for a Tier 2, 3, 4, or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule, and routes away more than 5,000 Customer contracts per day in a given month to an away market.

The Exchange now proposes to amend the BX Routing Fee to include the actual transaction fee assessed in addition to the “Fixed Fee” of \$0.13 per contract. The proposed changes will align BX’s Routing Fee with the current NOM Routing Fee.

The Exchange is proposing to recoup the actual transaction fee (in addition to the Fixed Fee) that is incurred by the Exchange in connection with routing orders, on behalf of its member organizations, to BX. Previously, the Exchange retained the rebates paid by BX to recover the costs associated with providing its routing services, did not assess the actual transaction fees charged by BX for Customer orders, and only assessed such orders the \$0.13 per contract Fixed Fee. This is because when orders are routed to BX, such orders are considered as removing liquidity on BX, and BX previously assessed rebates to Customer orders for removing liquidity. In particular, prior to the Recent Rule Change,<sup>6</sup> Customer orders executed on BX received Penny Symbol Rebates to Remove Liquidity when trading against a Non-Customer, Lead Market Maker, BX Options

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<sup>5</sup> If the away market transaction fee is \$0.00 or the away market pays a rebate, then the Exchange provides the member organization with a credit equal to the applicable Fixed Fee only. Member and member organizations under Common Ownership may aggregate their Customer volume routed away for purposes of calculating discount thresholds and receiving discounted routing fees.

<sup>6</sup> See Securities Exchange Act Release No. 91473 (April 5, 2021), 86 FR 18562 (April 9, 2021) (SR-BX-2021-009) (“Recent Rule Change”).

Market Maker, Customer or Firm that ranged from \$0.00 to \$0.35 per contract,<sup>7</sup> depending on the volume tier achieved. Customers also previously received Non-Penny Rebates to Remove Liquidity of \$0.80 per contract, regardless of tier and contra-party. As part of the Recent Rule Change, the aforementioned rebates were removed from the BX Pricing Schedule and replaced with a maker/taker fee structure where market participants are assessed a rebate or fee for adding liquidity to the market, or charged a fee for removing liquidity from the market.<sup>8</sup>

With this recent change in the structure of BX's Pricing Schedule, the Exchange proposes to align the Routing Fees to BX with the current Routing Fees to NOM. With this proposal, the Exchange will no longer retain rebates paid by BX as BX no longer provides rebates for Customer orders removing liquidity on BX and instead charges a taker fee for such orders. The Exchange will continue to assess the \$0.13 per contract Fixed Fee for routing Customer orders to BX, and will propose to also charge the actual transaction fee assessed by BX.

Finally, the Exchange will continue to provide the routing credit described above to orders that are routed away to BX if the member organization qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule, and routes away more than 5,000 Customer contracts per day in a given month. The routing

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<sup>7</sup> Participants that execute less than 0.05% of total industry customer equity and ETF option ADV contracts per month would receive no Penny Symbol Rebate to Remove Liquidity in Tier 1. Participants that execute 0.05% to less than 0.15% of total industry customer equity and ETF option ADV contracts per month would receive a \$0.25 per contract Penny Symbol Rebate to Remove Liquidity in Tier 2. Participants that execute 0.15% or more of total industry customer equity and ETF option ADV contracts per month would receive a \$0.35 per contract Penny Symbol Rebate to Remove Liquidity in Tier 3.

<sup>8</sup> See note 6 above.

credit will equal the \$0.13 per contract Fixed Fee plus \$0.01 per contract, unless the away market transaction fee is \$0.00 or the away market pays a rebate, in which case the member organization will be entitled to receive a credit equal to the \$0.13 per contract Fixed Fee. Accordingly, the application of the routing credit for BX under this proposal will continue to remain the same as today. For example, if Phlx routes a Customer order in a Non-Penny Symbol for execution on BX, Phlx would charge the member organization for the Customer order the \$0.13 per contract Fixed Fee plus the \$0.65 per contract taker fee, which is the actual transaction fee assessed by BX today for Customer orders taking liquidity, for a total of \$0.78 per contract. Further, if the Phlx member organization meets the qualifications for the routing credit (i.e., qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program, and routes away more than 5,000 Customer contracts per day in a given month), Phlx would provide the member organization a routing credit of \$0.14 per contract (i.e., the \$0.13 Fixed Fee plus \$0.01 per contract) instead of charging the \$0.78 per contract Routing Fee for the Customer order.

#### Technical Amendment

The Exchange proposes a non-substantive, technical amendment to Options 7, Section 4, currently titled “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed).” The Exchange now proposes to add a parenthetical that makes clear that SPY pricing is excluded from Section 4 pricing as it is set forth separately in Options 7, Section 3.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>10</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's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options 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 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’ ....”<sup>11</sup>

The Commission and the courts have repeatedly expressed their preference for

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>11</sup> 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)).



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.”<sup>12</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. 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. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange’s proposal to amend the BX Customer Routing Fee within Options 7, Section 7 to start charging the actual transaction fee assessed by BX in addition to the current \$0.13 per contract Fixed Fee is reasonable. As a general matter, the Exchange notes that use of the Exchange’s routing services is completely voluntary. In the alternative, member organizations may submit orders to the Exchange as ineligible for routing or “DNR” to avoid Routing Fees.<sup>13</sup> Furthermore, the Exchange operates in a highly competitive market in which market participants can readily select between

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<sup>12</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>13</sup> See Options 5, Section 4(a)(iii)(A).

various providers of routing services with different pricing. In this instance, proposing to assess the actual transaction fee, in addition to the current Fixed Fee of \$0.13 per contract, is reasonable in light of the Recent Rule Change described above where BX no longer provides rebates to Customer orders that are routed to and executed on BX, and instead charges them a taker fee.<sup>14</sup> As proposed, the Exchange would recoup the actual transaction cost it incurs when routing Customer orders to BX in lieu of collecting any rebate paid by BX. Today, the Exchange similarly assesses orders routed to NOM a Fixed Fee of \$0.13 per contract plus the actual transaction fee. As such, the proposal would align the BX Routing Fee with the NOM Routing Fee. The Exchange's proposal to amend the BX Customer Routing Fee within Options 7, Section 7 is equitable and not unfairly discriminatory because the Exchange would uniformly assess the same transaction fee assessed by BX for the Customer order routed to BX plus the current Fixed Fee of \$0.13 per contract.

Lastly, the Exchange believes that its proposal to add the parenthetical to the Options 7, Section 4 header to exclude SPY from Section 4 pricing is reasonable, equitable, and not unfairly discriminatory. The proposed rule change is a non-substantive, technical amendment that will make clear that SPY pricing is set forth separately in the Pricing Schedule.

#### 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. In terms of inter-market competition, the Exchange notes that it operates in a highly

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<sup>14</sup> See note 6 above.

competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, the Exchange is proposing to charge Customer orders that are routed to BX the actual transaction fee assessed by BX in addition to the current Fixed Fee of \$0.13 per contract in light of the fee changes under the Recent Rule Change described above where BX no longer provides rebates to Customer orders that are routed to and executed on BX, and instead charges them a taker fee.<sup>15</sup> The proposed changes reflect the need to recover the Exchange's costs associated with providing its routing services. Furthermore, as noted above, the use of the Exchange's routing services is completely voluntary and optional, and the Exchange operates in a highly competitive market in which market participants can readily select between various providers of routing services with different pricing. As such, it is likely that the Exchange will lose market share as a result of the changes proposed herein if they are unattractive to market participants.

The Exchange also does not believe its proposal will impose an undue burden on intra-market competition. As discussed above, the Exchange would uniformly assess the same transaction fee assessed by BX for the Customer order routed to BX plus a Fixed

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<sup>15</sup> See note 6 above.

Fee of \$0.13 per contract. Under this proposal, Non-Customer orders would continue to be assessed the \$0.99 per contract routing fee and not be assessed the actual BX transaction fee. The Exchange does not believe its pricing proposal will place any market participant at a relative disadvantage compared to other market participants because the proposed routing fee for Customer orders will actually narrow the difference between the routing fees assessed to Customer and Non-Customer orders routed to BX, as illustrated in the example above.

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,<sup>16</sup> 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

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-Phlx-2021-22)

April \_\_, 2021

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Pricing Schedule at Options 7

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 April 13, 2021, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the Exchange's Pricing Schedule at Options 7, 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

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

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

received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7. First, the Exchange proposes to amend the routing fees to Nasdaq BX Options ("BX"), which are set forth in Options 7, Section 7. Second, the Exchange proposes a non-substantive change in Options 7, Section 4 to add rule text that will make clear applicable pricing.

BX Routing Fees

Options 7, Section 7 sets forth the fees for routing contracts to markets other than Phlx. The Exchange proposes to amend the BX Routing Fee.

Currently, Non-Customers<sup>3</sup> are assessed a \$0.99 per contract Routing Fee to any options exchange. Customers<sup>4</sup> are currently assessed a Routing Fee to The Nasdaq Options Market ("NOM") of \$0.13 per contract ("Fixed Fee") in addition to the actual transaction fee assessed. Customers are also currently assessed a Routing Fee to BX of \$0.13 per contract. In addition, as it relates to all other options exchanges, Customers are

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<sup>3</sup> The term "**Non-Customer**" applies to transactions for the accounts of Lead Market Makers, Market Makers, Firms, Professionals, Broker-Dealers and JBOs.

<sup>4</sup> The term "**Customer**" applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of a broker or dealer or for the account of a "Professional" (as that term is defined in Options 1, Section 1(b)(45)).

currently assessed a Routing Fee of \$0.23 per contract (“Fixed Fee”) in addition to the actual transaction fee assessed. If the away market pays a rebate, the Routing Fee is \$0.13 per contract. Finally, the Exchange currently pays a credit (equal to the applicable Fixed Fee plus \$0.01 per contract)<sup>5</sup> to a member organization that qualifies for a Tier 2, 3, 4, or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule, and routes away more than 5,000 Customer contracts per day in a given month to an away market.

The Exchange now proposes to amend the BX Routing Fee to include the actual transaction fee assessed in addition to the “Fixed Fee” of \$0.13 per contract. The proposed changes will align BX’s Routing Fee with the current NOM Routing Fee.

The Exchange is proposing to recoup the actual transaction fee (in addition to the Fixed Fee) that is incurred by the Exchange in connection with routing orders, on behalf of its member organizations, to BX. Previously, the Exchange retained the rebates paid by BX to recover the costs associated with providing its routing services, did not assess the actual transaction fees charged by BX for Customer orders, and only assessed such orders the \$0.13 per contract Fixed Fee. This is because when orders are routed to BX, such orders are considered as removing liquidity on BX, and BX previously assessed rebates to Customer orders for removing liquidity. In particular, prior to the Recent Rule Change,<sup>6</sup> Customer orders executed on BX received Penny Symbol Rebates to Remove

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<sup>5</sup> If the away market transaction fee is \$0.00 or the away market pays a rebate, then the Exchange provides the member organization with a credit equal to the applicable Fixed Fee only. Member and member organizations under Common Ownership may aggregate their Customer volume routed away for purposes of calculating discount thresholds and receiving discounted routing fees.

<sup>6</sup> See Securities Exchange Act Release No. 91473 (April 5, 2021), 86 FR 18562 (April 9, 2021) (SR-BX-2021-009) (“Recent Rule Change”).



Liquidity when trading against a Non-Customer, Lead Market Maker, BX Options Market Maker, Customer or Firm that ranged from \$0.00 to \$0.35 per contract,<sup>7</sup> depending on the volume tier achieved. Customers also previously received Non-Penny Rebates to Remove Liquidity of \$0.80 per contract, regardless of tier and contra-party. As part of the Recent Rule Change, the aforementioned rebates were removed from the BX Pricing Schedule and replaced with a maker/taker fee structure where market participants are assessed a rebate or fee for adding liquidity to the market, or charged a fee for removing liquidity from the market.<sup>8</sup>

With this recent change in the structure of BX's Pricing Schedule, the Exchange proposes to align the Routing Fees to BX with the current Routing Fees to NOM. With this proposal, the Exchange will no longer retain rebates paid by BX as BX no longer provides rebates for Customer orders removing liquidity on BX and instead charges a taker fee for such orders. The Exchange will continue to assess the \$0.13 per contract Fixed Fee for routing Customer orders to BX, and will propose to also charge the actual transaction fee assessed by BX.

Finally, the Exchange will continue to provide the routing credit described above to orders that are routed away to BX if the member organization qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule, and

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<sup>7</sup> Participants that execute less than 0.05% of total industry customer equity and ETF option ADV contracts per month would receive no Penny Symbol Rebate to Remove Liquidity in Tier 1. Participants that execute 0.05% to less than 0.15% of total industry customer equity and ETF option ADV contracts per month would receive a \$0.25 per contract Penny Symbol Rebate to Remove Liquidity in Tier 2. Participants that execute 0.15% or more of total industry customer equity and ETF option ADV contracts per month would receive a \$0.35 per contract Penny Symbol Rebate to Remove Liquidity in Tier 3.

<sup>8</sup> See note 6 above.

routes away more than 5,000 Customer contracts per day in a given month. The routing credit will equal the \$0.13 per contract Fixed Fee plus \$0.01 per contract, unless the away market transaction fee is \$0.00 or the away market pays a rebate, in which case the member organization will be entitled to receive a credit equal to the \$0.13 per contract Fixed Fee. Accordingly, the application of the routing credit for BX under this proposal will continue to remain the same as today. For example, if Phlx routes a Customer order in a Non-Penny Symbol for execution on BX, Phlx would charge the member organization for the Customer order the \$0.13 per contract Fixed Fee plus the \$0.65 per contract taker fee, which is the actual transaction fee assessed by BX today for Customer orders taking liquidity, for a total of \$0.78 per contract. Further, if the Phlx member organization meets the qualifications for the routing credit (i.e., qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program, and routes away more than 5,000 Customer contracts per day in a given month), Phlx would provide the member organization a routing credit of \$0.14 per contract (i.e., the \$0.13 Fixed Fee plus \$0.01 per contract) instead of charging the \$0.78 per contract Routing Fee for the Customer order.

#### Technical Amendment

The Exchange proposes a non-substantive, technical amendment to Options 7, Section 4, currently titled “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed).” The Exchange now proposes to add a parenthetical that makes clear that SPY pricing is excluded from Section 4 pricing as it is set forth separately in Options 7, Section 3.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>9</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>10</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's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options 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 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’ ....”<sup>11</sup>

The Commission and the courts have repeatedly expressed their preference for

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>11</sup> 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)).

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.”<sup>12</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. 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. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

The Exchange’s proposal to amend the BX Customer Routing Fee within Options 7, Section 7 to start charging the actual transaction fee assessed by BX in addition to the current \$0.13 per contract Fixed Fee is reasonable. As a general matter, the Exchange notes that use of the Exchange’s routing services is completely voluntary. In the alternative, member organizations may submit orders to the Exchange as ineligible for routing or “DNR” to avoid Routing Fees.<sup>13</sup> Furthermore, the Exchange operates in a highly competitive market in which market participants can readily select between

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<sup>12</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>13</sup> See Options 5, Section 4(a)(iii)(A).

various providers of routing services with different pricing. In this instance, proposing to assess the actual transaction fee, in addition to the current Fixed Fee of \$0.13 per contract, is reasonable in light of the Recent Rule Change described above where BX no longer provides rebates to Customer orders that are routed to and executed on BX, and instead charges them a taker fee.<sup>14</sup> As proposed, the Exchange would recoup the actual transaction cost it incurs when routing Customer orders to BX in lieu of collecting any rebate paid by BX. Today, the Exchange similarly assesses orders routed to NOM a Fixed Fee of \$0.13 per contract plus the actual transaction fee. As such, the proposal would align the BX Routing Fee with the NOM Routing Fee. The Exchange's proposal to amend the BX Customer Routing Fee within Options 7, Section 7 is equitable and not unfairly discriminatory because the Exchange would uniformly assess the same transaction fee assessed by BX for the Customer order routed to BX plus the current Fixed Fee of \$0.13 per contract.

Lastly, the Exchange believes that its proposal to add the parenthetical to the Options 7, Section 4 header to exclude SPY from Section 4 pricing is reasonable, equitable, and not unfairly discriminatory. The proposed rule change is a non-substantive, technical amendment that will make clear that SPY pricing is set forth separately in the Pricing Schedule.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly

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<sup>14</sup> See note 6 above.

competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. In this instance, the Exchange is proposing to charge Customer orders that are routed to BX the actual transaction fee assessed by BX in addition to the current Fixed Fee of \$0.13 per contract in light of the fee changes under the Recent Rule Change described above where BX no longer provides rebates to Customer orders that are routed to and executed on BX, and instead charges them a taker fee.<sup>15</sup> The proposed changes reflect the need to recover the Exchange's costs associated with providing its routing services. Furthermore, as noted above, the use of the Exchange's routing services is completely voluntary and optional, and the Exchange operates in a highly competitive market in which market participants can readily select between various providers of routing services with different pricing. As such, it is likely that the Exchange will lose market share as a result of the changes proposed herein if they are unattractive to market participants.

The Exchange also does not believe its proposal will impose an undue burden on intra-market competition. As discussed above, the Exchange would uniformly assess the same transaction fee assessed by BX for the Customer order routed to BX plus a Fixed

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<sup>15</sup> See note 6 above.

Fee of \$0.13 per contract. Under this proposal, Non-Customer orders would continue to be assessed the \$0.99 per contract routing fee and not be assessed the actual BX transaction fee. The Exchange does not believe its pricing proposal will place any market participant at a relative disadvantage compared to other market participants because the proposed routing fee for Customer orders will actually narrow the difference between the routing fees assessed to Customer and Non-Customer orders routed to BX, as illustrated in the example above.

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>16</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.

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

#### 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-2021-22 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2021-22. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing



also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-Phlx-2021-22 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>17</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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

**EXHIBIT 5**

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

**Nasdaq PHLX LLC Rules**

\* \* \* \* \*

**Options 7 Pricing Schedule**

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**Section 4. Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY)**

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**Section 7. Routing Fees****Non-Customer**

- \$0.99 per contract to any options exchange.

**Customer**

- Routing Fees to NOM: \$0.13 per contract fee (“Fixed Fee”) in addition to the actual transaction fee assessed.
- Routing Fees to BX Options: \$0.13 per contract fee (“Fixed Fee”) in addition to the actual transaction fee assessed.
- Routing Fees to all other options exchanges: \$0.23 per contract fee (“Fixed Fee”) in addition to the actual transaction fee assessed. If the away market pays a rebate, the Routing Fee will be \$0.13.
- A member organization that: (1) qualifies for a Tier 2, 3, 4 or 5 rebate in the Customer Rebate Program in Section B of the Pricing Schedule; and (2) routes away more than 5,000 Customer contracts per day in a given month to an away market is entitled to receive a credit equal to the applicable Fixed Fee plus \$0.01 per contract, unless the away market transaction fee is \$0.00 or the away market pays a rebate, in which case the member organization is entitled to receive a credit equal to the applicable Fixed Fee. Members and member organizations under Common Ownership may aggregate their Customer volume routed away for purposes of calculating discount thresholds and receiving discounted routing fees.

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