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| Page 1 of * <input type="text" value="34"/> | SECURITIES AND EXCHANGE COMMISSION WASHINGTON, D.C. 20549 Form 19b-4 | File No.* SR - <input type="text" value="2021"/> - * <input type="text" value="39"/> | Amendment No. (req. for Amendments *) <input type="text"/> |
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Filing by
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

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|---|--------------------------------------|-------------------------------------|---|---|--|
| 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) | |

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| 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"/> |

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| 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 Phlx's Pricing Schedule at Options 7, Section 6, Part D related to the Options Regulatory Fee or ORF.

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 * Last Name *

Title *

E-mail *

Telephone * 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

By

(Name *)

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

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

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

Form 19b-4 Information *

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

Exhibit 1 - Notice of Proposed Rule Change *

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 *

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

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

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Exhibit Sent As Paper Document

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

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

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

Exhibit 4 - Marked Copies

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

Exhibit 5 - Proposed Rule Text

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Nasdaq Phlx LLC (“Phlx” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend Phlx’s Pricing Schedule at Options 7, Section 6, Part D related to the Options Regulatory Fee or “ORF”.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

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:

Angela Saccomandi Dunn
Principal Associate General Counsel
Nasdaq, Inc.
(215) 496-5692

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

a. Purpose

Currently, Phlx assesses an ORF of \$0.0042 per contract side as specified in Phlx's Pricing Schedule at Options 7, Section 6, Part D. The Exchange proposes to waive its ORF from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022.

By way of background, the options industry has experienced extremely high options trading volumes and volatility. This historical anomaly of persistent increased options volumes has impacted Phlx's ORF collection which, in turn, has caused the Exchange to continue to revisit its financial forecast to reflect the sustained elevated options volumes and volatility. As the Exchange continues to monitor the amount of revenue collected from the ORF to ensure that our ORF collection, in combination with other regulatory fees and fines, does not exceed regulatory costs, the Exchange has found it difficult to determine when volumes will return to more normal levels. In order to avoid iterative rule changes to amend its ORF, the Exchange believes it is prudent to instead waive its ORF from October 1, 2021 to January 31, 2022, to permit the Exchange to plan future forecasts without the need to account for any ORF collection during that timeframe. This proposal would ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs. Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. Furthermore, prior to February 1, 2022, Phlx will examine its ORF rate to determine if the \$0.0042 per contract side ORF is justified given the current volumes in 2022 as well as the current Exchange regulatory expenses at that

time. Phlx would file a proposed rule change to amend its per contract ORF if changes are necessary to ensure an equitable allocation of reasonable ORF, if e.g., the Exchange believes that the volumes Phlx experiences in the second half of 2021 are likely to persist throughout 2022. Of note, Phlx proposes to continue to operate with the ORF fee waived in January 2022 to allow its member organizations and other broker dealers time to align their systems for February 1, 2022, allowing for time after the holiday period which traditionally have year-end code freezes in place.

Collection of ORF

Currently, Phlx assesses its ORF for each customer option transaction that is either: (1) executed by a member organization³ on Phlx; or (2) cleared by a Phlx member organization at The Options Clearing Corporation (“OCC”) in the customer range,⁴ even if the transaction was executed by a non-member organization of Phlx, regardless of the exchange on which the transaction occurs.⁵

³ The term “member organization” means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a member organization by virtue of (i) admission to membership given to it by the Membership Department pursuant to the provisions of General 3, Sections 5 and 10 or the By-Laws or (ii) the transitional rules adopted by the Exchange pursuant to Section 6-4 of the By-Laws. References herein to officer or partner, when used in the context of a member organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a member organization. See General 1, Section 1(17).

⁴ Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that member organizations mark orders with the correct account origin code.

⁵ The Exchange uses reports from OCC when assessing and collecting the ORF.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member⁶ and member organization customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 42% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 58% of total regulatory costs for 2021.

⁶ The term "member" means a permit holder which has not been terminated in accordance with the By-Laws and these Rules of the Exchange. A member is a natural person and must be a person associated with a member organization. Any references in the rules of the Exchange to the rights or obligations of an associated person or person associated with a member organization also includes a member. See General 1, Section 1(16).

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members and member organizations, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to waive ORF from October 1, 2021 to January 31, 2022, to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. The Exchange issued an Options Trader Alert on July 2, 2021 indicating the proposed rate change for October 1, 2021.⁷

The proposed waiver is based on recent options volume which has remained at abnormally and unexpectedly high levels. Options volume in 2021 remains significantly high when that volume is compared to 2019 and 2020 options volume. For example, total options contract volume in November 2020 was 71% higher than the total options contract volume in November 2019.⁸ Below is industry data from OCC⁹ which illustrates the significant increase in volume during the fourth quarter of 2020.

⁷ See Options Trader Alert 2021-41.

⁸ See data from OCC at: <https://www.businesswire.com/news/home/20201202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago>.

⁹ See data from OCC at: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type>.

| Volume | October 2020 | November 2020 | December 2020 | Q4 2020 |
|---------------------|---------------------|----------------------|----------------------|----------------|
| Total | 633,365,184 | 673,660,858 | 753,568,354 | 2,060,594,396 |
| Customer | 587,707,301 | 630,297,252 | 708,037,956 | 1,926,042,509 |
| Total ADV | 28,789,326.55 | 33,683,042.90 | 34,253,107.00 | 32,196,787.44 |
| Customer ADV | 26,713,968.23 | 31,514,862.60 | 32,183,543.45 | 30,094,414.20 |

Below is industry data from OCC¹⁰ which illustrates the significant increase in volume from January 2021 through March 2021. The options volume in the first quarter of 2021 was higher than the fourth quarter of 2020. Also, April and May 2021 volumes remain significantly high as compared to 2020 options volume in general.

| Volume | January 2021 | February 2021 | March 2021 | April 2021 | May 2021 |
|---------------------|---------------------|----------------------|-------------------|-------------------|-----------------|
| Total | 838,339,790 | 823,412,827 | 898,653,388 | 711,388,828 | 718,368,993 |
| Customer | 784,399,878 | 782,113,450 | 837,247,059 | 667,208,963 | 659,913,862 |
| Total ADV | 44,123,146.84 | 43,337,517.20 | 39,071,886.40 | 33,875,658.50 | 35,918,449.70 |
| Customer ADV | 41,284,204.11 | 41,163,865.79 | 36,402,046.04 | 31,771,855.38 | 32,995,693.10 |

As a result of the historical anomaly created by these high options volumes, Phlx has no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue in excess of the Exchange's estimated regulatory costs for the year. Particularly, as noted above, the

¹⁰ Id.

options market has seen a substantial increase in volume in 2021 as compared to 2020, due in large part to the continued extreme volatility in the marketplace as a result of the COVID-19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to waive ORF from October 1, 2021 to January 31, 2022 to ensure it does not exceed its regulatory costs for 2021. Particularly, the Exchange believes that waiving ORF from October 1, 2021 to January 31, 2022 and considering all of the Exchange's other regulatory fees and fines would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.¹¹

Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. Until October 1, 2021, the Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange would also continue monitoring the amount of revenue collected from the ORF when it recommences assessing ORF on February 1, 2022. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by

¹¹ The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

submitting a fee change filing to the Commission and notifying¹² its member organizations via an Options Trader Alert.¹³

b. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹⁴ Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act¹⁵, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, member organizations, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee waiver is reasonable because customer transactions will be subject to no ORF from October 1, 2021 to January 31, 2022. Moreover, the proposed waiver is necessary, so the Exchange does not collect revenue in

¹² The Exchange will provide member organizations with such notice at least 30 calendar days prior to the effective date of the change.

¹³ The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange’s projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expenses.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(5).

excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange's practices.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when considering the recent options volume, which included an increase in customer options transactions, it estimates the ORF may generate revenues that may cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to waive ORF from October 1, 2021 to January 31, 2022 and recommence assessing ORF on February 1, 2022.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory as no member organization would be assessed an ORF from October 1, 2021 to January 31, 2022. While the Exchange has assessed and collected ORF from January through September, 2021, but will not collect ORF, with this proposal, from October 2021 through January 2022, the Exchange does not believe that it is unfairly discriminatory to not assess the ORF from October 2021 through January 2022 because the ORF is designed and intended to recover a portion of the Exchange's regulatory costs without collecting in excess of those costs. Unexpectedly high and sustained customer

volume has resulted in higher revenues from the ORF that, if not suspended, will likely result in over-collection of ORF, which would be inconsistent with the Exchange's prior representations and undertaking to not collect ORF in excess of regulatory expenses. Despite decreasing the amount of the ORF on April 1, 2021, the Exchange did not decrease the amount of the ORF again in 2021 because it did not expect, based on its prior experience, that customer volume would remain abnormally high. Also, it is equitable and not unfairly discriminatory to recommence the assessment of the ORF on February 1, 2022 because assessing the ORF to each member organization for options transactions cleared by OCC in the customer range where the execution occurs on another exchange and is cleared by a Phlx member organization is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.¹⁷

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes at that time warrant a proposed rule change, continues to ensure fairness by assessing higher fees to those member organizations that require more Exchange regulatory services based on the amount of customer options business they conduct. As noted in prior ORF rule changes which set the current ORF rate of \$0.0042 per contract side, regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive.

¹⁷ If the OCC clearing member is a Phlx member organization, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a Phlx member organization, ORF is collected only on the cleared customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member organization.

For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into customer complaints and the terminations of registered persons.¹⁸

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that this proposal creates an unnecessary or inappropriate intra-market or inter-market burden on competition for several reasons.

First, ORF has been amended several times since its inception in 2009.¹⁹ For example,

¹⁸ See Securities Exchange Act Release No. 91418 (March 26, 2021), 86 FR 17254 (April 1, 2021) (SR-Phlx-2021-16) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Phlx's Pricing Schedule at Options 7, Section 6, Part D To Reduce the Phlx Options Regulatory Fee). The Exchange also noted in this rule change that, "As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., member organization proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its member organizations, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG") the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its member organizations." See 86 FR 17256-7.

¹⁹ See Securities Exchange Act Release Nos. 61133 (December 9, 2009), 74 FR 66715 (December 16, 2009) (SR-Phlx-2009-100); 1529 (February 17, 2010), 75 FR 8421 (February 24, 2010) (SR-Phlx-2010-17); 62619 (July 30, 2010), 75 FR 47874 (August 9, 2010) (SR-Phlx-2010-100); 63436 (December 6, 2010),

most recently on April 1, 2021, Phlx amended its ORF rate from \$0.0050 to \$0.0042 per contract side as of April 1, 2021. Member organizations who either executed a transaction on Phlx or cleared a transaction at OCC in the customer range would have been assessed a higher ORF for a transaction executed on Phlx on March 31, 2021 (\$0.0050 per contract side) as compared to April 1, 2021 (\$0.0042 per contract side). There have been other ORF amendments prior to 2021 which have caused Phlx to assess different ORF rates to member organizations for different time periods causing member organizations to have paid different ORFs since 2009. Second, Phlx's regulatory costs have varied over time. For example, if Phlx received payment of a fine from a disciplinary action, that fine would offset regulatory costs and would cause Phlx to require less regulatory revenue for a particular period. The changing regulatory costs would impact the ORF assessed by Phlx to member organizations. In the past, the Exchange has amended ORF to be higher or lower,²⁰ thereby impacting the amount paid by member organizations in a calendar year. Third, options markets assess ORF at different rates. For instance, today, Nasdaq MRX, LLC ("MRX") assesses a lower ORF of \$0.0004 per contract side.²¹ MRX has assessed this rate since February 1, 2019.²²

77021 (December 10, 2010) (SR-Phlx-2010-166); 65897 (December 6, 2011), 76 FR 77277 (December 12, 2011) (SR-Phlx-2011-163); 66664 (March 27, 2012), 77 FR 19743 (April 2, 2012) (SR-Phlx-2012-36); 71569 (February 19, 2014), 79 FR 10593 (February 25, 2014) (SR-Phlx-2014-12); 75749 (August 21, 2015), 80 FR 52073 (August 27, 2017) (SR-Phlx-2015-71); 77032 (February 2, 2016), 81 FR 6560 (February 8, 2016) (SR-Phlx-2016-04); and 79751 (January 6, 2017), 82 FR 3826 (January 12, 2017) (SR-Phlx-2017-02); 81343 (August 8, 2017), 82 FR 37964 (August 14, 2017) (SR-Phlx-2017-54); and 85125 (February 13, 2019), 84 FR 5171 (February 20, 2019) (SR-Phlx-2019-01).

²⁰ Id.

²¹ See Securities Exchange Act Release Nos. 85127 (February 13, 2019), 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03).

Depending on where a customer order is executed, a member organization could be assessed a much different ORF. For example, in the case where a customer order is sent to Phlx and routed to MRX, and a non-member organization cleared that transaction, the Phlx ORF of \$0.0042 would not be assessed to the member organization who executed the transaction or cleared the transaction, rather the MRX rate of \$0.0004 per contract side would be assessed. In that same scenario presuming a non-member organization cleared the transaction, if the customer order could have executed on Phlx instead of routing away the member organization would have been assessed the Phlx ORF of \$0.0042 per contract side. The customer, in that instance, would have no knowledge of where the order could be executed, as the liquidity profile of each exchange may differ at that exact moment. Therefore, member organizations could be assessed a different ORF on the same day on the same transaction based on routing decisions, and in those cases the member organization would continue to benefit from the regulatory program available on each market and discover where the liquidity is available, irrespective of any ORF rate differentials across markets.

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expenses at that time warrant a proposed rule change, does not create an undue burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. Recommencing the assessment of the current ORF does not create an

²² Of note, prior to February 1, 2019, MRX assessed no ORF thereby creating a calendar year where member organizations were assessed no ORF for a period similar to what is proposed.

unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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,²³ the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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

²³ 15 U.S.C. 78s(b)(3)(A)(ii).

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission
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-2021-39)

July __, 2021

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx's Options Regulatory Fee

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 30, 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 Phlx's Pricing Schedule at Options 7, Section 6, Part D related to the Options Regulatory Fee or "ORF".

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2021.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 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

Currently, Phlx assesses an ORF of \$0.0042 per contract side as specified in Phlx's Pricing Schedule at Options 7, Section 6, Part D. The Exchange proposes to waive its ORF from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022.

By way of background, the options industry has experienced extremely high options trading volumes and volatility. This historical anomaly of persistent increased options volumes has impacted Phlx's ORF collection which, in turn, has caused the Exchange to continue to revisit its financial forecast to reflect the sustained elevated options volumes and volatility. As the Exchange continues to monitor the amount of revenue collected from the ORF to ensure that our ORF collection, in combination with other regulatory fees and fines, does not exceed regulatory costs, the Exchange has found it difficult to determine when volumes will return to more normal levels. In order to avoid iterative rule changes to amend its ORF, the Exchange believes it is prudent to instead waive its ORF from October 1, 2021 to January 31, 2022, to permit the Exchange to plan future forecasts without the need to account for any ORF collection during that

timeframe. This proposal would ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would not exceed the Exchange's total regulatory costs. Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. Furthermore, prior to February 1, 2022, Phlx will examine its ORF rate to determine if the \$0.0042 per contract side ORF is justified given the current volumes in 2022 as well as the current Exchange regulatory expenses at that time. Phlx would file a proposed rule change to amend its per contract ORF if changes are necessary to ensure an equitable allocation of reasonable ORF, if e.g., the Exchange believes that the volumes Phlx experiences in the second half of 2021 are likely to persist throughout 2022. Of note, Phlx proposes to continue to operate with the ORF fee waived in January 2022 to allow its member organizations and other broker dealers time to align their systems for February 1, 2022, allowing for time after the holiday period which traditionally have year-end code freezes in place.

Collection of ORF

Currently, Phlx assesses its ORF for each customer option transaction that is either: (1) executed by a member organization³ on Phlx; or (2) cleared by a Phlx member

³ The term "member organization" means a corporation, partnership (general or limited), limited liability partnership, limited liability company, business trust or similar organization, transacting business as a broker or a dealer in securities and which has the status of a member organization by virtue of (i) admission to membership given to it by the Membership Department pursuant to the provisions of General 3, Sections 5 and 10 or the By-Laws or (ii) the transitional rules adopted by the Exchange pursuant to Section 6-4 of the By-Laws. References herein to officer or partner, when used in the context of a member organization, shall include any person holding a similar position in any organization other than a corporation or partnership that has the status of a member organization. See General 1, Section 1(17).

organization at The Options Clearing Corporation (“OCC”) in the customer range,⁴ even if the transaction was executed by a non-member organization of Phlx, regardless of the exchange on which the transaction occurs.⁵

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

Revenue generated from ORF, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of member⁶ and member organization customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain

⁴ Participants must record the appropriate account origin code on all orders at the time of entry of the order. The Exchange represents that it has surveillances in place to verify that member organizations mark orders with the correct account origin code.

⁵ The Exchange uses reports from OCC when assessing and collecting the ORF.

⁶ The term “member” means a permit holder which has not been terminated in accordance with the By-Laws and these Rules of the Exchange. A member is a natural person and must be a person associated with a member organization. Any references in the rules of the Exchange to the rights or obligations of an associated person or person associated with a member organization also includes a member. See General 1, Section 1(16).

indirect expenses in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 42% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 58% of total regulatory costs for 2021.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members and member organizations, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to waive ORF from October 1, 2021 to January 31, 2022, to help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. The Exchange issued an Options Trader Alert on July 2, 2021 indicating the proposed rate change for October 1, 2021.⁷

The proposed waiver is based on recent options volume which has remained at abnormally and unexpectedly high levels. Options volume in 2021 remains significantly high when that volume is compared to 2019 and 2020 options volume. For example,

⁷ See Options Trader Alert 2021-41.

total options contract volume in November 2020 was 71% higher than the total options contract volume in November 2019.⁸ Below is industry data from OCC⁹ which illustrates the significant increase in volume during the fourth quarter of 2020.

| Volume | October 2020 | November 2020 | December 2020 | Q4 2020 |
|---------------------|---------------------|----------------------|----------------------|----------------|
| Total | 633,365,184 | 673,660,858 | 753,568,354 | 2,060,594,396 |
| Customer | 587,707,301 | 630,297,252 | 708,037,956 | 1,926,042,509 |
| Total ADV | 28,789,326.55 | 33,683,042.90 | 34,253,107.00 | 32,196,787.44 |
| Customer ADV | 26,713,968.23 | 31,514,862.60 | 32,183,543.45 | 30,094,414.20 |

Below is industry data from OCC¹⁰ which illustrates the significant increase in volume from January 2021 through March 2021. The options volume in the first quarter of 2021 was higher than the fourth quarter of 2020. Also, April and May 2021 volumes remain significantly high as compared to 2020 options volume in general.

| Volume | January 2021 | February 2021 | March 2021 | April 2021 | May 2021 |
|---------------------|---------------------|----------------------|-------------------|-------------------|-----------------|
| Total | 838,339,790 | 823,412,827 | 898,653,388 | 711,388,828 | 718,368,993 |
| Customer | 784,399,878 | 782,113,450 | 837,247,059 | 667,208,963 | 659,913,862 |
| Total ADV | 44,123,146.84 | 43,337,517.20 | 39,071,886.40 | 33,875,658.50 | 35,918,449.70 |
| Customer ADV | 41,284,204.11 | 41,163,865.79 | 36,402,046.04 | 31,771,855.38 | 32,995,693.10 |

⁸ See data from OCC at: <https://www.businesswire.com/news/home/20201202005584/en/OCC-November-2020-Total-Volume-Up-71-Percent-From-a-Year-Ago>.

⁹ See data from OCC at: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Volume-by-Account-Type>.

¹⁰ Id.

As a result of the historical anomaly created by these high options volumes, Phlx has no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate may result in revenue in excess of the Exchange's estimated regulatory costs for the year. Particularly, as noted above, the options market has seen a substantial increase in volume in 2021 as compared to 2020, due in large part to the continued extreme volatility in the marketplace as a result of the COVID-19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange (thereby resulting in substantially higher ORF revenue than projected). The Exchange therefore proposes to waive ORF from October 1, 2021 to January 31, 2022 to ensure it does not exceed its regulatory costs for 2021. Particularly, the Exchange believes that waiving ORF from October 1, 2021 to January 31, 2022 and considering all of the Exchange's other regulatory fees and fines would allow the Exchange to continue covering a material portion of its regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate.¹¹

Phlx would recommence assessing its current ORF rate of \$0.0042 per contract side as of February 1, 2022. Until October 1, 2021, the Exchange will continue to

¹¹ The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation.

monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange would also continue monitoring the amount of revenue collected from the ORF when it recommences assessing ORF on February 1, 2022. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission and notifying¹² its member organizations via an Options Trader Alert.¹³

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹⁴

Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act¹⁵, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its members, member organizations, and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁶ requirement that the

¹² The Exchange will provide member organizations with such notice at least 30 calendar days prior to the effective date of the change.

¹³ The Exchange notes that in connection with this proposal, it provided the Commission confidential details regarding the Exchange’s projected regulatory revenue, including projected revenue from ORF, along with a projected regulatory expenses.

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(5).

rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed fee waiver is reasonable because customer transactions will be subject to no ORF from October 1, 2021 to January 31, 2022. Moreover, the proposed waiver is necessary, so the Exchange does not collect revenue in excess of its anticipated regulatory costs, in combination with other regulatory fees and fines, which is consistent with the Exchange's practices.

The Exchange designed the ORF to generate revenues that would be less than the amount of the Exchange's regulatory costs to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange's business operations. As discussed above, however, after review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines, the Exchange determined that absent a reduction in ORF, it may be collecting revenue in excess of its regulatory costs. Indeed, the Exchange notes that when considering the recent options volume, which included an increase in customer options transactions, it estimates the ORF may generate revenues that may cover more than the approximated Exchange's projected regulatory costs. As such, the Exchange believes it's reasonable and appropriate to waive ORF from October 1, 2021 to January 31, 2022 and recommence assessing ORF on February 1, 2022.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory as no member organization would be assessed an ORF from October 1, 2021 to January 31, 2022. While the Exchange has assessed and collected ORF from

January through September, 2021, but will not collect ORF, with this proposal, from October 2021 through January 2022, the Exchange does not believe that it is unfairly discriminatory to not assess the ORF from October 2021 through January 2022 because the ORF is designed and intended to recover a portion of the Exchange's regulatory costs without collecting in excess of those costs. Unexpectedly high and sustained customer volume has resulted in higher revenues from the ORF that, if not suspended, will likely result in over-collection of ORF, which would be inconsistent with the Exchange's prior representations and undertaking to not collect ORF in excess of regulatory expenses. Despite decreasing the amount of the ORF on April 1, 2021, the Exchange did not decrease the amount of the ORF again in 2021 because it did not expect, based on its prior experience, that customer volume would remain abnormally high. Also, it is equitable and not unfairly discriminatory to recommence the assessment of the ORF on February 1, 2022 because assessing the ORF to each member organization for options transactions cleared by OCC in the customer range where the execution occurs on another exchange and is cleared by a Phlx member organization is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.¹⁷

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes at that time warrant a proposed rule change, continues to ensure fairness by assessing higher fees to those member organizations that require more

¹⁷ If the OCC clearing member is a Phlx member organization, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA); and (2) if the OCC clearing member is not a Phlx member organization, ORF is collected only on the cleared customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member organization.

Exchange regulatory services based on the amount of customer options business they conduct. As noted in prior ORF rule changes which set the current ORF rate of \$0.0042 per contract side, regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into customer complaints and the terminations of registered persons.¹⁸

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

¹⁸ See Securities Exchange Act Release No. 91418 (March 26, 2021), 86 FR 17254 (April 1, 2021) (SR-Phlx-2021-16) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Phlx's Pricing Schedule at Options 7, Section 6, Part D To Reduce the Phlx Options Regulatory Fee). The Exchange also noted in this rule change that, "As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., member organization proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its member organizations, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG") the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its member organizations." See 86 FR 17256-7.

Act. The Exchange does not believe that this proposal creates an unnecessary or inappropriate intra-market or inter-market burden on competition for several reasons. First, ORF has been amended several times since its inception in 2009.¹⁹ For example, most recently on April 1, 2021, Phlx amended its ORF rate from \$0.0050 to \$0.0042 per contract side as of April 1, 2021. Member organizations who either executed a transaction on Phlx or cleared a transaction at OCC in the customer range would have been assessed a higher ORF for a transaction executed on Phlx on March 31, 2021 (\$0.0050 per contract side) as compared to April 1, 2021 (\$0.0042 per contract side). There have been other ORF amendments prior to 2021 which have caused Phlx to assess different ORF rates to member organizations for different time periods causing member organizations to have paid different ORFs since 2009. Second, Phlx's regulatory costs have varied over time. For example, if Phlx received payment of a fine from a disciplinary action, that fine would offset regulatory costs and would cause Phlx to require less regulatory revenue for a particular period. The changing regulatory costs would impact the ORF assessed by Phlx to member organizations. In the past, the

¹⁹ See Securities Exchange Act Release Nos. 61133 (December 9, 2009), 74 FR 66715 (December 16, 2009) (SR-Phlx-2009-100); 1529 (February 17, 2010), 75 FR 8421 (February 24, 2010) (SR-Phlx-2010-17); 62619 (July 30, 2010), 75 FR 47874 (August 9, 2010) (SR-Phlx-2010-100); 63436 (December 6, 2010), 75 FR 77021 (December 10, 2010) (SR-Phlx-2010-166); 65897 (December 6, 2011), 76 FR 77277 (December 12, 2011) (SR-Phlx-2011-163); 66664 (March 27, 2012), 77 FR 19743 (April 2, 2012) (SR-Phlx-2012-36); 71569 (February 19, 2014), 79 FR 10593 (February 25, 2014) (SR-Phlx-2014-12); 75749 (August 21, 2015), 80 FR 52073 (August 27, 2017) (SR-Phlx-2015-71); 77032 (February 2, 2016), 81 FR 6560 (February 8, 2016) (SR-Phlx-2016-04); and 79751 (January 6, 2017), 82 FR 3826 (January 12, 2017) (SR-Phlx-2017-02); 81343 (August 8, 2017), 82 FR 37964 (August 14, 2017) (SR-Phlx-2017-54); and 85125 (February 13, 2019), 84 FR 5171 (February 20, 2019) (SR-Phlx-2019-01).

Exchange has amended ORF to be higher or lower,²⁰ thereby impacting the amount paid by member organizations in a calendar year. Third, options markets assess ORF at different rates. For instance, today, Nasdaq MRX, LLC (“MRX”) assesses a lower ORF of \$0.0004 per contract side.²¹ MRX has assessed this rate since February 1, 2019.²² Depending on where a customer order is executed, a member organization could be assessed a much different ORF. For example, in the case where a customer order is sent to Phlx and routed to MRX, and a non-member organization cleared that transaction, the Phlx ORF of \$0.0042 would not be assessed to the member organization who executed the transaction or cleared the transaction, rather the MRX rate of \$0.0004 per contract side would be assessed. In that same scenario presuming a non-member organization cleared the transaction, if the customer order could have executed on Phlx instead of routing away the member organization would have been assessed the Phlx ORF of \$0.0042 per contract side. The customer, in that instance, would have no knowledge of where the order could be executed, as the liquidity profile of each exchange may differ at that exact moment. Therefore, member organizations could be assessed a different ORF on the same day on the same transaction based on routing decisions, and in those cases the member organization would continue to benefit from the regulatory program available on each market and discover where the liquidity is available, irrespective of any ORF rate differentials across markets.

²⁰ Id.

²¹ See Securities Exchange Act Release Nos. 85127 (February 13, 2019), 84 FR 5173 (February 20, 2019) (SR-MRX-2019-03).

²² Of note, prior to February 1, 2019, MRX assessed no ORF thereby creating a calendar year where member organizations were assessed no ORF for a period similar to what is proposed.

The Exchange believes recommencing the ORF on February 1, 2022 at the same rate, unless options volumes or the Exchange's regulatory expenses at that time warrant a proposed rule change, does not create an undue burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. Recommencing the assessment of the current ORF does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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.²³

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

²³ 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.

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. Please include File Number SR-Phlx-2021-39 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-2021-39. 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-2021-39 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.²⁴

J. Matthew DeLesDernier
Assistant Secretary

²⁴ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

New text is underlined; deleted text is in brackets.

NASDAQ Phlx LLC Rules

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Options Rules

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Options 7 Pricing Schedule

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Section 6. Other Transaction Fees

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D. Options Regulatory Fee

Phlx will waive[~~assess an~~]the Options Regulatory Fee of \$0.0042 per contract side [as of April 1, 2021]from October 1, 2021 to January 31, 2022. Phlx will recommence assessing an Options Regulatory Fee of \$0.0042 per contract side as of February 1, 2022.

The Options Regulatory Fee (“ORF”) is assessed by Phlx to each Phlx member organization for options transactions cleared by The Options Clearing Corporation (“OCC”) in the Customer range where: (1) the execution occurs on Phlx or (2) the execution occurs on another exchange and is cleared by a Phlx member organization. The ORF is collected by OCC on behalf of Phlx from (1) Phlx clearing members for all Customer transactions they clear or (2) non-member organizations for all Customer transactions they clear that were executed on Phlx. Phlx uses reports from OCC when assessing and collecting ORF. The Exchange will notify members and member organizations via an Options Trader Alert of any change in the amount of the fee at least 30 calendar days prior to the effective date of the change.

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