

Required fields are shown with yellow backgrounds and asterisks.

Page 1 of \* 22

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

File No. \* SR 2023 - \* 23

Amendment No. (req. for Amendments \*)

Filing by Nasdaq PHLX LLC

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
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Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>
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Rule

<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)
<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)
<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Section 806(e)(1) \*

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Section 806(e)(2) \*

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Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934

Section 3C(b)(2) \*

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Exhibit 2 Sent As Paper Document

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Exhibit 3 Sent As Paper Document

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### Description

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

Amend Options 7, Section 4

### 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 *	Angela	Last Name *	Dunn
Title *	Principal Associate General Counsel		
E-mail *	angela.dunn@nasdaq.com		
Telephone *	(215) 496-5692	Fax	

### Signature

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

Date 06/01/2023


(Title \*)

By John Zecca

(Name \*)

EVP and Chief Legal Officer

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

 Date: 2023.06.01 10:03:14 -04'00'

Required fields are shown with yellow backgrounds and astericks.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

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

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

Add Remove View

SR-Phlx-2023-23 19b-4.doc

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

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

Add Remove View

SR-Phlx-2023-23 Exhibit 1 .doc

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

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

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

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

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Exhibit Sent As Paper Document

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

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

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Exhibit Sent As Paper Document

**Exhibit 4 - Marked Copies**

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

**Exhibit 5 - Proposed Rule Text**

Add Remove View

SR-Phlx-2023-23 Exhibit 5.doc

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

**Partial Amendment**

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

1. Text of the Proposed Rule Change

(a) Nasdaq PHLX LLC (“Phlx” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<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 Phlx’s Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).”

A notice of the proposed rule change for publication in the Federal Register is attached hereto as Exhibit 1 and a copy of the applicable portion of the Pricing Schedule is attached hereto as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

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

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

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

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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

Phlx proposes to amend its Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).” Specifically, Phlx proposes to amend its Floor Transaction (Open Outcry) Floor Broker Incentive Program.

Today, the Exchange offers an incentive program for Floor Brokers<sup>3</sup> that is designed to attract order flow to Phlx’s trading floor for execution in open outcry. Today, the Exchange pays Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates on qualifying volume at each threshold level per the below schedule.

<b>Qualifying Contracts</b>	<b>Per Contract Rebate</b>
0 -5,000,000	\$0.03
5,000,001-10,000,000	\$0.06
Greater than 10,000,000	\$0.09

By way of example, a Floor Broker that executes floor transactions in a given month totaling 10,500,000 contracts is paid \$0.03 for the first 5,000,000 floor transaction contracts (\$150,000), \$0.06 for the next 5,000,000 floor transaction contracts (\$300,000), and \$0.09 for the final 500,000 floor transaction contracts (\$45,000) for a total rebate of \$495,000 for that month. Further, as an additional clarifying example, if a Floor Broker executes a floor transaction in the amount of 1,000,000 contracts, represents both sides of the floor transaction, and executes the floor transaction as a crossing transaction pursuant to Options 8, Section 30(a) for 700,000 of the 1,000,000 contracts, then trades the

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<sup>3</sup> The term “Floor Broker” means an individual who is registered with the Exchange for the purpose, while on the Options Floor, of accepting and handling options orders. See Phlx Options 7, Section 1(c).

remaining 300,000 contracts with the trading crowd, the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebate for this transaction will be paid on the qualifying floor transaction volume of 1,000,000 contracts. The Exchange caps rebates for the Floor Transaction (Open Outcry) Floor Broker Incentive Program at \$1,000,000 per member or member organization in a given month.

Today, the following floor transactions are not subject to the rebates offered within the Floor Transaction (Open Outcry) Floor Broker Incentive Program: (1) Floor QCC Orders, as defined in Options 8, Section 30(e);<sup>4</sup> (2) dividend, merger, short stock interest, reversal and conversion, jelly roll and box spread strategy executions as defined in this Options 7, Section 4; (3) Firm Floor Options Transactions Charges for members executing facilitation orders pursuant to Options 8, Section 30 when such members are trading in their own proprietary account (including Cabinet Options Transaction Charges); and (4) Customer-to-Customer transactions.

At this time, the Exchange proposes to amend the rebates that will be paid on qualifying volume at each threshold level. The Exchange proposes to increase the rebate from \$0.03 to \$0.05 per contract for qualifying contracts from 1 – 5,000,000. The Exchange proposes to increase the rebate from \$0.06 to \$0.08 per contract for qualifying contracts from 5,000,001 to 10,000,000. Finally, the Exchange proposes to increase rebate from \$0.09 to \$0.11 per contract for qualifying contracts greater than 10,000,000. The Exchange is not amending qualifying floor transactions that are subject to the

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<sup>4</sup> Today, Floor QCC Orders are not transacted in open outcry. The Exchange proposes to include Floor QCC Orders in the list of exclusions to remind members and member organizations that Floor QCC Orders will not be paid the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebate.

rebates. The Exchange would make corresponding changes to the example beneath the rebate table in Options 7, Section 4.

The Exchange believes that the Floor Transaction (Open Outcry) Floor Broker Incentive Program will continue to attract greater order flow to Phlx's trading floor.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>6</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 Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>7</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>8</sup> ("NetCoalition") the D.C. Circuit upheld the Commission's use of a market-based

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

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>7</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

<sup>8</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>9</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>10</sup>

Further, “[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> Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange’s proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) is reasonable because the Exchange believes that these rebates will serve to continue to incentivize Floor Brokers to execute a greater number of orders in the Exchange’s trading crowd. Any market participant may send an order to a Phlx Floor Broker for execution

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<sup>9</sup> See NetCoalition, at 534 - 535.

<sup>10</sup> Id. at 537.

<sup>11</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

on Phlx's trading floor. The Exchange notes that other Phlx floor members<sup>12</sup> may interact with orders exposed in open outcry on the Exchange's trading floor.

The Exchange's proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) is equitable and not unfairly discriminatory as the Exchange would uniformly calculate all qualifying volume and uniformly pay rebates associated with the Floor Transaction (Open Outcry) Floor Broker Incentive Program up to \$1,000,000 in rebates a month.

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.

Inter-market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges. Because competitors are free to modify their own fees in response, and

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<sup>12</sup> Floor members include all members who have acquired a permit to trade on Phlx's trading floor.



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.

#### Intra-market Competition

The proposed amendments do not impose an undue burden on intra-market competition. In terms of intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. The proposed Floor Broker Incentive Program rebates should encourage Floor Brokers to send additional order flow to Phlx to obtain rebates and lower their costs. Any market participant may send an order to a Phlx Floor Broker for execution on Phlx's trading floor. The Exchange believes that the additional liquidity will enhance the quality of the Exchange's market and increase certain trading opportunities on the Exchange's trading floor for floor members.

The Exchange's proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) does not impose an undue burden on competition as the Exchange would uniformly calculate all qualifying volume and uniformly pay rebates associated with the Floor Transaction (Open Outcry) Floor Broker Incentive Program up to \$1,000,000 in rebates a month.

#### 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>13</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed 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.

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

The proposed rule change is not based on the rules of another self-regulatory organization or of the Commission.

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 for publication in the Federal Register.

5. Applicable portion of the Exchange's Pricing Schedule.

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_; File No. SR-Phlx-2023-23)

June \_\_, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 7, Section 4

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 June 1, 2023, 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 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).”

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.

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

<sup>2</sup> 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

Phlx proposes to amend its Pricing Schedule at Options 7, Section 4, “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY).” Specifically, Phlx proposes to amend its Floor Transaction (Open Outcry) Floor Broker Incentive Program.

Today, the Exchange offers an incentive program for Floor Brokers<sup>3</sup> that is designed to attract order flow to Phlx’s trading floor for execution in open outcry. Today, the Exchange pays Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates on qualifying volume at each threshold level per the below schedule.

<b>Qualifying Contracts</b>	<b>Per Contract Rebate</b>
0 -5,000,000	\$0.03
5,000,001-10,000,000	\$0.06
Greater than 10,000,000	\$0.09

<sup>3</sup> The term “Floor Broker” means an individual who is registered with the Exchange for the purpose, while on the Options Floor, of accepting and handling options orders. See Phlx Options 7, Section 1(c).

By way of example, a Floor Broker that executes floor transactions in a given month totaling 10,500,000 contracts is paid \$0.03 for the first 5,000,000 floor transaction contracts (\$150,000), \$0.06 for the next 5,000,000 floor transaction contracts (\$300,000), and \$0.09 for the final 500,000 floor transaction contracts (\$45,000) for a total rebate of \$495,000 for that month. Further, as an additional clarifying example, if a Floor Broker executes a floor transaction in the amount of 1,000,000 contracts, represents both sides of the floor transaction, and executes the floor transaction as a crossing transaction pursuant to Options 8, Section 30(a) for 700,000 of the 1,000,000 contracts, then trades the remaining 300,000 contracts with the trading crowd, the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebate for this transaction will be paid on the qualifying floor transaction volume of 1,000,000 contracts. The Exchange caps rebates for the Floor Transaction (Open Outcry) Floor Broker Incentive Program at \$1,000,000 per member or member organization in a given month.

Today, the following floor transactions are not subject to the rebates offered within the Floor Transaction (Open Outcry) Floor Broker Incentive Program: (1) Floor QCC Orders, as defined in Options 8, Section 30(e);<sup>4</sup> (2) dividend, merger, short stock interest, reversal and conversion, jelly roll and box spread strategy executions as defined in this Options 7, Section 4; (3) Firm Floor Options Transactions Charges for members executing facilitation orders pursuant to Options 8, Section 30 when such members are trading in their own proprietary account (including Cabinet Options Transaction Charges); and (4) Customer-to-Customer transactions.

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<sup>4</sup> Today, Floor QCC Orders are not transacted in open outcry. The Exchange proposes to include Floor QCC Orders in the list of exclusions to remind members and member organizations that Floor QCC Orders will not be paid the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebate.

At this time, the Exchange proposes to amend the rebates that will be paid on qualifying volume at each threshold level. The Exchange proposes to increase the rebate from \$0.03 to \$0.05 per contract for qualifying contracts from 1 – 5,000,000. The Exchange proposes to increase the rebate from \$0.06 to \$0.08 per contract for qualifying contracts from 5,000,001 to 10,000,000. Finally, the Exchange proposes to increase rebate from \$0.09 to \$0.11 per contract for qualifying contracts greater than 10,000,000. The Exchange is not amending qualifying floor transactions that are subject to the rebates. The Exchange would make corresponding changes to the example beneath the rebate table in Options 7, Section 4.

The Exchange believes that the Floor Transaction (Open Outcry) Floor Broker Incentive Program will continue to attract greater order flow to Phlx's trading floor.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>6</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 Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in

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

<sup>6</sup> 15 U.S.C. 78f(b)(4) and (5).

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>7</sup>

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>8</sup> (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.<sup>9</sup> As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”<sup>10</sup>

Further, “[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> Although the court

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

<sup>8</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>9</sup> See NetCoalition, at 534 - 535.

<sup>10</sup> Id. at 537.

<sup>11</sup> Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange's proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) is reasonable because the Exchange believes that these rebates will serve to continue to incentivize Floor Brokers to execute a greater number of orders in the Exchange's trading crowd. Any market participant may send an order to a Phlx Floor Broker for execution on Phlx's trading floor. The Exchange notes that other Phlx floor members<sup>12</sup> may interact with orders exposed in open outcry on the Exchange's trading floor.

The Exchange's proposal to increase the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) is equitable and not unfairly discriminatory as the Exchange would uniformly calculate all qualifying volume and uniformly pay rebates associated with the Floor Transaction (Open Outcry) Floor Broker Incentive Program up to \$1,000,000 in rebates a month.

**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.

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<sup>12</sup> Floor members include all members who have acquired a permit to trade on Phlx's trading floor.



### Inter-market Competition

The proposal does not impose an undue burden on inter-market competition. The Exchange believes its proposal remains competitive with other options markets and will offer market participants with another choice of where to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other 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.

### Intra-market Competition

The proposed amendments do not impose an undue burden on intra-market competition. In terms of intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. The proposed Floor Broker Incentive Program rebates should encourage Floor Brokers to send additional order flow to Phlx to obtain rebates and lower their costs. Any market participant may send an order to a Phlx Floor Broker for execution on Phlx's trading floor. The Exchange believes that the additional liquidity will enhance the quality of the Exchange's market and increase certain trading opportunities on the Exchange's trading floor for floor members.

The Exchange's proposal to increase the Floor Transaction (Open Outcry) Floor

Broker Incentive Program rebates that will be paid on qualifying volume at each threshold level (\$0.03 to \$0.05 per contract for 1 – 5,000,000; \$0.06 to \$0.08 per contract for 5,000,001 to 10,000,000; and \$0.09 to \$0.11 per contract for greater than 10,000,000) does not impose an undue burden on competition as the Exchange would uniformly calculate all qualifying volume and uniformly pay rebates associated with the Floor Transaction (Open Outcry) Floor Broker Incentive Program up to \$1,000,000 in rebates a month.

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>13</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>13</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-2023-23 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-2023-23. 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-2023-23 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>14</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

*New text is underlined; deleted text is in brackets.*

**Nasdaq PHLX LLC Rules**

\* \* \* \* \*

**Options Rules**

\* \* \* \* \*

**Options 7 Pricing Schedule**

\* \* \* \* \*

**Section 4. Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY and broad-based index options symbols listed within Options 7, Section 5.A)**

\* \* \* \* \*

**Floor Transaction (Open Outcry) Floor Broker Incentive Program**

♦ Floor Brokers will be paid the below rebates for transactions executed on the trading floor, in open outcry, excluding the following transactions:

- (1) Floor QCC Orders, as defined in Options 8, Section 30(e);
- (2) dividend, merger, short stock interest, reversal and conversion, jelly roll, and box spread strategy executions as defined in this Options 7, Section 4;
- (3) Firm Floor Options Transactions for members executing facilitation orders pursuant to Options 8, Section 30 when such members are trading in their own proprietary account (including Cabinet Options Transaction Charges); and
- (4) Customer-to-Customer transactions.

♦ Rebates will be paid on qualifying volume at each threshold level based on the below schedule.

<b>Qualifying Contracts</b>	<b>Per Contract Rebate</b>
0 -5,000,000	\$0.0[3] <u>5</u>
5,000,001-10,000,000	\$0.0[6] <u>8</u>
Greater than 10,000,000	\$0.[09] <u>11</u>

## Examples:

- A Floor Broker that executes floor transactions in a given month totaling 10,500,000 contracts will be paid \$0.0[3]5 for the first 5,000,000 floor transaction contracts (\$[1]250,000), \$0.0[6]8 for the next 5,000,000 floor transaction contracts (\$[3]400,000), and \$0.[09]11 for the final 500,000 floor transaction contracts (\$[4]55,000) for a total rebate of \$[49]705,000 for that month.
- If a Floor Broker executes a floor transaction in the amount of 1,000,000 contracts, represents both sides of the floor transaction, and executes the floor transaction as a crossing transaction pursuant to Options 8, Section 30(a) for 700,000 of the 1,000,000 contracts, then trades the remaining 300,000 contracts with the trading crowd, the Floor Transaction (Open Outcry) Floor Broker Incentive Program rebate for this transaction will be paid on the qualifying floor transaction volume of 1,000,000 contracts.
- ♦ Rebates for the Floor Transaction (Open Outcry) Floor Broker Incentive Program will be capped at \$1,000,000 per member or member organization in a given month.

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