

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 codify the definition of Phlx Options Trade Outline in the Phlx rulebook. This filing also incorporates a previous proposal to adjust fees for Phlx Options Trade Outline for both the End of Day and Intra-Day product, as described further below.

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”). 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:

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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

The purpose of the proposed rule change is to codify the definition of Phlx Options Trade Outline in the Phlx rulebook. This filing also incorporates a previous proposal to adjust fees for Phlx Options Trade Outline for both the End of Day and Intra-Day product.³

PHLX Options Trade Outline (“PHOTO”)

PHOTO⁴ provides aggregate quantity and volume information for trades on the Exchange for all series⁵ during a trading session.⁶ Information is provided in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume

³ The previously introduced fee proposal was initially filed on July 1, 2024, as SR-Phlx-2024-31. On July 15, 2024, that filing was withdrawn and refiled as SR-Phlx-2024-35. On July 29, 2024, that filing was withdrawn and refiled as SR-Phlx-2024-38. On August 12, 2024, that proposal was withdrawn and replaced with SR-Phlx-2024-41 to incorporate those fees into a filing that codifies the definition of PHLX Options Trade Outline. On August 23, 2024, SR-Phlx-2024-41 was withdrawn and replaced with SR-Phlx-2024-44 to provide additional information. On September 6, 2024, SR-Phlx-2024-44 was withdrawn and replaced with the instant filing to provide further information.

⁴ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (establishing fees for the PHOTO intra-day and end of day products); Securities Exchange Act Release No. 63351 (November 19, 2010), 75 FR 73140 (November 29, 2010) (SR-Phlx-2010-154) (establishing fees for PHOTO historical data); Securities Exchange Act Release No. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-Phlx-2021-58) (changing fees and introducing discount for historical data and license for the external distribution of Derived Data).

⁵ Every options series trades as a distinct symbol; the terms “series” and “symbol” are therefore synonyms.

⁶ PHOTO provides information on electronic trades, but excludes trades made on the PHLX floor.

effected to open a position,⁷ characterized by origin type (Customer,⁸ Broker-Dealer,⁹ Market Maker,¹⁰ Firm¹¹ and Professional¹²), and for Customers and Professionals, further subdivided by trade size buckets; and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position,¹³ characterized by origin type, (Customer,

⁷ PHOTO provides subscribers with the aggregate number of “opening purchase transactions.” The term “opening purchase transaction” means an exchange options transaction in which the purchaser’s intention is to create or increase a long position in the series of options involved in such transaction. See Options 1, Section 1(b)(34). PHOTO will also provide subscribers with the aggregate number of “opening writing transactions.” The term “opening writing transaction” means an Exchange options transaction in which the seller’s (writer’s) intention is to create or increase a short position in the series of options involved in such transaction. See Options 1, Section 1(b)(35)

⁸ The term “Customer” applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of a broker or dealer or for the account of a “Professional” (as that term is defined in Options 1, Section 1(b)(45)). Options 7, Section 1(c).

⁹ The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. Options 7, Section 1(c)

¹⁰ The term “Market Maker” is defined in Options 1, Section 1(b)(28) as a member of the Exchange who is registered as an options Market Maker pursuant to Options 2, Section 12(a). A Market Maker includes SQTs and RSQTs as well as Floor Market Makers. Options 7, Section 1(c). This includes specialists, Registered Options Traders (“ROT”), Streaming Quote Traders (“SQTs”) and Remote Streaming Quote Traders (“RSQTs”). A “Streaming Quote Trader” or “SQT” means a Market Maker who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the trading floor of the Exchange. An SQT may only submit quotes in classes of options in which the SQT is assigned. See Options 1, Section 1(b)(54). A “Remote Streaming Quote Trader” or “RSQT” means a Market Maker that is a member affiliated with a Remote Streaming Quote Trader Organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. A qualified RSQT may function as a Remote Lead Market Maker upon Exchange approval. An RSQT is also known as a Remote Market Maker (“RMM”) pursuant to Options 2, Section 11. A Remote Streaming Quote Organization (“RSQTO”) or Remote Market Maker Organization (“RMO”) are Exchange member organizations that have qualified pursuant to Options 2, Section 1. *See* Options 1, Section 1(b)(49)

¹¹ The term “Firm” applies to any transaction that is identified by a member or member organization for clearing in the Firm range at OCC. Options 7, Section 1(c).

¹² The term “Professional” applies to transactions for the accounts of Professionals, as defined in Options 1, Section 1(b)(45) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). Options 7, Section 1(c).

¹³ PHOTO provides subscribers with the aggregate number of “closing purchase transactions” in the affected series. A “closing purchase transaction” means an Exchange options transaction in which the purchaser’s intention is to reduce or eliminate a short position in the series of options involved in such transaction. See Options 1, Section 1(b)(11). PHOTO will also provide subscribers with

Broker-Dealer, Market Maker, Firm and Professional), and for Customers and Professionals, further subdivided by trade size buckets.

PHLX Options Trade Outline End of Day will also provide opening buy, closing buy, opening sell and closing sell information, which shall include option first trade price, option high trade price, option low trade price, and option last trade price.

End of Day information is available the next business day. Intra-Day information is updated at 10-minute intervals over the course of the trading day. Historical information is available upon request.

PHOTO provides proprietary Exchange trade data and does not include any intraday trade data from any other exchange.¹⁴ The information provided, both in End of Day and Intraday formats, is not a real-time data feed.

PHOTO is a completely voluntary product in that the Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase it only if they voluntarily choose to do so.

This information is available to all market participants, including both members and non-members, for all series and symbols in End of Day, Intra-Day, and historical files (upon request).

The End of Day file is updated during an overnight process with the additional fields described above and is available the following morning. The monthly subscriber fee for the End of Day product is currently \$750.

the aggregate number of “closing sale transactions.” A “closing sale transaction” means an Exchange options transaction in which the seller’s intention is to reduce or eliminate a long position in the series of options involved in such transaction. See Options 1, Section 1(b)(12).

¹⁴ The End of Day report includes a field that presents Total Industry Volume for the Series.

The Intra-Day product is captured in “snapshots” taken every 10 minutes throughout the trading day, available to subscribers within 2 minutes of the conclusion of each period. Subscribers receive the first calculation at 9:42 a.m. ET, representing data captured from 9:30 a.m. to 9:39 a.m., and the second calculation at 9:52 a.m., representing data from both the most recent snapshot and previous snapshots, continuing over the course of the trading day. The monthly subscriber fee for the Intra-Day product is currently \$2,500.

PHOTO historical data provides information about the past activity of all option series traded on the Exchange for each trading session conducted during a prior calendar month selected by the subscriber.¹⁵ This data is intended to enhance a purchaser’s ability to analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option series, and create and test trading models and analytical strategies. Historical files provide the same fields of information as the End of Day and Intraday files, respectively. Historical data is available starting in January 2009.

Products similar to Trade Outline have been available on multiple exchanges for many years and are well-established in the market. Such products are available from Nasdaq Options Market (“NOM”),¹⁶ Nasdaq ISE LLC (“ISE”),¹⁷ Nasdaq GEMX LLC

¹⁵ See Securities Exchange Act Release 63351 (November 19, 2010), 75 FR 73140 (November 29, 2010) (SR-Phlx-2010-154).

¹⁶ See Nasdaq Stock Market Rules, Options 7, Section 4 (Nasdaq Options Market Data Distributor Fees).

¹⁷ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intra-day).

(“GEMX”),¹⁸ Cboe Options Exchange (“Cboe”),¹⁹ NYSE American Options (“NYSE American”),²⁰ NYSE Arca Options (“NYSE Arca”),²¹ BOX Options Market LLC (“BOX”),²² MIAX Pearl Options Exchange (“Pearl”),²³ and others. In general, the relative value of these products depends on the volume of transactions included; the greater the volume of transactions, the greater the value of the data. The current purchasers of Trade Outline are investment banks, market makers, asset managers and other buy-side investors.

Proposed Changes

Definition of PHOTO

The Exchange proposes to codify the definition of PHOTO. Nothing in this codification is intended to change the product in any way, but rather is intended to describe the product exactly as it exists. Specifically, the Exchange proposes the following definition:

¹⁸ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intra-day Trade Profile)

¹⁹ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

²⁰ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

²¹ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

²² See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

²³ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

PHLX Options Trade Outline provides aggregate quantity and volume information for trades on the Exchange for all series during a trading session. Information is provided in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume effected to open a position, characterized by origin type (Customer, Broker-Dealer, Market Maker, Firm, and Professional), and for Customers and Professionals, further subdivided by trade size buckets; and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position, characterized by origin type (Customer, Broker-Dealer, Market Maker, Firm, and Professional), and for Customers and Professionals, further subdivided by trade size buckets.

PHLX Options Trade Outline End of Day will also provide opening buy, closing buy, opening sell and closing sell information, which shall include option first trade price, option high trade price, option low trade price, and option last trade price.

End of Day information will be available the next business day. Intra-Day information is updated at 10-minute intervals over the course of the trading day. Historical information will be available upon request.

Previously Introduced Fee Changes

The Exchange previously proposed to increase the fee for the End of Day product from \$750 to \$850 per month, and the Intra-Day Product from \$2,500 to \$3,000 per month.

The Exchange also proposes to clarify that ad hoc requests for historical data are \$500 per month for End of Day data and \$1,000 per month for Intra-Day data, and that historical data will be available starting in January 2009. These rates will apply to any request for historical data that does not fall within the existing discounts for the most recent 36 months of information for Current Distributors. The proposed language is intended to avoid confusion over fees for historical data, and to specify the availability of such data, but will not change any applicable fees.

In addition, the Exchange proposes to insert a comma after the phrase “or the Intra-Day Product for the current month” into the definition of Current Distributor. The revised sentence will read as follows:

A “Current Distributor” is any firm that purchases either the End of Day Product for the current month, or the Intra-Day Product for the current month, in the same month that the 36 months of historical End of Day or Intra-Day data is ordered.

The change is designed to clarify that the phrase “the same month that the 36 months of historical End of Day or Intra-Day data is ordered” applies to both firms that purchase End of Day data in the current month and firms that purchase Intra-Day data for the current month. The clarification will not change how the fee is charged.

b. Statutory Basis

The Exchange believes that its proposal to codify the definition of PHOTO is consistent with Section 6(b) of the Act,²⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁵ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Adding the definition of PHOTO will provide additional clarity and specificity to the Phlx rulebook. Nothing in this codification is intended to change the product or the way it functions, but rather is intended to describe the product exactly as it exists today. Providing additional clarity about an exchange product will help investors make better

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(5).

informed decisions about PHOTO, and therefore will help protect investors and promote the public interest.

Similarly, adding language regarding fees for ad hoc requests for historical data that do not fall within existing discounts for historical data will also provide additional clarity and specificity to the rulebook. Nothing in this codification is intended to change the product or the way it functions, but rather is intended to describe the product as it exists today.

The same holds true for the clarification of the definition of Current Distributor, which is also designed to add clarity and specificity to the rulebook without changing the underlying fees. This additional clarity will help investors make better informed decisions about PHOTO, and thereby help protect investors and promote the public interest.

The Exchange also believes that its proposal to change fees is consistent with Section 6(b) of the Act,²⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁷ 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.

Equitable Allocation of Reasonable Dues, Fees and Other Charges

The proposed changes are an equitable allocation of reasonable dues, fees and other charges because: (i) the trade outline products offered by multiple exchanges are

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(4) and (5).

substitutes, and customers are free to choose which product they purchase; and (ii) the proposed fees are comparable to the fees charged by other exchanges, and customers are free to purchase other products if the Exchange has mistaken the value of its product.

Substitution

As noted above, products similar to Trade Outline have been available on multiple exchanges for many years and are well-established in the market. Such products are available from the Phlx,²⁸ ISE,²⁹ GEMX,³⁰ Cboe,³¹ NYSE American,³² NYSE Arca,³³ BOX,³⁴ Pearl,³⁵ and others.

Trade outline products offer the same categories of data through end of day or intra-day reports. The information provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another,

²⁸ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

²⁹ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intra-day).

³⁰ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intra-day Trade Profile)

³¹ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

³² See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³³ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³⁴ See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

³⁵ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

and market sentiment trends that appear on one exchange are likely to be similar to the sentiment trends on other exchanges. The key differentiator in the quality of the data depends on the volume of transactions on a given exchange; the greater the volume of transactions, the greater the value of the data. Customers can choose not to purchase the trade outline product of one exchange and substitute it for that of another exchange.

Customers can also choose not to purchase a trade outline product at all. Trade outline products are designed to help investors understand underlying market trends to improve the quality of investment decisions, but are not necessary to execute a trade. Customers can, and do, choose to forego the information from Trade Outline or any of its competitor products when making a trade.

Nasdaq and its affiliates have observed that customers purchase sufficient data to provide a view of the market, but not more, as the value of data from each additional exchange yields diminishing returns. As a result, all exchanges are limited in what they will be able to charge for trade outline.

As the Commission and courts³⁶ have recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain

³⁶ The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed and that the SEC wield its regulatory power in those situations where competition may not be sufficient, such as in the creation of a consolidated transactional reporting system.” NetCoalition I at 535 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323) (internal quotation marks omitted). The court agreed with the Commission’s conclusion that “Congress intended that competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.” *Id.* (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73bFR 74770 (December 9, 2008) (SR-NYSEArca-2006-21)).

unreasonable or unfair behavior.”³⁷ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”³⁸ 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.”³⁹ Trade Outline is in direct competition with multiple exchanges that offer similar products in end of day and intra-day formats.⁴⁰

Comparability of Proposed Fees

The proposed fees are comparable to the fees charged by similarly situated exchanges.

As explained above, the value of Trade Outline is determined in part by the number of underlying transactions reflected in the data. The Phlx Exchange has a market share comparable to the Cboe C1 exchange, which has a market share of approximately

³⁷ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

³⁸ See *id.*

³⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁴⁰ These substitute products include NOTO, ISE Trade Profile, GEMX Trade Profile data; open-close data from Cboe C1, C2, BZX, and EDGX; and Open Close Reports from MIAX Options, Pearl, and Emerald.

9%, while PHLX has a market share of approximately 10% during the second quarter of 2024.⁴¹ As the Cboe C1 exchange charges \$3,000 for its intra-day product,⁴² the proposed fee of \$3,000 for the PHLX Intra-day product is comparable.

For the end of day trade outline product, Cboe C1 charges \$600.⁴³ The Exchange believes that a fee of \$600 understates the true value of the end of day product. The Intra-day to end of day price ratio for Cboe C1 is 5:1 (\$3,000 v. \$600). Most trade outline products have a lower ratio. EDGX, with an 8% market share, has a ratio of 2:1 (\$1,000 for intra-day data and \$500 for end of day data).⁴⁴ PHLX believes that the proposed end of day fee of \$850 (with a ratio of 3.5:1) better reflects the relative value of the products, and therefore is proposing a fee of \$850 for its end of day product.

If the Exchange is incorrect in its assessment of the marketplace, current and prospective customers will elect not to purchase Trade Outline.

As noted above, clarifying fees for ad hoc requests for historical data, and the definition of Current Distributor, will not change fees, and therefore will not impact the equitable allocation of reasonable dues, fees and other charges.

The Proposal Does Not Permit Unfair Discrimination

Nothing in the proposal treats any category of market participant any differently from any other category of market participant. Trade Outline is available to all market

⁴¹ See NasdaqTrader.com, “Options Market Statistics,” available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>.

⁴² See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

⁴³ Id.

⁴⁴ Id.

participants, including members and non-members, and all market participants receive the same information in the Trade Outline data feed.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In terms of inter-market competition, the Exchange notes that it operates in a highly 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 and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to 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.

Adding the definition of PHOTO will promote competition by helping investors make better informed decisions about PHOTO. Nothing about the addition of a definition will impact inter-market competition or intra-market competition negatively.

Intermarket Competition

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations).

As discussed above, Trade Outline is subject to direct competition from other options exchanges that offer substitutes. Nothing in the proposal would interfere with the ability of any exchange to change its fees.

Intra-market Competition

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data). Trade Outline is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase these products can do so on a non-discriminatory basis.

Adding language to clarify fees for ad hoc requests for historical data, and to clarify the definition of Current Distributor, will not change fees, and will promote competition by better informing investors.

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)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)⁴⁵ of the Act and Rule 19b-4(f)(6) thereunder⁴⁶ in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest.

⁴⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴⁶ 17 CFR 240.19b-4(f)(6).

The proposed changes do not significantly affect the protection of investors or the public interest. As explained above, adding the definition of PHOTO will provide additional clarity and specificity to the Phlx rulebook. Nothing in this codification is intended to change the product or the way it functions, but rather is intended to describe the product exactly as it exists today. As such, adding this definition to the Phlx rulebook will not significantly affect the protection of investors or the public interest.

The proposed fee changes also do not significantly affect the protection of investors or the public interest. As explained above, PHOTO can be substituted with a trade outline product offered by another exchange. Customers can choose not to purchase PHOTO and substitute it for the trade outline product of another exchange. Customers can also choose not to purchase a trade outline product at all. Trade outline products, including PHOTO, are designed to help investors understand market trends, but are not necessary to execute a trade.

The proposed fees for the current product are also comparable to the fees charged by other exchanges, and customers are free to purchase the trade outline products offered by these other exchanges if PHLX has mistaken the value of PHOTO.

As such, the proposed fee changes do not significantly affect the protection of investors or the public interest.

The proposal also does not impose any significant burden on competition. Adding the definition of PHOTO will help investors make better informed decisions about PHOTO and therefore would not burden competition. As discussed above, PHOTO is subject to direct competition from other options exchanges that offer substitutes. Any of these exchanges can replicate this proposal in full or in part, and

nothing in the proposal would interfere with the ability of any exchange to do so.

Moreover, PHOTO is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase this product can do so on a non-discriminatory basis. Indeed, the proposal will foster competition by expanding dissemination of data to vendors and the general investing public, and by encouraging more market participants to use PHOTO data to help inform their investments strategies and analytic models.

Furthermore, Rule 19b-4(f)(6)(iii)⁴⁷ requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.

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

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. Rule 19b-4(f)(6)(iii), however, permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay contained in Rule 19b-4(f)(6)(iii).

⁴⁷ 17 CFR 240.19b-4(f)(6)(iii).

As explained above, adding the definition of PHOTO will provide additional clarity and specificity to the Phlx rulebook, and nothing in the clarification changes the product or the way it functions, but rather describes the product exactly as it exists today. There is no basis for imposing an operative delay for that clarification. Also as explained above, the fees included in this filing have been in effect since July 1, 2024. Nothing in this filing changes those fees, and waiver of the operative delay will allow application of those fees to continue uninterrupted. For these reasons, the Exchange requests waiver of the operative delay.

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-2024-48)

September _____, 2024

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Codify the Definition of Phlx Options Trade Outline

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 September 6, 2024, 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 codify the definition of Phlx Options Trade Outline in the Phlx rulebook. This filing also incorporates a previous proposal to adjust fees for Phlx Options Trade Outline for both the End of Day and Intra-Day product.

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

The purpose of the proposed rule change is to codify the definition of Phlx Options Trade Outline in the Phlx rulebook. This filing also incorporates a previous proposal to adjust fees for Phlx Options Trade Outline for both the End of Day and Intra-Day product.³

PHLX Options Trade Outline (“PHOTO”)

³ The previously introduced fee proposal was initially filed on July 1, 2024, as SR-Phlx-2024-31. On July 15, 2024, that filing was withdrawn and refiled as SR-Phlx-2024-35. On July 29, 2024, that filing was withdrawn and refiled as SR-Phlx-2024-38. On August 12, 2024, that proposal was withdrawn and replaced with SR-Phlx-2024-41 to incorporate those fees into a filing that codifies the definition of PHLX Options Trade Outline. On August 23, 2024, SR-Phlx-2024-41 was withdrawn and replaced with SR-Phlx-2024-44 to provide additional information. On September 6, 2024, SR-Phlx-2024-44 was withdrawn and replaced with the instant filing to provide further information.

PHOTO⁴ provides aggregate quantity and volume information for trades on the Exchange for all series⁵ during a trading session.⁶ Information is provided in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume effected to open a position,⁷ characterized by origin type (Customer,⁸ Broker-Dealer,⁹

⁴ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (establishing fees for the PHOTO intra-day and end of day products); Securities Exchange Act Release No. 63351 (November 19, 2010), 75 FR 73140 (November 29, 2010) (SR-Phlx-2010-154) (establishing fees for PHOTO historical data); Securities Exchange Act Release No. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-Phlx-2021-58) (changing fees and introducing discount for historical data and license for the external distribution of Derived Data).

⁵ Every options series trades as a distinct symbol; the terms “series” and “symbol” are therefore synonyms.

⁶ PHOTO provides information on electronic trades, but excludes trades made on the PHLX floor.

⁷ PHOTO provides subscribers with the aggregate number of “opening purchase transactions.” The term “opening purchase transaction” means an exchange options transaction in which the purchaser’s intention is to create or increase a long position in the series of options involved in such transaction. See Options 1, Section 1(b)(34). PHOTO will also provide subscribers with the aggregate number of “opening writing transactions.” The term “opening writing transaction” means an Exchange options transaction in which the seller’s (writer’s) intention is to create or increase a short position in the series of options involved in such transaction. See Options 1, Section 1(b)(35)

⁸ The term “Customer” applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation (“OCC”) which is not for the account of a broker or dealer or for the account of a “Professional” (as that term is defined in Options 1, Section 1(b)(45)). Options 7, Section 1(c).

⁹ The term “Broker-Dealer” applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category. Options 7, Section 1(c)

Market Maker,¹⁰ Firm¹¹ and Professional¹²), and for Customers and Professionals, further subdivided by trade size buckets; and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position,¹³ characterized by origin type, (Customer, Broker-Dealer, Market Maker, Firm and Professional), and for Customers and Professionals, further subdivided by trade size buckets.

PHLX Options Trade Outline End of Day will also provide opening buy, closing buy, opening sell and closing sell information, which shall include option first trade price, option high trade price, option low trade price, and option last trade price.

¹⁰ The term “Market Maker” is defined in Options 1, Section 1(b)(28) as a member of the Exchange who is registered as an options Market Maker pursuant to Options 2, Section 12(a). A Market Maker includes SQTs and RSQTs as well as Floor Market Makers. Options 7, Section 1(c). This includes specialists, Registered Options Traders (“ROTs”), Streaming Quote Traders (“SQTs”) and Remote Streaming Quote Traders (“RSQTs”). A “Streaming Quote Trader” or “SQT” means a Market Maker who has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. An SQT may only submit such quotations while such SQT is physically present on the trading floor of the Exchange. An SQT may only submit quotes in classes of options in which the SQT is assigned. See Options 1, Section 1(b)(54). A “Remote Streaming Quote Trader” or “RSQT” means a Market Maker that is a member affiliated with a Remote Streaming Quote Trader Organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically in options to which such RSQT has been assigned. A qualified RSQT may function as a Remote Lead Market Maker upon Exchange approval. An RSQT is also known as a Remote Market Maker (“RMM”) pursuant to Options 2, Section 11. A Remote Streaming Quote Organization (“RSQTO”) or Remote Market Maker Organization (“RMO”) are Exchange member organizations that have qualified pursuant to Options 2, Section 1. See Options 1, Section 1(b)(49).

¹¹ The term “Firm” applies to any transaction that is identified by a member or member organization for clearing in the Firm range at OCC. Options 7, Section 1(c).

¹² The term “Professional” applies to transactions for the accounts of Professionals, as defined in Options 1, Section 1(b)(45) means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). Options 7, Section 1(c).

¹³ PHOTO provides subscribers with the aggregate number of “closing purchase transactions” in the affected series. A “closing purchase transaction” means an Exchange options transaction in which the purchaser’s intention is to reduce or eliminate a short position in the series of options involved in such transaction. See Options 1, Section 1(b)(11). PHOTO will also provide subscribers with the aggregate number of “closing sale transactions.” A “closing sale transaction” means an Exchange options transaction in which the seller’s intention is to reduce or eliminate a long position in the series of options involved in such transaction. See Options 1, Section 1(b)(12).

End of Day information is available the next business day. Intra-Day information is updated at 10-minute intervals over the course of the trading day. Historical information is available upon request.

PHOTO provides proprietary Exchange trade data and does not include any intraday trade data from any other exchange.¹⁴ The information provided, both in End of Day and Intraday formats, is not a real-time data feed.

PHOTO is a completely voluntary product in that the Exchange is not required by any rule or regulation to make this data available and potential subscribers may purchase it only if they voluntarily choose to do so.

This information is available to all market participants, including both members and non-members, for all series and symbols in End of Day, Intra-Day, and historical files (upon request).

The End of Day file is updated during an overnight process with the additional fields described above and is available the following morning. The monthly subscriber fee for the End of Day product is currently \$750.

The Intra-Day product is captured in “snapshots” taken every 10 minutes throughout the trading day, available to subscribers within 2 minutes of the conclusion of each period. Subscribers receive the first calculation at 9:42 a.m. ET, representing data captured from 9:30 a.m. to 9:39 a.m., and the second calculation at 9:52 a.m., representing data from both the most recent snapshot and previous snapshots, continuing over the course of the trading day. The monthly subscriber fee for the Intra-Day product is currently \$2,500.

¹⁴ The End of Day report includes a field that presents Total Industry Volume for the Series.

PHOTO historical data provides information about the past activity of all option series traded on the Exchange for each trading session conducted during a prior calendar month selected by the subscriber.¹⁵ This data is intended to enhance a purchaser's ability to analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option series, and create and test trading models and analytical strategies. Historical files provide the same fields of information as the End of Day and Intraday files, respectively. Historical data is available starting in January 2009.

Products similar to Trade Outline have been available on multiple exchanges for many years and are well-established in the market. Such products are available from Nasdaq Options Market ("NOM"),¹⁶ Nasdaq ISE LLC ("ISE"),¹⁷ Nasdaq GEMX LLC ("GEMX"),¹⁸ Cboe Options Exchange ("Cboe"),¹⁹ NYSE American Options ("NYSE American"),²⁰ NYSE Arca Options ("NYSE Arca"),²¹ BOX Options Market LLC

¹⁵ See Securities Exchange Act Release 63351 (November 19, 2010), 75 FR 73140 (November 29, 2010) (SR-Phlx-2010-154).

¹⁶ See Nasdaq Stock Market Rules, Options 7, Section 4 (Nasdaq Options Market Data Distributor Fees).

¹⁷ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intra-day).

¹⁸ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intra-day Trade Profile)

¹⁹ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

²⁰ See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

²¹ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

(“BOX”),²² MIAX Pearl Options Exchange (“Pearl”),²³ and others. In general, the relative value of these products depends on the volume of transactions included; the greater the volume of transactions, the greater the value of the data. The current purchasers of Trade Outline are investment banks, market makers, asset managers and other buy-side investors.

Proposed Changes

Definition of PHOTO

The Exchange proposes to codify the definition of PHOTO. Nothing in this codification is intended to change the product in any way, but rather is intended to describe the product exactly as it exists. Specifically, the Exchange proposes the following definition:

PHLX Options Trade Outline provides aggregate quantity and volume information for trades on the Exchange for all series during a trading session. Information is provided in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume effected to open a position, characterized by origin type (Customer, Broker-Dealer, Market Maker, Firm, and Professional), and for Customers and Professionals, further subdivided by trade size buckets; and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position, characterized by origin type (Customer, Broker-Dealer, Market Maker, Firm, and Professional), and for Customers and Professionals, further subdivided by trade size buckets.

PHLX Options Trade Outline End of Day will also provide opening buy, closing buy, opening sell and closing sell information, which shall include option first trade price, option high trade price, option low trade price, and option last trade price.

²² See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

²³ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

End of Day information will be available the next business day. Intra-Day information is updated at 10-minute intervals over the course of the trading day. Historical information will be available upon request.

Previously Introduced Fee Changes

The Exchange previously proposed to increase the fee for the End of Day product from \$750 to \$850 per month, and the Intra-Day Product from \$2,500 to \$3,000 per month.

The Exchange also proposes to clarify that ad hoc requests for historical data are \$500 per month for End of Day data and \$1,000 per month for Intra-Day data, and that historical data will be available starting in January 2009. These rates will apply to any request for historical data that does not fall within the existing discounts for the most recent 36 months of information for Current Distributors. The proposed language is intended to avoid confusion over fees for historical data, and to specify the availability of such data, but will not change any applicable fees.

In addition, the Exchange proposes to insert a comma after the phrase “or the Intra-Day Product for the current month” into the definition of Current Distributor. The revised sentence will read as follows:

A “Current Distributor” is any firm that purchases either the End of Day Product for the current month, or the Intra-Day Product for the current month, in the same month that the 36 months of historical End of Day or Intra-Day data is ordered.

The change is designed to clarify that the phrase “the same month that the 36 months of historical End of Day or Intra-Day data is ordered” applies to both firms that purchase End of Day data in the current month and firms that purchase Intra-Day data for the current month. The clarification will not change how the fee is charged.

2. Statutory Basis

The Exchange believes that its proposal to codify the definition of PHOTO is consistent with Section 6(b) of the Act,²⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,²⁵ in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

Adding the definition of PHOTO will provide additional clarity and specificity to the Phlx rulebook. Nothing in this codification is intended to change the product or the way it functions, but rather is intended to describe the product exactly as it exists today. Providing additional clarity about an exchange product will help investors make better informed decisions about PHOTO, and therefore will help protect investors and promote the public interest.

Similarly, adding language regarding fees for ad hoc requests for historical data that do not fall within existing discounts for historical data will also provide additional clarity and specificity to the rulebook. Nothing in this codification is intended to change the product or the way it functions, but rather is intended to describe the product as it exists today.

The same holds true for the clarification of the definition of Current Distributor, which is also designed to add clarity and specificity to the rulebook without changing the underlying fees. This additional clarity will help investors make better informed

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(5).

decisions about PHOTO, and thereby help protect investors and promote the public interest.

The Exchange also believes that its proposal to change fees is consistent with Section 6(b) of the Act,²⁶ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,²⁷ 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.

Equitable Allocation of Reasonable Dues, Fees and Other Charges

The proposed changes are an equitable allocation of reasonable dues, fees and other charges because: (i) the trade outline products offered by multiple exchanges are substitutes, and customers are free to choose which product they purchase; and (ii) the proposed fees are comparable to the fees charged by other exchanges, and customers are free to purchase other products if the Exchange has mistaken the value of its product.

Substitution

As noted above, products similar to Trade Outline have been available on multiple exchanges for many years and are well-established in the market. Such products

²⁶ 15 U.S.C. 78f(b).

²⁷ 15 U.S.C. 78f(b)(4) and (5).

are available from the Phlx,²⁸ ISE,²⁹ GEMX,³⁰ Cboe,³¹ NYSE American,³² NYSE Arca,³³ BOX,³⁴ Pearl,³⁵ and others.

Trade outline products offer the same categories of data through end of day or intra-day reports. The information provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another, and market sentiment trends that appear on one exchange are likely to be similar to the sentiment trends on other exchanges. The key differentiator in the quality of the data depends on the volume of transactions on a given exchange; the greater the volume of transactions, the greater the value of the data. Customers can choose not to purchase the trade outline product of one exchange and substitute it for that of another exchange.

²⁸ See Securities Exchange Act Release No. 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121) (introducing PHOTO on September 1, 2010),

²⁹ See Nasdaq ISE Rules, Options 7, Section 10(A) and (B) (Nasdaq ISE Open/Close Trade Profile End of Day; Nasdaq ISE Open/Close Trade Profile Intra-day).

³⁰ See Nasdaq GEMX Rules, Options 7, Sections 7(D) (Nasdaq GEMX Open/Close End of Day Trade Profile) and 7(E) (Nasdaq GEMX Open/Close Intra-day Trade Profile)

³¹ See, e.g., Securities Exchange Act Release No. 94913 (May 13, 2022), 87 FR 30534 (May 19, 2022) (SR-Cboe-2022-023) (describing End of Day and Intra-day Open-Close Data as a summary of trading activity on the exchange at the option level by origin, side of the market, price and transaction type).

³² See, e.g., Securities Exchange Act Release No. 93803 (December 16, 2021, 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³³ See, e.g., Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82) (describing the NYSE Options Open-Close Volume Summary as a volume summary of trading activity on the exchange at the option level by origin, side of the market, contract volume and transaction type).

³⁴ See, e.g., Securities Exchange Act Release No. 97174 (March 21, 2023), 88 FR 18201 (March 27, 2023) (SR-BOX-2023-09) (describing the BOX exchange Open-Close Data report as providing volume by origin, buying/selling, and opening/closing criteria).

³⁵ See, e.g., Securities Exchange Act Release No. 91964 (May 21, 2021), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24) (introducing the Open-Close Report).

Customers can also choose not to purchase a trade outline product at all. Trade outline products are designed to help investors understand underlying market trends to improve the quality of investment decisions, but are not necessary to execute a trade. Customers can, and do, choose to forego the information from Trade Outline or any of its competitor products when making a trade.

Nasdaq and its affiliates have observed that customers purchase sufficient data to provide a view of the market, but not more, as the value of data from each additional exchange yields diminishing returns. As a result, all exchanges are limited in what they will be able to charge for trade outline.

As the Commission and courts³⁶ have recognized, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”³⁷ Accordingly, “the existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”³⁸ The Commission and the courts have repeatedly expressed their

³⁶ The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010) upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed and that the SEC wield its regulatory power in those situations where competition may not be sufficient, such as in the creation of a consolidated transactional reporting system.” NetCoalition I at 535 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323) (internal quotation marks omitted). The court agreed with the Commission’s conclusion that “Congress intended that competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.” *Id.* (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73bFR 74770 (December 9, 2008) (SR-NYSEArca-2006-21)).

³⁷ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

³⁸ See id.

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.”³⁹ Trade Outline is in direct competition with multiple exchanges that offer similar products in end of day and intra-day formats.⁴⁰

Comparability of Proposed Fees

The proposed fees are comparable to the fees charged by similarly situated exchanges.

As explained above, the value of Trade Outline is determined in part by the number of underlying transactions reflected in the data. The Phlx Exchange has a market share comparable to the Cboe C1 exchange, which has a market share of approximately 9%, while PHLX has a market share of approximately 10% during the second quarter of 2024.⁴¹ As the Cboe C1 exchange charges \$3,000 for its intra-day product,⁴² the proposed fee of \$3,000 for the PHLX Intra-day product is comparable.

³⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁴⁰ These substitute products include NOTO, ISE Trade Profile, GEMX Trade Profile data; open-close data from Cboe C1, C2, BZX, and EDGX; and Open Close Reports from MIAX Options, Pearl, and Emerald.

⁴¹ See NasdaqTrader.com, “Options Market Statistics,” available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>.

⁴² See Cboe DataShop, “Cboe Open-Close Volume Summary,” available at <https://datashop.cboe.com/cboe-options-open-close-volume-summary>.

For the end of day trade outline product, Cboe C1 charges \$600.⁴³ The Exchange believes that a fee of \$600 understates the true value of the end of day product. The Intra-day to end of day price ratio for Cboe C1 is 5:1 (\$3,000 v. \$600). Most trade outline products have a lower ratio. EDGX, with an 8% market share, has a ratio of 2:1 (\$1,000 for intra-day data and \$500 for end of day data).⁴⁴ PHLX believes that the proposed end of day fee of \$850 (with a ratio of 3.5:1) better reflects the relative value of the products, and therefore is proposing a fee of \$850 for its end of day product.

If the Exchange is incorrect in its assessment of the marketplace, current and prospective customers will elect not to purchase Trade Outline.

As noted above, clarifying fees for ad hoc requests for historical data, and the definition of Current Distributor, will not change fees, and therefore will not impact the equitable allocation of reasonable dues, fees and other charges.

The Proposal Does Not Permit Unfair Discrimination

Nothing in the proposal treats any category of market participant any differently from any other category of market participant. Trade Outline is available to all market participants, including members and non-members, and all market participants receive the same information in the Trade Outline data feed.

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

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

⁴³ Id.

⁴⁴ Id.

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 and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to 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.

Adding the definition of PHOTO will promote competition by helping investors make better informed decisions about PHOTO. Nothing about the addition of a definition will impact inter-market competition or intra-market competition negatively.

Intermarket Competition

Nothing in the proposal burdens inter-market competition (the competition among self-regulatory organizations).

As discussed above, Trade Outline is subject to direct competition from other options exchanges that offer substitutes. Nothing in the proposal would interfere with the ability of any exchange to change its fees.

Intra-market Competition

Nothing in the proposal burdens intra-market competition (the competition among consumers of exchange data). Trade Outline is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase these products can do so on a non-discriminatory basis.

Adding language to clarify fees for ad hoc requests for historical data, and to clarify the definition of Current Distributor, will not change fees, and will promote competition by better informing investors.

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.⁴⁵

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

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or

⁴⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2024-48 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-2024-48. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-Phlx-2024-48 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁶

Sherry R. Haywood,

Assistant Secretary.

⁴⁶ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

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

NASDAQ PHLX LLC RULES**Options Rules**

* * * * *

Options 3: Options Trading Rules

* * * * *

Section 23. Data Feeds and Trade Information

(a) – (b) No change.

(c) The following trade information is available on an End of Day, Intra-Day, and historical basis:

(1) PHLX Options Trade Outline provides aggregate quantity and volume information for trades on the Exchange for all series during a trading session. Information is provided in the following categories: (i) total exchange volume for Intra-Day information and total exchange and industry volume for End of Day information for each reported series; (ii) open interest for the series; (iii) aggregate quantity of trades and aggregate trade volume effected to open a position, characterized by origin type (Customer, Broker-Dealer, Market Maker, Firm, and Professional), and for Customers and Professionals, further subdivided by trade size buckets; and (iv) aggregate quantity of trades and aggregate trade volume effected to close a position, characterized by origin type (Customer, Broker-Dealer, Market Maker, Firm, and Professional), and for Customers and Professionals, further subdivided by trade size buckets.

PHLX Options Trade Outline End of Day will also provide opening buy, closing buy, opening sell and closing sell information, which shall include option first trade price, option high trade price, option low trade price, and option last trade price.

End of Day information will be available the next business day. Intra-Day information is updated at 10-minute intervals over the course of the trading day. Historical information will be available upon request.

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Options 7: Pricing Schedule**Section 10. Proprietary Data Feed Fees**

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PHLX Options Trade Outline ("PHOTO")

Account Type	Monthly Charge
End of Day Product Distributor:	<u>\$850</u> [\$750]
Intra-Day Product Distributor:	<u>\$3,000</u> [\$2,500]

PHOTO Historical Data

Account Type	Fee
End of Day Product Distributor:	\$500 per month
Historical Data for Current End of Day Product Distributors:	\$6,000 for the most recent 36 months
Intra-Day Product Distributor:	\$1,000 per month
Historical Data for Current Intra-Day Product Distributors:	\$12,000 for the most recent 36 months

A "Current Distributor" is any firm that purchases either the End of Day Product for the current month, or the Intra-Day Product for the current month, in the same month that the 36 months of historical End of Day or Intra-Day data is ordered.

The most recent 36 months is measured based on the date of purchase of the 36 months of data by a Current Distributor.

Ad hoc requests for historical data are \$500 per month for End of Day data and \$1,000 per month for Intra-Day data. Historical information is available starting in January 2009.

External Distribution

Unlimited External Distribution of Derived Data from PHOTO:	\$5,000 per month
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Fees for external distribution of Derived Data from PHOTO are in addition to fees for the End of Day product or the Intra-Day product, or both, as applicable.

“Derived Data” is any information generated in whole or in part from Exchange Information such that the information generated cannot be reverse engineered to recreate Exchange Information, or be used to create other data that is recognizable as a reasonable substitute for such Exchange Information.

“Exchange Information” is any data or information that has been collected, validated, processed and/or recorded by the Exchange and made available for transmission relating to: (i) eligible securities or other financial instruments, markets, products, vehicles, indicators or devices; (ii) activities of the Exchange; or (iii) other information or data from the Exchange. Information includes, but is not limited to, any element of information used or processed in such a way that Exchange Information or a substitute for such Information can be identified, recalculated or re-engineered from the processed information.

End of Day and Intra-Day reports for the period January 1, 2014, through June 30, 2014, will be available free of charge on the NasdaqTrader website (www.nasdaqtrader.com), or a successor website, to allow access to PHOTO Historical Data for this period.

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