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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85125; File No. SR-Phlx-2019-01]

### **Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Options Regulatory Fee**

February 13, 2019

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 February 1, 2019, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (the “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 revise its Pricing Schedule at Options 7, Section 6, Part D to amend the Phlx Options Regulatory Fee or “ORF.”

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

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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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Currently, Phlx assesses an ORF of \$0.0045 per contract side. The Exchange proposes to increase this ORF to \$0.0050 per contract side as of February 1, 2019. In light of recent market volumes, the Exchange is proposing to increase the amount of ORF that will be collected by the Exchange. The proposal would allow the Exchange to increase the per contract amount of ORF in order to offset the Exchange anticipated regulatory costs. The Exchange's proposed change to the ORF should balance the Exchange's regulatory revenue against the anticipated regulatory costs. The Exchange also proposes to delete obsolete language in the rule text as described herein.

Collection of ORF

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

Corporation (“OCC”) in the customer range,<sup>3</sup> even if the transaction was executed by a non-member of Phlx, regardless of the exchange on which the transaction occurs.<sup>4</sup> If the OCC clearing member is a Phlx member, ORF is assessed and collected on all cleared customer contracts (after adjustment for CMTA<sup>5</sup>); and (2) if the OCC clearing member is not a Phlx member, ORF is collected only on the cleared customer contracts executed at Phlx, taking into account any CMTA instructions which may result in collecting the ORF from a non-member.

By way of example, if Broker A, a Phlx member, routes a customer order to CBOE and the transaction executes on CBOE and clears in Broker A’s OCC Clearing account, ORF will be collected by Phlx from Broker A’s clearing account at OCC via direct debit. While this transaction was executed on a market other than Phlx, it was cleared by a Phlx member in the member’s OCC clearing account in the customer range, therefore there is a regulatory nexus between Phlx and the transaction. If Broker A was not a Phlx member, then no ORF should be assessed and collected because there is no nexus; the transaction did not execute on Phlx nor was it cleared by a Phlx member.

In the case where a member both executes a transaction and clears the transaction, the ORF is assessed to and collected from that member. In the case where a member executes a transaction and a different member clears the transaction, the ORF is assessed to and collected from the member who clears the transaction and not the member who executes the transaction. In the case where a non-member executes a transaction at an away market and a member clears

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<sup>3</sup> Participants must record the appropriate account origin code on all orders at the time of entry in order. The Exchange represents that it has surveillances in place to verify that members mark orders with the correct account origin code.

<sup>4</sup> The Exchange uses reports from OCC when assessing and collecting the ORF.

<sup>5</sup> CMTA or Clearing Member Trade Assignment is a form of “give-up” whereby the position will be assigned to a specific clearing firm at OCC.

the transaction, the ORF is assessed to and collected from the member who clears the transaction. In the case where a member executes a transaction on Phlx and a non-member clears the transaction, the ORF is assessed to the member that executed the transaction on Phlx and collected from the non-member who cleared the transaction. In the case where a member executes a transaction at an away market and a non-member clears the transaction, the ORF is not assessed to the member who executed the transaction or collected from the non-member who cleared the transaction because the Exchange does not have access to the data to make absolutely certain that ORF should apply. Further, the data does not allow the Exchange to identify the member executing the trade at an away market.

#### ORF Revenue and Monitoring of ORF

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

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

The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees, will cover a material portion, but not all, of the Exchange's regulatory costs. The Exchange will continue to monitor the amount of revenue collected from

the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed regulatory costs. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission.

### Proposal

The Exchange is proposing to increase the ORF from \$0.0045 to \$0.0050 per contract side as of February 1, 2019. In light of recent market volumes, the Exchange is proposing to increase the amount of ORF that will be collected by the Exchange. The proposal would allow the Exchange to increase the per contract amount of ORF in order to offset the Exchange anticipated regulatory costs. The Exchange proposes to add the following rule text to Options 7, Section 6, Part D, “Phlx will assess an Options Regulatory Fee of \$0.0050 per contract side as of February 1, 2019.”

The Exchange regularly reviews its ORF to ensure that the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs. The Exchange believes this adjustment will permit the Exchange to cover a material portion of its regulatory costs, while not exceeding regulatory costs.

The Exchange notified members via an Options Trader Alert of the proposed change to the ORF thirty (30) calendar days prior to the proposed operative date, February 1, 2019.<sup>6</sup> The Exchange believes that the prior notification market participants will ensure market participants are prepared to configure their systems to account properly for the ORF.

Finally, the Exchange proposes to remove the following rule text from Options 7, Section 6, Part D, “\$0.0045 per contract side”. This text is obsolete as it references a prior ORF rate.

## 2. Statutory Basis

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<sup>6</sup> See Options Trader Alert #2018-46.

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act<sup>8</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 its facility and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that increasing the ORF from \$0.0045 to \$0.0050 per contract side as of February 1, 2019 is reasonable because with this increase, the Exchange would recoup additional regulatory revenue to offset anticipated regulatory costs. The Exchange believes that the proposed adjustments noted herein will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs.

The Exchange believes that increasing the ORF from \$0.0045 to \$0.0050 per contract side as of February 1, 2019 is equitable and not unfairly discriminatory because assessing the ORF to each member for options transactions cleared by OCC in the customer range where the execution occurs on another exchange and is cleared by a Phlx member is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. OCC collects the ORF on behalf of Phlx from Exchange clearing members for all customer transactions they clear or from non-members for all customer transactions they clear that were executed on Phlx. The Exchange believes the ORF ensures fairness by assessing fees to members based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be

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

<sup>8</sup> 15 U.S.C. 78f(b)(4) and (5).

more automated and less labor-intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., member proprietary transactions) of its regulatory program.

The ORF is designed to recover a material portion of the costs of supervising and regulating members' customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. This proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>9</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-Phlx-2019-01 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.

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<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

All submissions should refer to File No. SR-Phlx-2019-01. 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-Phlx-2019-01, 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>10</sup>

**Eduardo A. Aleman,**

*Deputy Secretary.*

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<sup>10</sup> 17 CFR 200.30-3(a)(12).

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