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SECURITIES AND EXCHANGE COMMISSION

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Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Phlx’s Pricing Schedule at Options 7, Section 8, “Membership Fees.”

April 6, 2021.

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 March 25, 2021, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II 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 8, “Membership Fees.”

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

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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

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 within Options 7, Section 8, “Membership Fees” to (1) waive the Inactive Nominee Fee for a six month period; and (2) remove obsolete language. Each change is described below.

Options 7, Section 8

First, Phlx proposes to amend Options 7, Section 8, “Membership Fees,” at Part A, “Permit and Registration Fees,” to waive the Inactive Nominee<sup>3</sup> Fee which is a fee of \$600 for 6 months.<sup>4</sup> Phlx proposes to waive the Inactive Nominee Fee from April 1, 2021 through September 30, 2021. The Exchange notes that the Clerk Fee<sup>5</sup> of \$100 per month will continue to be assessed.

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<sup>3</sup> The term “inactive nominee” shall mean a natural person associated with and designated as such by a member organization and who has been approved for such status and is registered as such with the Membership Department. An inactive nominee shall have no rights or privileges under a permit unless and until said inactive nominee becomes admitted as a member of the Exchange pursuant to the By-Laws and Rules of the Exchange. An inactive nominee merely stands ready to exercise rights under a permit upon notice by the member organization to the Membership Department on an expedited basis. See Options 8, Section 2(a)(3). An Inactive Nominee shall be deemed a Clerk pursuant to Options 8, Section 12(a). An inactive nominee’s status expires after six months unless it has been reaffirmed in writing by the member organization or is sooner terminated. A member organization is assessed the Inactive Nominee Fee every time the status is reaffirmed. An inactive nominee is also assessed Application and Initiation Fees when such person applies to be an inactive nominee. Such fees are reassessed if there is a lapse in their inactive nominee status. However, an inactive nominee is not assessed Application and Initiation Fees if such inactive nominee applied for membership without any lapse in that individual’s association with a particular member organization. An Inactive Nominee is also assessed the Clerk Fee.

<sup>4</sup> The member organization is assessed \$100 per month for the applicable six month period unless the member organization provides proper notice of its intent to terminate an inactive nominee prior to the first day of the next billing month.

<sup>5</sup> The Clerk Fee is imposed on any registered on-floor person employed by or associated with a member or member organization pursuant to Options 3, Section 19, including

By way of background, on March 17, 2019 [sic],<sup>6</sup> Phlx suspended open outcry trading as a result of precautions taken with respect to COVID-19. When the Trading Floor reopened on June 3, 2020,<sup>7</sup> the Exchange permitted each Trading Floor member organization to be represented on the Trading Floor. However, due to the social distancing measures that were put in place to comply with Commonwealth of Pennsylvania health standards as well as Nasdaq's safety measures designed to prevent the spread of COVID-19, not all members and employees associated with a Phlx member organization were able to return to the Trading Floor. Certain floor members have utilized Inactive Nominees to staff the Trading Floor due to illness or other circumstances which necessitated a change in staff.

An Inactive Nominee allows a floor member to have additional flexibility in obtaining coverage on the trading floor. An Inactive Nominee stands ready to assume a membership upon notice by the member requesting that a specific permit be transferred intra-firm on an expedited and temporary basis. By way of example, an Inactive Nominee would be activated in the event of an emergency due to illness or other factors. An Inactive Nominee allows a member organization to have a full staff available to conduct business on the Exchange trading floor in the event of unplanned circumstances.

At this time, with COVID-19 precautions still in place on Phlx's trading floor, the Exchange proposes this waiver to provide floor members with greater flexibility in registering Inactive Nominees to be activated in the event of illness or other factors without a fee. The Exchange believes that this waiver will enable floor members to plan staffing more efficiently in the upcoming months, including staffing needs during the summer, while the Trading Floor remains socially distanced. With this waiver, member organizations may choose to register

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Inactive Nominees pursuant to Options 8, Section 7. The Clerk Fee is not imposed on permit holders. See Phlx Rules at Options 7, Section 8A.

<sup>6</sup> See Options Trader Alert #2020 – 07.

<sup>7</sup> See Options Trader Alert #2020 – 13.

Inactive Nominees so that they have back-ups available if they require coverage on the Trading Floor.

Second, Phlx proposes to remove the following obsolete rule text from Options 7, Section 8:

Phlx waives the Floor Lead Market Maker and Floor Market Maker Permit Fee, for the months of July and August 2020, provided a member or member organization (1) paid the Floor Lead Market Maker or Floor Market Maker Permit Fee in March 2020; and (2) was not otherwise registered as a Streaming Quote Trader or as a Remote Streaming Quote Trader in March 2020.

The above rule text is no longer relevant as the timeframe for which the waiver was in effect for certain fees has passed.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>9</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>10</sup>

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

<sup>9</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>10</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

Likewise, in NetCoalition v. Securities and Exchange Commission<sup>11</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>12</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>13</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>14</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.

#### Options 7, Section 8

Phlx’s proposal to amend Options 7, Section 8, “Membership Fees,” at Part A, “Permit and Registration Fees,” to waive the Inactive Nominee Fee from April 1, 2021 through September 30, 2021 is reasonable. An Inactive Nominee allows a floor member to have additional flexibility in obtaining coverage on the trading floor. An Inactive Nominee stands ready to assume a membership upon notice by the member requesting that a specific permit be transferred intra-firm on an expedited and temporary basis. An Inactive Nominee allows a member organization to have a full staff available to conduct business on the Exchange trading

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<sup>11</sup> NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

<sup>12</sup> See NetCoalition, at 534 - 535.

<sup>13</sup> Id. at 537.

<sup>14</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)).

floor in the event of unplanned circumstances. At this time, with COVID-19 precautions still in place on Phlx's trading floor, the Exchange proposes this waiver to provide floor members with greater flexibility in registering Inactive Nominees to be activated in the event of illness or other factors without a fee.

Phlx's proposal to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to waive the Inactive Nominee Fee from April 1, 2021 through September 30, 2021 is equitable and not unfairly discriminatory. All member organizations may register an Inactive Nominee and therefore take advantage of the fee waiver.

The Exchange's proposal to remove obsolete rule text from Options 7, Section 8 is reasonable, equitable and not unfairly discriminatory. The rule text is no longer relevant as the timeframe for which the waiver was in effect for certain fees has passed.

**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.

**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 to a proposal, 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**

## Options 7, Section 8

Phlx's proposal to amend Options 7, Section 8, "Membership Fees," at Part A, "Permit and Registration Fees," to waive the Inactive Nominee Fee from April 1, 2021 through September 30, 2021 does not impose an undue burden on competition. All member organizations may register an Inactive Nominee and therefore take advantage of the fee waiver.

The Exchange's proposal to remove obsolete rule text from Options 7, Section 8 does not impose an undue burden on competition. The rule text is no longer relevant as the timeframe for which the waiver was in effect for certain fees has passed.

### 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>15</sup> and paragraph (f) of Rule 19b-4 thereunder.<sup>16</sup>

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

### 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:

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

<sup>16</sup> 17 CFR 240.19b-4(f)(2).

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2021-19 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-Phlx-2021-19. 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 Number SR-Phlx-2021-19 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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