

third line, “SIPC–2016–01” should read “SIPC–2016–02”.

3. On page 39989, in the third column, in the seventh paragraph, on the second line, “SIPC–2016–01” should read “SIPC–2016–02”.

4. On page 39989, in the third column, in the ninth paragraph, on the second line, “SIPC–2016–01” should read “SIPC–2016–02”.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–78103; File No. SR–NASDAQ–2016–089]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Options Pricing at Chapter XV, Section 2

June 20, 2016.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup>, and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on June 14, 2016, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Chapter XV, entitled “Options Pricing,” at Section 2, which governs pricing for Exchange members using the NASDAQ Options Market (“NOM”), the Exchange’s facility for executing and routing standardized equity and index options.<sup>3</sup>

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaq.cchwallstreet.com>, 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 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 Exchange proposes certain amendments to the NOM transaction fees set forth at Chapter XV, Section 2(1) for executing and routing standardized equity and index options under the Penny Pilot Option<sup>4</sup> program. Specifically, the Exchange proposes in Section 2(1) two new incentives regarding Non-NOM Market Makers and NOM Market Makers Penny Pilot Options Fees for Removing Liquidity; and proposes to delete note 4 regarding Non-Penny Pilot Options Fee for Removing Liquidity. The proposed changes will allow the Exchange to continue to offer and expand incentives to NOM Participants to add more liquidity to NOM.

##### Change 1: Penny Pilot Options—Incentives To Earn Additional Discounts on Fee for Removing Liquidity

Note 2 to Section 2(1) applies to Non-NOM Market Makers<sup>5</sup> and NOM Market Makers<sup>6</sup> Penny Pilot Options Fees for Removing Liquidity. Currently, note 2

<sup>4</sup> The Penny Pilot was established in March 2008 and was last extended in 2015. See Securities Exchange Act Release Nos. 57579 (March 28, 2008), 73 FR 18587 (April 4, 2008) (SR–NASDAQ–2008–026) (notice of filing and immediate effectiveness establishing Penny Pilot); and 75283 (June 24, 2015), 80 FR 37347 (June 30, 2015) (SR–NASDAQ–2015–063) (notice of filing and immediate effectiveness extending the Penny Pilot through June 30, 2016). All Penny Pilot Options listed on the Exchange can be found at <http://www.nasdaqtrader.com/Micro.aspx?id=phlx>.

<sup>5</sup> The term “Non-NOM Market Maker” is a registered market maker on another options exchange that is not a NOM Market Maker. A Non-NOM Market Maker must append the proper Non-NOM Market Maker designation to orders routed to NOM.

<sup>6</sup> The term “NOM Market Maker” is a Participant that has registered as a Market Maker on NOM pursuant to Chapter VII, Section 2, and must also remain in good standing pursuant to Chapter VII,

offers a \$0.02 discount (reduction to \$0.48 per contract fee) on the Penny Pilot Options Fee for Removing Liquidity.<sup>7</sup> Currently, note 2 offers that Participants<sup>8</sup> that add 1.30% of Customer,<sup>9</sup> Professional,<sup>10</sup> Firm,<sup>11</sup> Broker-Dealer,<sup>12</sup> or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option average daily volume or ADV contracts per day are assessed a \$0.48 per contract Penny Pilot Options Fee for Removing Liquidity provided the Participant is (i) both the buyer and the seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.<sup>13</sup> The Exchange proposes two additional ways to earn an enhanced discount on the NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fee for Removing Liquidity.

First, the Exchange proposes to amend note 2 to Section 2(1) to add a new incentive that would assess NOM Market Maker and Non-NOM Market Maker a \$0.32 per contract fee applicable to executions less than 10,000 contracts provided the Participant adds 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in

Section 4. In order to receive NOM Market Maker pricing in all securities, the Participant must be registered as a NOM Market Maker in at least one security.

<sup>7</sup> The NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fees for Removing Liquidity are \$0.50 per contract.

<sup>8</sup> The term “Participant” or “Options Participant” means a firm, or organization that is registered with the Exchange pursuant to Chapter II of these Rules for purposes of participating in options trading on NOM as a “Nasdaq Options Order Entry Firm” or “Nasdaq Options Market Maker”. Participants on NOM are also known as “NOM Participants.”

<sup>9</sup> The term “Customer” or (“C”) applies to any transaction that is identified by a Participant for clearing in the Customer range at The Options Clearing Corporation which is not for the account of broker or dealer or for the account of a “Professional” (as that term is defined in Chapter I, Section 1(a)(48)).

<sup>10</sup> The term “Professional” or (“P”) 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) pursuant to Chapter I, Section 1(a)(48). All Professional orders shall be appropriately marked by Participants.

<sup>11</sup> The term “Firm” or (“F”) applies to any transaction that is identified by a Participant for clearing in the Firm range at The Options Clearing Corporation.

<sup>12</sup> The term “Broker-Dealer” or (“B”) applies to any transaction which is not subject to any of the other transaction fees applicable within a particular category.

<sup>13</sup> The term “Common Ownership” shall mean Participants under 75% common ownership or control. Common Ownership shall apply to all pricing in Chapter XV, Section 2 for which a volume threshold or volume percentage is required to obtain the pricing.

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> References in this proposal to Chapter and Series are to NOM rules, unless otherwise indicated.

Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant meets or exceeds the cap for the Nasdaq Stock Market Opening Cross<sup>14</sup>, and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. The Exchange believes that this proposed change, which includes a new methodology to earn an incentive via meeting or exceeding the cap for the Nasdaq Stock Market Opening Cross, will incentivize bringing additional flow to the Exchange. This proposal offers an \$0.18 per contract discount from the current Penny Pilot Options Fees for Removing Liquidity for NOM Market Maker and Non-NOM Market Makers.<sup>15</sup>

Second, the Exchange proposes to amend note 2 to Section 2(1) to add a new incentive that would assess NOM Market Maker and Non-NOM Market Maker a \$0.32 per contract fee applicable to executions less than 10,000 contracts provided the Participant adds 1.75% of Customer, Professional, Firm, Broker-Dealer, or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. This proposal offers an \$0.18 per contract discount from the current Penny Pilot Options Fees for Removing Liquidity for NOM Market Maker and Non-NOM Market Makers.<sup>16</sup>

The amendments proposed herein to note 2 to Section 2(1) would, for executions less than 10,000 contracts, offer Participants two ways to earn an \$0.18 per contract discount from the current Penny Pilot Options NOM Market Maker or Non-NOM Market Maker Fee for Removing Liquidity by delivering a greater amount of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity on NOM.<sup>17</sup>

<sup>14</sup> The term "Nasdaq Opening Cross" means the process for determining the price at which orders shall be executed at the open and for executing those orders. See Nasdaq Rule 4752(a)(2)(E)(5). Nasdaq firms that execute orders in the Nasdaq Opening Cross will be subject to fees for such executions up to a monthly maximum of \$30,000, provided, however, that such firms add at least one million shares of liquidity, on average, per month. See Nasdaq Rule 7018(e)(2).

<sup>15</sup> The Penny Pilot Options Fee for Removing Liquidity for NOM Market Maker and Non-NOM Market Makers is \$0.50 per contract.

<sup>16</sup> *Id.*

<sup>17</sup> For all executions 10,000 contracts or greater, a \$0.48 per contract fee will be applicable provided

Change 2: Non-Penny Pilot Options—Delete Note 4

Note 4 currently states that a Participant that qualifies for Customer or Professional Penny Pilot Options Rebate to Add Liquidity Tiers 2, 3, 4, 5, 6, 7, or 8 in a month will be assessed a Non-Penny Pilot Options Fee for Removing Liquidity of \$1.08 per contract in that month. The Exchange proposes to remove note 4 from the Non-Penny Pilot Options Fee for Removing Liquidity and at the same time proposes additional ways to earn an enhanced discount on the NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fee for Removing Liquidity. The Exchange is incentivizing Participants to bring Penny Pilot Options liquidity to the Exchange since Penny Pilot Options represent the most highly-traded options in the market.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>18</sup> in general, and with Section 6(b)(4) and 6(b)(5) of the Act,<sup>19</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 or system which the Exchange operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Attracting order flow to the Exchange benefits all Participants who have the opportunity to interact with this order flow.

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

the Participant adds 1.30% of Customer, Professional, Firm, Broker-Dealer, or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. This \$0.48 fee represents a \$0.02 per contract discount from the current Penny Pilot Options Fees for Removing Liquidity of \$0.50 for NOM Market Maker and Non-NOM Market Makers and represents no change from the current Pricing Schedule.

<sup>18</sup> 15 U.S.C. 78f.

<sup>19</sup> 15 U.S.C. 78f(b)(4) and (5).

promoting market competition in its broader forms that are most important to investors and listed companies."<sup>20</sup>

Likewise, in *NetCoalition v. Securities and Exchange Commission*<sup>21</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>22</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>23</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>24</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.

## Change 1: Penny Pilot Options—Incentives To Earn Additional Discounts on Fee for Removing Liquidity

The Exchange's proposal to amend note 2 to Section 2(1) to create two new incentives that would assess NOM Market Maker and Non-NOM Market Maker a \$0.32 per contract fee applicable to executions less than 10,000 contracts. The first new incentive is if the Participant adds 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant meets or exceeds the cap for the Nasdaq Stock Market Opening Cross and the Participant is (i) both the buyer and

<sup>20</sup> Securities Exchange Act Release No. 51808 (June 29, 2005), 70 FR 37496 at 37499 (File No. S7-10-04) ("Regulation NMS Adopting Release") [sic].

<sup>21</sup> *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

<sup>22</sup> See *id.* at 534-535.

<sup>23</sup> See *id.* at 537.

<sup>24</sup> See *id.* at 539 (quoting Securities Exchange Act Commission at [sic] Release No. 59039 (December 2, 2008), 73 FR 74770 at 74782-74783 (December 9, 2008) (SR-NYSEArca-2006-21)).

seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. The second new incentive is if the Participant adds 1.75% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. The new incentives are reasonable, equitable, and not unfairly discriminatory for the reasons that follow.

The Exchange believes that the new incentives will attract a greater amount of order flow on NOM by offering a discounted rate. Participants are provided additional opportunities to lower NOM Market Maker and Non-NOM Market Maker fees when removing Penny Pilot Options liquidity, thereby attracting order flow to the Exchange to the benefit of all other market participants. Participants may send either Penny or Non-Penny Pilot Options to qualify for the discount. All Participant order flow that adds liquidity to the order book, other than NOM Market Maker volume, will apply to the 1.50% or 1.75% threshold to qualify for the discount. The Exchange believes that it is not necessary to count NOM Market Maker volume toward the volume to qualify for the fee discount because that volume is counted toward the qualifiers for the NOM Market Maker rebates. The Exchange also believes, as discussed below, that the proposal is reasonable in light of what is offered on other exchanges and the Exchange's effort to bring Penny Pilot Options liquidity to the Exchange.

Providing the discount to NOM Market Makers is equitable and not unfairly discriminatory because NOM Market Makers obligations to the market and regulatory requirements, which normally do not apply to other market participants.<sup>25</sup> A NOM Market Maker has the obligation, for example, to make continuous markets, engage in a course

of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and not make bids or offers or enter into transactions that are inconsistent with a course of dealings. The proposed differentiation as between NOM Market Makers and other market participants recognizes the differing contributions made to the trading environment on the Exchange by NOM Market Makers. For the above reasons, the Exchange believes that NOM Market Makers are entitled to discounted fees, provided they qualify for the discount. The Exchange believes it is equitable and not unfairly discriminatory to offer the fee discount to Non-NOM Market Makers because the Exchange is offering Participants flexibility in the manner in which they are submitting their orders. Non-NOM Market Makers have obligations on other exchanges to qualify as a market maker. Also, the Exchange believes that market makers not registered on NOM will be encouraged to send orders to NOM as an away market maker (Non-NOM Market Maker) with this incentive. Because the incentive is being offered to both market makers registered on NOM and those not registered on NOM, the Exchange believes that the proposal is equitable and not unfairly discriminatory because it encourages market makers to direct liquidity to NOM to the benefit of all Participants. This proposal recognizes the overall contributions made by market makers to a listed options market.

The Exchange's proposal to count all order flow (Penny and Non-Penny Pilot Options) toward the 1.50% and 1.75% requisites for volume, except for NOM Market Maker order flow, is reasonable, equitable, and not unfairly discriminatory because NOM Market Makers continue to be entitled to rebates today similar to Customers and Professionals. Customer volume is important because it continues to attract liquidity to the Exchange, which benefits all market participants. Further, with respect to Professional liquidity, the Exchange initially established Professional pricing in order to “. . . bring additional revenue to the Exchange.”<sup>26</sup> The Exchange noted in the Professional Filing that it believes “. . . that the increased revenue from

the proposal would assist the Exchange to recoup fixed costs.”<sup>27</sup> Further, the Exchange noted in that filing that it believes that establishing separate pricing for a Professional, which ranges between that of a Customer and market maker, accomplishes this objective.<sup>28</sup> The Exchange offers NOM Market Makers rebates in acknowledgment of the obligations these Participants bear in the market.<sup>29</sup>

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to continue to permit NOM Participants under Common Ownership to aggregate their volume for purposes of obtaining the fee discount because certain NOM Participants chose to segregate their businesses into different legal entities for purposes of conducting business. The Exchange believes that, in terms of Common Ownership, these NOM Participants should continue to be treated as one entity for purposes of qualifying for the discounted Fee for Removing Liquidity in Penny Pilot Options, as long as there is at least 75% Common Ownership or control among the NOM Participants. The Exchange also believes that it is reasonable, equitable and not unfairly discriminatory to offer an \$0.18 per contract discount of the Penny Pilot Option Fee for Removing Liquidity to Non-NOM Market Makers and NOM Market Makers for transactions in which the same NOM Participant or a NOM Participant under Common Ownership is the buyer and the seller. NOM Participants that chose to segregate their businesses into different legal entities should still be afforded the opportunity to receive the discount as if they were the same NOM Participant on both sides of the transaction.

It is important to note that NOM Participants are unaware at the time the order is entered of the identity of the contra-party. Because contra-parties are anonymous, the Exchange believes that NOM Participants would continue to aggressively pursue order flow in order to receive the benefit of the fee discount. NOM Participants would continue to only receive the incentive if they interact with their own order flow, recognizing Common Ownership where applicable. Offering the additional fee discount is reasonable, equitable and

<sup>25</sup> Pursuant to Chapter VII (Market Participants), Section 5 (Obligations of Market Makers), in registering as a market maker, an Options Participant commits himself to various obligations. Transactions of a Market Maker in its market making capacity must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and Market Makers should not make bids or offers or enter into transactions that are inconsistent with such course of dealings. Further, all Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder. See Chapter VII, Section 5 [sic].

<sup>26</sup> See Securities Exchange Act Release No. 64494 (May 13, 2011), 76 FR 29014 (May 19, 2011) (SR-NASDAQ-2011-066) (“Professional Filing”). In this filing, the Exchange addressed the perceived favorable pricing of Professionals who were assessed fees and paid rebates like a Customer prior to the filing. The Exchange noted in that filing that a Professional, unlike a retail Customer, has access to sophisticated trading systems that contain functionality not available to retail Customers.

<sup>27</sup> See 76 FR 29014, 29015 (Professional Filing).

<sup>28</sup> See 76 FR 29014 [sic] (Professional Filing). The Exchange also noted in the Professional Filing that it believes the role of the retail Customer in the marketplace is distinct from that of the Professional and the Exchange's fee proposal at that time accounted for this distinction by pricing each market participant according to their roles and obligations.

<sup>29</sup> See e.g., Chapter VII (Market Participants), Section 5 (Obligations of Market Makers).

not unfairly discriminatory because Participants would be entitled to receive the fee discount only when the Participant is both the buyer and seller. By way of example, if a NOM Participant that is assigned the firm code<sup>30</sup> "ABC" by the Exchange posted an order utilizing its Customer order router, and the order was removed by an ABC NOM Market Maker order, the NOM Participant would receive the proposed \$0.18 per contract fee discount for that trade,<sup>31</sup> which would be \$0.16 more than the current \$0.02 per contract discount. The Exchange proposes to utilize the Exchange assigned firm code to determine which NOM Participant executed an order and to apply the fee discount to the Non-NOM Market Maker or NOM Market Maker Penny Pilot Option Fee for Removing Liquidity if the same NOM Participant was the buyer and the seller to a transaction.<sup>32</sup> This concept is not novel. Today NASDAQ PHLX LLC ("Phlx") assesses a Firm Floor Options Transaction Charge based on which side of the transaction the member represents as well whether the same member or its affiliates under Common Ownership was represented.<sup>33</sup> Also

<sup>30</sup> Each NOM Participant is assigned a firm code by the Exchange.

<sup>31</sup> The discount would be applicable to executions less than 10,000 contracts if: (a) the Participant adds 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant meets or exceeds the cap for the Nasdaq Stock Market Opening Cross and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership; or (b) the Participant adds 1.75% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.

<sup>32</sup> In this example, the same Participant that added and removed the order would be entitled to the fee discount because the NOM Participant was the buyer and seller (or removes liquidity from another Participant under Common Ownership) on the transaction.

<sup>33</sup> The Firm Floor Options Transaction Charges will be waived for members executing facilitation orders pursuant to Phlx Rule 1064 when such members are trading in their own proprietary account (including Cabinet Options Transaction Charges). The Firm Floor Options Transaction Charges will be waived for the buy side of a transaction if the same member or its affiliates under Common Ownership represents both sides of a Firm transaction when such members are trading in their own proprietary account. In addition, the Broker-Dealer Floor Options Transaction Charge (including Cabinet Options Transaction Charges) will be waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members would otherwise incur this charge for trading in their own proprietary account contra to

today, NASDAQ BX Options ("BX Options") provides discounted Fees for Removing Liquidity for registered BX Options Market Makers, based on Tier positions for the BX Participant.<sup>34</sup> The Exchange believes that the note 2 proposal is reasonable in comparison to other exchanges and also because of its decision to deploy Penny Pilot Options incentives in a concentrated manner.

Today the Exchange offers a \$0.02 discount (\$0.48 vs. \$0.50 per contract) in current note 2 of Chapter XV, Section 2(1) to Participants that add 1.30% of Customer, Professional, Firm, Broker-Dealer, or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month when the Participant is (i) both the buyer and the seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. The Exchange is proposing to offer a deeper \$0.18 discount (\$0.32 vs. \$0.50 per contract), for executions less than 10,000 contracts,<sup>35</sup> provided; (a.) the Participant adds 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant meets or exceeds the cap for the Nasdaq Stock Market Opening Cross and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership; or (b.) the Participant adds 1.75% of Customer, Professional, Firm, Broker-Dealer or

a Customer ("BD-Customer Facilitation"), if the member's BD-Customer Facilitation average daily volume (including both FLEX and non-FLEX transactions) exceeds 10,000 contracts per day in a given month. See Phlx's Pricing Schedule.

<sup>34</sup> The BX Options Select Symbols Fee to Remove Liquidity when BX Options Market Maker trading with a Customer ("BX Options Fee") is generally inversely proportional to the BX Select Symbols Options Tier Schedule, which requires additional liquidity with increased Tiers. The BX Options Fee is, for example, \$0.42 in Tier 1 and Tier 2, \$0.39 in Tier 3, and \$0.25 in Tier 4. The following are BX Options Select Symbols: ASHR, DIA, DXJ, EEM, EFA, EWJ, EWT, EWW, EWY, EWZ, FAS, FAZ, FXE, FXI, FXP, GDX, GLD, HYG, IWM, IYR, KRE, OIH, QID, QLD, QQQ, RSX, SDS, SKF, SLV, SPY, SRS, SSO, TBT, TLT, TNA, TZA, UNG, URE, USO, UUP, UVXY, UYG, VXX, XHB, XLB, XLE, XLF, XLI, XLK, XLP, XLU, XLV, XLY, XME, XOP, XRT. See BX Options Pricing Schedule.

<sup>35</sup> The intention of the new pricing discount is, as discussed, to attract customer orders to the Exchange. We reviewed the minimum and maximum execution size for year to date activity on the Exchange order book and determined the 10,000 contract threshold was equitable and reasonable as trades above this threshold are not typical of customer orders.

Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership. The Exchange believes that it is reasonable to offer this deeper discount when the Participant is both the buyer and the seller (or removes liquidity from another Participant under Common Ownership) because qualifying for the discount requires a NOM Participant to commit a substantially larger volume of liquidity on NOM. This significantly more substantial investment of order flow and liquidity into the market is beneficial to all market participants, who are free to interact with such order flow.

The Exchange believes the proposed discount where Participant adds 1.50% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options is reasonable, equitable, and not unfairly discriminatory. The Exchange believes that the proposed change is reasonable because the methodology used to qualify for the proposed discount includes the Participant meeting or exceeding the cap for the Nasdaq Stock Market Opening Cross. This concept is not novel as NOM currently uses the NASDAQ Stock Market Closing Cross "MOC" and "LOC" % of total volume to determine the NOM Participants Customer and Professional tier position.<sup>36</sup> The Exchange believes that incentivizing Participants to bring added liquidity by meeting or exceeding the cap for the NASDAQ Stock Market Opening Cross will benefit all Participants by providing greater opportunity for price discovery and liquidity during the Opening Cross process.

Moreover, the condition to meet or exceed the cap for the Nasdaq Stock Market Opening Cross is reasonable, equitable and not unfairly discriminatory because it provides Participants that are not able to meet the Opening Cross requirement and therefore are not able to achieve the 1.75% tier [sic] an additional way in which to qualify for the NOM Market Maker and Non-NOM Market Maker \$0.32 per contract fee. That is, a Participant unable to achieve the 1.75% tier [sic] can still achieve the 1.50% tier

<sup>36</sup> See, e.g., Securities Exchange Act Release No. 77661 (April 20, 2016), 81 FR 24668 (April 26, 2016) (SR-NASDAQ-2016-055) (notice of filing and immediate effectiveness to amend options pricing at NOM Chapter VX, Section 2).

[sic] provided also that the Participant adds 1.50% [sic] of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Pilot Options and/or Non-Penny Pilot Options of total industry customer equity and ETF option ADV contracts per day in a month and the Participant is (i) both the buyer and seller or (ii) the Participant removes liquidity from another Participant under Common Ownership.

Like all of the changes proposed herein, this proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all Participants.

#### Change 2: Non-Penny Pilot Options—Delete Note 4

In Change 2 the Exchange proposes to delete Note 4 which currently indicates the assessment for Non-Penny Pilot Options Fee for Removing Liquidity. The proposal is reasonable, equitable, and not unfairly discriminatory for the reasons that follow.

The removal of note 4 is reasonable because it is proposed commensurate with proposing two additional ways to earn an enhanced discount on the NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fee for Removing Liquidity in note 2. This is reasonable because in its Fee Schedule the Exchanges is encouraging bringing Penny Pilot Options liquidity to the Exchange. Since Penny Pilot Options represent the most highly-traded and liquid options on the Exchange it is reasonable for the exchange to make a concerted effort to bring Penny Pilot Options liquidity to the Exchange. Participants are provided additional opportunities to lower NOM Market Maker and Non-NOM Market Maker fees when removing Penny Pilot Options liquidity, thereby attracting order flow to the Exchange to the benefit of all other market participants. Participants may send either Penny or Non-Penny Pilot Options to qualify for the discount. All Participant order flow that adds liquidity to the order book, other than NOM Market Maker volume, will apply to the 1.50% or 1.75% threshold to qualify for the discount. Additional order flow on the Exchange promotes interaction with the added liquidity.

The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to offer the discounted remove fee in note 2 applicable to Penny Pilot Options without having an alternate fee in note 4 applicable in Non-Penny Pilot Options because, as discussed, Penny Pilot Options are clearly the highest volume, most liquid options traded on the Exchange and the

Exchange is promoting such liquidity. Moreover, in light of the Exchange's effort to focus on Penny Pilot Options liquidity on the Exchange, the proposal to discontinue note 4 regarding Non-Penny Pilot Options is equitable and not unfairly discriminatory because it will apply uniformly to all Participants.

#### 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 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.

In this instance, the proposed amendments to NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fees for Removing Liquidity seek to continue to incentivize Participants to send order flow to NOM. The Exchange does not believe this proposal to add two incentives imposes an undue burden on inter-market competition because the Exchange's execution services are completely voluntary and subject to extensive competition.

The Exchange's proposal to incentivize Participants by continuing to offer the opportunity to reduce the NOM Market Maker and Non-NOM Market Maker Penny Pilot Options Fees for Removing Liquidity and also offering additional incentives to lower these fees from \$0.50 to \$0.32 per contract, does not create an undue burden on intra-market competition for various reasons. NOM Market Makers have obligations to the market and regulatory requirements,<sup>37</sup> which, as discussed, normally do not apply to other market participants. Offering the fee discount to

Non-NOM Market Makers provides Participants with flexibility in the manner in which they are submitting their orders. Non-NOM Market Makers have obligations on other exchanges to qualify as a market maker. Also, the Exchange believes that market makers not registered on NOM will be encouraged to send orders to NOM as an away market maker (Non-NOM Market Maker) with this incentive. Because the incentive is being offered to both market makers registered on NOM and those not registered on NOM, the Exchange believes that the proposal does not impose an undue burden on intra-market competition because it encourages market makers to direct liquidity to NOM to the benefit of all Participants.

Participants would be entitled to receive the fee discount when the Participant is both the buyer and seller (or removes liquidity from another Participant under Common Ownership) and therefore this qualifier does not create an undue burden on intra-market competition. NOM Participants are unaware at the time the order is entered of the identity of the contra-party, therefore, since contra-parties are anonymous, the Exchange believes that NOM Participants would aggressively pursue order flow in order to receive the benefit of the fee discount, to the benefit of all Participants.

The Exchange's proposal to continue to count all order flow toward the 1.50% or 1.75% requisite volume discussed herein, except for NOM Market Maker order flow, does not impose an undue burden on intra-market competition. It is not necessary to count NOM Market Maker volume in qualifying for the fee discount as that volume is counted toward qualifying for NOM Market Maker rebates.

The Exchange believes that permitting NOM Participants with 75% Common Ownership to aggregate their volume for purposes of obtaining the fee discount does not create an undue burden on intra-market competition because certain NOM Participants chose to segregate their businesses into different legal entities for purposes of conducting business. NOM Participants that chose to segregate their businesses into different legal entities should still be afforded the opportunity to receive the discount as if they were the same NOM Participant on both sides of the transaction.

<sup>37</sup> See *supra* note 25.

*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>38</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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2016-089 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-NASDAQ-2016-089. 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 Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2016-089 and should be submitted on or before July 15, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-14929 Filed 6-23-16; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-78106; File No. SR-NYSEMKT-2016-59]

**Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adopting New NYSE MKT Rules 2090—Equities (Know Your Customer) and 2111—Equities (Suitability) That Are Substantially Similar to FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability), Deleting Current NYSE MKT Rule 405—Equities (Diligence as to Accounts), and Making Other Conforming Changes**

June 20, 2016.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on June 9, 2016, NYSE MKT LLC ("Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission ("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 adopting new rule text that is substantially similar to Rules 2090 (Know Your Customer) and 2111 (Suitability) of the Financial Industry Regulatory Authority, Inc. ("FINRA"), (2) deleting current Rule 405—Equities (Diligence as to Accounts) ("Rule 405"), and (3) making other conforming changes. The proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), 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 self-regulatory organization 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 those 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 parts of such statements.

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

1. Purpose

The Exchange proposes to amend its rules to harmonize with certain FINRA rules. Specifically, the Exchange proposes (1) adopting new rule text that is substantially similar to FINRA Rules 2090 and 2111; (2) deleting Rule 405;<sup>4</sup> and (3) making other conforming changes.

Background

In 2007, FINRA and the Exchange's affiliate the New York Stock Exchange LLC ("NYSE")<sup>5</sup> entered into an

<sup>4</sup> References to rules are to NYSE MKT rules unless otherwise indicated.

<sup>5</sup> NYSE Regulation, Inc., a former not-for-profit subsidiary of the NYSE, was also a party to the Agreement by virtue of the fact that it performed regulatory functions for the NYSE pursuant to a delegation agreement. See Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251, 11264-65 (March 6, 2006) (SR-NYSE-2005-77) (approving delegation agreement). NYSE Regulation also performed regulatory services for the Exchange pursuant to an intercompany Regulatory Services Agreement ("RSA") that gave the Exchange the contractual right to review NYSE

<sup>38</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>39</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.