

and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2016-134. 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-2016-134 and should be submitted on or before November 7, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Robert W. Errett,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79080; File No. SR-Phlx-2016-100]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing of Proposed Rule Change To Amend the Pricing Schedule at Section IV, Part B titled "Flex Transaction Fees"

October 11, 2016.

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 October 3, 2016, NASDAQ PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the Pricing Schedule at Section IV, Part B titled "Flex Transaction Fees" to permit FLEX³ options to trade as strategies for purposes Section II Strategy Cap pricing.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqphlx.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 to amend Section IV, Part B, related to FLEX pricing, to permit Multiply Listed FLEX options to be eligible for the Section II Strategy Caps.⁴ The Section II Strategy

Fee cap generally applies to all strategy executions executed in standard option contracts (as opposed to Mini Option contracts) on the same trading day in the same option class.⁵ Today, Multiply Listed FLEX options are excluded from Strategy Caps. The proposal is designed to compete with other markets that apply similar fee caps but that do not exclude Multiply Listed FLEX option transactions from Strategy Fee Caps.⁶ FLEX options are only executed on the Exchange's trading floor and are not executed electronically on the Exchange.

Today, Customers are not assessed a fee for Multiply Listed FLEX options and Non-Customers are assessed a \$0.25 per contract fee for Multiply Listed FLEX options. Further, the Monthly Firm Fee Cap, Monthly Market Maker Cap, and the Options Surcharge in BKX, MNX and NDX described in Section II apply to Multiply Listed FLEX options. No other fees described in Section II apply to Multiply Listed FLEX options. The FLEX transaction fees for a Firm are waived for members executing facilitation orders pursuant to Exchange Rule 1064 when such members are trading in their own proprietary account. In addition, FLEX transaction fees for a Broker-Dealer are 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 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. Finally, Multiply Listed FLEX options are not eligible for Section II strategy caps.

The Exchange proposes to permit Multiply Listed FLEX options to be subject to strategy cap pricing.⁷ Currently, to qualify for a strategy cap,

equities, ETFs, ETNs and indexes which are Multiply Listed.

⁵ Dividend, merger and short stock interest strategies are the same trading day in the same options class when such members are trading in their own proprietary accounts.

⁶ See NYSE AMEX OPTIONS Fee Schedule. See also Securities Exchange Act Release No. 71015 (December 6, 2013), 78 FR 75642 (December 12, 2013).

⁷ The Exchange noted in a prior rule change that there is no mechanism to mark FLEX Option transactions for strategy caps, and therefore excluded Multiply Listed FLEX options for strategy treatment. See Securities Exchange Act Release No. 69548 (May 9, 2013), 78 FR 28681 (May 15, 2013) (SR-Phlx-2013-29). With this proposal the Exchange will implement a manual process to record the FLEX strategy with staff intervention thereby documenting the strategy for billing purposes.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ FLEX options are flexible exchange-traded index, equity, or currency option contracts that provide investors the ability to customize basic option features including size, expiration date, exercise style, and certain exercise prices. FLEX options may have expiration dates within five years. See Rule 1079. FLEX currency option contracts traded on the Exchange are also known as FLEX WCO or FLEX FCO contracts.

⁴ Section II includes pricing for Multiply Listed Options Fees which includes options overlying

²⁹ 17 CFR 200.30-3(a)(12).

the buy and sell side of a transaction must originate from the Exchange floor. The following are the strategy fee caps in Section II:

Floor options transactions—multiply listed options	Strategy	Qualification	Cap
Specialist, Market Maker, Professional, Firm, and Broker–Dealer.	Dividend, merger and short stock interest strategies.	Executed on the same trading day in the same options class when such members are trading in their own proprietary accounts.	\$1,500
	Reversal and conversion strategies	Executed on the same trading day in the same options class.	700
	Jelly rolls	Executed on the same trading day in the same options class.	700
	Box spreads	Executed on the same trading day in the same options class.	700
Per member organization	Dividend, merger, short stock interest, reversal and conversion, jelly roll, and box spread strategies (“Monthly Strategy Cap”).	Combined executions in a month when trading in own proprietary accounts.	65,000

The following types of strategies are eligible for the pricing in Section II: dividend strategy,⁸ merger strategy,⁹ short stock interest strategy,¹⁰ reversal and conversion strategies,¹¹ jelly roll strategy¹² and a box spread strategy.¹³ Reversal and conversion, jelly roll and box spread strategy executions are not included in the Monthly Strategy Cap for a Firm. Reversal and conversion, jelly roll and box spread strategy executions (as defined in this Section II) are included in the Monthly Firm Fee Cap. All dividend, merger, short stock interest, reversal and conversion, jelly

⁸ A dividend strategy is defined as transactions done to achieve a dividend arbitrage involving the purchase, sale and exercise of in-the-money options of the same class, executed the first business day prior to the date on which the underlying stock goes ex-dividend.

⁹ A merger strategy is defined as transactions done to achieve a merger arbitrage involving the purchase, sale and exercise of options of the same class and expiration date, executed the first business day prior to the date on which shareholders of record are required to elect their respective form of consideration, *i.e.*, cash or stock.

¹⁰ A short stock interest strategy is defined as transactions done to achieve a short stock interest arbitrage involving the purchase, sale and exercise of in-the-money options of the same class.

¹¹ Reversal and conversion strategies are transactions that employ calls and puts of the same strike price and the underlying stock. Reversals are established by combining a short stock position with a short put and a long call position that shares the same strike and expiration. Conversions employ long positions in the underlying stock that accompany long puts and short calls sharing the same strike and expiration.

¹² A jelly roll strategy is defined as transactions created by entering into two separate positions simultaneously. One position involves buying a put and selling a call with the same strike price and expiration. The second position involves selling a put and buying a call, with the same strike price, but with a different expiration from the first position.

¹³ A box spread strategy is a strategy that synthesizes long and short stock positions to create a profit. Specifically, a long call and short put at one strike is combined with a short call and long put at a different strike to create synthetic long and synthetic short stock positions, respectively.

roll and box spread strategy executions (as defined in Section II) are excluded from the Monthly Market Maker Cap.

The Exchange is amending the rule text to include Strategy Caps in the list of Section II pricing which is applicable to Multiply Listed FLEX options. As a result, a Multiply Listed FLEX option transaction that is part of a strategy execution would be included in the Strategy Fee cap. The proposal is designed to encourage members and member organizations to engage in both additional Multiply Listed FLEX option transactions and strategy executions on the Exchange.

The Exchange also proposes to correct a typographical error in Section IV to add a hyphen in the term BD-Customer.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁵ 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.”¹⁶

Likewise, in *NetCoalition v. Securities and Exchange Commission*¹⁷ (“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.¹⁸ 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.”¹⁹

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.’ . . .”²⁰ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange’s proposal to permit Multiply-Listed FLEX options to be eligible for the Section II Strategy Caps is reasonable because including

¹⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹⁷ *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010).

¹⁸ See *NetCoalition*, at 534–535.

¹⁹ *Id.* at 537.

²⁰ *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)).

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4) and (5).

Multiply-Listed FLEX option transactions in the Strategy Fee Cap may encourage members and member organizations to execute additional Multiply-Listed FLEX options and strategy executions on the Exchange. The proposed change would therefore result in greater amounts of liquidity on the Exchange, which should benefit the quality of the Exchange's market and investors, generally. This proposed change is further reasonable because the Exchange understands that other option markets similarly include Multiply Listed FLEX option transactions in certain fee caps applicable to strategy executions on such other markets.²¹

The Exchange believes that the proposed change is equitable and not unfairly discriminatory because all members and member organizations are eligible to transact Multiply Listed FLEX options and are eligible for the Strategy Fee Cap.

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.

The pricing proposed herein are intended to continue to incentivize market participants to execute additional Multiply Listed FLEX options and strategy executions on the Exchange and for this reason imposes no inter-market burden on competition. The proposal could increase competition on the Exchange by including Multiply Listed FLEX option transactions in the Strategy Fee Cap. This could result in members and

member organizations engaging in both additional Multiply Listed FLEX option transactions and strategy executions in order to reach the fee cap levels. The proposed change could also increase competition between the Exchange and other option markets by making the Exchange a more desirable market with respect to pricing for Multiply Listed FLEX option transactions and strategy executions.

If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of members or competing order execution venues to maintain their competitive standing in the financial markets.

The Exchange's proposal to permit Multiply Listed FLEX options to be eligible for the Section II Strategy Caps does not impose an undue burden on intra-market competition because all members and member organizations are eligible to transact Multiply Listed FLEX options and are eligible for the Strategy Fee Cap.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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. Please include File Number SR-Phlx-2016-100 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-2016-100. 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.

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SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of FOIA Services,

²¹ See note 6 above.

²² 17 CFR 200.30-3(a)(12).