

each risk setting is available to all Equity Members equally.

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

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act<sup>30</sup> and Rule 19b-4(f)(6)<sup>31</sup> thereunder.

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

**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-PEARL-2022-43 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-PEARL-2022-43. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<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 a.m. and 3 p.m. Copies of such 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-PEARL-2022-43 and should be submitted on or before November 28, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-96199; File No. SR-ISE-2022-24]

**Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Pricing Schedule at Options 7, Section 6 To Adopt a New Qualified Contingent Cross Rebate Program and Increase the Crossing Fee Cap**

November 1, 2022.

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 October 24, 2022, Nasdaq ISE, LLC ("ISE" 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 Exchange's Pricing Schedule at Options 7, Section 6.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/ise/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 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.

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

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

<sup>30</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>31</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>32</sup> 17 CFR 200.30-3(a)(12).

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

1. Purpose

The purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 6 to: (1) adopt a new Qualified Contingent Cross ("QCC")<sup>3</sup> rebate program, and (2) increase the Crossing Fee Cap.

The Exchange initially filed the proposed pricing changes on October 3, 2022 (SR-ISE-2022-21). On October 14, 2022, the Exchange withdrew that filing and submitted SR-ISE-2022-22. On October 24, 2022, the Exchange withdrew that filing and submitted this filing.

QCC Rebate

Background

Today, the Exchange offers a QCC and Solicitation Rebate program in Options 7, Section 6.A whereby Members using QCC and/or other solicited orders executed in the Solicitation<sup>4</sup> or Facilitation<sup>5</sup> Mechanisms (together with QCC, collectively, "Current Solicited Orders") receive rebates for each originating contract side in all symbols traded on the Exchange. Once a Member reaches a certain volume threshold in Current Solicited Orders during a month, the Exchange provides rebates to that Member for all of its eligible Current Solicited Order traded contracts for that month.<sup>6</sup> Members receive the rebate for all Current Solicited Orders except for Current Solicited Orders between two Priority Customers.<sup>7</sup>

<sup>3</sup> A QCC Order is comprised of an originating order to buy or sell at least 1000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Supplementary Material .01 to Options 3, Section 7, coupled with a contra-side order or orders totaling an equal number of contracts. See Options 3, Section 7(j).

<sup>4</sup> The Solicitation or Solicited Order Mechanism is a process by which an Electronic Access Member ("EAM") can attempt to execute orders of 500 or more contracts it represents as agent against contra orders that it solicited. See Options 3, Section 11(d). The Exchange will make a corrective change in Section 6.A to replace the reference to Solicitation Mechanism with Solicited Order Mechanism.

<sup>5</sup> The Facilitation Mechanism is a process by which an EAM can execute a transaction wherein the EAM seeks to facilitate a block-size order it represents as agent, and/or a transaction wherein the EAM solicited interest to execute against a block-size order it represents as agent. See Options 3, Section 11(b).

<sup>6</sup> All eligible volume from affiliated Members is aggregated in determining QCC and Solicitation volume totals, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

<sup>7</sup> A Priority Customer is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on

Today, the volume threshold and corresponding QCC and Solicitation Rebates in Section 6.A are as follows:

Originating contract sides	Rebate
0 to 99,999 .....	\$0.00
100,000 to 199,999 .....	(\$0.05)
200,000 to 499,999 .....	(\$0.07)
500,000 to 749,999 .....	(\$0.09)
750,000 to 999,999 .....	(\$0.10)
1,000,000+ .....	(\$0.11)

Volume resulting from all Current Solicited Orders is aggregated in determining the applicable volume tier as set forth above. For Members that achieve the highest volume threshold of 1,000,000 or more originating contract sides, the Exchange also currently provides an additional rebate of \$0.01 per originating contract side on Current Solicited Orders that qualify for the QCC and Solicitation Rebate program if the Member achieves in a given month: (i) combined Current Solicited Order volume of more than 1,750,000 originating contract sides and (ii) Priority Customer Complex Tiers 6 or higher in Section 4 (the "note \* incentive").<sup>8</sup> In addition, the Exchange provides an additional rebate of \$0.01 per originating contract side that is applied to each QCC and Solicitation Rebate volume tier where the Member receives the rebate (*i.e.*, tier 2 or higher) if the Member also achieves Priority Customer Complex Tier 2 or higher in a given month (the "note &" incentive). Thus, qualifying Members may receive up to \$0.06 in the second QCC and Solicitation Rebate volume tier, \$0.08 in the third tier, \$0.10 in the fourth tier, \$0.11 in the fifth tier, and \$0.13 in the sixth and highest tier (*i.e.*, the \$0.11 base rebate, the \$0.01 note \* incentive, and the \$0.01 note & incentive).

Proposal

To further encourage QCC order flow, the Exchange now proposes to adopt a new QCC Rebate program in Section 6.B. As a result of this change, the Exchange will no longer provide the Section 6.A rebates, as described above, for QCC orders. With the proposed changes, the Exchange will continue to provide the Section 6.A rebates for solicited orders executed in the Solicited Order Mechanism or Facilitation Mechanism ("Amended

average during a calendar month for its own beneficial account(s), as defined in Nasdaq ISE Options 1, Section 1(a)(37).

<sup>8</sup> As set forth in Options 7, Section 4, Priority Customer Complex Tiers are based on Total Affiliated Member or Affiliated Entity complex order volume (excluding Crossing Orders and Responses to Crossing Orders) calculated as a percentage of Customer Total Consolidated Volume.

Solicited Orders"). In addition, executed QCC volume will continue to be combined with executed Amended Solicited Order volume to count towards the Section 6.A rebate tiers described above; however, the Section 6.A rebates will only be provided to the Amended Solicited Orders as the Exchange will pay the new QCC Rebates in Section 6.B to QCC orders under this proposal.

To effectuate the foregoing changes, the Exchange first proposes to update all references to the "QCC and Solicitation Rebate" in Section 6.A to the "Solicitation Rebate." The Exchange also proposes to amend the first paragraph of Section 6.A to provide that Members using the QCC and/or other solicited orders executed in the Solicited Order Mechanism or Facilitation Mechanism will receive rebates for solicited orders executed in the Solicited Order Mechanism or Facilitation Mechanism (*i.e.*, Amended Solicited Orders) according to the table in Section 6.A for each originating contract side in all symbols traded on the Exchange. Volume associated with QCC executions will be aggregated in calculating the Solicitation Rebate volume tiers in Section 6.A, but Members that execute QCC volume will receive the QCC Rebate in Section 6.B.

The Exchange also proposes to update each instance in Section 6.A where the current language refers to Amended Solicited Order volume to add a reference to QCC volume as well, and to make clear in the second paragraph of Section 6.A that the volume aggregation in Section 6.A would include *combined* QCC and Amended Solicited Order volume (as is the case today). The Exchange further proposes a corrective change in the second paragraph of Section 6.A to replace the reference to QCC and Solicitation volume totals with QCC and Amended Solicited Order volume totals to use correct terminology.

Next, the Exchange proposes to set forth the new QCC Rebate in Section 6.B, and relocate the PIM and Facilitation Rebate currently in Section 6.B into Section 6.C, which is currently reserved. As proposed, Section 6.B will provide that Members that submit QCC orders when at least one side of the QCC transaction is a Non-Priority Customer will receive the below QCC Rebates. QCC Rebates will be paid to each agency contract side ("QCC Agency Side") in all symbols traded on the Exchange. Specifically:

- When only one side of the QCC transaction is a Non-Priority Customer,<sup>9</sup> the Member will receive a \$0.14 per contract rebate for each QCC Agency Side.

- When both sides of the QCC transaction are Non-Priority Customers, the Member will receive a \$0.22 per contract rebate for each QCC Agency Side.

In addition, the Exchange proposes to provide an additional incentive of \$0.03 per contract for each QCC Agency Side that qualifies for the QCC Rebate program if they achieve Priority Customer Complex Tier 2 or higher in a given month. The proposed incentive will be structured similarly to the existing note & incentive within Section 6.A in that Members will need to achieve the same Priority Customer Complex Tier 2 or higher to be eligible for the incentive. The proposed incentive will also be applied to each QCC Rebate and will be cumulative of the QCC Rebates so that qualifying Members could receive up to \$0.17 per contract for each QCC Agency Side when only one side of the QCC transaction is a Non-Priority Customer, and up to \$0.25 per contract for each QCC Agency Side when both sides of the QCC transaction are Non-Priority Customers.

Lastly, the Exchange proposes to define Non-Priority Customers in Section 1 because this term is currently used throughout Options 7,<sup>10</sup> and will also be used in proposed Section 6.B. Today, Non-Priority Customers include every market participant capacity in the Exchange's Pricing Schedule except for Priority Customers. This is also how the Exchange will use this term in proposed Section 6.B. As such, the Exchange proposes to define Non-Priority Customers in Section 1 as including Market Makers,<sup>11</sup> Non-Nasdaq ISE Market Makers (FarMMs),<sup>12</sup> Firm

Proprietary<sup>13</sup>/Broker-Dealers,<sup>14</sup> and Professional Customers.<sup>15</sup>

Overall, Members will be eligible to receive higher rebates on qualifying QCC orders under Section 6.B compared to the rebates they receive today under Section 6.A. As such, Members may be incentivized to send more QCC and complex order flow to the Exchange.

#### Crossing Fee Cap

As set forth in Options 7, Section 6.H, the Exchange presently offers a Crossing Fee Cap of \$90,000 per month, per Member, on all Firm Proprietary transactions that are part of the originating or contra-side of a Crossing Order.<sup>16</sup> Fees charged by the Exchange for Responses to Crossing Orders are not included in the calculation of the monthly fee cap. Surcharge fees charged by the Exchange for licensed products and the fees for index options as set forth in Section 5 are not included in the calculation of the monthly fee cap.<sup>17</sup> For purposes of the Crossing Fee Cap the Exchange attributes eligible volume to the ISE Member on whose behalf the Crossing Order was executed.

At this time, the Exchange proposes to increase the Crossing Fee Cap from \$90,000 to \$150,000. While the Crossing Fee Cap will increase under this proposal, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act,<sup>18</sup> in general, and furthers the objectives of sections 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, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange's proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: "[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>20</sup>

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>21</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its

<sup>9</sup> Non-Priority Customers include Market Makers, Non-Nasdaq ISE Market Makers (FarMMs), Firm Proprietary/Broker-Dealers, and Professional Customers.

<sup>10</sup> See Section 3, Section 4, and Section 5.C.

<sup>11</sup> The term "Market Makers" refers to Competitive Market Makers and Primary Market Makers, collectively. See Options 1, Section 1(a)(21).

<sup>12</sup> A Non-Nasdaq ISE Market Maker is a market maker as defined in section 3(a)(38) of the Securities Exchange Act of 1934, as amended, registered in the same options class on another options exchange.

<sup>13</sup> A Firm Proprietary order is an order submitted by a member for its own proprietary account.

<sup>14</sup> A Broker-Dealer order is an order submitted by a member for a broker-dealer account that is not its own proprietary account.

<sup>15</sup> A Professional Customer is a person or entity that is not a broker/dealer and is not a Priority Customer. See also Options 1, section 1(a)(40).

<sup>16</sup> Crossing Orders are contracts that are submitted as part of a Facilitation, Solicitation, PIM, Block or QCC order. All eligible volume from affiliated Members is aggregated for purposes of the Crossing Fee Cap, provided there is at least 75% common ownership between the Members as reflected on each Member's Form BD, Schedule A.

<sup>17</sup> In addition, a service fee of \$0.00 per side applies to all order types that are eligible for the fee cap. The service fee would apply once a Member reaches the fee cap level and would apply to every contract side above the fee cap. A Member who does not reach the monthly fee cap is not charged the service fee. Once the fee cap is reached, the service fee shall apply to eligible Firm Proprietary orders in all Nasdaq ISE products. The service fee is not calculated in reaching the cap.

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

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

<sup>20</sup> *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

<sup>21</sup> Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

liquidity and market share relative to its competitors.

#### QCC Rebate

The Exchange believes that the proposed QCC Rebate program is reasonable, equitable, and not unfairly discriminatory. The proposed changes are designed to incentivize market participants to direct more QCC and complex order flow to ISE, which the Exchange believes would enhance market quality to the benefit of all market participants. The Exchange believes the proposed QCC Rebate structure is reasonable because the proposed changes provide opportunities for Members to receive higher rebates for each QCC Agency Side than they currently receive under the QCC and Solicitation Rebate program in Options 7, Section 6.A, which may incentivize more QCC order flow to the Exchange. As discussed above, qualifying Members presently receive up to \$0.06 in the second QCC and Solicitation Rebate volume tier, \$0.08 in the third tier, \$0.10 in the fourth tier, \$0.11 in the fifth tier, and \$0.13 in the sixth and highest tier (*i.e.*, the \$0.11 base rebate, the \$0.01 note \* incentive, and the \$0.01 note & incentive). With the proposed changes, qualifying Members would receive \$0.14 per contract (or \$0.17 per contract if they also achieve Priority Customer Complex Tier 2 or higher in a given month) for each QCC Agency Side when only one side of the QCC transaction is a Non-Priority Customer, and \$0.22 per contract (or \$0.25 per contract if they also achieve Priority Customer Complex Tier 2 or higher in a given month) when both sides of the QCC transaction are Non-Priority Customers. The Exchange will continue to not provide any rebates under this proposal when both sides of the QCC transaction are Priority Customers, as is the case today. The Exchange believes that this is reasonable given that Priority Customers are already incentivized by having no transaction fees for Crossing Orders, including QCC orders.<sup>22</sup> The Exchange also notes that other competing exchanges offer alternative QCC rebates that depend on the capacity of the parties to the transaction.<sup>23</sup>

The Exchange also believes that the proposed additional \$0.03 incentive that will be provided to Members that achieve Priority Customer Complex Tier 2 or higher in a given month (in addition to qualifying for the QCC Rebate program) is reasonable because this incentive is intended to encourage Members to send more QCC order and complex order flow to the Exchange. As discussed above, the proposed incentive is similar to the existing & incentive in Options 7, Section 6.A in that Members will need to achieve the same Priority Customer Complex Tier 2 or higher to be eligible for the incentive. Members, however, that qualify for the QCC Rebate Program will now receive a higher additional incentive under this proposal for each QCC Agency Side than they currently receive under the note & incentive in Section 6.A. As such, more Members may seek to qualify for the proposed incentive by sending additional QCC order and complex order flow to ISE. All market participants benefit from increased order interaction when more order flow is available on the Exchange.

The Exchange also believes that the proposed QCC Rebate program in Options 7, Section 6.B is equitable and not unfairly discriminatory because all Members will be eligible for the proposed rebates by sending QCC and complex order flow to the Exchange. Further, the Exchange believes that applying the proposed rebates where at least one party to the QCC transaction is a Non-Priority Customer is equitable and not unfairly discriminatory because Priority Customers do not receive any QCC incentives today under the QCC and Solicitation Rebate program in Options 7, Section 6.A when both sides of the QCC transaction are Priority Customers. As discussed above, Priority Customers are not assessed fees for QCC transactions today, and therefore do not need the added incentive of the proposed rebates. In addition, to the extent the proposed QCC Rebate program encourages Members to send more QCC and complex order flow to ISE, all market participants will benefit from the resulting additional liquidity and trading opportunities on ISE.

The Exchange believes that the proposed changes in Options 7, Section 6.A are reasonable, equitable, and not unfairly discriminatory because all of the changes are intended to make clear

that the Exchange will continue to provide the Section 6.A rebates for solicited orders executed in the Solicited Order Mechanism or Facilitation Mechanism (*i.e.*, the Amended Solicited Orders) and that QCC orders will receive the proposed rebates in Section 6.B. In addition, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory to continue aggregating executed QCC volume with executed Amended Solicited Order volume towards the Section 6.A rebate tiers described above while only providing the Section 6.A rebates to the Amended Solicited Orders, as the Exchange will pay the new QCC Rebates in Section 6.B to QCC orders under this proposal. The Exchange also believes that this proposal will further encourage Members to bring additional QCC order flow to ISE in order to receive the Section 6.A rebates on their Amended Solicited Orders and Section 6.B rebates on their QCC orders, which, in turn, brings increased liquidity and additional opportunities for interaction with this order flow to the benefit of all market participants.

Lastly, the Exchange believes that its proposal to add the definition of “Non-Priority Customers” in Options 7, Section 1 is reasonable, equitable, and not unfairly discriminatory because it will bring greater transparency to the Exchange’s Pricing Schedule by codifying how this term is used today throughout the Exchange’s Pricing Schedule, and how it will be used in the proposed QCC Rebate program.

#### Crossing Fee Cap

The Exchange believes that its proposal to increase the Crossing Fee Cap from \$90,000 to \$150,000 is reasonable. The Crossing Fee Cap was established to reward Members for executing a higher volume of Firm Proprietary Crossing Orders on the Exchange by capping the associated fees. The Exchange believes that the increased fee cap will be set at a level that continues to appropriately reward Members for executing high volumes of such Crossing Orders. Despite the proposed increase, the Exchange believes that Members will continue to be incentivized to bring Firm Proprietary Crossing Order flow to ISE, as Members will still have the opportunity to pay no transaction fees for such orders beyond the \$150,000 cap.

The Exchange also believes that the proposed increase to the Crossing Fee Cap is equitable and not unfairly discriminatory because it will apply uniformly to all Members engaged in

<sup>22</sup> See Options 7, Sections 3 and 4.

<sup>23</sup> See BOX Exchange (“BOX”) Fee Schedule, Section IV.D.1. BOX offers tiered QCC rebates to Participants that entered the order into the BOX System when at least one party to the QCC transaction is a Broker-Dealer or Market Maker. When only one side of the QCC transaction is a Broker-Dealer or Market Maker, Rebate 1 will apply. When both parties to the QCC transaction are a Broker-Dealer or Market Maker, Rebate 2 will apply. See also Cboe EDGX Options Exchange (“EDGX”) Fee Schedule, QCC Initiator/Solicitation Rebate Tiers. Like BOX, EDGX offers tiered rebates for QCC

transactions when at least one side of the transaction is of Non-Customer, Non-Professional capacity. When only one side of the transaction is of Non-Customer, Non-Professional capacity, Rebate 1 will apply. When both sides of the transaction are of Non-Customer, Non-Professional capacity, Rebate 2 will apply.

Firm Proprietary trading in options classes traded on the Exchange. The Exchange does not believe it is unfairly discriminatory to offer the Crossing Fee Cap to Firm Proprietary transactions as differentiated pricing already exists on the Exchange's Pricing Schedule to encourage different segments of order flow. For instance, the Exchange generally provides Priority Customer orders more favorable pricing through lower or no transaction fees, including Priority Customer Crossing Orders that are presently assessed no fees, and through rebate opportunities like the Priority Customer rebate currently provided for adding liquidity in Non-Select Symbols.<sup>24</sup> Professional Customer orders are presently charged a lower transaction fee for executed QCC orders and for orders executed in the Solicited Order Mechanism (\$0.10 for Professional Customers versus \$0.20 for all other Non-Priority Customers).<sup>25</sup> Broker-Dealer and Firm Proprietary orders are incentivized in the Exchange's PIM and Facilitation Rebate program.<sup>26</sup> Market Makers are offered rebates through the Exchange's Market Maker Plus program.<sup>27</sup> The Exchange further believes there is nothing impermissible about offering the Crossing Fee Cap solely to Firm Proprietary transactions given that this practice is consistent with firm fee caps in place on other options exchanges.<sup>28</sup> To the extent the amended Crossing Fee Cap continues to encourage additional Firm Proprietary Crossing Order flow to ISE, such order flow brings increased liquidity and additional opportunities for interaction with this order flow, which ultimately benefits all market 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 intra-market competition, the Exchange does not believe that this proposal will place any category of market participant at a competitive disadvantage. As discussed above, any Member may qualify for the proposed QCC Rebate program (which will be higher than the current rebates being

provided under Section 6.A) by sending QCC and complex order flow to the Exchange. While the Exchange will apply the proposed rebates to QCC transactions where at least one party is a Non-Priority Customer, Priority Customers are not assessed fees for QCC transactions today, and therefore do not need the added incentive of the proposed rebates. Further, to the extent the Exchange's proposal incentivizes Members to bring additional QCC and complex order flow to ISE, the Exchange believes that the resulting additional volume and liquidity will benefit all market participants. The Exchange also does not believe that increasing the Crossing Fee Cap will impose an undue burden on intra-market competition because it will apply uniformly to all Members engaged in Firm Proprietary trading in options classes traded on the Exchange. To the extent the amended Crossing Fee Cap continues to provide an incentive for Members to bring additional Firm Proprietary Crossing Order flow to the Exchange, such order flow brings increased liquidity to the benefit of all market participants.

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. 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 sum, 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.

#### *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>29</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-ISE-2022-24 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-ISE-2022-24. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<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,

<sup>24</sup> See Options 7, Sections 3 and 4. Non-Select Symbols are options overlying all symbols that are not included in the Penny Interval Program.

<sup>25</sup> See Options 7, Section 3 (note 16) and Section 4 (note 14).

<sup>26</sup> See Options 7, Section 6.B.

<sup>27</sup> See Options 7, Section 3 (note 5).

<sup>28</sup> See, e.g., Nasdaq GEMX Options 7, Section 4.C and Nasdaq Phlx Options 7, Section 4.

<sup>29</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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-ISE-2022-24 and should be submitted on or before November 28, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>30</sup>

**J. Matthew DeLesDernier,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96197; File No. SR-Phlx-2022-41]

### Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Phlx's Pricing Schedule

November 1, 2022.

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 October 17, 2022, 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 Phlx's Pricing Schedule at Options 7.<sup>3</sup>

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 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 Schedule at Options 7. Specifically, Phlx proposes to amend: (1) Options 7, Section 3, Rebates and Fees for Adding and Removing Liquidity in SPY, with respect to its pricing for Price Improvement XL ("PIXL") executions in SPY; (2) Options 7, Section 4, Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY and broad-based index options symbols listed within Options 7, Section 5.A), with respect to its Qualified Contingent Cross ("QCC") Rebates and Monthly Firm Fee Cap; and (3) Options 7, Section 6, Other Transaction Fees, with respect to PIXL pricing other than options in SPY. Each change will be described below.

###### Options 7, Section 3

The Exchange proposes to amend Options 7, Section 3, Rebates and Fees for Adding and Removing Liquidity in SPY, with respect to its PIXL executions in SPY. Today, SPY PIXL Initiating Orders<sup>4</sup> are assessed a \$0.05 per contract fee, however, members or member organizations that qualify for Options 7, Section 2, Customer<sup>5</sup> Rebate Tiers 2 through 6 or qualify for the

Monthly Firm Fee Cap<sup>6</sup> are eligible for a rebate of \$0.12 per contract for all SPY Complex PIXL Orders greater than 499 contracts, provided the member or member organization executes an average of 2,500 contracts per day of SPY Complex PIXL Orders in a month.<sup>7</sup> The Exchange separately assesses fees for PIXL Orders contra the Initiating Order<sup>8</sup> which are not being amended at this time.

At this time, the Exchange proposes to continue to assess SPY PIXL Initiating Orders a \$0.05 per contract fee. Members or member organizations that qualify for Options 7, Section 2, Customer Rebate Tiers 2 through 6 or qualify for the Monthly Firm Fee Cap will continue to be eligible for a rebate of \$0.12 per contract for all SPY Complex PIXL Orders greater than 499 contracts when contra to an Initiating Order, provided the member or member organization executes an average of 2,500 contracts per day of SPY Complex PIXL Orders in a month. The Exchange's proposal to further qualify that the SPY Complex PIXL Orders greater than 499 contracts must be contra to an Initiating Order, in addition to the member or member organization having executed an average of 2,500 contracts per day of SPY Complex PIXL Orders in a month. As is the case today, when the PIXL Order is contra to other than the Initiating Order, the PIXL Order is assessed \$0.00 per contract, unless the PIXL Order is a Customer, in which case the Customer receives a rebate of \$0.40 per contract.

Below is an example of the proposed change which presumes the market participant has met the qualifications for the rebate.

<sup>6</sup> Today, Firms are subject to a Monthly Firm Fee Cap of \$75,000. See Options 7, Section 4.

<sup>7</sup> A member may electronically submit for execution an order it represents as agent on behalf of a public customer, broker-dealer, or any other entity ("PIXL Order") against principal interest or against any other order (except as provided in Options 3, Section 13(a)(6)) it represents as agent ("Initiating Order") provided it submits the PIXL order for electronic execution into the PIXL Auction ("Auction") pursuant to Options 3, Section 13.

<sup>8</sup> When the PIXL Order is contra to the Initiating Order, a Customer PIXL Order is assessed \$0.00 per contract and all other Non-Customer market participants are assessed a \$0.38 per contract fee when contra to an Initiating Order. Further, when the PIXL Order is contra to other than the Initiating Order, the PIXL Order is assessed \$0.00 per contract, unless the PIXL Order is a Customer, in which case the Customer receives a rebate of \$0.40 per contract. Finally, all other Non-Customer contra parties to the PIXL Order that are not the Initiating Order are assessed a Fee for Removing Liquidity of \$0.50 per contract or are entitled to receive the Rebate for Adding Liquidity. When the PIXL Order is contra to a Lead Market Maker or Market Maker quote, which was established at the initiation of a PIXL auction, the Customer PIXL Order is not eligible for a rebate. See Options 7, Section 3.

<sup>30</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The Exchange initially filed the proposed pricing changes on October 3, 2022 as SR-Phlx-2022-40. The instant filing replaced SR-Phlx-2022-40 which was withdrawn on October 17, 2022.

<sup>4</sup> An order entered into a PIXL Auction mechanism shall be comprised of two orders, a PIXL agency order and a contra-side Initiating Order. See Options 3, Section 13.

<sup>5</sup> The term "Customer" applies to any transaction that is identified by a member or member organization for clearing in the Customer range at The Options Clearing Corporation ("OCC") which is not for the account of a broker or dealer or for the account of a "Professional" (as that term is defined in Options 1, Section 1(b)(45)). See Options 7, Section 1(c).