

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76780; File No. SR-Phlx-2015-111)

December 28, 2015

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NASDAQ OMX PHLX Fee Schedule to Increase the Options Surcharge Fee for MNX and NDX

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 December 18, 2015, NASDAQ OMX 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 Exchange’s Pricing Schedule at Section II, entitled “Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed).”³ The Exchange purposes to increase the Options Surcharge in MNX⁴ and NDX.⁵

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments to become operative on January 4, 2016.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The following symbols are assessed the fees in Section III for Singly Listed Options: SOX, HGX and OSX, and not Section II.

⁴ MNX represents options on the one-tenth value of the Nasdaq 100 Index traded under the symbol MNX (“MNX”).

⁵ NDX represents options on the Nasdaq 100 Index traded under the symbol NDX (“NDX”).

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqomxphlx.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 increase the Options Surcharge for transactions in MNX and NDX from \$0.20 to \$0.25 per contract for all non-Customers (Professionals,⁶ Market Makers,⁷ Specialists,⁸ Broker-Dealers⁹ and Firms¹⁰) in Section II of the Pricing Schedule. Customers¹¹

⁶ The term "Professional" 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). See Rule 1000(b)(14).

⁷ A "Market Maker" includes Registered Options Traders (Rule 1014(b)(i) and (ii)), which includes Streaming Quote Traders (see Rule 1014(b)(ii)(A)) and Remote Streaming Quote Traders (see Rule 1014(b)(ii)(B)). Directed Participants are also market makers.

⁸ The term "Specialist" applies to transactions for the account of a Specialist as defined in Exchange Rule 1020(a).

⁹ The term "Broker-Dealer" applies to any transaction that is not subject to any of the other transaction fees applicable within a particular category.

¹⁰ The term "Firm" applies to any transaction that is identified by a member or member organization for clearing in the Firm range at The Options Clearing Corporation.

will continue not to be assessed an Options Surcharge in MNX and NDX. The Options Surcharge is assessed in addition to the Options Transactions Charges in Section II of the Pricing Schedule. This rule change applies to both electronic and floor transactions.

The Exchange believes that these surcharges will assist the Exchange in remaining competitive in these options by recouping certain fees.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹² in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act¹³ in particular, because 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.

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, for example, the Commission indicated that market forces should generally determine the price of non-core market data because national market system regulation “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁴ Likewise, in

¹¹ 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 and that is not for the account of a broker or dealer or for the account of a “Professional” as that term is defined in Rule 1000(b)(14).

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ Securities Exchange Act Release No. 51808 at 37499 [sic] (June 9, 2005) (“Regulation NMS Adopting Release”).

NetCoalition v. NYSE Arca, Inc.¹⁵ (“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.¹⁶ 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.”¹⁷

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’”¹⁸ 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 increase the Options Surcharge for transactions in MNX and NDX from \$0.20 to \$0.25 per contract for all non-Customer market participants is reasonable because all non-Customer market participants will be assessed the same increased Options Surcharge of \$0.25 per contract. Customers will continue not to be assessed an Options Surcharge. Customer liquidity benefits the Exchange in offering other market participants an opportunity to interact with this order flow on the Exchange. Also, the Options Surcharge

¹⁵ NetCoalition v. NYSE Arca, Inc. 615 F.3d 525 (D.C. Cir. 2010).

¹⁶ See NetCoalition, at 534.

¹⁷ Id. at 537.

¹⁸ Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

remains competitive with fees at other options exchanges.¹⁹

The Exchange's proposal to increase the Options Surcharge for transactions in MNX and NDX from \$0.20 to \$0.25 per contract for all non-Customer market participants is equitable and not unfairly discriminatory because the Exchange will continue to assess all non-Customer market participants a uniform Options Surcharge. Customers are not assessed an Options Surcharge. Customer order flow is unique because Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Finally, the Exchange believes that it is equitable and not unfairly discriminatory for non-Customer market participants who trade these products to pay the Options Surcharge as the Exchange has entered into a licensing agreement to obtain intellectual property rights to list these products and seeks to recoup a portion of its costs.

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

¹⁹ See NYSE MKT LLC's ("NYSE Amex") Fee Schedule. NYSE Amex assesses a Royalty Fee of \$0.22 per contract for transactions in MNX and NDX. See also NYSE Arca Inc.'s ("NYSE Arca") Fees and Charges. NYSE Arca, Inc. assesses a Royalty Fee of \$0.22 per contract for transactions in MNX and NDX.

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 Exchange's proposal to increase the Options Surcharge for transactions in MNX and NDX from \$0.20 to \$0.25 per contract for all non-Customer market participants does not impose an undue burden on intra-market competition because all non-Customer market participants will continue to be assessed a uniform Options Surcharge for transactions in MNX and NDX, in addition to other transaction fees. Customer liquidity benefits all market participants by providing more trading opportunities, which attracts Specialists and Market Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

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.²⁰

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,

²⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2015-111 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2015-111. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m.

and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; 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-Phlx-2015-111 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Jill M. Peterson
Assistant Secretary

²¹ 17 CFR 200.30-3(a)(12).