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.

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–BATS–2013–058 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–BATS–2013–058. 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 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; 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–BATS–2013–058 and should be submitted on or before December 10, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–27619 Filed 11–18–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70866; File No. SR–Phlx–2013–113]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Offer a Customer Rebate

November 13, 2013.

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 31, 2013, 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 Section B of the Exchange's Pricing Schedule, entitled ''Customer Rebate Program'', to offer its market participants an additional rebate.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed amendment to be operative on November 1, 2013.

The text of the proposed rule change is available on the Exchange's Web site 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 purpose of the proposed rule change is to amend the Customer Rebate Program in Section B of the Pricing Schedule to increase Customer rebates available to market participants that transact Customer-denominated orders on Phlx. Specifically, Phlx proposes to offer its members the opportunity to increase the Customer rebates offered in Section B of the Pricing Schedule for transactions on Phlx if the aggregate volumes of Customer orders transacted by a member organization and its affiliates on Phlx, The NASDAQ Options Market LLC (''NOM'') and/or NASDAQ OMX BX, Inc. (''BX Options'') (collectively ''NASDAQ OMX exchanges'') exceed a specified volume. The Exchange would increase the applicable Phlx Customer rebate for which the member organization qualified in the Customer Rebate Program by $0.02 per contract, in any category, provided the member organization, together with any affiliate under Common Ownership,[3] transacts Customer volume on Phlx, NOM and/or BX in multiply-listed options that is electronically delivered and executed equal to or greater than 2.5% of national customer volume in multiply-listed options during the month.

Today, the Exchange pays Customer Rebates based on a four-tier structure comprised of percentage thresholds of Customer Orders in multiply-listed options based on national volume. There are two Categories, A and B, of transactions eligible for rebates. In Category A, rebates are paid to members executing electronically-delivered Customer Simple Orders in Penny Pilot Options and Customer Simple Orders in Non-Penny Pilot Options in Section II symbols.[4] In Category B, rebates are

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] Common ownership is defined in the Preface to the Pricing Schedule as [sic] member organizations under 75% common ownership or control.

[4] Rebates are paid on PIXL Orders in Section II symbols that execute against non-Initiating Order interest, except in the case of Customer PIXL Orders that are greater than 999 contracts. All Customer

paid to members executing electronically-delivered Customer Complex Orders in Penny Pilot Options and Non-Penny Pilot Options in Section II symbols.[5] The Exchange bases a market participant's qualification for a Customer Rebate Tier on the percentage of total national customer volume in multiply-listed options that are transacted monthly on Phlx. To determine the applicable rebate, the Exchange totals Customer volume in Multiply Listed Options [6] (including options overlying the SPDR S&P 500 (''SPY'')) [7] that are electronically-delivered and executed, except volume associated with electronic Qualified Contingent Cross (''QCC'') Orders. [8] Today, the Customer Rebate Tiers [9] are as follows: [10]

Customer rebate tiers	Percentage thresholds of national customer volume in multiply-listed equity and ETF options classes, excluding SPY options (monthly)	Category A	Category B
Tier 1	0.00%–0.75%	$0.00	$0.00
Tier 2	Above 0.75%–1.60%	0.12	0.17
Tier 3	Above 1.60%–2.50%	0.14	0.17
Tier 4	Above 2.50%	0.15	0.17

The Exchange proposes to offer Phlx members the opportunity to earn a higher rebate on Phlx by transacting a quantity of electronically delivered and executed Multiply Listed Customer volume that is equal to or greater than 2.5% percent of national customer volume in multiply-listed options. The Exchange desires to incentivize its members to achieve this type of volume by offering to aggregate Customer volume transacted on Phlx with volume transacted on NOM and/or BX Options for the sole purpose of measuring the volume criteria. Phlx would pay the additional $0.02 per contract rebate, above and beyond other Customer rebates, on all eligible orders [11] transacted on Phlx by the qualifying member organization.[12] The Exchange believes that the additional rebate would lower costs to transact business on Phlx and increase the volume of Customer orders directed to and executed on Phlx, to the benefit of all other market participants on Phlx.

2. Statutory Basis

The Exchange believes that its proposal to amend its Pricing Schedule is consistent with Section 6(b) of the Act [13] in general, and furthers the objectives of Section 6(b)(4) and (b)(5) of the Act [14] 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 Phlx operates or controls, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In analyzing the market for non-core market data, the Commission developed a framework for analyzing whether market data fees are equitable, fair and reasonable, and not unreasonably discriminatory.[15] NASDAQ [sic] believes that the analytical framework adopted in the ArcaBook order with respect to non-core market data is equally applicable to exchange transaction fees, which must also be reasonable, equitably allocated, and not unfairly discriminatory in order to be consistent with the Act. As the Commission found:

> If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior. . . . [W]hen an exchange is subject to competitive forces in its distribution of non-core data, many market participants would be unlikely to purchase the exchange's data products if it sets fees that are inequitable, unfair, unreasonable, or unreasonably discriminatory. As a result, competitive forces generally will constrain an exchange in setting fees for non-core data because it should recognize that its own profits will suffer if it attempts to act unreasonably or unfairly. For example, an exchange's attempt to impose unreasonably or unfairly discriminatory fees on a certain category of customers would likely be counter-productive for the exchange because, in a competitive environment, such customers generally would be able to respond by using alternatives to the exchange's data. The Commission therefore believes that the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, reasonable, and not unreasonably or unfairly discriminatory.[16]

PIXL Orders that are greater than 999 contracts will be paid a rebate regardless of the contra-party to the transaction. PIXL is the Exchange's price improvement mechanism known as Price Improvement XL or (PIXL℠). *See* Rule 1080(n). 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 Rule 1080(n)(i)(E)) it represents as agent (''Initiating Order''), provided it submits the PIXL order for electronic execution into the PIXL Auction (''Auction'') pursuant to Rule 1080. *See* Exchange Rule 1080(n).

[5] Rebates are paid on PIXL Orders in Section II symbols that execute against non-Initiating Order interest, except in the case of Customer PIXL Complex Orders that are greater than 999 contracts. All Customer PIXL Complex Orders that are greater than 999 contracts will be paid a rebate regardless of the contra-party to the transaction.

[6] A Multiply Listed security means an option that is listed on more than one exchange.

[7] SPY is a Multiply Listed Option that is priced differently on Phlx as compared to other Multiply Listed Option symbols. *See* Section I of the Pricing Schedule.

[8] A QCC Order is comprised of an 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 Rule 1080(o)(3), coupled with a contra-side order to buy or sell an equal number of contracts. The QCC Order must be executed at a price at or between the National Best Bid and Offer (''NBBO'') and be rejected if a Customer order is resting on the Exchange book at the same price. A QCC Order shall only be submitted electronically from off the floor to the PHLX XL II System. *See* Rule 1080(o). *See also* Securities Exchange Act Release No. 64249 (April 7, 2011), 76 FR 20773 (April 13, 2011) (SR-Phlx-2011–47) (a rule change to establish a QCC Order to facilitate the execution of stock/option Qualified Contingent Trades (''QCTs'') that satisfy the requirements of the trade-through exemption in connection with Rule 611(d) of the Regulation NMS).

[9] The Exchange recently filed a rule change to amend the percentage threshold requirements in Tiers 3 and 4 as of November 1, 2013. *See* SR-Phlx-2013–108 (not yet published).

[10] Members and member organizations under Common Ownership may aggregate their Customer volume for purposes of calculating the Customer Rebate Tiers and receiving rebates.

[11] Orders that are eligible for Customer rebates are specified in Section B of the Exchange's Pricing Schedule.

[12] A member organization, together with its affiliate under Common Ownership, that qualifies for any rebate tier in the Customer Rebate Program in Section B of the Pricing Schedule, will have the opportunity to increase the applicable Customer rebate by $0.02 per contract on Phlx.

[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4), (5).

[15] Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) (''ArcaBook Order''), *vacated on other grounds, NetCoalition* v. *SEC,* 615 F.3d 525 (D.C. Cir. 2010) (''*NetCoalition I*'').

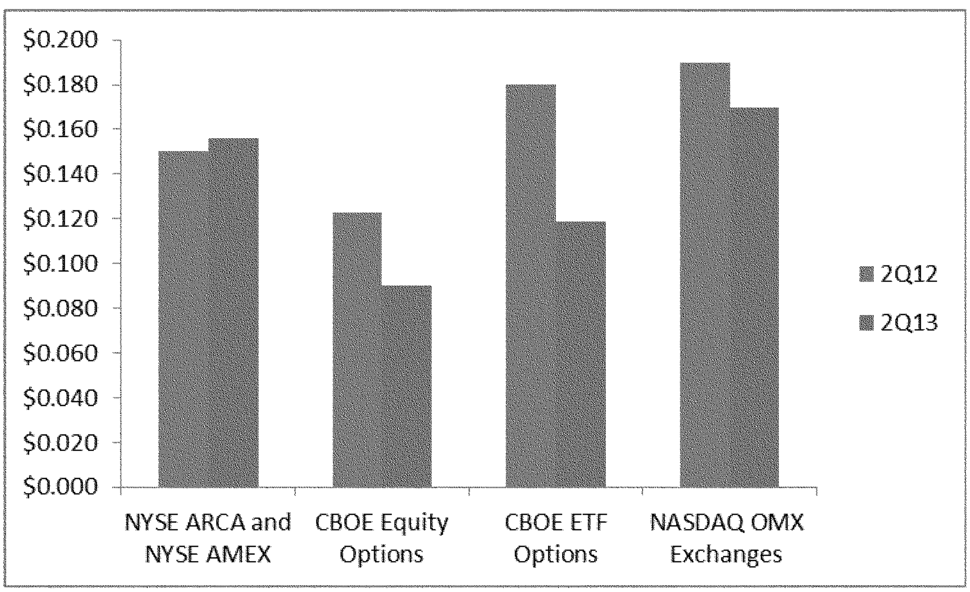
[16] ArcaBook Order, 73 FR at 74781–74782.

This reasoning applies with equal weight to transaction fees, since members that believe fees at a particular venue to be unreasonable, inequitable, or unfairly discriminatory are able to respond by using the numerous competitive alternatives that exist. Moreover, although the Court of Appeals for the District of Columbia Circuit vacated the ArcaBook Order because it concluded that the record before it in that case did not adequately support the Commission's determination that the market for depth-of-book data was competitive, the Court's opinion endorsed the Commission's view that the existence of competitive markets may be used as the basis for concluding that a fee is consistent with the requirements of the Act.

The petitioners believe that the SEC's market-based approach is prohibited under the Exchange Act because the Congress intended ''fair and reasonable'' to be determined using a cost-based approach. The SEC counters that, because it has statutorily-granted flexibility in evaluating market data fees, its market-based approach is fully consistent with the Exchange Act. We agree with the SEC.[17]

Thus, in analyzing the consistency of a fee change with the Act, NASDAQ [sic] believes that it is justified in analyzing, first and foremost, the competitive nature of the market in which the fee is adopted.

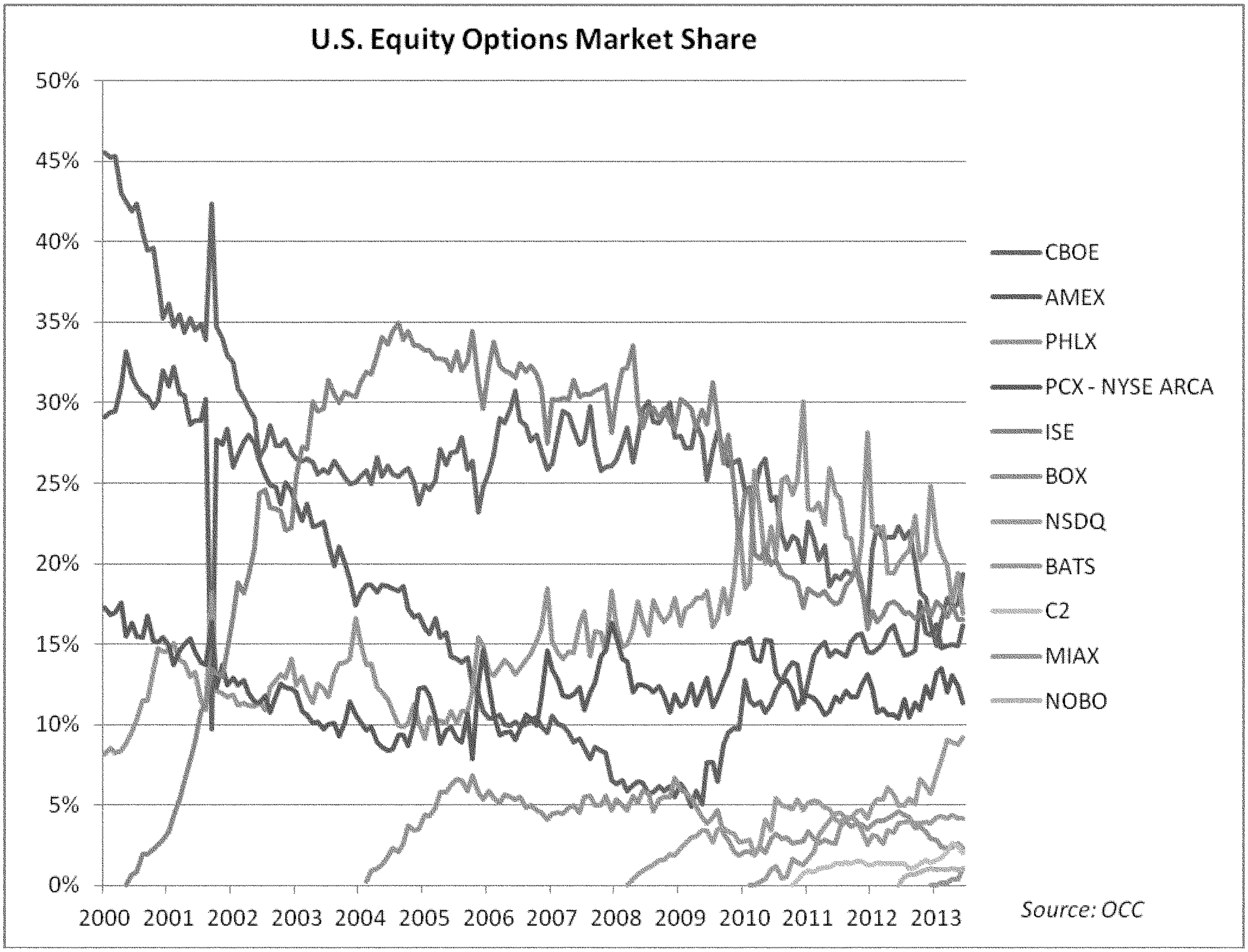
The Exchange operates in a highly competitive market, comprised of twelve exchanges, in which market participants can easily and readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or rebates to be inadequate.[18] Accordingly, in order to remain competitive in its efforts to attract order flow, the Exchange must offer market participants an attractive trading platform, responsive customer service, and effective management tools, in addition to competitive fees and liquidity rebates. Price competition is a central component of the competition for order flow. As part of this competition, the NASDAQ OMX exchanges have modified options trading fees monthly or even bi-monthly to attract new order flow, retain existing order flow, and regain order flow lost to competitors' price cuts. In 2012, PHLX, NOM and BX Options filed 72 execution fee changes. As one would expect in a competitive market, the overall effect of these fee changes has been to lower options trading costs, benefitting investors and promoting the goals of the Securities Exchange Act of 1934. For example, based on publicly available data, average revenue per contract has generally declined for major options market operators as they compete for order flow. The following table illustrates the results of that competition.



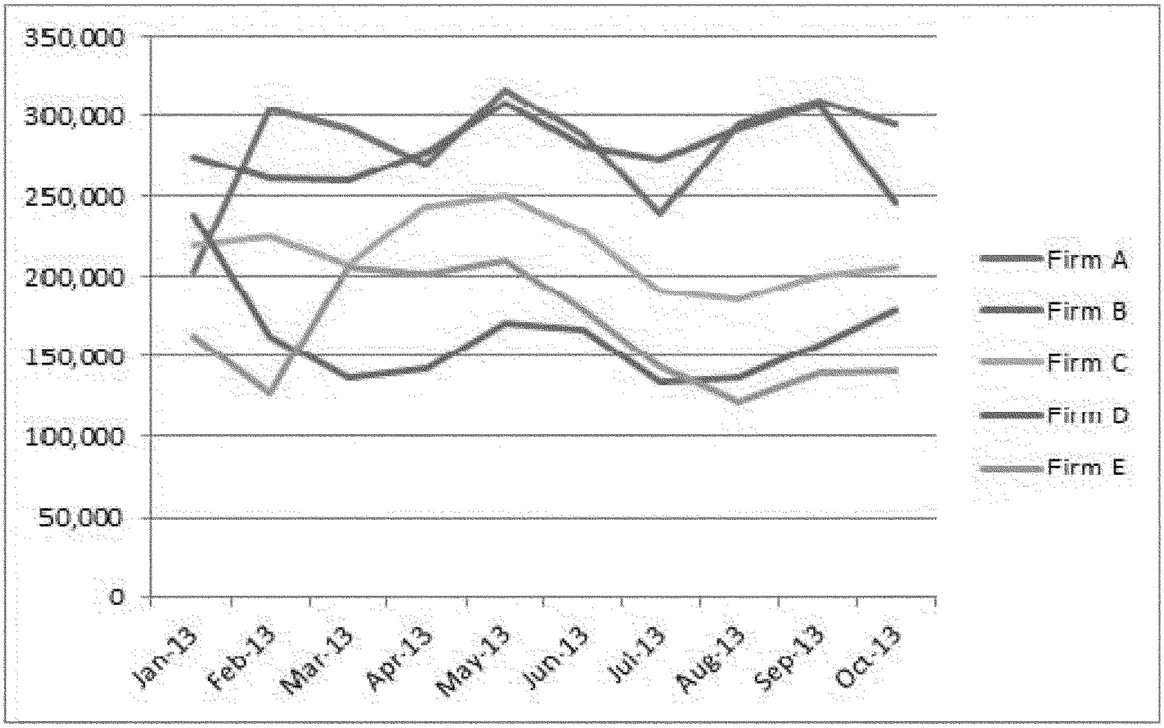
Empirical evidence also demonstrates that no exchange has market power sufficient to raise prices for competitively-traded options in an unreasonable or unfairly discriminatory manner in violation of the Exchange Act. In actuality, it is member firms that control the order flow that options markets compete to attract. Only by attracting members' orders can options exchanges display bids and offers that are the sine qua non of trade executions. This ''second-order'' competition—where competition is driven by customers rather than sellers of a product—is reflected both in the large number of pricing-related rule changes and also in rapid shifts of market share among multiple effective competitors seen on the chart of equity options market share below.

[17] *NetCoalition I,* 615 F.3d at 534.

[18] ''No 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'. . . .'' *NetCoalition I,* 615 F.3d at 539 (quoting ArcaBook Order, 73 FR at 74782–74783). Although the Court and the SEC were discussing the cash equities markets, NASDAQ believes that, as discussed above, these views apply with equal force to the options markets.



This level of competition is also readily apparent in the behavior of market participants with respect to the Customer orders that are the subject of this filing. The chart below shows fluctuations in the volume of Customer orders routed to the NASDAQ OMX exchanges by their top five member organizations since the beginning of 2013. As is apparent from the chart, fluctuations in volume of more than 50% occur, as member organizations respond to varying pricing incentives.



The Commission has a statutory duty to promote competition, including price competition. The Commission's traditional restraint in regulating fees has fostered intense competition that benefits investors and all market participants greatly. In mature markets where competition is vibrant, pricing changes are often the most effective way for markets to compete vigorously. Where participants view pricing on one options market as unpalatable, they are free to move business to another market or markets with favorable pricing, and in fact do so with regularity, as demonstrated by the empirical data provided above. Price competition works best where a variety of different models and pricing schemes exist from which to choose and market participants are highly knowledgeable about alternatives.

Diversity in the products and services offered by market participants enhances competition and benefits consumers. To establish policies that artificially enforce price uniformity would (i) eliminate incentives for innovative market participants to invest in providing desirable products, (ii) foster marketplace stagnation, and (iii) run directly contrary to sound policy.[19] When Congress charged the Commission with supervising the development of a ''national market system'' for securities, a premise of its action was that prices ordinarily would be determined by market forces.[20] Consistent with this purpose, Congress and the Commission have repeatedly stated their preference for competition, rather than regulatory intervention, to determine prices, products, and services in the securities markets.[21]

Against this background, which establishes that exchange transaction fees should be presumed reasonable, equitable, and not unfairly discriminatory, Phlx now turns to a particularized analysis of the proposed rebate that is the subject of this filing. In doing so, Phlx notes that the ArcaBook Order cited the possibility that even in a competitive market, a fee might be subject to disapproval if ''there is a substantial countervailing basis for determining that a proposal is inconsistent with the Act.'' [22] By way of example, the Commission theorized that such a basis might exist in the case of an exchange proposal that seeks to ''penalize market participants for trading in markets other than the proposing exchange'' because it might constitute ''unreasonable and unfair discrimination.'' [23] Although the issue was not before it, the Commission also ventured that ''the Exchange Act precludes *anti-competitive tying* of the liquidity pools of separately registered national securities exchanges even if they are under common control.'' [24] As discussed in greater detail below, although the proposal considers volume on NOM and BX Options in determining whether a member organization is eligible for a rebate on Phlx, the proposal at issue is not tying, because

[19] *See, e.g., United States* v. *Microsoft Corp.,* 147 F.3d 935, 948 (D.C. Cir. 1998) (''Antitrust scholars have long recognized the undesirability of having courts oversee product design, and any dampening of technological innovation would be at cross purposes with antitrust law.'').

[20] *See, e.g.,* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (stating Congress's intent that the ''national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed'').

[21] *See* S. Rep. No. 94–75, 94th Cong., 1st Sess. 8 (1975) (''The objective [in enacting the 1975 amendments to the Exchange Act] would be to enhance competition and to allow economic forces, interacting within a fair regulatory field, to arrive at appropriate variations in practices and services.''); ArcaBook Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system. Indeed, competition among multiple markets and market participants trading the same products is the hallmark of the national market system.''); Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7–10–04) (''Regulation NMS Adopting Release'') (observing that national market system regulation ''has been remarkably successful in promoting market competition in [the] forms that are most important to investors and listed companies'').

[22] ArcaBook Order, 73 FR at 74782.

[23] *Id. See also* Securities Exchange Act Release No. 65362 (September 20, 2011), 76 FR 59466 (September 26, 2011) (SR–NASDAQ–2011–010) (decision pursuant to delegated authority to disapprove proposal to discount market data fees for NASDAQ market participants), *petition for Commission review granted by* Securities Exchange Act Release No. 66667 (March 28, 2012), 77 FR 20079 (April 3, 2012).

[24] ArcaBook Order, 73 FR at 74790 (emphasis added).

the Phlx member organization is not required to use NOM or BX Options at all in order to receive the rebate. Similarly, the proposal is not anti-competitive, because Phlx lacks market power, and because the proposal is a price incentive paid by Phlx to Phlx member organizations with respect to orders executed on Phlx, just like any other exchange price discount. Moreover, in discussing why anti-competitive tying between two exchanges would present concerns, the Commission stated that ''a proposed exchange rule must stand or fall based, among other things, on the interests of customers, issuers, broker-dealers, and other persons using the facilities of *that exchange.''* [25] In other words, Phlx must explain why its proposal is in the best interests of Phlx's members to enable the Commission to determine that a countervailing basis does not exist for concluding that the proposal is inconsistent with the Act in any respect. For the reasons discussed below, Phlx believes that the proposal readily meets these standards.

The Proposal Is Consistent With the Requirement That Phlx Fees Must Be Reasonable

The Exchange's proposal is reasonable because it provides an opportunity for market participants to receive greater rebates and therefore enables them to lower costs. In this respect, the proposal should be considered, like any fee decrease or rebate increase, presumptively consistent with the requirement that exchange fees must be reasonable, since trading costs will be lower following implementation of the proposal than before. Since existing fees are themselves the product of the intense competition described above, it is difficult to see how a fee decrease or rebate increase could in any set of circumstances cause fees to become unreasonable. Moreover, because the rebate is specific to Customer orders transacted on Phlx, it benefits retail investors when member organizations choose to pass on some portion of the rebate to their customers. Finally, Phlx notes that the proposal does not restrict any existing rebates or increase any other fees, and therefore will not place any market participants that do not qualify for the rebate in a less favorable position than under the existing Pricing Schedule. However, as discussed below, to the extent that the proposal succeeds in its competitive goal of attracting more Customer orders to the Exchange, it has the potential to benefit all Phlx market participants.

[25] ArcaBook Order, 73 FR at 74793.

The Proposal Is Consistent With the Requirement That Phlx's Fees Provide for an Equitable Allocation of Fees

The Exchange's proposal is consistent with an equitable allocation of fees because it benefits not only market participants receiving the proposed rebate, but has the potential to benefit all other Phlx market participants as well. Specifically, the proposal is intended to attract a larger amount of Customer liquidity to the Exchange. Today, Phlx offers members certain Customer rebates to encourage Phlx member organizations to direct Customer order flow to the Exchange, and the proposal will provide an additional incentive for Customer order flow. Customer liquidity benefits all market participants by providing more trading opportunities, which attract 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.

The proposed rebate is structured as a volume-based discount, similar to the existing rebate tiers in Section B of the Pricing Schedule. The Commission has previously accepted such volume tiers, and they have been adopted by various options exchanges. Tiers are a well-established method for drawing liquidity to an exchange by paying higher rebates to those members that direct a greater amount of order flow to the Exchange. Volume tiers in both the cash equity and options markets provide reduced pricing to the heaviest liquidity providers and liquidity takers. As with existing tiers, the higher the percentage of a market participant's Customer orders on Phlx, the higher the rebate. However, the aspect of the proposal under which a member organization's eligibility is determined by volume on all of the NASDAQ OMX exchanges broadens the potential availability of a higher rebate to market participants that spread volume across multiple exchanges, rather than requiring a concentration of activity on Phlx. Market participants with Customer order flow often divide that order flow among Phlx, NOM and BX Options, as well as other options exchanges; due to the different market and pricing models available at various exchanges, dividing order flow may allow them to improve execution quality and to minimize costs. For example, a market participant that wants to transact contracts in SPY under a pro rata allocation would necessarily send order flow to Phlx, rather than NOM or BX Options, because Phlx offers such a pro rata allocation.[26] NOM and BX Options would allocate the same SPY transaction using a price-time execution algorithm.[27] Similarly, each exchange offers an array of services in order to accommodate the wide array of demands that market participants represent on behalf of investors. Finally, because different pricing incentives are available on different exchanges, firms may divide order flow in order to minimize trading costs. One exchange's technology and one exchange's array of services may not be adequate to meet the needs of all investors in all circumstances. A one-size-fits-all pricing mechanism would not reflect the reality of those market participants who represent a diverse set of investors' demands.

Therefore, recognizing Customer orders on other NASDAQ OMX exchanges for purposes of determining volume is aimed at providing market participants an incentive that does not make unreasonable demands to send all order flow to Phlx, but rather permits those market participants to seek different economics and execution models while still receiving the benefit of an additional rebate for those Customer orders that are transacted on Phlx. Thus, the rebate is an equitable means of incentivizing a member with large quantities of Customer orders to increase the amount of Customer order flow transacted on Phlx, even though the current market structure requires it to fragment Customer orders in its efforts to improve execution quality and reduce execution costs across its total book of orders. Through the proposal, the Exchange seeks to reduce distortionary incentives created by one-size-fits-all pricing by including Customer volumes traded on NOM and BX Options in determining eligibility for the Phlx rebate.

The Proposal Is Not Unfairly Discriminatory

The Exchange's proposal is not unfairly discriminatory. As discussed above, the proposal broadens the availability of an enhanced rebate because it does recognize that market participants with high volumes of Customer orders may need to fragment their order flow among options markets to improve execution quality and lower costs by taking advantage of different market structures and pricing options.

[26] *See* Phlx Rule 1080.

[27] *See* NOM and BX Options Rules at Chapter VI, Section 7. BX Options utilizes a price-time execution, as specified on BX Options' system setting page located at: *http://www.nasdaqomxtrader.com/Content/TechnicalSupport/BXOptions_SystemSettings.pdf.*

Similar to current volume tiers on Phlx and volume tiers at other options exchanges, the value of the incentive received for Customer orders executed on Phlx increases as the volume of qualifying orders *on Phlx* increases. Any Phlx market participant may qualify for the Customer Rebate Program. Those Phlx members that are able to aggregate their Customer volume and achieve high national customer volume on Phlx already benefit by receiving rebates for that Customer volume when transacted on Phlx. This proposal seeks to incentivize those members to send more Customer volume to Phlx in order to receive an enhanced rebate paid only with respect to orders on Phlx, while permitting them to aggregate Customer volume across NASDAQ OMX exchanges for purposes of determining eligibility for the rebate. Therefore, the proposal does not discriminate among Phlx members that control high volumes of Customer orders, but rather incentivizes them to execute as many Customer orders as possible on Phlx in order to receive the benefit of the rebate on those orders; moreover, the proposal does not require them to fragment their Customer orders to achieve this goal, but neither does it discriminate against them by denying eligibility for the higher rebate if they do in fact direct order flow away from Phlx. Thus, this proposal provides market participants the ability to achieve lower costs without compromising their execution obligations. Fundamentally, however, the proposed incentive rewards market participants for directing a greater number of Customer orders to Phlx, just as is the case with existing tier structures at Phlx and other options markets.[28]

To the extent that they offer better pricing to higher volume members, existing tier structures that exist at Phlx and other options markets are inherently discriminatory, but this discrimination has been widely accepted as not *unfairly* discriminatory because it incentivizes greater usage of the market offering the pricing tier, thereby benefitting the market's viability and providing liquidity benefits to other market participants at that market.[29]

Specifically, options exchanges have filed and continue to file rule filings with the Commission proposing fees and rebates that create price differentiations and segmentations; Phlx believes that such differentiations exist in mature healthy competitive markets such as the options market, because pricing is a key means by which exchange participants compete with one another. Today, various options exchanges segment pricing related to Multiply Listed Options as compared to Singly Listed Options.[30] Penny Pilot Options [31] are also assessed different fees and paid different rebates [32] as compared to Non-Penny Options.[33] Options exchanges differentiate fees for options transacted in open outcry [34] as compared to electronic transactions.[35] A Phlx member transacting Customer orders on the floor is not entitled to the Customer Rebate Program described herein because that program applies only to electronic transactions.[36] Indeed, the Exchange today differentiates various aspects of floor and electronic pricing.[37] Other types of differentials include Simple versus Complex Orders; [38] auction [39] versus non-auction orders; [40] opening transactions [41] versus regular hours trading; order types; [42] floor facilitation [43] versus non-agency

[28] *See* Phlx's Pricing Schedule, NOM at Chapter IV, Section 2, NYSE Arca's Fee Schedule, NYSE MKT's Fee Schedule, Chicago Board Options Exchange, Incorporated's (''CBOE'') Fees Schedule, MIAX's Fee Schedule, BATS BZX's Fee Schedule, Gemini's Fee Schedule, C2's Options Exchange, Incorporated (''C2'') Fee Schedule and ISE's Fee Schedule.

[29] Arguably, a uniform fee schedule in which all members pay the same fee would also be discriminatory, because it would fail to recognize reasoned bases for reflecting in the fees that members pay their differing contributions to the quality of the market. It may be helpful to understand ''unfair discrimination'' as discrimination based on factors other than competition, such as pricing designed to exclude or impair a class of participants.

[30] Singly Listed Option means an option that is only listed on the Exchange and is not listed by any other national securities exchange.

[31] The Penny Pilot was established in January 2007; and in October 2009, it was expanded and extended through December 31, 2013. *See* Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR–Phlx–2006–74) (notice of filing and approval order establishing Penny Pilot); 60873 (October 23, 2009), 74 FR 56675 (November 2, 2009) (SR–Phlx–2009–91) (notice of filing and immediate effectiveness expanding and extending Penny Pilot); 60966 (November 9, 2009), 74 FR 59331 (November 17, 2009) (SR–Phlx–2009–94) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 61454 (February 1, 2010), 75 FR 6233 (February 8, 2010) (SR–Phlx–2010–12) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62028 (May 4, 2010), 75 FR 25890 (May 10, 2010) (SR–Phlx–2010–65) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 62616 (July 30, 2010), 75 FR 47664 (August 6, 2010) (SR–Phlx–2010–103) (notice of filing and immediate effectiveness adding seventy-five classes to Penny Pilot); 63395 (November 30, 2010), 75 FR 76062 (December 7, 2010) (SR–Phlx–2010–167) (notice of filing and immediate effectiveness extending the Penny Pilot); 65976 (December 15, 2011), 76 FR 79247 (December 21, 2011) (SR–Phlx–2011–172) (notice of filing and immediate effectiveness extending the Penny Pilot); 67326 (June 29, 2012), 77 FR 40126 (July 6, 2012) (SR–Phlx–2012–86) (notice of filing and immediate effectiveness extending the Penny Pilot); 68534 (December 21, 2012), 77 FR 77174 (December 31, 2012) (notice of filing and immediate effectiveness extending the Penny Pilot); and 69786 (June 18, 2013), 78 FR 37863 (June 24, 2013) (SR–Phlx–2013–64) (notice of filing and immediate effectiveness extending the Penny Pilot). *See also* Exchange Rule 1034.

[32] *See* Phlx's Pricing Schedule, NOM Pricing at Chapter IV, Section 2, ISE's Fee Schedule, CBOE's Fees Schedule, NYSE MKT's Fee Schedule, BATS BZX's Fee Schedule, MIAX's Fee Schedule, Gemini's Fee Schedule and NYSE Arca's Fee Schedule.

[33] Non-Penny Pilot refers to options classes not in the Penny Pilot.

[34] The Exchange has Rules in place which govern the submission of Orders in an open outcry market for execution. *See* Exchange Rules 110, 155, 1000, 1014, 1033, 1060, 1063, 1064, 1066, 1080 and Options Floor Procedure Advices C–1, C–2, C–3, F–2 and F–14. *See also* NYSE MKT and NYSE ARCA's Fee Schedule.

[35] Electronically delivered orders do not include orders delivered through the Floor Broker Management System.

[36] *See* Section B of the Phlx Pricing Schedule.

[37] *See* Section II of the Phlx Pricing Schedule, CBOE's Fee Schedule, NYSE Arca's Fee Schedule and NYSE MKT's Fee Schedule.

[38] A Complex Order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced at a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. Furthermore, a Complex Order can also be a stock-option order, which is an order to buy or sell a stated number of units of an underlying stock or exchange-traded fund (''ETF'') coupled with the purchase or sale of options contract(s). *See* Exchange Rule 1080, Commentary .08(a)(i). *See also* Section I of the Exchange's Pricing Schedule. *See also* CBOE's Fees Schedule, ISE's Fee Schedule, NYSE Arca's Fee Schedule, C2's Fee Schedule and NYSE MKT's Fee Schedule.

[39] PIXL is the Exchange's price improvement mechanism known as Price Improvement XL or (PIXL℠). *See* Rule 1080(n). 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 Rule 1080(n)(i)(E)) it represents as agent (''Initiating Order'') provided it submits the PIXL order for electronic execution into the PIXL Auction (''Auction'') pursuant to Rule 1080. *See* Exchange Rule 1080(n). COLA is the automated Complex Order Live Auction process. A COLA may take place upon identification of the existence of a COLA-eligible order either: (1) Following a COOP, or (2) during normal trading if the Phlx XL system receives a Complex Order that improves the cPBBO. *See* Exchange Rule 1080. *See also* CBOE's Fees Schedule and ISE's Fee Schedule.

[40] *See* Phlx's Pricing Schedule, CBOE's Fees Schedule, ISE's Fee Schedule, NYSE Arca' Fees Schedule and BATS BZX's Fee Schedule.

[41] *See* Exchange Rule 1017. *See also* Section II of the Exchange's Pricing Schedule.

[42] For example, a Qualified Contingent Cross (''QCC'') Order, which is an order comprised of an 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 Rule 1080(o)(3), coupled with a contra-side order to buy or sell an equal number of contracts, has different pricing compared to other types of order types. *See* Section II of the Exchange's Pricing Schedule.

[43] *See* Exchange Rule 1064. The Exchange offers certain fee waivers for floor facilitation transactions at Section II of the Exchange's Pricing Schedule. *See also* NYSE MKT's Fee Schedule.

transactions; directed [44] versus non-directed orders; [45] pricing by market participant; [46] Payment for Order Flow [47] and fee caps.[48] In addition, there are other examples of market segmentation evidenced today in fees assessed by other SROs. Similarly, in the area of market data various differentiations exist, such as displayed versus non-displayed quotes/orders,[49] professional and non-professional user data [50] and proprietary [51] versus consolidated market data.

In light of this wide-ranging degree of differentiation, the Exchange submits that its proposal does not materially alter the degree of differential pricing among Phlx market participants. Just as the foregoing pricing differentials exist to encourage and reward market participants for making order flow and other purchasing decisions that benefit the Exchange, its market structure, and/or other market participants, likewise the proposed rule change serves to incentivize order routing decisions with respect to Customer orders that benefit the Exchange and its participants. With this proposal, members are not required to transact any volume on other options exchanges. In fact, the more volume they transact on Phlx, the greater the reward, as only qualifying Customer orders *executed* on Phlx are entitled to the rebate. However, the proposal does not discriminate against members that choose to direct orders to other options markets. By way of example, the proposal is structured so that the maximum benefit occurs for market participants who execute 2.5% or more of national customer volume and are able to execute it all on Phlx. Such a participant would receive an additional $0.02 per contract rebate for all its eligible volume transacted on Phlx. If a market participant believes that it would better meet its best execution obligation to a Customer by displaying orders on a market with a different fee or market structure, such as NOM, the participant can do so and will not receive the additional $0.02 per contract rebate for any execution that results on NOM, but would still be able to benefit from those NOM Customer orders by receiving a rebate on Customer orders executed on Phlx which may qualify for an enhanced rebate. Thus, the participant is not penalized from an eligibility standpoint by its incidental usage of NOM or BX Options.[52]

If all of the participant's Customer volume was transacted solely on NOM, then the market participant would not receive a Phlx rebate, which is not surprising, since it is not bringing order flow to Phlx; it would, however, still be eligible for any rebate that is offered on NOM. Thus, a participant transacting volume on NOM is in no worse position with the proposal. Today, a NOM Participant that transacted a large amount of volume on NOM to benefit from the rebate structure offered on that market would only receive rebates on Phlx for those orders transacted on Phlx. With this proposal, the NOM Participant still benefits from the current NOM pricing without change, but will have the added benefit of possibly qualifying for a rebate on Phlx for any orders that were transacted on Phlx. Because the benefit only attributes to orders on Phlx, as is the case today, there is no change in circumstance for the NOM Participant. In fact, the NOM Participant that necessarily had Customer orders routed to Phlx because that market was at the best price, with this proposal may receive an added benefit on Phlx by qualifying for a rebate on that market because of the Customer orders transacted on NOM. Moreover, as discussed above, the Commission stated that ''a proposed exchange rule must stand or fall based, among other things, on the interests of customers, issuers, broker-dealers, and other persons using the facilities of *that exchange.''* [53]

In this instance, the proposal is unambiguously beneficial to Phlx market participants, whether or not they receive the enhanced rebate. With respect to two members transacting orders on Phlx, the proposal is not materially different from current differentiations. Today, the Exchange assesses different fees and pays different rebates to two Phlx members that transact the same number of Customer orders on the Exchange, if one Exchange member transacted those orders on the Exchange floor and the other member transacted those orders electronically. Only the electronic Customer orders would potentially qualify for a Customer rebate pursuant to Section B of the Pricing Schedule. Also, only certain types of orders in Categories A and B qualify for the Customer Rebate today, so depending on the types of electronic orders transacted by a Phlx member, one member may qualify for a Customer rebate while another member with the same number of Customer orders may not qualify for a rebate. Finally, two members on Phlx may transact Customer orders today, but

[44] An order that is ''directed'' is one that is directed by an Order Flow Provider to a specific Market Maker or Specialist when that order is entered electronically into PHLX XL II. The term ''Order Flow Provider'' means any member or member organization that submits, as agent, orders to the Exchange. *See* Rule 1080(l)(i)(B).

[45] *See* NYSE MKT's Fee Schedule and CBOE's Fees Schedule. Phlx also previously differentiated pricing on the basis of whether the order was directed.

[46] All options exchanges distinguish pricing by market participant.

[47] The Payment for Order Flow (''PFOF'') Program assesses fees to Specialists and Market Makers resulting from Customer orders (''PFOF Fees''). The PFOF fees are available to be disbursed by the Exchange according to the instructions of the Specialist or Market Maker to order flow providers that are members or member organizations that submit, as agent, Customer orders to the Exchange through a member or member organization that is acting as agent for those customer orders. Any excess PFOF funds billed but not utilized by the Specialist or Market Maker are carried forward unless the Specialist or Market Maker elects to have those funds rebated on a pro rata basis, reflected as a credit on the monthly invoices. At the end of each calendar quarter, the Exchange calculates the amount of excess funds from the previous quarter and subsequently rebates excess funds on a pro-rata basis to the applicable Specialist or Market Maker that paid into that pool of funds. There are no Payment for Order Flow Fees on trades that are not delivered electronically. *See* Phlx's Pricing Schedule and CBOE's Fees Schedule.

[48] Today the Exchange has in place a fee cap for Specialists and Market Makers (''Monthly Market Maker Cap'') of $550,000 for: (i) Electronic and floor Option Transaction Charges; (ii) QCC Transaction Fees (as defined in Exchange Rule 1080(o)) and Floor QCC Orders, as defined in 1064(e)); and (iii) fees related to an order or quote that is contra to a PIXL Order or specifically responding to a PIXL auction. Also, the Exchange caps Firms up to a maximum fee of $75,000 (''Monthly Firm Fee Cap''). *See* Section II of the Exchange's Pricing Schedule. *See also* NYSE Arca's Fee Schedule (Firm and Broker-Dealer open outcry executions are capped).

[49] *See* Nasdaq Rule 7018.

[50] *See* Nasdaq Rule 7026.

[51] *See* Nasdaq Rule 7039.

[52] Of course, volume on exchanges other than Phlx, NOM, and BX Options would not qualify. The Exchange believes that it is not unfairly discriminatory to recognize volume on its affiliates but not other exchanges. Specifically, volume on NOM and BX Options benefits Phlx by contributing to the overall financial well-being of the exchange group of which Phlx is a part. It is reasonable, equitable and not unfairly discriminatory to lower costs for market participants transacting orders on Phlx by offering these market participants the ability to qualify for lower pricing realized by leveraging NASDAQ OMX's various options exchange offerings that are available to market participants to provide greater flexibility to market participants desiring to transact orders on NOM and BX Options. Requiring Phlx to provide favorable pricing to member organizations that meet the 2.5% volume requirement by directing orders to, for example, CBOE would make as little sense as stipulating that a member organization could meet existing Phlx tiers by executing orders on CBOE. Phlx submits that the Act does not require such an illogical result. Moreover, as discussed in more detail below, the Phlx proposal does not tie the use of Phlx to NOM or BX Options, because usage of those exchanges is not required, and in any event, reduces the aggregate rebate paid by Phlx. Moreover, because Phlx lacks market power, it cannot in any event use the proposal to extend market power to its affiliates. Finally, Customer orders which are executed on NOM and BX Options will continue to benefit the market participants on those markets because that order flow will provide liquidity to NOM and BX Options respectively and participants on those markets may interact with that order flow.

[53] ArcaBook Order, 73 FR at 74793.

depending on the number of qualifying Customer orders, one member may qualify for Customer Rebate Tier 1 and the other member may qualify for Customer Rebate Tier 2. In this scenario, Tier 1 does not pay a rebate and Tier 2 of the Section B Customer Rebate Program does pay a rebate; therefore one member would receive a rebate while another member would not receive a rebate, due to differences in volume. In other words, the proposed enhanced rebate does not create a pricing differential as between two Phlx members that is different from differentials that exist today. The proposal would differentiate market participants based on the volume of qualifying Customer orders that are transacted *on Phlx,* and that is already the case today with the existing Customer rebate tiers as well as other pricing.

The Proposal is Similar to Other SRO Rules

The Commission already permits a particular trading venue to consider volume executed away from that venue for fee calculation purposes. For example, under NOM's pricing schedule, participants that add (1) Customer and/or Professional liquidity of 25,000 or more contracts per day in a month on NOM, (2) qualify for the Investor Support Program set forth in Rule 7014 with respect to NASDAQ's cash equity market, and (3) execute at least one order on NASDAQ's cash equity market, qualify for a Tier 5 Customer and/or Professional rebate on NOM.[54] Thus, NOM's rebate permits a NOM Participant to qualify for an options rebate based on its activity in both options and cash equities markets. Another example of a fee imposed by exchanges that considers volume on other exchanges is the options regulatory fee or ''ORF,'' which is assessed by many options exchanges.[55] ORF is assessed on all transactions by member firms of an options exchange that are cleared in the customer range at The Options Clearing Corporation (''OCC'').[56] For example, if an OCC clearing member, ABC, is a member of Phlx, ABC pays ORF on all executed and cleared customer transactions regardless of where the trade executed. The ORF structure is not dependent on a transaction on a particular SRO; rather, it is based on transactions at other SROs.

There are also examples where qualifying volume is quantified in a different manner from the payment of a rebate. For example, Phlx members may qualify for a Customer rebate by including SPY volume in the calculation of qualifying orders for the purpose of calculating Customer rebate tiers, but Phlx does not pay Customer rebates on SPY volume as specified in the Customer Rebate Program.[57] Volume other than the volume on which the rebate is paid is considered for eligibility.

Equally important, offering discounts between affiliated exchanges is not novel. New York Stock Exchange LLC (''NYSE'') waives certain annual fees for issuers that transfer the listing of their primary class of common shares from NYSE Arca, Inc. (''NYSE Arca''), or NYSE MKT LLC (''NYSE MKT''), to NYSE (''NYSE Listing Incentive'').[58] The Exchange assesses issuers an Initial Application Fee of $25,000 in connection with applying to list an equity security except that, among other things, the fee is waived if an issuer transfers a listing of any class of equity security from another national securities exchange.[59] In a similar manner, this proposed rule change is premised on the principle that, in its efforts to provide greater competitive incentives, Phlx should be permitted to consider activity on other exchanges, given the need for member organizations to spread their Customer order flow across multiple exchanges in an effort to improve execution quality and reduce trading 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. As described above in considerable detail, the Exchange operates in a highly competitive market; in order to remain competitive the Exchange must offer market participants an attractive trading platform, customer service and effective management tools in addition to competitive fees and liquidity rebates to attract order flow to the market. It is the competitive forces present among options exchanges that constrain the Exchange's pricing by commanding pricing that is reasonable, equitable, fair and not unreasonably discriminatory if the Exchange hopes to attract order flow. The Exchange believes that its proposed pricing will not harm competition but rather will benefit market participants by lowering costs. Fundamentally, the proposal is a price reduction, and therefore is consistent with achieving the benefits of the robust competition that clearly exists in this market.

As discussed above, the ArcaBook Order stated that ''the Exchange Act precludes anti-competitive tying . . . of separately registered national securities exchanges even if they are under common control.''[60] However, the proposal neither constitutes tying, nor is it anti-competitive in nature of effect. Tying is ''an agreement by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.''[61] Accordingly, a tying arrangement exists only where there is a *requirement* that two separate products be purchased together.[62] Thus, for example, if a supplier offers two separate products together in a bundle, there is no tying arrangement if the supplier also offers each product for purchase separately. This is true even if the supplier offers a discount for purchasing the bundle of products (which, obviously, is a commonplace offering found in all sorts of industries).[63] ''[W]here the buyer is free to take either product by itself[,] there is no tying problem even though the seller may also offer the two items as a unit at a single price.''[64]

Even where there is a tying arrangement, such arrangements are not always (or even usually) unlawful. As the Supreme Court has explained, ''[i]t is clear . . . that not every refusal to sell two products separately can be said to restrain competition . . . . Buyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively.''[65] Indeed, the judicial

[54] *See* NOM Rules at Chapter XV, Section 2.

[55] Today ORF is assessed by PHLX, NOM, CBOE, ISE, NYSE Arca, NYSE MKT, BOX Options Exchange LLC, MIAX, C2 and Gemini.

[56] ORF is also assessed on transactions executed at an options exchange by that options exchange.

[57] *See* Section B of the Exchange's Pricing Schedule.

[58] *See* NYSE Rules at Section 902.3.

[59] *Id.*

[60] ArcaBook Order, 73 FR at 74790.

[61] *N. Pac. Ry. Co.* v. *United States,* 356 U.S. 1, 5–6 (1958).

[62] *See, e.g., Paladin Assocs.* v. *Mont. Power Co.,* 328 F.3d 1145, 1159 (9th Cir. 2003) (''Essential to . . . a tying claim is proof that the seller *coerced* a buyer to purchase the tied product.'').

[63] *See, e.g., Warren Gen. Hosp.* v. *Amgen Inc.,* 2010 U.S. Dist. LEXIS 56220, at *2–3, *21–22 (D.N.J. June 7, 2010) (a ''pricing and rebate scheme'' that applies only when the buyer purchases both of the defendants' products is not a tie because the buyer may purchase either product by itself).

[64] *N. Pac. Ry. Co.,* 356 U.S. at 6 n.4; *accord Jefferson Parish Hosp. Dist. No. 2* v. *Hyde,* 466 U.S. 2, 12 (1984).

[65] *Jefferson Parish,* 466 U.S. at 11–12.

skepticism of tying arrangements that prevailed decades ago has given way to a general recognition that tying arrangements are often procompetitive and beneficial to consumers and competition, and that they therefore are not anticompetitive in most circumstances. For example, in 2006, a unanimous Supreme Court explained that ''[o]ver the years, this Court's strong disapproval of tying arrangements has substantially diminished.'' [66] Accordingly, absent proof that a tying arrangement creates foreclosure in the tied product market, the antitrust laws do not condemn tying arrangements.[67]

Because a tying arrangement can only run afoul of the antitrust laws where the arrangement harms competition by creating foreclosure in the tied product market, the Supreme Court has stated that ''in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.'' [68] This requirement makes good sense when considering the economic impact of a tying arrangement. If a supplier *lacking* market power attempts to condition the purchase of one product (the tying product) on the purchase of a second, unwanted product (the tied product), the supplier's customers will simply go elsewhere. There is no conceivable harm to competition in this scenario—the misguided supplier will simply lose business to its competitors. And, conversely, if customers desire the bundled offering—such that they buy the bundled products even when they are not forced to do so—that is a procompetitive outcome that benefits consumers, which is not condemned by the antitrust laws. It is only when the supplier has *market power* over the tying product that it can force customers to take the unwanted product and distort competition in the sale of the tied product, and it is therefore only in those circumstances that tying arrangements can violate the antitrust laws.[69]

As discussed above, empirical evidence demonstrates that the options market is a highly competitive market in which no exchange has market power sufficient to raise prices for competitively-traded options in an unreasonable or unfairly discriminatory manner in violation of the Exchange Act. Moreover, this proposal is not tying in any event, because (a) members may trade on any exchange, without having to trade on another exchange (*i.e.,* nothing is tied together), and (b) Phlx members can qualify for the offered rebate without even using another NASDAQ OMX exchange. The proposed rebate simply makes it easier for members to reach the Phlx rebate levels if they trade on another NASDAQ OMX exchange, but there is no requirement to do so. Historically Phlx market participants have transacted greater than 2.5% of Customer volume solely on Phlx. Thus, if the Commission accepts the compelling logic of the antitrust precedents discussed above, it is clear that the proposal could not be used in an anticompetitive manner to force unwilling market participants to conduct transactions on NOM or BX Options. Rather, as discussed extensively above, the proposal incentivizes market participants to execute as many Customer orders on Phlx as possible by reducing fees—an inherently pro-competitive result—without penalizing them for incidental usage of the other NASDAQ OMX exchanges. If the Commission nevertheless concludes that the proposal is inconsistent with the Act because it constitutes anti-competitive tying, Phlx believes that it must, as a minimum, demonstrate why the proposal is anti-competitive in effect when similar pricing incentives are viewed as pro-competitive under the antitrust laws. Put another way, if the Commission concludes that a pricing decrease adopted in a highly competitive market is *per se* anticompetitive merely because of its cross-market aspect, it must explain why this conclusion differs so dramatically from the analysis in established Supreme Court precedents.

The NASDAQ OMX exchanges offer complementary models that members and investors demand, and this proposal seeks to provide an opportunity for market participants to benefit from those complementary services. The Exchange competes for order flow by enhancing its technology and the array of services offered on its market, as well as offering rebates and assessing lower fees. Today, Phlx, NOM and BX Options offer market participants an array of services including state-of-the-art platforms. Phlx's trading platform executes orders utilizing a Customer priority, pro-rata execution algorithm. Phlx accepts Complex Orders [70] and QCC Orders and offers auctions for both Simple and Complex Orders.[71] Phlx also has robust options listings on its market, including index listing and various Singly Listed products. Today, Phlx lists 3,660 options contracts as compared to NOM which lists 2,411 options contracts and BX Options which lists 1,145 options contracts. NOM's trading platform executes orders utilizing a price time execution algorithm. NOM does not accept Complex Orders or QCC Orders and does not offer auctions. BX Options' trading platform executes orders utilizing a price time execution algorithm. Similar to NOM, BX Options does not accept Complex Orders or QCC Orders and does not offer auctions. For example, a market participant that transacts a Complex Order cannot do so on NOM or BX Options or certain other options exchanges for that matter. Thus, the proposal will ensure that the range of a member organization's business across these markets is considered for eligibility purposes.

The Exchange also does not believe that the proposal imposes a burden on competition with respect to Phlx members' status as members of NOM and/or BX Options. If a market participant believes that it would better meet its best execution obligation to a Customer by displaying orders on a market with a different fee structure, such as NOM, the participant can chose to take advantage of NOM's pricing structure instead. The market participant would not receive the additional $0.02 per contract rebate for any execution that results, but would still be able to benefit from those orders, which would be aggregated with qualifying Customer volume on Phlx and BX Options for purposes of determining if the member qualified for a rebate on Phlx. If all the volume was transacted solely on NOM, then that market participant would still be eligible for any rebate that is offered on

[66] *Ill. Tool Works* v. *Indep. Ink, Inc.,* 547 U.S. 28, 35 (2006).

[67] *See, e.g., id.; Jefferson Parish,* 466 U.S. at 13–14, 16.

[68] *Ill. Tool,* 547 U.S. at 46; *see also Jefferson Parish,* 466 U.S. at 13–14 (''we have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market'').

[69] *See Jefferson Parish,* 466 U.S. at 13–14.

[70] A Complex Order is any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced at a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. Furthermore, a Complex Order can also be a stock-option order, which is an order to buy or sell a stated number of units of an underlying stock or exchange-traded fund (''ETF'') coupled with the purchase or sale of options contract(s). *See* Exchange Rule 1080, Commentary .08(a)(i).

[71] COLA is the automated Complex Order Live Auction process. A COLA may take place upon identification of the existence of a COLA-eligible order either: (1) following a COOP, or (2) during normal trading if the Phlx XL system receives a Complex Order that improves the cPBBO. *See* Exchange Rule 1080.

NOM today. The Exchange does not believe that a participant transacting volume on NOM is in any worse of a position with this proposal. Further, NOM and BX Options members benefit from the pricing structures available to them on those markets.[72]

The Exchange further believes that its proposal does not impact established pricing differentials among NASDAQ OMX exchanges; rather, it enhances equality among market participants transacting orders on different NASDAQ OMX exchanges. The NOM Participant who is also a Phlx member would be given an opportunity to earn a rebate on Phlx similar to the current Phlx member. The same is true of a BX Options member who is also a member on Phlx. If these market participants do not have a membership on Phlx, then they transact no orders on Phlx today and therefore would not be able to take advantage of the rebate because these rebates would only apply to orders transacted on Phlx. The same is true of any Phlx pricing proposal. The NOM or BX Options member that does not choose to be a Phlx member is not able to take advantage of any Phlx pricing, including this proposal, because it has not expended the effort to become a Phlx member, but it is free to do so at any time. Moreover, Phlx's proposal ''must stand or fall, based, among other things, on the interests of . . . persons using the facilities of [Phlx].[73]

Fundamentally, this proposal offers market participants a price decrease, the essence of competition. Price differentiation exists in the options markets today, as noted in the various examples provided above. These types of differentiation have not been seen as anticompetitive. There is no evidence to support a conclusion that competition would be harmed with the implementation of this proposal. Competitors could replicate the rebate that is being offered by Phlx, and to the extent that a competitor does not operate multiple exchanges, the desired discount could be offered on the sole market to achieve the same lower cost. Moreover, other options exchanges operate multiple markets, with different functionality and pricing being offered at the different markets, and there are no significant barriers to entry of additional options exchanges. For example, the International Stock Exchange LLC (''ISE'') recently launched a second options exchange, Topaz Exchange, LLC (''Gemini''), the twelfth options exchange today. New market entrants today offer incentivized pricing to bring order flow to that market. Miami International Securities Exchange LLC (''MIAX''), a recent options market entrant, waived transaction fees that apply to marker makers from June 3, 2013 through August 31, 2013.[74] In its filing, MIAX stated that:

> [t]he fee waiver is designed to both enhance the Exchange's competitiveness with other options exchanges and to strengthen its market quality. The Exchange believes that the fee waiver increases both intermarket and intramarket competition by incenting market participants and market makers on other exchanges to register as Market Makers on the Exchange. In addition, the Exchange believes that waiving transaction fees for Market Makers registered on the Exchange promotes tighter bid-ask spreads by Market Makers, and increases the volume of transactions in order to allow the Exchange to compete more effectively with other options exchanges for such transactions. The Exchange notes that the Exchange's daily percentage of the total market volume in MIAX listed options has increased since the beginning of the fee waiver—indicating that the fee waiver has enabled the Exchange to compete more effectively with other options exchanges for such transactions.[75]

Similarly, Phlx believes that its proposal promotes further vigorous, healthy and appropriate competition, and will lead other options exchanges to follow suit by offering higher rebates to attract order flow. The interests of all investors are furthered by the lowering of prices as a result of robust competition.

In sum, the Exchange believes that the proposed rule change will promote competition through a price reduction that enhances Phlx's competitiveness but to which other markets may respond in kind. The Exchange believes that the proposed change would increase both intermarket and intramarket competition by providing market participants a different option to consider when they decide which exchange provides the most attractive destination for directing order flow. Moreover, the proposal to offer the rebate does not constitute a tying arrangement under directly relevant judicial precedent. The Exchange believes that the proposed rebate would enable market participants to lower costs and incent them to provide additional liquidity at the Exchange, thereby enhancing the quality of its markets and increasing the volume of Customer contracts traded on Phlx. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity.

Given the robust competition for volume among options markets, many of which offer the same products, attracting order flow by offering rebates is consistent with the pro-competitive goals of the Act. The Exchange does not believe that the enhanced rebate could cause any competitive harm to the options market or to market participants, because no exchange has market power sufficient to raise prices for competitively-traded options in an unreasonable or unfairly discriminatory manner in violation of the Exchange Act.

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.[76] 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.* Please include File Number SR–Phlx–2013–113 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission,

[72] NOM offers Customers rebates. *See* Chapter XV, Section 2(1).

[73] ArcaBook Order, 73 FR at 74793–74794.

[74] *See* Securities Exchange Act Release No. 70069 (July 30, 2013), 78 FR 47457 (August 5, 2013) (SR–MIAX–2013–36).

[75] *Id.*

[76] 15 U.S.C. 78s(b)(3)(A)(ii).

100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–Phlx–2013–113. 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–Phlx–2013–113 and should be submitted on or before December 10, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[77]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–27632 Filed 11–18–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70863; File No. SR–Phlx–2013–112]

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the PIXL Auction Notification Requirements Under Rule 1080

November 13, 2013.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act")[2] and Rule 19b–4 thereunder,[3] notice is hereby given that on October 31, 2013, NASDAQ OMX PHLX LLC (the "Exchange" or "PHLX") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. 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 the Substance of the Proposed Rule Change

The Exchange proposes to amend the PIXL[4] Auction Notification ("PAN") requirements under Rule 1080(n) by no longer including the stop price in the PAN.

The text of the proposed rule change is below; proposed new language is italicized; proposed deletions are in brackets.

* * * * *

Rule 1080 Phlx XL and Phlx XL II

* * * * *

(n) Price Improvement XL ("PIXL")

(i)–(ii)(A)(1)–(2) No change.

(3) When the Exchange receives a PIXL Order for Auction processing, a PAN detailing the side[,] *and* size [and the stop price] of the PIXL Order will be sent over the Exchange's TOPO Plus Orders data feed *and Specialized Quote Feed.* [An updated PAN will also be sent over the Exchange's TOPO Plus Orders data feed if the Initiating Member improves the stop price of the PIXL Order. The updated PAN will include the side, size and improved stop price of the PIXL Order.]

(ii)(A)(4)–(vii) No change.

* * * * *

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 purpose of the proposed rule change is to encourage better PAN responses and thereby attain more price improvement for PIXL orders. The PAN is a broadcast message sent over TOPO Plus Orders,[5] the Exchange's market data feed for subscribers interested in the detailed information it offers, as well as over the Specialized Quote Feed ("SQF") 6.0.[6]

Background—Current PIXL and PAN

The PIXL mechanism is a process whereby members electronically submit orders they represent as agent against principal interest or other interest that they represent as agent. The submitted orders are stopped at a price and are subsequently entered into an auction seeking price improvement. An Exchange member may initiate a PIXL Auction ("Initiating Member") by submitting a PIXL Order ("Initiating Order") specifying one of the following:

(1) A single price at which it seeks to execute the PIXL Order (a "stop price");

(2) that it is willing to automatically match as principal or as agent on behalf of an Initiating Order, the price and size of all trading interest, and responses to the PAN (known as "auto-match"), in which case the PIXL Order will be stopped at the National Best Bid/Offer ("NBBO") on the Initiating Order side of the market; or

(3) that it is willing to either: (i) Stop the entire order at a single stop price and auto-match PAN responses, together with trading interest, at a price or prices that improve the stop price to a specified price above or below which the Initiating Member will not trade (a "Not Worse Than" or "NWT" price); (ii) stop the entire order at a single stop price and auto-match all PAN responses and trading interest at or better than the stop price; or (iii) stop the entire order at the NBBO on the Initiating Order side, and auto-match PAN responses and trading interest at a price or prices

[77] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] The Exchange adopted PIXL in October 2010 as a price improvement mechanism that is a component of the Exchange's fully automated options trading system. *See* Securities Exchange Act Release No. 63027 (October 1, 2010), 75 FR 62160 (October 7, 2010) (SR–Phlx–2010–108)(order granting approval of price improvement system, PIXL).

[5] Securities Exchange Act Release No. 60877 (October 26, 2009), 74 FR 56255 (October 30, 2009) (SR–Phlx–2009–92).

[6] Securities Exchange Act Release No. 63034 (October 4, 2010), 75 FR 62441 (October 8, 2010) (SR–Phlx–2010–124).