

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62876; File No. SR-Phlx-2010-120)

September 9, 2010

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of
Proposed Rule Change by NASDAQ OMX PHLX, Inc. to Establish Fees for NASDAQ
OMX PSX

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 August 31, 2010, NASDAQ OMX PHLX, Inc. ("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 adopt new fees in connection with the trading of NMS stocks through the new NASDAQ OMX PSX system ("PSX"). The text of the proposed rule change is available on the Exchange's website at

<http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, on the Commission's website at www.sec.gov, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

Shortly after its acquisition by The NASDAQ OMX Group, Inc. (“NASDAQ OMX”) in 2008, the Exchange ceased operation of XLE, its former system for trading NMS stocks.³ Earlier this year, the Exchange filed a proposed rule change to resume trading NMS stocks through a new electronic platform known as NASDAQ OMX PSX.⁴ In anticipation of approval and launch of PSX, the Exchange is filing this proposed rule change to establish fees, dues, and other charges applicable to PSX. The proposed fees are structurally similar to those of the Exchange’s affiliated exchanges, The NASDAQ Stock Market LLC (the “NASDAQ Exchange”) and NASDAQ OMX BX, Inc. (“BX”), but with the omission of fees that are not pertinent to the Exchange’s planned business and with differences in the level of certain fees.

Order Execution Fees

Order execution fees will be uniform for all types of securities and member organizations. Specifically, for securities executed at prices of \$1 or more, the Exchange will charge \$0.0013 per share executed and pay a liquidity provider rebate of \$0.0020 per share executed. For executions below \$1, the execution fee will be 0.2% of the total

³ Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR-PHLX-2008-65).

⁴ Securities Exchange Act Release No. 62519 (July 16, 2010), 75 FR 43597 (July 26, 2010) (SR-PHLX-2010-79).

transaction cost, and the rebate will be \$0. The Exchange proposes this “inverted” pricing structure as a temporary promotional mechanism to attract liquidity to PSX. Other exchanges and trading venues have adopted inverted pricing in the past as a means to promote the development of a new market entrant.⁵

PSX TotalView

The Exchange proposes to establish fees for its PSX TotalView data product. Like NASDAQ TotalView and BX TotalView, PSX TotalView will provide all Displayed Orders in the market at every price level.⁶ In recognition of the start-up nature of the new market, the data feed will be provided free of charge to subscribers and distributors for a period ending on the last day of the twelfth full calendar month of PSX’s operation. Thus, if PSX commences operations on September 27, 2010, PSX TotalView fees will be waived until October 1, 2011.

After the initial free period, the Exchange will offer users a range of pricing options. In general, charges will be assessed to distributors of PSX Total View on a per distributor basis, with additional charges assessed on a per subscriber basis for each subscriber receiving the data from a distributor. A “distributor” is defined as any entity that receives a feed or data file of Exchange data directly from the Exchange (a “direct distributor”) or indirectly through another entity (an “indirect distributor”) and then

⁵ See, e.g., Securities Exchange Act Release No. 59452 (February 25, 2009), 74 FR 9456 (March 4, 2009) (SR-BX-2009-012) (temporarily decreasing order execution fee to a level below prevailing liquidity provider rebate); BATS ECN Unveils Ultra-Aggressive January Pricing Special (December 19, 2006) (available at http://www.batstrading.com/resources/press_releases/BATS%20ECN%20Unveils%20Ultra-Aggressive%20January%20Pricing%20Special.pdf).

⁶ In contrast with the NASDAQ Exchange and BX, however, all orders designated as Displayed Orders will be displayed without attribution to the entering market participant.

distributes the data either internally (within that entity) or externally (outside that entity). Distributors of PSX TotalView will pay a \$1,000 monthly fee to receive the data directly from the Exchange (including from the Exchange through an extranet); indirect distributors would not pay this charge. Distributors will also pay either a \$500 monthly fee to distribute the data feed internally (i.e., to employees) or a \$1,250 monthly fee to distribute to external customers (as well as internally, if applicable). All of the foregoing fees will be waived during the initial free period. Finally, distributors receiving any PSX TotalView or any other PSX data feed will be charged an annual administrative fee: either \$500 for delayed distribution of data, or \$1,000 for real-time distribution.⁷ The administrative fees, which are assessed annually, will be charged at the beginning of the first calendar year after the launch of PSX, rather than being subject to the one-year free period applicable to other data fees. If, as the Exchange expects, PSX launches in 2010, the fees would therefore be charged in January 2011.⁸

In addition to the distributor fees, the Exchange will also charge subscriber fees for controlled accesses to the TotalView data feed. “Subscriber” is defined with reference to instances of access to the data on computer equipment that can receive the data. Specifically, a “subscriber” is defined as any access that a distributor provides to (i) access the information in the PSX TotalView entitlement package, or (ii) communicate with a distributor so as to cause the distributor to access the information in the entitlement package. If a distributor provides its customers or employees an option to use

⁷ These annual administrative fees may be waived for colleges and universities receiving the data for research and educational purposes.

⁸ The administrative fees will also cover distribution of any other PSX data feeds, including free data feeds such as the PSX Last Sale Data Feeds described later in this proposed rule change, and other free or fee-liable feeds that the Exchange offers in the future.

or not to use PSX TotalView data on their computers, and the data is not actually used on a specific computer that has access to it, then the computer in question would not be charged as a subscriber. However, the burden is on the distributor to demonstrate that a particular computer with access is not using the data.

Following the initial one-year free period, the Exchange will assess a monthly charge for each subscriber. The fee for each professional PSX TotalView subscriber is \$40 per month.⁹ Alternatively, market participants using the data internally on non-display controlled devices may purchase an enterprise license at a rate of \$16,000 per month for internal use on an unlimited number of non-display devices within the firm, and thereby avoid individual subscription charges for these devices.¹⁰

In addition to the foregoing fees, which apply to professional users of PSX TotalView, the Exchange will also allow distributors to provide PSX TotalView to non-professional subscribers at a reduced rate. A “non-professional” is defined as a natural person who is neither (i) registered with the Commission, the Commodities Futures Trading Commission, a state securities agency, a securities exchange or securities association, or a commodities or futures contract market or association; (ii) engaged as an investment advisor as defined in Section 202(a)(11) of the Investment Advisors Act of 1940¹¹ (the “1940 Act”) (whether or not the person is registered or qualified under the

⁹ The fee is comparable to the corresponding fee on BX, but BX bifurcates the product between a version of the product covering NASDAQ Exchange-listed securities and a version covering securities listed on other exchanges, charging \$20 per subscriber per month for each version. PSX TotalView will provide data about orders for all securities for a fee of \$40 per subscriber per month.

¹⁰ A non-display device uses data from the PSX TotalView for calculations and routing decisions but does not provide means to display the information on a screen.

¹¹ 15 U.S.C. 80b-2(a)(11).

1940 Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if performed for another organization. The non-professional fee is \$1 per subscriber per month. This fee will also be waived until the end of the twelfth full calendar month following PSX's launch.

After the expiration of the one-year introductory period, the Exchange will allow distributors to provide PSX TotalView to new subscribers receiving PSX TotalView for the first time free of charge for an individual one-month trial period. The free trial period applies to individual subscribers receiving the data on a per-subscriber basis, and to broker-dealers that opt to receive the data under an enterprise license. The fee waiver would be applied to the first full month of charges following the date on which a new subscriber is first entitled by a distributor to receive access to PSX TotalView.

The foregoing fee structure is similar to the structure for NASDAQ TotalView and BX TotalView, but the overall level of fees will be lower than for NASDAQ TotalView and comparable to those for BX TotalView. These fee levels reflect the start-up nature of the Exchange's new equities trading platform, and will help to promote competition among exchanges with respect to the quoting and trading services. Specifically, the Exchange believes that the fees it sets for PSX TotalView will help to attract order flow to the Exchange. At inception, the Exchange will have zero market share and therefore must set its fees, including data fees, with a view to attracting order flow. Moreover, the alternatives that exist for market participants to determine market depth – such as other depth of book products that may be associated with markets with more liquidity, or order routing strategies designed to ascertain market depth – provide

incentives for the Exchange to ensure that its fees for PSX TotalView are set reasonably. Accordingly, the Exchange will charge no fee at all for a period of more than twelve months, and thereafter will charge fees comparable to those already established for BX.

The fees are not unreasonably discriminatory. The fees for subscribers are uniform for all subscribers, except with respect to reasonable and well-established distinctions between fees for professional and non-professional subscribers. These distinctions, previously approved by the Commission for the NASDAQ Exchange and BX, are designed to promote more widespread distribution to non-professional users. Similarly, the fees for distributors are uniform except with respect to reasonable and well-established distinctions between internal and external distribution and direct and indirect receipt of data. These distinctions, also previously approved by the Commission for the NASDAQ Exchange and BX, are designed to charge lower fees to distributors whose activities do not require the Exchange to establish and maintain direct connections to the distributor, and to distributors that do not establish and maintain external distribution networks requiring more extensive procedures to monitor subscriber usage. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

TradeInfo PSX

TradeInfo PSX is an order and execution management tool, similar to comparable products offered by the NASDAQ Exchange and BX. TradeInfo PSX allows users to manage their order flow and mitigate risk by giving them the ability to view their orders and executions, as well as the ability to perform cancels at the port level. It also allows users to download records of their orders and executions for record-keeping purposes. It

will be available to PSX participants for a fee of \$95 per user per month, which is the same as the fee for the comparable products of the NASDAQ Exchange and BX.

Testing

The Exchange proposes to establish fees for its testing facility, to be set at levels identical to the fees for the NASDAQ Exchange's and BX's testing facilities. In general, the Exchange will charge \$285 per hour for an active connection during the facility's normal operating hours and \$333 per hour for an active connection at other times. The fees are waived for testing of new, enhanced, or modified services and/or software offered by the Exchange, as well as for modifications initiated by the Exchange and for a 30-day period for new subscribers to existing services. In addition, all testing fees will be waived for the period ending on the last day of the sixth full calendar month following the launch of PSX. Thereafter, as provided in the rule, the fees will be waived for a 30-day period for each new market participant.

Other Fees

Other fee rules relate to installation, removal or relocation of equipment at a subscriber's premises,¹² administrative reports,¹³ special data requests,¹⁴ and partial month charges¹⁵ and are comparable to corresponding fees of the NASDAQ Exchange

¹² This provision allows the Exchange to pass through any costs it incurs.

¹³ An administrative report is prepared at a member organization's request regarding its activities to assist the firm in activities such as auditing its internal systems, verifying back-office processing, or projecting monthly costs. The fee is \$25 per month.

¹⁴ This provision allows the Exchange to recoup costs associated with responding to ad hoc requests for market data, such as requests that may be made by news reporters or academic researchers.

¹⁵ This provision provides that market data distributors may elect to be billed on a prorated basis during the month of initiation or termination of service.

and BX. Fee language governing the aggregation of the activity of affiliated Exchange member organizations for purposes of volume pricing discounts would not be immediately operative, since the Exchange will not initially offer such discounts, but is being adopted at this time to address any such discounts adopted in the future.

Non-Fee Liable Data

The Exchange also proposes to make certain data feeds and other data products available without assessing any distributor or subscriber fees.¹⁶ If the Exchange opts to charge a fee for these feeds or products at a later date, it will file a proposed rule change under Section 19 of the Act to establish the fee.

The feeds are comparable to corresponding feeds offered by BX. First, the Exchange will offer PSX Last Sale Data Feeds, which will provide real-time last sale information, including execution price, volume, and time for executions occurring within PSX. The Exchange believes that these data feeds will increase transparency and the efficiency of executions by enabling vendors to provide additional market data in a cost-efficient manner. The Exchange will offer the PSX Last Sale for NASDAQ and the PSX Last Sale for NYSE/Amex feeds, providing information for (i) NASDAQ Exchange-listed securities, and (ii) securities listed on the New York Stock Exchange (“NYSE”), NYSE Amex, and other exchanges.

Second, the Exchange will offer real-time data feeds of PSX’s Best Bid and Offer (“BBO”). The Exchange will offer three different feeds, one providing the BBO for

¹⁶ The Exchange will assess the annual administrative fee described above to all distributors receiving a data feed, including non-fee-liable feeds. The Exchange reserves the right to impose distributor and/or subscriber fees for these products at a later date by submitting a proposed rule change under Section 19 of the Act. 15 U.S.C. 78s.

NASDAQ Exchange-listed securities, a second for NYSE-listed securities, and a third for NYSE Amex-listed securities.

Third, the Exchange will offer the PSX Ouch BBO Feed, a data feed that will represent PSX's internal view of the best bid and offer among all market centers other than PSX. The PSX Ouch BBO Feed will be available to all PSX market participants equally at no charge, and will offer all firms transparent, real-time data concerning the Exchange's internal view of the BBO. This data feed reflects the Exchange's view of the BBO, at any given time, based on orders executed on PSX and updated quote information from the SIPs. PSX will make the PSX Ouch BBO Feed available to all market participants via subscription through an established connection to PSX.

The PSX Ouch BBO Feed will contain the following data elements: symbol, bid price, and ask price.¹⁷ Unlike the PSX TotalView feed, the Ouch BBO feed will not contain information about individual orders, either those residing within the PSX system or those executed or routed by PSX. Unlike the SIP feeds containing the National Best Bid and Offer ("NBBO"), the PSX Ouch BBO Feed will not identify either the market center quoting the BBO or the size of the BBO quotes. It merely contains the symbol and bid and offer prices.

By making the PSX Ouch BBO Feed data available, the Exchange will enhance market transparency and foster competition among orders and markets. Member organizations may use the PSX Ouch BBO Feed to more accurately price their orders based on PSX's view of what the BBO is at any point in time, which may not be reflected in the official NBBO due to latencies inherent in the NBBO's dissemination. As a

¹⁷ PSX also provides a time stamp and message type field for reference.

consequence, firms may more accurately price their orders on PSX, thus avoiding price adjustments by PSX based on a quote that is no longer available. Additionally, market participants can price orders more aggressively to narrow the NBBO and provide better reference prices for investors.

Fourth, the Exchange will make a version of NASDAQ OMX's Weblink ACT product available for use by PSX participants. For PSX participants, Weblink Act will provide a convenient system for member organizations to access comprehensive records of their own trades in PSX. Weblink ACT will be provided free of charge at the time of PSX's launch. Users will have the option of receiving the Weblink ACT service for PSX as a standalone product, or in addition to Weblink ACT for the NASDAQ Exchange service that they may already be receiving. In either case, the Exchange will not charge a fee for the PSX version.

Finally, the PSX Trading and Compliance Data Package will provide PSX Participants with historical data reports containing trade-reporting information about the Participant's own trades in PSX, for delivery on an end-of-day or T+1 basis. The Exchange may modify the contents of the PSX Trading and Compliance Data Package from time to time based on subscriber interest. Users will have the option to request and download these reports as a standalone product, and subscribers to the existing NASDAQ Exchange Trading and Compliance Data package who are PSX Participants will also have the option to request PSX reports through their existing service. In either case, the Exchange will not charge a fee for the PSX version at this time.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁸ in general and with Section 6(b)(4) of the Act,¹⁹ in particular, in that it provides an equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange makes all services and products subject to these fees available on a non-discriminatory basis to similarly situated recipients. All fees are structured in manner comparable to corresponding fees of the NASDAQ Exchange or BX already in effect, and are set at levels equal to or lower than the levels of the comparable NASDAQ Exchange and BX fees. Most of the proposed fees, including transaction execution and testing fees, are uniform for all customers and are therefore equitably allocated based on usage of PSX services. The proposed fees for PSX TotalView are equitably allocated since the fees vary solely based on reasonable and well-established distinctions with respect to professional and non-professional users, internal and external distribution, and direct and indirect receipt of data. The fees are fair and reasonable in that they compare favorably to fees charged by other exchanges for comparable products.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. Despite its long history, the Exchange will effectively be entering the highly competitive markets for trading NMS stocks as a start-up venture. Accordingly, its fees must be set at a level that will promote competition in these markets, or potential users of its services will simply continue to obtain services from the

¹⁸ 15 U.S.C. 78f.

¹⁹ 15 U.S.C. 78f(b)(4).

Exchange's multiple competitors. If the Exchange sets fees at inappropriately high levels, market participants will seek to avoid using the Exchange. Thus, the products and services introduced by the Exchange will promote competition if they succeed in providing market participants with viable and cost-effective alternatives to existing competitors. Conversely, they will impose no burden on competition if they fail to provide such alternatives.

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 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 proposal is consistent with the Act.

Comments may be submitted by any of the following methods:

²⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

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 No. SR-Phlx-2010-120 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 No. SR-Phlx-2010-120. 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 such filing will also 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 No. SR-Phlx-2010-120 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

Elizabeth M. Murphy
Secretary

²¹ 17 CFR 200.30-3(a)(12).