

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76403; File No. SR-Phlx-2015-87)

November 10, 2015

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding NASDAQ Last Sale Plus

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 27, 2015, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend Chapter VIII of NASDAQ OMX PSX Fees (“PSX Chapter VIII”), in the section entitled PSX Last Sale Data Feeds and NASDAQ Last Sale Plus Data Feeds (“Last Sale”), with language clarifying that the data consolidation component of the fees for NASDAQ Last Sale Plus (“NLS Plus”), a comprehensive data feed offered by NASDAQ OMX Information LLC,³ will be charged solely to firms that are Internal Distributors and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ NASDAQ OMX Information LLC is a subsidiary of Nasdaq, Inc. (formerly, The NASDAQ OMX Group, Inc.), separate and apart from The NASDAQ Stock Market LLC. The primary purpose of NASDAQ OMX Information LLC is to combine publicly available data from the three filed last sale products of the exchange subsidiaries of Nasdaq, Inc. and from the network processors for the ease and convenience of market data users and vendors, and ultimately the investing public. In that role, the function of NASDAQ OMX Information LLC is analogous to that of other market data vendors, and it has no competitive advantage over other market data vendors; NASDAQ OMX Information LLC performs precisely the same functions as Bloomberg, Thomson Reuters, and other market data vendors.

External Distributors (collectively, “Distributors” of the data feed) that receive a NLS Plus direct data feed.⁴

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqomxphlx.cchwallstreet.com>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of this proposal is to amend PSX Chapter VIII, Last Sale (b) with language clarifying that the data consolidation component of the fees for NLS Plus will be charged solely to firms that are Distributors that receive an NLS Plus direct data feed.⁵

NLS Plus⁶ allows data distributors to access last sale products offered by each of Nasdaq, Inc.’s three U.S. equity exchanges.⁷ NLS Plus includes all transactions from these exchanges, as

⁴ “Internal Distributors” are Distributors that receive NASDAQ Last Sale Plus data and then distribute that data to one or more Subscribers within the Distributor’s own entity. “External Distributors” are Distributors that receive NASDAQ Last Sale Plus data and then distribute that data to one or more Subscribers outside the Distributor’s own entity. Internal Distributors and External Distributors are together known as “Distributors”. Proposed BX Rule 7039(b)(1).

⁵ Thus, the fee does not apply to persons that receive the NLS Plus data feed indirectly, through an Internal Distributor or External Distributor.

well as FINRA/NASDAQ TRF data that is included in the current NLS product. In addition, NLS Plus features total cross-market volume information at the issue level, thereby providing redistribution of consolidated volume information (“consolidated volume”) from the securities information processors (“SIPs”) for Tape A, B, and C securities.⁸ Thus, NLS Plus covers all securities listed on NASDAQ and New York Stock Exchange (“NYSE”) (now under the

⁶ See Securities Exchange Act Release Nos. 75763 (August 26, 2015), 80 FR 52817 (September 1, 2015) (SR-Phlx-2015-72) (notice of filing and immediate effectiveness regarding NLS Plus on PSX); 75890 (September 10, 2015), 80 FR 55692 (September 16, 2015) (SR-Phlx-2015-76) (notice of filing and immediate effectiveness regarding fees for NLS Plus on PSX); 75709 (August 14, 2015), 80 FR 50671 (August 20, 2015) (SR-BX-2015-047) (notice of filing and immediate effectiveness regarding NLS Plus on BX); 75830 (September 3, 2015), 80 FR 54640 (September 10, 2015) (SR-BX-2015-054) (notice of filing and immediate effectiveness regarding fees for NLS Plus on BX); 75257 (June 22, 2015), 80 FR 36862 (June 26, 2015) (SR-NASDAQ-2015-055) (order approving proposed rule change regarding NLS Plus); and 75600 (August 4, 2015), 80 FR 47968 (August 10, 2015) (SR-NASDAQ-2015-088) (notice of filing and immediate effectiveness regarding fees for NLS Plus) (the “NLS Plus fee proposal”).

⁷ The NASDAQ OMX U.S. equity markets include the Exchange, The NASDAQ Stock Market LLC (“NASDAQ”), and NASDAQ OMX BX, Inc. (“BX”) (together known as the “NASDAQ OMX equity markets”). BX and NASDAQ are filing companion proposals similar to this one. NASDAQ’s last sale product, NASDAQ Last Sale, includes last sale information from the FINRA/NASDAQ Trade Reporting Facility (“FINRA/NASDAQ TRF”), which is jointly operated by NASDAQ and the Financial Industry Regulatory Authority (“FINRA”). See Securities Exchange Act Release No. 71350 (January 17, 2014), 79 FR 4218 (January 24, 2014) (SR-FINRA-2014-002). For proposed rule changes submitted with respect to NASDAQ Last Sale, BX Last Sale, and PSX Last Sale, see, e.g., Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178, (June 20, 2008) (SR-NASDAQ-2006-060) (order approving NASDAQ Last Sale data feeds pilot); 61112 (December 4, 2009), 74 FR 65569, (December 10, 2009) (SR-BX-2009-077) (notice of filing and immediate effectiveness regarding BX Last Sale data feeds); and 62876 (September 9, 2010), 75 FR 56624, (September 16, 2010) (SR-Phlx-2010-120) (notice of filing and immediate effectiveness regarding PSX Last Sale data feeds).

⁸ Tape A and Tape B securities are disseminated pursuant to the Security Industry Automation Corporation’s (“SIAC”) Consolidated Tape Association Plan/Consolidated Quotation System, or CTA/CQS (“CTA”). Tape C securities are disseminated pursuant to the NASDAQ Unlisted Trading Privileges (“UTP”) Plan. NLS Plus reflects real-time trading activity for Tape C securities and 15-minute delayed information for Tape A and Tape B securities.

Intercontinental Exchange (“ICE”) umbrella), as well as US “regional” exchanges such as NYSE MKT, NYSE Arca, and BATS (also known as BATS/Direct Edge).⁹

NLS Plus is currently codified in PSX Chapter VIII, Last Sale (b). The fees for NLS Plus are set forth in PSX Chapter VIII, Last Sale (b)(1) – (b)(3) as follows:

- (1) Firms that receive NLS Plus shall pay the annual administration fees for NLS, BX Last Sale, and PSX Last Sale, and a data consolidation fee of \$350 per month.
- (2) Firms that receive NLS Plus would either be liable for NLS fees or NASDAQ Basic fees.
- (3) In the event that NASDAQ OMX BX and/or NASDAQ OMX PHLX adopt user fees for BX Last Sale and/or PSX Last Sale, firms that receive NLS Plus would also be liable for such fees.¹⁰

The Exchange now proposes to clarify how the data consolidation fee in PSX Chapter VIII, Last Sale (b) will be charged. Specifically, the Exchange proposes to clarify that firms that are Distributors that receive a NASDAQ Last Sale Plus direct data feed and are Distributors shall pay a data consolidation fee of \$350 per month. Thus, only Distributors that receive NLS Plus would be charged the data consolidation fee. As proposed to be amended, PSX Chapter VIII, Last Sale (b)(1) would state:

(1) Firms that receive NLS Plus shall pay the annual administrative fees for NLS, BX Last Sale, and PSX Last Sale. Additionally, Internal Distributors or External Distributors shall pay a data consolidation fee of \$350 per month.¹¹ “Internal Distributors” are Distributors that

⁹ Registered U.S. exchanges are listed at <http://www.sec.gov/divisions/marketreg/mrexchanges.shtml>.

¹⁰ Annual administrative fees are in BX Rule 7035, NASDAQ Rule 7035, and NASDAQ OMX PSX Fees Chapter VIII. These remain unchanged at: \$1,000 for NASDAQ, \$1,000 for BX, and \$1,000 for PSX. For purposes of conformity, “administration” is changed to “administrative” in PSX Chapter VIII, Last Sale (b)(1), discussed below.

¹¹ The Exchange notes that those that have received NASDAQ Last Sale Plus directly from the Exchange have all, in fact, been firms. While the NASDAQ Last Sale Plus feed is

receive NLS Plus data and then distribute that data to one or more Subscribers within the Distributor's own entity. "External Distributors" are Distributors that receive NLS Plus data and then distribute that data to one or more Subscribers outside the Distributor's own entity.¹²

The NLS Plus fee structure as amended continues to be designed to ensure that vendors could compete with the Exchange by creating a product similar to NLS Plus.¹³ The proposed fee structure reflects the cost of the data feeds underlying NLS Plus (including user fees and annual administrative fees), as well as the incremental cost of the aggregation and consolidation function (the "consolidation function") for NLS Plus. Accordingly, the Exchange believes that the fee structure would not result in charges for NLS Plus that are lower than the cost to a vendor creating a competing product, including the cost of receiving the underlying data feeds and consolidating them. The data consolidation fee recognizes that NLS Plus is created from data derived from NASDAQ Last Sale, BX Last Sale, PSX Last Sale, and data from the SIPs to which a consolidation function is applied. Charging the consolidation fee will not impede an entity receiving the underlying direct data feeds from creating a competing product to the NLS Plus feed based on combining individual data feeds, and charging its clients a fee that it believes reflects the value of the consolidation function. The Exchange believes that the incremental cost of aggregation to an entity that wants to re-create NLS Plus will be factored into the entity's revenue opportunity and may be inconsequential where the vendor has in place systems to perform these functions as part of creating its proprietary market data products and allocating

available to all that subscribe and pay the requisite costs, the Exchange believes that in light of such costs it will continue to experience only firms receiving the feed directly from the Exchange.

¹² PSX Chapter VIII, Last Sale (b)(2) and (b)(3) would remain unchanged.

¹³ For additional discussion regarding potential competition with NLS Plus, see *supra* note 6 and filings cited therein.

costs over numerous products and customer relationships. For these reasons, the Exchange believes that vendors could readily offer a product similar to the NLS Plus on a competitive basis at a similar cost.

The amendment to clarify that the consolidation fee applies to Distributors that receive the NLS Plus data feed directly but does not apply to persons that receive NLS Plus indirectly through a Distributor is designed to ensure that the Exchange charges the fee only to those persons that directly benefit from the consolidation function. Specifically, if a person wished to combine the products that underlie NLS Plus and distribute them to customers or internal users, it would incur its own consolidation costs. By purchasing NLS Plus for distribution, a Distributor foregoes these costs and instead opts to pay the Exchange to perform the consolidation function for it. Thus, imposing this fee upon Distributors is a logical corollary to the service being provided. By contrast, imposing the fee upon persons receiving the product through Distributors would effectively impose a duplicative charge, since such persons consume the data but are not in the business of distributing it and therefore do not forego consolidation costs when receiving the product. The Exchange further notes that the consolidation fee for BATS One, an analogous product of competing exchanges, is charged solely to external distributors of that product.¹⁴

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹⁵ in general, and with Sections 6(b)(4) and (5) of the Act,¹⁶ in particular, in

¹⁴ See, e.g., Securities Exchange Act Release No. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR-BATS-2014-055; SR-BYX-2014-030; SR-EDGA-2014-25; SR-EDGX-2014-25) (order approving market data product called BATS One Feed being offered by four affiliated exchanges).

¹⁵ 15 U.S.C. 78f.

that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers. All recipients of the NLS Plus data offering continue to pay the underlying data feed fees and annual administrative fees for NLS, BX Last Sale, and PSX Last Sale. The Exchange is simply clarifying that the data consolidation component of the fees for NLS Plus will be charged solely to firms that receive a NASDAQ Last Sale Plus direct data feed and are Distributors.

This change is reasonable and consistent with an equitable allocation of fees because it is designed to ensure that the Exchange charges the fee only to those persons that directly benefit from the consolidation function. Specifically, if a person wished to combine the products that underlie NLS Plus and distribute them to customers or internal users, it would incur its own consolidation costs. By purchasing NLS Plus for distribution, a Distributor foregoes these costs and instead opts to pay the Exchange to perform the consolidation function for it. Thus, imposing this fee upon Distributors is a logical corollary to the service being provided. The change is also not unfairly discriminatory. Indeed, imposing the fee upon persons receiving NLS Plus indirectly through Distributors would effectively impose a duplicative charge upon them, since such persons consume the data but are not in the business of distributing it and therefore do not forego consolidation costs when receiving the product. The Exchange further notes that the consolidation fee for BATS One, an analogous product of competing exchanges, is charged solely to external distributors of that product.¹⁷ Accordingly, the exchanges that distribute BATS

¹⁶ 15 U.S.C. 78f(b)(4) and (5).

¹⁷ See, e.g., Securities Exchange Act Release No. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (SR-BATS-2014-055; SR-BYX-2014-030; SR-EDGA-2014-25; SR-EDGX-2014-25) (order approving market data product called BATS One Feed being offered by four affiliated exchanges).

One take an analogous approach, in that they do not charge a consolidation fee to indirect recipients of the product, but rather charge the fee only to a subset of its distributors.

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. The change proposed herein is designed to ensure that the consolidation fee for NLS Plus is appropriately assessed to Distributors of the product that benefit from the consolidation function performed by NASDAQ OMX Information LLC in creating the product and insures that a duplicative charge is not also assessed against indirect recipients of the product. Thus, the change will avoid the imposition of fees on certain product recipients, while not increasing fees for any recipients.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. This rule proposal does not burden competition, which is reflected in the offerings of other exchanges that sell alternative data products¹⁸ and in the ability of competing data feed vendors to combine underlying data feeds in direct competition with NLS Plus. NASDAQ OMX Information LLC was constructed specifically to establish a level playing field with market data vendors and to preserve fair competition between them. NASDAQ OMX Information LLC receives NLS, BX Last Sale, and PSX Last Sale from each NASDAQ-operated exchange in the same manner, at the same speed, and reflecting the same fees as for all market data vendors. Therefore, NASDAQ OMX Information LLC has no competitive advantage with respect to these last sale products and NASDAQ commits to maintaining this level playing field in the future. In other words, NASDAQ will continue to disseminate separately the underlying

¹⁸

Id.

last sale products to avoid creating a latency differential between NASDAQ OMX Information LLC and other market data vendors, and to avoid creating a pricing advantage for NASDAQ OMX Information LLC.

NLS Plus exists in a market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/NASDAQ TRF data that is a component of NLS and NLS Plus, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data

products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content and content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the internet after being purchased).¹⁹ In NASDAQ's case, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, NASDAQ would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating,

¹⁹ See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," Antitrust Law Journal, Vol. 70, No. 3 (2003).

regulating,²⁰ and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

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

Pursuant to Section 19(b)(3)(A)(ii) of the Act,²¹ the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed on any person, whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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:

²⁰ It should be noted that the costs of operating the FINRA/NASDAQ TRF borne by NASDAQ include regulatory charges paid by NASDAQ to FINRA.

²¹ 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 Number SR-Phlx-2015-87 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2015-87. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-Phlx-2015-87 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.²²

Robert W. Errett
Deputy Secretary

²² 17 CFR 200.30-3(a)(12).