SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-83811; File No. SR-Phlx-2018-53)

August 9, 2018

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Incorporate the "PSX Last Sale and Nasdaq Last Sale Plus Data Feeds" into the Market Data Enterprise License Proposed by the Nasdaq Stock Market LLC

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 July 27, 2018, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

This amendment is immediately effective upon filing.[3]

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

The Exchange proposes to incorporate the "PSX Last Sale and Nasdaq Last Sale Plus Data Feeds" into the market data enterprise license proposed by the Nasdaq Stock Market LLC ("Nasdaq"), which is designed to lower fees, reduce administrative costs, and expand the

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

2 17 CFR 240.19b-4.

3 This proposed change was initially filed on July 3, 2018, and became immediately effective on that date. See SR-Phlx-2018-51, available at http://nasdaq.cchwallstreet.com/. It was subsequently refiled on July 17, 2018. See SR-Phlx-2018-52, available at http://nasdaq.cchwallstreet.com/. A firm eligible to purchase the enterprise license proposed by Nasdaq may purchase it for the month of July, effective on July 3, 2018, and the monthly fee for the license will be prorated for the period July 3 through July 31, 2018. Any fees owed by the purchaser of the enterprise license for the use of NLS Plus on July 1 and July 2, 2018, will also be prorated accordingly.

availability of Nasdaq Last Sale ("NLS") Plus, NLS, Nasdaq Basic and Nasdaq Depth-of-Book products. The proposal is described in further detail below.

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

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

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

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

1. Purpose

The Exchange proposes to incorporate the "PSX Last Sale and Nasdaq Last Sale Plus Data Feeds" into the market data enterprise license proposed by Nasdaq,[4] which is designed to lower fees, reduce administrative costs, and expand the availability of NLS Plus, NLS, Nasdaq Basic and Nasdaq Depth-of-Book products (TotalView and Level 2).

NLS Plus is a comprehensive data feed offered by Nasdaq that allows distributors to access the three last sale products[5] offered by Nasdaq and its affiliated U.S. equity exchanges,[6] as

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4 See SR-NASDAQ-2018-058 (not yet published).

5 The three last sale products consist of Nasdaq Last Sale, BX Last Sale, and PSX Last Sale. PSX Last Sale consists of two data feeds containing real-time last sale information for trades executed on the Exchange. "PSX Last Sale for Nasdaq" contains all transaction reports for Nasdaq-listed securities. "PSX Last Sale for NYSE/NYSEAmex"

well as the FINRA/Nasdaq Trade Reporting Facility ("TRF"). It provides total cross-market volume information at the issue level, and reflects the cumulative consolidated volume of real-time trading activity for Tape A, B and C securities.[7] NLS Plus provides Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Regulation SHO Short Sale Price Test Restricted Indicator, Trading Action, and Symbol Directory are included. NLS Plus may be received by itself or in combination with NASDAQ Basic.

Firms that receive NLS Plus pay the monthly administrative fees for PSX Last Sale, BX Last Sale and NLS, and distributors pay a data consolidation fee of $350 per month.[8] The Exchange does not currently charge user fees for PSX Last Sale, but firms that receive NLS Plus would be required to pay any user fees adopted by the Exchange.[9]

The Exchange proposes to incorporate any fees owed under the PSX Last Sale and Nasdaq Last Sale Plus Data Feeds into the market data enterprise license proposed by Nasdaq, which is designed to lower fees, reduce administrative costs, and expand the availability of NLS

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contains all such transaction reports for securities listed on NYSE, NYSE Amex, and other exchanges.

6 The Nasdaq, Inc. U.S. equity markets are Nasdaq PSX, Nasdaq, and Nasdaq BX.

7 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.

8 The fee applies to both Internal and External Distributors. See PSX Last Sale and Nasdaq Last Sale Plus Data Feeds, Subsection (b)(1). "Internal Distributors" are Distributors that 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.

9 See PSX Last Sale and Nasdaq Last Sale Plus Data Feeds, Subsection (b)(3).

Plus, NLS, Nasdaq Basic and Nasdaq Depth-of-Book products. These fees include the monthly administrative fee applicable to NLS, PSX Last Sale and BX Last Sale, a data consolidation fee for Internal or External Distributors, and any user fees for PSX Last Sale or BX Last Sale that may be adopted in the future.[10]

As set forth in greater detail under the Nasdaq proposal, the market data enterprise license for display usage proposed by Nasdaq will allow Distributors who are broker-dealers or Investment Advisers[11] to disseminate these products to a wide audience for a monthly fee of $600,000, with the opportunity to lower that fee further to $500,000 per month if they contract for twelve months of service in advance. As explained in greater detail in Nasdaq's filing, the Exchange believes that the proposed market data enterprise license will reduce exchange fees, lower administrative costs for distributors, and help expand the availability of market information to investors, and thereby increase participation in financial markets. The enterprise license is being introduced in response to competition from other exchanges,[12] and demonstrates both the power and the benefits of the competitive market to spur innovation and change.

The purpose of this filing is to incorporate PSX Last Sale fees into the Nasdaq market data enterprise license as a means of lowering costs for all three equity markets. The rationale

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10 The Exchange also proposes a technical change to the PSX Last Sale and Nasdaq Last Sale Plus Data Feeds to reflect that PSX administrative fees are charged on a monthly, rather than annual, basis. See Securities Exchange Act Release No. 79654 (December 22, 2016), 81 FR 96140 (December 29, 2016) (SR-Phlx-2016-122).

11 "Investment Adviser" is defined in Section 202(a)(11) of the Investment Advisers Act of 1940, as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . ."

12 See, e.g., Enterprise Fee for the Cboe Equities One Feed, available at https://markets.cboe.com/us/equities/market_data_products/bats_one/.

and support for this proposal are the same as already set forth by Nasdaq in its companion proposal.[13]

The proposed enterprise license is optional in that no exchange is required to offer it and distributors are not required to purchase it. Firms can discontinue its use at any time and for any reason, and may decide to purchase market data products individually or substitute products from one exchange with competing products from other exchanges.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,[15] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As described above, the proposal to cover PSX fees for NLS Plus within the proposed market data enterprise license will lower fees, reduce administrative costs, and expand the availability of market data to retail investors, which the Exchange expects to improve transparency for financial market participants and lead to increased participation in financial markets. Discounts for broader dissemination of market data information have routinely been adopted by exchanges and permitted by the Commission as equitable allocations of reasonable dues, fees and other charges.[16] Distributors will be free to move from the month to month rate to

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13 See n.4.

14 15 U.S.C. 78f(b).

15 15 U.S.C. 78f(b)(4) and (5).

16 For example, the Commission has permitted pricing discounts for market data under Nasdaq Rules 7023(c) and 7047(b). See also Securities Exchange Act Release No. 82182

the annual rate at any time, or from the annual rate to the monthly rate, with notice, at the expiration of the twelve month term.

This proposal demonstrates the existence of an effective, competitive market because it resulted from a need to generate innovative approaches in response to competition from other exchanges that offer enterprise licenses for market data.[17] As the Commission has recognized, "[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior,"[18] and "the existence of significant competition provides a substantial basis for finding that the terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."[19] The proposed enterprise license will be subject to significant competition from other exchanges because each eligible distributor will have the ability to accept or reject the license depending on whether it will or will not lower its fees, and because other exchanges will be able to offer their own competitive responses. As the Commission has held in the past, the presence of competition provides a substantial basis for a finding that the proposal will be an equitable allocation of reasonable dues, fees and other charges.[20]

Furthermore, the proposed enterprise license will not unfairly discriminate between customers, issuers, brokers or dealers. The Act does not prohibit all distinctions among customers, but only discrimination that is unfair, and it is not unfair discrimination to charge

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(November 30, 2017), 82 FR 57627 (December 6, 2017) (SR-NYSE-2017-60) (changing an enterprise fee for NYSE BBO and NYSE Trades).

17 See n. 12.

18 Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21).

19 Id.

20 Id.

those distributors that are able to reach the largest audiences of retail investors a lower fee for incremental investors in order to encourage the widespread distribution of market data. The proposed change to the PSX rule book is designed to incorporate the PSX Last Sale and Nasdaq Last Sale Plus Data Feeds into the market data enterprise license proposed by Nasdaq. As explained in the Nasdaq filing, the market data enterprise license will be subject to significant competition, and that competition will ensure that there is no unfair discrimination. Each distributor will be able to accept or reject the license depending on whether it will or will not lower costs for that particular distributor, and, if the license is not sufficiently competitive, the Exchange may lose market share.

In adopting Regulation NMS, the Commission granted SROs and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

> [E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.[21]

The Commission was speaking to the question of whether broker-dealers should be subject to a regulatory requirement to purchase data, such as Depth-of-Book data, that is *in excess of* the data provided through the consolidated tape feeds, and the Commission concluded that the choice

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[21] See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) ("Regulation NMS Adopting Release").

should be left to them. Accordingly, Regulation NMS removed unnecessary regulatory restrictions on the ability of exchanges to sell their own data, thereby advancing the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

The proposed change to the PSX rule book is designed to incorporate the PSX Last Sale and Nasdaq Last Sale Plus Data Feeds into the market data enterprise license proposed by Nasdaq, and the proposed enterprise license will compete with other enterprise licenses offered by Nasdaq, underlying fee schedules promulgated by the Exchange, and enterprise licenses and fee structures implemented by other exchanges. The enterprise license is a voluntary product for which market participants can readily find substitutes. Accordingly, both PSX and Nasdaq are constrained from introducing a fee that would be inequitable or unfairly discriminatory.

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. This proposal will eliminate PSX fees for NLS Plus as part of a market data enterprise license proposed by Nasdaq that is intended to lower fees, reduce administrative costs, and expand the availability of market data to retail investors, which the Exchange expects to lead to increased participation in financial markets. It will not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act, but rather will enhance competition by introducing an innovative fee structure for market data, lowering prices and enhancing competition.

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. 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.

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, the cost of implementing cybersecurity to protect the data from external threats 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).[22]

It is costly for the Exchange 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 each are subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, the Exchange would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of trade reports from the TRF without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating, 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.

An exchange's broker-dealer customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will disfavor a particular exchange if the expected revenues from executing trades on the exchange do not exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it. Moreover, as a broker-dealer chooses to direct fewer orders to a particular exchange, the value of the product

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[22] 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).

to that broker-dealer decreases, for two reasons. First, the product will contain less information, because executions of the broker-dealer's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing more orders will become correspondingly more valuable.

Similarly, vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail broker-dealers offer their retail customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. Exchanges, TRFs, and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, the Exchange believes that market data products can enhance order flow by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by investors with access to the internet or television. Conversely, the value of such products to Distributors and investors decreases if order flow falls, because the products contain less content.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an "excessive" price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.[23]

Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing broker-dealers and various forms of alternative trading systems ("ATSs"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. It is common for broker-dealers to further exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, broker-dealers, and ATSs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATS, and broker-dealer is currently permitted to produce proprietary

[23] Cf. Ohio v. American Express, No. 16-1454 (S. Ct. June 25, 2018), https://www.supremecourt.gov/opinions/17pdf/16-1454_5h26.pdf (recognizing the need to analyze both sides of a two sided platform market in order to determine its competitiveness).

data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE American, NYSE Arca, IEX, and BATS/Direct Edge.

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.[24]

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

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2018-53 on the subject line.

[24] 15 U.S.C. 78s(b)(3)(A)(ii).

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2018-53. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-Phlx-2018-53 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.[25]

Eduardo A. Aleman
Assistant Secretary

[25] 17 CFR 200.30-3(a)(12).