

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87073; File No. SR-Phlx-2019-37)

September 24, 2019

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Pricing of a Technology Infrastructure Migration

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 September 18, 2019, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“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 Phlx pricing at Options 7, Section 9 titled “Other Member Fees.” The amendment will describe the pricing with respect to a technology infrastructure migration.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on October 1, 2019.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 amend Phlx pricing at Options 7, Section 9 titled “Other Member Fees.” The Exchange previously filed a fee proposal to not assess a fee for duplicative FIX Ports³ and CTI Ports⁴ to new FIX Ports and CTI Ports, during the month of September 2019, in connection with an upcoming technology infrastructure migration.⁵ With this rule change, the Exchange proposes to not assess a fee for duplicative FIX Ports and CTI Ports to new FIX Ports and CTI Ports, during the month of October 2019 to allow additional time for the Exchange to migrate its technology.

³ Financial Information eXchange or “FIX” is an interface that allows members and their Sponsored Customers to connect, send, and receive messages related to orders and auction orders and responses to and from the Exchange. Features include the following: (1) execution messages; (2) order messages; and (3) risk protection triggers and cancel notifications. See Rule 1080(a)(i)(A).

⁴ Clearing Trade Interface or “CTI” is a real-time clearing trade update message that is sent to a member after an execution has occurred and contains trade details specific to that member. The information includes, among other things, the following: (i) The Clearing Member Trade Agreement or “CMTA” or “OCC” number; (ii) Exchange badge or house number; (iii) the Exchange internal firm identifier; (iv) an indicator which will distinguish electronic and non-electronically delivered orders; (v) liquidity indicators and transaction type for billing purposes; and (vi) capacity. See Rule 1070(b)(1).

⁵ See Securities and Exchange Act Release No. 86795 (August 28, 2019), 84 FR 46578 (September 4, 2019) (SR-Phlx-2019-30).

Description of Migration and Pricing Impact

In connection with this migration, members may request new FIX Ports and CTI Ports during the month of October 2019, which are duplicative of the type and quantity of their current ports, at no additional cost to allow for testing of the new ports and allow for continuous connection to the match engine during the transition period.⁶ For example, a Phlx member with 3 FIX Ports and 1 CTI Port on October 1, 2019 could request 3 new FIX Ports and 1 new CTI Port for the month of October 2019 at no additional cost. The Phlx member would be assessed only for the legacy market ports, in this case 3 FIX Ports and 1 CTI Port for the month of October 2019 and would not be assessed for the new ports, which are duplicative of the current ports. A member may acquire any additional legacy ports during the month of October 2019 and would be assessed the charges indicated in the current Pricing Schedule. The migration does not require a member to acquire any additional ports, rather the migration requires a new port to replace any existing ports provided the member desired to maintain the same number of ports.⁷ A member desiring to enter orders into Phlx is required to obtain 1 FIX Port. A member may also obtain order and execution ports, such as a CTI Port, to receive clearing messages. The number of additional FIX or order and execution ports obtained by a member is dependent on the member's business needs.

⁶ Members would contact Market Operations to acquire new duplicative FIX Ports and CTI Ports. See Options Technical Update #2019-3.

⁷ The migration is 1:1 and therefore would not require a member to acquire new ports, nor would it reduce the number of ports needed to connect.

Applicability to and Impact on Members⁸

The proposal is not intended to impose any additional fees on any Phlx members. All members may enter orders on Phlx. As noted above, a Phlx member may enter all orders on Phlx through one FIX Port. The Exchange does not require a Phlx member to obtain more than one FIX Port, however, a member may obtain multiple FIX Ports or a CTI Port to meet its individual business needs. This proposal is intended to permit a Phlx member to migrate its current FIX Ports and CTI Ports at no additional costs during the month of October 2019 to allow for continuous connection to the Exchange. Members would only be assessed a fee for their current FIX Ports and CTI Ports and not be assessed a fee for any new duplicative ports they acquire in connection with the technology infrastructure migration. This proposal is not intended to have a pricing impact.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among

⁸ On May 21, 2019, the SEC Division of Trading and Markets (the “Division”) issued fee filing guidance titled “Staff Guidance on SRO Rule Filings Relating to Fees” (“Guidance”). Within the Guidance, the Division noted, among other things, that the purpose discussion should address “how the fee may apply differently (e.g., additional cost vs. additional discount) to different types of market participants (e.g., market makers, institutional brokers, retail brokers, vendors, etc.) and different sizes of market participants.” See Guidance (available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>). The Guidance also suggests that the purpose discussion should include numerical examples. Where possible, the Exchange is including numerical examples. In addition, the Exchange is providing data to the Commission in support of its arguments herein. The Guidance covers all aspects of a fee filing, which the Exchange has addressed throughout this filing.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The proposal is also consistent with Section 11A of the Act relating to the establishment of the national market system for securities. Moreover, the Exchange believes that its proposal complies with Commission guidance on SRO fee filings that the Commission Staff issued on May 21, 2019.¹¹

The Proposal is Reasonable

The Exchange's proposal is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹²

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is one of several options venues to which market participants may direct their order flow, and it

¹¹ See Guidance, supra note 8. Although the Exchange believes that this filing complies with the Guidance, the Exchange does not concede that the standards set forth in the Guidance are consistent with the Exchange Act and reserves its right to challenge those standards through administrative and judicial review, as appropriate.

¹² NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

represents a small percentage of the overall market. The Exchange believes its proposal is reasonable because it will not cause a pricing impact on any Phlx member, rather the proposal is intended to permit Phlx members to migrate their FIX Ports and CTI Ports to new technology at no additional cost during the month of October 2019. This proposal, which offers duplicative ports to members at no cost, will allow members to test and maintain continuous connection to the Exchange during the month of October 2019.

The Proposal represents an Equitable Allocation and is not Unfairly Discriminatory

The Exchange believes its proposal allocates its fees fairly among its market participants. The proposal is equitable and not unfairly discriminatory. All members may enter orders on Phlx. As noted above, a Phlx member may enter all orders on Phlx through one FIX Port. The Exchange does not require a Phlx member to obtain more than one FIX Port, however, a member may obtain multiple FIX Ports or a CTI Port to meet its individual business needs. This proposal is not intended to have a pricing impact to any Phlx member.

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.

Inter-market Competition

The proposal does not impose an undue burden on inter-market competition. This proposal does not amend pricing or functionality. Rather, this technology migration will enable Phlx members to continue to connect to Phlx, as is the case today, for the entry of orders.

Intra-market Competition

The proposal does not impose an undue burden on intra-market competition. All members may enter orders on Phlx. As noted above, a Phlx member may enter all orders on Phlx through one FIX Port. The Exchange does not require a Phlx member to obtain more than

one FIX Port, however, a member may obtain multiple FIX Ports or a CTI Port to meet its individual business needs. This proposal is not intended to have a pricing impact to any Phlx member.

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.¹³

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-2019-37 on the subject line.

¹³ 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-2019-37. 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-2019-37 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.¹⁴

Jill M. Peterson
Assistant Secretary

¹⁴ 17 CFR 200.30-3(a)(12).