

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60202; File No. SR-Phlx-2009-54)

June 30, 2009

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Fees for the Top of PHLX Options (“TOPO”) Data Feed

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4² thereunder, notice is hereby given that on June 30, 2009, 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 amend its fee schedule by establishing subscriber fees for a direct data product related to the trading of standardized options on the Exchange’s enhanced electronic trading platform for options, Phlx XL II.³ Specifically, the Exchange is proposing to adopt fees for the Top of Phlx Options (“TOPO”), a direct data feed product that features the Exchange’s best bid and offer position, with aggregate size and last sale information on the Phlx XL II system.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32).

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/>, 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

On June 5, 2009, the Exchange launched the Phlx XL II system, which is subject to a symbol-by-symbol rollout schedule expected to last up to 12 weeks. In conjunction with the launch and rollout of the Phlx XL II system, the Exchange is developing TOPO. TOPO will provide to subscribers a direct data feed that includes the Exchange's best bid and offer position, with aggregate size, based on displayable order and quoting interest on the Phlx XL II system. The data contained in the TOPO data feed is identical to the data sent to the processor for the Options Price Regulatory Authority ("OPRA"), and the TOPO and OPRA data leave the Phlx XL II System at the same time.

Currently, the Exchange does not make market data products such as TOPO available. Accordingly, there are no current fees for distribution or use of these products on the Exchange's fee schedule. In coordination with the projected completion of the rollout of the Phlx XL II

system, the Exchange proposes to charge monthly fees to distributors, beginning August 1, 2009, for use of TOPO. The monthly “Distributor Fee” charged will depend on whether the distributor is an “Internal Distributor” or an “External Distributor,” as defined below.

Under the proposal, the Exchange’s fee schedule will reflect that a “distributor” of NASDAQ OMX PHLX data is any entity that receives a feed or data file of data directly from NASDAQ OMX PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity), and that all distributors would be required to execute a NASDAQ OMX PHLX distributor agreement.⁴

Internal Distributor

An Internal Distributor is an organization that subscribes to the Exchange for the use of TOPO, and is permitted by agreement with the Exchange to provide TOPO data to internal users (i.e., users within their own organization). Internal Distributors would be charged a monthly fee of \$2,000 per organization.

External Distributor

An External Distributor is an organization that subscribes to the Exchange for the use of TOPO, and is permitted by agreement with the Exchange to provide TOPO data to both internal users and to external users (i.e., users outside of their own organization). External Distributors will be charged a monthly fee of \$2,500 per organization.

⁴ The Exchange notes that the proposed definition of “distributor” and references to internal and external distribution are identical to those set forth in NASDAQ Rule 7019(c).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁵ in general and with Section 6(b)(4) of the Act,⁶ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Phlx operates or controls.

The Exchange believes that the proposed rule change is also consistent with the provisions of Section 6(b)(5) of the Act,⁷ in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act⁸ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as set forth in more detail below.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the

⁵ 15 U.S.C. 78f.

⁶ 15 U.S.C. 78f(b)(4).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78f(b)(8).

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 has recently issued an order firmly establishing that in reviewing non-core data products such as TOPO, the Commission will utilize a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.⁹ The Commission adopted a two-part test:

The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the proposal unless it determines that there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder. If, however, the exchange was not subject to significant competitive forces in setting the terms of a proposal for non-core data, the Commission will require the exchange to provide a substantial basis, other than competitive forces, in its proposed rule change demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.¹⁰

This standard begins from the premise that no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.¹¹

In its NetCoalition Order the Commission concluded that “at least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its Proposal to distribute the ArcaBook data: (1) NYSE Arca’s compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data. The Commission conducted an exhaustive 14-page review of these two competitive forces before concluding that the availability of alternatives, as well as the

⁹ Securities Exchange Act Release No. 57917 [sic] (Dec. 2, 2008) (NetCoalition Order” resolving File No. SR-NYSEArca-2006-21).

¹⁰ Id. at 48 – 49.

¹¹ Id. at 4.

compelling need to attract order flow, imposed significant competitive pressure on the exchange's need to act equitably, fairly, and reasonably in setting the terms of the fees for its non-core data product.¹²

The market data provided in TOPO is non-core data that is governed by the same analysis the Commission set forth in the NetCoalition Order. As with the NYSE Arca depth-of-book product, no rule requires Phlx or any other exchange to offer top of book data; nor are vendors required to purchase or display that data. Additionally, Phlx is constrained by the same two competitive forces in the options market as the Commission found are present in the proposal of the International Securities Exchange, Inc. ("ISE") to establish fees for a real-time depth of market data offering, the ISE Depth of Market Data Feed ("Depth of Market").¹³

First, Phlx has a compelling need to attract order flow from market participants, just as ISE, in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on Phlx to act reasonably in setting its fees for Phlx market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom Phlx must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.

¹² Id. at 51 – 65. The Commission then spent an additional 36 pages (65 – 101) analyzing and refuting comments challenging the Commission's competition analysis.

¹³ See Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR-ISE-2007-97) (Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to Market Data Fees).

As an illustration of the intensity of the competition for options order flow among the seven U.S. options exchanges, the ISE and Chicago Board Options Exchange, Inc. (“CBOE”) each enjoy close to thirty percent market share of volume, followed by Phlx at close to twenty percent market share, followed by four other exchanges with meaningful market share.

Phlx currently trades options on 7 proprietary index products that are not traded on any other exchange. These 7 options currently represent less than 0.04% of Phlx’s total contract volume. Given the small percentage of Phlx’s total contract volume represented by these 7 products, the Exchange believes that the inclusion of data on these products in the TOPO product should not confer market power on Phlx to compel market participants to purchase the entire Phlx data feed. The Exchange therefore believes that the inclusion of top-of-book data for these products in Phlx’s TOPO product does not undermine the fact that Phlx is subject to significant competitive forces in setting the terms of its proposal.

Second, Phlx is constrained in pricing TOPO by the availability to market participants of alternatives to purchasing TOPO. Phlx must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange’s data. For example, although the TOPO data feed is separate from the core data feed made available by OPRA, all the information available in TOPO is included in the core data feed. The core OPRA data is widely distributed and relatively inexpensive, thus constraining Phlx’s ability to price TOPO. Additionally, both ISE and CBOE are potential competitors because each exchange enjoys greater market share and thus the ability to offer a top-of-book product that would compete favorably with TOPO.

If the Commission finds that Phlx is subject to significant competitive forces in setting the terms of TOPO pricing, then the Commission should approve the proposal in the absence of a

substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. Phlx submits that no such countervailing basis exists.

To the contrary, Phlx's considerations in setting the fees for TOPO are virtually identical to those the Commission approved in the NetCoalition Order. First, the proposed fees for TOPO are lower for Internal Distributors than for External Distributors. Because Internal Distributors are by definition more limited in the scope of their distribution of TOPO data than External Distributors, it is reasonable to expect that Internal Distributors will provide TOPO data to a smaller number of internal subscribers. Conversely, External Distributors can reasonably be expected to distribute the TOPO data to a higher number of subscribers because they do not have the same limitation. Accordingly, the Exchange will charge a higher fee to External Distributors than to Internal Distributors. The fees therefore do not unreasonably discriminate among types of subscribers, such as by favoring participants in the Phlx market or penalizing participants in other markets. Second, Phlx projects that the total revenues generated by the TOPO fee initially will amount to less than the \$8 million per year that NYSE Arca projected would be generated by its ArcaBook data.¹⁴

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. To the contrary, the market for options orders and executions is already highly competitive and Phlx's proposal is itself pro-competitive in several ways. First, the TOPO data feed offers a competitive, lower-priced alternative to the consolidated data OPRA feed for users and situations

¹⁴ Id. at 101 – 104. [sic]

where consolidated data is unnecessary. Second, the Phlx believes that offering the TOPO data feed will help attract new users and new order flow to the Phlx market, thereby improving Phlx's ability to compete in the market for options order flow and executions.

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 Exchange requests accelerated approval in order to expedite the availability of TOPO, which should promote consistency and transparency in the Exchange's markets.

The Exchange believes that accelerated approval should provide customers, and broker-dealers that make routing decisions on behalf of customers, with greater transparency in the Phlx markets on an expedited basis. Once a full 21-day comment period has taken place, the Exchange believes (in the absence of any comments that would require a response) that it is appropriate for the Commission to accelerate the operative date for TOPO fees because the proposed rule change is in the public interest and supports the protection of investors by allowing data distributors to make additional market data available to investors that choose to purchase it. Widespread availability of Phlx options data benefits average investors by improving access to real-time market data that investors can use to make better-informed trading decisions. Additionally, to the extent users can substitute the lower-priced TOPO data for the higher-priced consolidated data feed, those users will have the opportunity to pass the savings on to investors in the form of lower overall trading costs.

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which

the Exchange consents, the Commission shall: (a) by order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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-2009-54 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-Phlx-2009-54. 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 Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, 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-2009-54 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.¹⁵

Elizabeth M. Murphy
Secretary

¹⁵ 17 CFR 200.30-3(a)(12).