

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79654; File No. SR-Phlx-2016-122)

December 22, 2016

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify Administrative Charges for Distributors of Proprietary Data Feed Products

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 December 14, 2016, 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.

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

The Exchange proposes to amend the Exchange’s Pricing Schedule under Section VIII, entitled “NASDAQ PSX FEES,” in the subsection currently entitled “Annual Administrative Fee,” to change the billing cycle for administrative fees paid by distributors of the Exchange’s market data from annual to monthly, and to: (1) replace the current \$500 annual administrative fee assessed to distributors of delayed market data with a \$50 monthly administrative fee, and (2) replace the current \$1,000 annual administrative fee assessed to distributors of real-time market data with a \$100 monthly administrative fee. The proposal is described further below.³

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The NASDAQ Stock Market LLC and NASDAQ BX, Inc. are filing companion proposals similar to this one. All three proposals will change the billing cycle for administrative fees paid by distributors of market data from annual to monthly, and will: (1) replace the current \$500 annual administrative fee assessed to distributors of delayed market data with a \$50 monthly administrative fee, and (2) replace the current \$1,000

While these amendments are effective upon filing, the Exchange has designated the proposed amendments to be operative on January 1, 2017.

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 purpose of the proposed rule change is to change the billing cycle for administrative fees paid by distributors of the Exchange's market data from annual to monthly, and to: (1) replace the current \$500 annual administrative fee assessed to distributors of delayed market data with a \$50 monthly administrative fee, and (2) replace the current \$1,000 annual administrative fee assessed to distributors of real-time market data with a \$100 monthly administrative fee.

Annual Administrative Fee

The Exchange assesses an annual administrative fee to any market data distributor that receives any proprietary Exchange data feed product. The amount of that annual fee is \$500 for

annual administrative fee assessed to distributors of real-time market data with a \$100 monthly administrative fee.

delayed market data and \$1,000 for real-time market data. Distributors of both delayed and real-time market data are not required to pay both fees; they are charged only the higher fee. The time difference between “delayed” and “real-time” data varies by product. PSX Basic, for example, is considered delayed after 15 minutes, while PSX TotalView-ITCH data is considered delayed after midnight ET. The specific delay interval applicable to each product is published on the Nasdaq Trader website. The fee is not prorated if the distributor receives the data feed for less than a year.

Proposed Changes

The Exchange proposes to change the billing cycle for administrative fees paid by distributors of the Exchange’s market data from annual to monthly, and to: (1) replace the current \$500 annual administrative fee assessed to distributors of delayed market data with a \$50 monthly administrative fee, and (2) replace the current \$1,000 annual administrative fee assessed to distributors of real-time market data with a \$100 monthly administrative fee.

The purposes of the proposal are to: (1) facilitate billing by aligning the current annual administrative fee billing cycle with the standard monthly billing cycle used by the Exchange; (2) allocate the fee more equitably by charging distributors that receive less than a year of market data an administrative fee only for those months that they receive market data; and (3) bring the Exchange’s administrative fee into alignment with the Nasdaq and BX market data administrative fees, which, after current proposals take effect, will be charged the same administrative fees on the same billing cycle.

The complexity of administering the Exchange’s market data program has increased significantly since the current fee was set in November of 2011. New, more complex products and services require the Exchange to expend more resources in administration and monitoring.

For example, the introduction of Enhanced Display Solutions—which allow subscribers to view data from PSX TotalView on computer monitors and export it to applications—required the Exchange to create new reporting systems and review mechanisms for the use of market data. New reporting and review mechanisms also had to be created to implement Managed Data Solutions, which allow electronic systems access to PSX TotalView without human intervention. These programs were created in response to customer demand, and all require administrative expenditures that had not been necessary when the amount of the administrative fee was set in 2011.

The administrative fee is entirely optional in that it applies only to firms that elect to distribute the Exchange’s market data.

The proposed changes do not raise the cost of any other product sold by the Exchange, except to the extent that they increase the total cost of purchasing market data.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁴ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁵ 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.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(4) and (5).

prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁶

Likewise, in NetCoalition v. Securities and Exchange Commission⁷ (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.⁸ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”⁹

Further, “[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’”¹⁰

The Exchange believes that the proposal to replace the current \$500 annual administrative fee assessed to distributors of delayed market data with a \$50 monthly administrative fee, and the current \$1,000 annual administrative fee assessed to distributors of

⁶ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

⁷ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

⁸ See NetCoalition, at 534 - 535.

⁹ Id. at 537.

¹⁰ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

real-time data with a \$100 monthly administrative fee, is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed fee change is reasonable and necessary to facilitate billing, allocate fees more equitably, and align the administrative charges for market data with those of the Nasdaq and BX exchanges. Moreover, administrative fees are constrained by the Exchange's need to compete for order flow.

The Exchange believes that the proposed change is an equitable allocation and is not unfairly discriminatory because the Exchange will apply the same fee to all similarly-situated 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. In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The proposal is to replace the current \$500 annual administrative fee assessed to distributors of delayed market data with a \$50 monthly administrative fee, and the current \$1,000

annual administrative fee assessed to distributors of real-time market data with a \$100 monthly administrative fee. If the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result.

Specifically, market forces constrain administrative fees in three respects. First, all fees associated with proprietary data are constrained by competition among exchanges and other entities attracting order flow. Second, administrative fees impact the total cost of market data, and are constrained by the total cost of the market data offered by other entities. Third, competition among distributors constrains the total cost of market data, including administrative fees.

Competition for Order Flow

Administrative fees are constrained by competition among exchanges and other entities seeking to attract order flow. Order flow is the “life blood” of the exchanges. Broker-dealers currently have numerous alternative venues for their order flow, including thirteen self-regulatory organization (“SRO”) markets, as well as internalizing broker-dealers (“BDs”) 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 Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. The existence of fierce competition for order flow implies a high degree of price sensitivity on the part of BDs, which may readily reduce costs by directing orders toward the lowest-cost trading venues.

The level of competition and contestability in the market for order flow is demonstrated by the numerous examples of entrants that swiftly grew into some of the largest electronic trading platforms and proprietary data producers: Archipelago, Bloomberg Tradebook, Island,

RediBook, Attain, TracECN, BATS Trading and BATS/Direct Edge. A proliferation of dark pools and other ATSS operate profitably with fragmentary shares of consolidated market volume. For a variety of reasons, competition from new entrants, especially for order execution, has increased dramatically over the last decade.

Each SRO, TRF, ATS, and BD that competes for order flow is permitted to produce proprietary data products. Many currently do or have announced plans to do so, including NYSE, NYSE Amex, NYSE Arca, BATS, and IEX. This is because Regulation NMS deregulated the market for proprietary data. While BDs had previously published their proprietary data individually, Regulation NMS encourages market data vendors and BDs to produce market data products cooperatively in a manner never before possible. Order routers and market data vendors can facilitate production of proprietary data products for single or multiple BDs. The potential sources of proprietary products are virtually limitless.

The markets for order flow and market data are inextricably linked: a trading platform cannot generate market information unless it receives trade orders. As a result, the competition for order flow constrains the prices that platforms can charge for proprietary data products. Firms make decisions on how much and what types of data to consume based on the total cost of interacting with an exchange. Administrative fees are part of the total cost of proprietary data. A supracompetitive increase in the fees charged for either transactions or market data has the potential to impair revenues from both products.

Competition from Market Data Providers

Administrative fees are constrained by competition from other exchanges that sell market data. If administrative fees were to become excessive, distributors may elect to discontinue one or two products or services purchased from the Exchange, or reduce the level of their purchases,

to signal that the overall cost of market data had become excessive. Such a reduction in purchases would act as a discipline to the PSX administrative fees, and would constrain the Exchange in its pricing decisions.

Competition Among Distributors

Distributors provide another form of price discipline for market data products. Distributors are in competition for users, and can curtail their purchases of market data if the total price of market data, including administrative fees, were set above competitive levels.

In summary, market forces constrain the level of administrative fees through competition for order flow, competition from other sources of proprietary data, and in the competition among distributors for customers. For these reasons, the Exchange has provided a substantial basis demonstrating that the fee is equitable, fair, reasonable, and not unreasonably discriminatory, and therefore consistent with and in furtherance of the purposes of the Exchange Act.

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.¹¹

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,

¹¹ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2016-122 on the subject line.

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-2016-122. 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 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-2016-122, 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.¹²

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Assistant Secretary

¹² 17 CFR 200.30-3(a)(12).