

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82032; File No. SR-Phlx-2017-84)

November 8, 2017

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Access and Redistribution Fee

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 26, 2017, 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 Substance of the Proposed Rule Change

The Exchange proposes to amend and conform Sections VIII and XIII of the Exchange’s Pricing Schedule, to define key terms; to clarify the rule language; to clarify its application to Extranet Providers, Members, and Non-members in various contexts; and to make conforming changes to the Pricing Schedule’s Table of Contents.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 proposed rule change concerns Section VIII of the Exchange's Pricing Schedule (the "Equities Rule") and Section XIII of the Exchange's Pricing Schedule (collectively, the "Rules"), currently entitled "Extranet Access Fee." The Exchange first imposed an Extranet Access Fee in January of 2015.³ Today, technology and the ecosystem have changed such that the Rules need updating and clarification. Therefore, the Exchange is proposing several parallel changes to the Rules.

First, the Exchange is proposing to rename both Rules and to clarify their meaning through the use of defined terms. The Exchange is adding definitions of the terms Equipment Configuration, and Extranet Provider to new subsection (a) of the Rules. The Exchange is also cross-referencing the definition of Distributors currently set forth in Section IX of the Exchange's Pricing Schedule.

The term "Equipment Configuration" will be defined to mean "any line, circuit, router package, or other technical configuration used to provide a connection to the Exchange market data feeds." The term Equipment Configuration replaces the term "Customer Premises Equipment Configuration" set forth in the current rules. The Exchange believes that the term "Customer Premises Equipment Configuration" is ambiguous and creates confusion about the

³ See Securities Exchange Act Release No. 74022 (Jan. 9, 2015); 80 F.R. 2157 (Jan. 15, 2015) (SR-Phlx-2015-04).

ownership and location of equipment through which direct access to market data feeds is provided. By referring instead to “Equipment Configuration,” the Exchange intends to specify that the ownership and location of the equipment is inconsequential to the application of access and redistribution fees. Rather, it is the number of configurations that matters, determining the number of monthly access and redistribution fees to be assessed.

For example, if an Extranet Provider supplies market data to five recipients via five configurations, two of which are located in a single Exchange facility (such as Carteret, New Jersey) and three of which are located at different customer facilities, the Extranet Provider will be assessed access and redistribution fees of \$5,000 per month. If an Extranet Provider supplies market data to one customer at two separate locations via two configurations – one within a Exchange facility and one located elsewhere – the Extranet Provider will be assessed access and redistribution fees of \$2,000 per month. If an Extranet Provider supplies market data to four customers via four configurations all located within an Exchange co-location facility, the Extranet Provider will be assessed \$4,000 per month in access and redistribution fees. The Exchange is proposing to define the term “Extranet Provider” as “any entity that has signed the Exchange Extranet Connection Agreement and that establishes a telecommunications connection in the Exchange’s co-location facility.” The Exchange requires entities to sign the Exchange Extranet Connection Agreement⁴ for the purpose of setting the terms and conditions for those entities to place equipment in the Exchange’s co-location facility in order to establish a telecommunications connection directly to the Exchange and to provide its own customers with access to the Exchange market data feeds.

⁴ Available at <http://www.nasdaqtrader.com/Content/AdministrationSupport/AgreementsData/NASDAQOMXExtranetAgreement.pdf>.

Finally, in order to further enhance the clarity of the Exchange's rules, the Exchange is proposing to cross-reference the definition of "Distributor" for purposes of this rule. Section IX of the Exchange's Pricing Schedule currently defines Distributor as:

[A]ny entity that receives a feed or data file of NASDAQ PHLX data directly from NASDAQ PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors shall execute a NASDAQ PHLX distributor agreement.

The Exchange is proposing to renumber and rearrange the existing rule text of the Rules. The first two sentences of existing rule text will become new subsection (b). The Exchange also proposes to improve the clarity of subsection (b) by using the new definitions outlined above and by specifying that the monthly fees referred to are the monthly access and redistribution fees. As described earlier, the third sentence of existing rule text is being modified and moved to paragraph (1) of new subsection (a) as the improved definition of "Equipment Configuration." The fourth and fifth sentences of existing rule text will move to new subsection (d) with modest textual improvements but no change in application of fees. The sixth sentence of existing rule text will move to the final sentences of subsections (b) and (c) with minor textual enhancements to apply it with equal effect to Extranet Providers and Distributors.

The Exchange also proposes to add new subsection (c) to specify and codify that similarly situated Distributors and Extranet Providers will pay similar fees. Under subsection (b), Extranet Providers are assessed a monthly fee of \$1,000 for each Equipment Configuration that offers Exchange market data feeds. Similarly, under proposed subsection (c), the same \$1,000 monthly fee applies to Distributors to whom the same Exchange market data feeds are published via a Direct Circuit Connection to the Exchange. The Exchange believes that, as defined, Extranet Providers and Distributors are similarly situated because both entities connect directly to the Exchange, and both provide Exchange market data feeds to their customers via

those connections.⁵ Likewise, the customers of Extranet Providers and Distributors are similarly situated in that they receive the same Exchange market data feeds through similar means.

For example, a Distributor with two Direct Circuit Connections to the Exchange, both of which emanate from a single Exchange co-location facility (such as Carteret, New Jersey) and both of which receive Exchange market data feeds, will be assessed access and redistribution fees of \$2,000 per month. A Distributor with two Direct Circuit Connections to the Exchange that emanate from two separate locations and that receives Exchange market data feeds over each connection will be assessed access and redistribution fees of \$2,000 per month. A Distributor with two Direct Circuit Connections to the Exchange that emanate from two separate locations and that receives Exchange market data feeds over only one of the connections will be assessed access and redistribution fees of \$1,000 per month.

The Exchange previously assessed and currently assesses this fee in its capacity as operator of Nasdaq Technology Services, which had been considered an Extranet Provider.⁶ The Exchange believes that defining Extranet Providers and codifying the fee to Distributors (other than Extranet Providers) is clearer to market participants. The Exchange also understands that Distributors, like Extranet Providers, commonly pass the fee on to their customers and therefore specifying that Distributors employing a Direct Circuit Connection also pay the fee will ensure consistent treatment between users enjoying the same benefits via Extranet Providers on the one hand and Distributors on the other, as described above.

⁵ Proposed Subsection (c) of Chapters VIII and XIII apply only to Distributors that connect to the Exchange via a Direct Circuit Connection pursuant to Section XI of the Pricing Schedule. They do not apply to Distributors that are co-located with the Exchange pursuant to Section X of the Pricing Schedule and that connect to the Exchange as specified under that Rule. Nor do they apply to entities that connect to Nasdaq [sic] remotely via Point of Presence Connectivity under Nasdaq Rule 7051(c) as set forth in SR-NASDAQ-2017-97.

⁶ See SR-Phlx-2015-04 at footnote 16.

Finally, the Exchange proposes to amend the Pricing Schedule's Table of Contents to make conforming changes to Section XIII's title.

2. Statutory Basis

The Exchange believes that this proposal is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,⁸ in particular, in that it provides for an equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using its facility, and to specify that the fees are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the application of identical Access and Redistribution fees to Distributors and Extranet Providers as described in the proposed rule change is fair and equitable and non-discriminatory. As stated above, Distributors and Extranet Providers both connect to the Exchange directly for the purpose of re-distributing Exchange market data feeds to their own customers and both enjoy similar benefits in doing so. Likewise, those customers, whether receiving Exchange market data feeds via a Distributor or an Extranet Provider receive that market data feeds in a similar fashion and with similar benefits. Those benefits are considerable: secure, rapid, reliable access to the highest quality market data feeds on the trading of equities and options on the Exchange.

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 prices and SRO revenues and, also, recognized that current regulation of the market system "has

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(4) and (5).

been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁹

The Exchange believes it is fair and equitable and not discriminatory to apply equal access and redistribution fees to Distributors, as it does to Extranet Providers. As stated above, Distributors and Extranet Providers are similarly situated in that they receive Exchange market data feeds directly from the Exchange and they redistribute that data to their own customers. Likewise, the Exchange believes that the customers of Extranet Providers and of Distributors are similarly situated in the manner in which they receive Exchange market data feeds.

The Exchange believes that it is consistent with an equitable allocation of reasonable dues and fees and not unfairly discriminatory to charge the fees proposed under subsection (c) of Chapters VIII and XIII of the PHLX Pricing Schedule to Extranet Providers and Distributors that are not co-located, but not to charge those same fees to Distributors that are co-located. First, Distributors that are co-located already pay fees set forth in Section X of the Pricing Schedule which include connectivity and access to data. Second, if a co-located Distributor were to send data feeds out of the co-location facility, the feeds would be processed and normalized by the Distributor, as opposed to by the Exchange; in that case, the Distributor would not be using the proximity for which Extranets and Direct Circuit Connection Distributors are being assessed fees under subsection (c) of Chapters VIII and XIII of the PHLX Pricing Schedule.

The Exchange is proposing to enhance the clarity of the language of the Rules to ensure that customers understand the proper application of the Rules as technology has changed and continues to change. The Exchange believes that customers support the continued evolution of its rules, and that regulators do and should support and facilitate this evolution.

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

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule change will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that applying equal fees to similarly situated Extranet Providers and Distributors, enhancing the clarity of the Rules, and eliminating ambiguity imposes no burden on competition and is, in fact, pro-competitive. Extranet Providers and Distributors benefit from having a more accurate and complete understanding of the Exchange's services and fees when determining which if any of those competing services to purchase voluntarily.

The Exchange believes that the proposed rule change places no burden on competition because it specifies that identical fees will apply to all similarly situated Distributors and Extranet Providers that provide Exchange market data feeds to their own customers. As described above, such Distributors and Extranet Providers offer the same Exchange market data feeds in the same manner to similarly situated customers. The Exchange offers similar benefits to Distributors and Extranet Providers by offering them such access to Exchange market data feeds.

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.¹⁰

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

¹⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2017-84 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-2017-84. 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-2017-84 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.¹¹

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Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(12).