

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-100160; File No. SR-Phlx-2024-15)

May 16, 2024

Self-Regulatory Organizations; Nasdaq PHLX LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Exchange's Fees for Top of PHLX Options (TOPO), PHLX Orders, and TOPO Plus Orders

I. Introduction

On March 20, 2024, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change (File Number SR-Phlx-2024-15) to increase fees for certain market data products (“Proposal”). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the Federal Register on March 28, 2024.⁴ Pursuant to Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (1) temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ See Securities Exchange Act Release No. 99841 (March 22, 2024), 89 FR 21648 (“Notice”). The Commission has received one comment letter on the proposed rule change. See Letter from Brookes Ross, received April 29, 2024 (“Ross Letter”). Comments received on the Proposal are available at: <https://www.sec.gov/comments/sr-phlx-2024-15/srphlx202415.htm>.

⁵ 15 U.S.C. 78s(b)(3)(C).

II. Background and Description of the Proposed Rule Change

The Exchange states that the purpose of the proposed rule change is to amend the Exchange’s proprietary data fees for Top of PHLX Options (“TOPO”),⁶ PHLX Orders,⁷ and TOPO Plus Orders at Options 7, Section 10.⁸

The Exchange states that TOPO is a direct data feed that provides subscribers with PHLX Best Bid and Offer (“BBO”)⁹ and last sale information.¹⁰ The Exchange also states that the data distributed on TOPO is identical to the data simultaneously sent to the Options Price Reporting Authority (“OPRA”).¹¹ The Exchange states that TOPO feed also provides administrative information to facilitate trading on the Exchange such as, for example, the list of symbols trading

⁶ See Notice, 89 FR at 21648 (citing Options 3, Section 23(a)(1) (“Top of PHLX Options (“TOPO”) is a direct data feed product that includes the Exchange’s best bid and offer price, with aggregate size, based on displayable order and quoting interest on Phlx and last sale information for trades executed on Phlx. The data contained in the TOPO data feed is identical to the data simultaneously sent to the processor for the OPRA and subscribers of the data feed. The data provided for each options series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and whether the option series is available for trading on Phlx and identifies if the series is available for closing transactions only.”)).

⁷ See Notice, 89 FR at 21648 (citing Options 3, Section 23(a)(1) (“PHLX Orders is a real-time full Limit Order book data feed that provides pricing information for orders on the PHLX Order book for displayed order types as well as market participant capacity. PHLX Orders is currently provided as part of the TOPO Plus Orders data product. PHLX Orders provides real-time information to enable users to keep track of the single and complex order book(s). The data provided for each options series includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, leg information on complex strategies and whether the option series is available for trading on Phlx and identifies if the series is available for closing transactions only. The feed also provides auction and exposure notifications and order imbalances on opening/reopening (size of matched contracts and size of the imbalance)”)).

⁸ The proposed changes were initially filed on November 16, 2023, as SR-Phlx-2023-51. On December 5, 2023, SR-Phlx-2023-51 was withdrawn and replaced with SR-Phlx-2023-57. On January 29, 2024, SR-Phlx-2023-57 was withdrawn and replaced with SR-Phlx 2024-03. On March 20, 2024, SR-Phlx-2024-03 was withdrawn and replaced with the instant filing to provide additional detail regarding the proposal. See Notice, 89 FR at 21648.

⁹ See Notice, 89 FR at 21648. The Exchange states that Best Bid and Offer includes aggregate size information based on displayable order and quoting interest on the Exchange. Id. at n.6.

¹⁰ See Notice, 89 FR at 21648 (citing PHLX, “Top of Phlx Options,” available at [https://www.nasdaqtrader.com/Micro.aspx?id=TOPO#:~:text=Top%20of%20PHLX%20Options%20\(TOP%20O,in%20the%20consolidated%20market%20feed\).](https://www.nasdaqtrader.com/Micro.aspx?id=TOPO#:~:text=Top%20of%20PHLX%20Options%20(TOP%20O,in%20the%20consolidated%20market%20feed).)

¹¹ See Notice, 89 FR at 21648 (citing Options 3 (Options Trading Rules), Section 23(a)(1) (Data Feeds and Trade Information) (“The data contained in the TOPO data feed is identical to the data simultaneously sent to the processor for the OPRA and subscribers of the data feed.”)).

on a particular day.¹² The Exchange states that TOPO reduces the transmission and processing latencies for top of book information relative to the OPRA feed by avoiding the latencies generated by the latter in consolidating data.¹³ The Exchange states that monthly fees for TOPO are currently \$2,000 for Internal Distributors,¹⁴ \$2,500 for External Distributors,¹⁵ \$1 for a Non-Professional Subscriber,¹⁶ and \$40 for a Professional Subscriber.¹⁷ The Exchange further states that none of these fees have changed for over a decade since January 2013.¹⁸

The Exchange states that PHLX Orders is a real-time order book feed with pricing information for displayed orders on the PHLX order book.¹⁹ The Exchange states that the data

¹² See Notice, 89 FR at 21648 (citing Nasdaq, “Top of Phlx Options Interface Specifications, Version 3.4” Section 4.3 available at <https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topofphlx.pdf> (describing the start of day options directory message, which lists all symbols eligible for the auction process)).

¹³ See Notice, 89 FR at 21648.

¹⁴ See Notice, 89 FR at 21648 (citing Options 7, Section 10 (Proprietary Data Feed Fees) (Top of PHLX Options) (“A ‘distributor’ of Nasdaq PHLX data is any entity that receives a feed or data file . . . 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 execute a Nasdaq PHLX distributor agreement.”)).

¹⁵ See Notice, 89 FR at 21648 (citing Options 7, Section 10 (Proprietary Data Feed Fees) (Top of PHLX Options)).

¹⁶ See Notice, 89 FR at 21648 (citing Options 7, Section 10 (Proprietary Data Feed Fees) (Top of PHLX Options) (“A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an ‘investment adviser’ as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Non-Professional Subscriber may only use the data provided for personal purposes and not for any commercial purpose.”)).

¹⁷ See Notice, 89 FR at 21648 (citing Options 7, Section 10 (Proprietary Data Feed Fees) (Top of PHLX Options) (“A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber. If the Nasdaq Subscriber agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.”)).

¹⁸ See Notice, 89 FR at 21649 (citing Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145)).

¹⁹ See Notice, 89 FR at 21649 (citing Options 3 (Options Trading Rules), Section 23(a)(2) (Data Feeds and Trade Information)).

provided for each options series includes the symbols (series and underlying security), a put or call indicator, expiration date, and the strike price of the series.²⁰ The Exchange states that it also provides the real-time status of simple and complex orders²¹ on the order book, including new orders and changes to orders resting on the PHLX book for all PHLX-listed options.²² The Exchange states that PHLX Orders feed includes data on the opening imbalance, Price Improvement XL (PIXL),²³ and Complex Order Live Auction (COLA).²⁴ The Exchange further states that a notification message is sent for symbols entering an auction.²⁵ The Exchange states that PHLX Orders also furnishes an historical record of all simple and complex order message data from the PHLX Orders data feed and that PHLX Orders information is not sent to OPRA.²⁶

²⁰ See Notice, 89 FR at 21649.

²¹ See Notice, 89 FR at 21649 (citing Options 3 (Options Trading Rules), Section 23(a)(2) (Data Feeds and Trade Information); Section 14(a)(i) (“Complex Order. For purposes of the electronic trading of Complex Orders, a Complex Order is an order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced as a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy.”)).

²² See Notice, 89 FR at 21649 (citing Nasdaq, “PHLX Orders,” available at <https://www.nasdaqtrader.com/Micro.aspx?id=PHLXOrders>).

²³ See Notice, 89 FR at 21649 (citing Options 3 (Options Trading Rules), Section 23(a)(2); Section 13 (Price Improvement XL) (“A member may electronically submit for execution an order it represents as agent on behalf of a Public Customer, broker-dealer, or any other entity (‘PIXL Order’) against principal interest or against any other order (except as provided in sub-paragraph (a)(6) below) it represents as agent (an ‘Initiating Order’) provided it submits the PIXL Order for electronic execution into the PIXL Auction (‘Auction’) pursuant to this Rule.”)).

²⁴ See Notice, 89 FR at 21649 (citing Options 3, Section 14(e) which describes the process for the Complex Order Live Auction (“COLA”)).

²⁵ Notice, 89 FR at 21649 (citing Nasdaq, “PHLX Orders Interface Specification,” (Version 1.92) available at <https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topoplusorders.pdf> (describing auction notification message)).

²⁶ See Notice, 89 FR at 21649 (citing Limited Liability Company Agreement of Options Price Reporting Authority, LLC Article V, Section 5.2(c)(i) (January 1, 2010), available at https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Update%20Exhibit%20A%20-%2006-19-2019.pdf (describing last sale and best bid and offer information disseminated by OPRA)).

The Exchange states that PHLX Orders is an alternative to PHLX Depth of Market and is an optimized technical channel designed to lower technology costs, reduce processing time, and facilitate the ingestion of data while still providing customers insight beyond the top of book by viewing active buy and sell orders.²⁷ The Exchange further states that PHLX Orders excludes quotations by market makers and other authorized entities that is included in PHLX Depth of Market.²⁸ Regarding the utility of an orders-only data feed, the Exchange states that it provides customers with the opportunity to reduce bandwidth (and therefore data processing costs) by several orders of magnitude relative to the full depth of book feed, while retaining a view of market participant orders (setting aside symbols where participants have not placed orders).²⁹

The Exchange states that the December 2023 bandwidth report shows that the PHLX Depth of Market feed transmitted a maximum of 14.3 billion messages per day during the month of December, while the PHLX Orders feed transmitted a maximum of 53.6 million messages over the same period (41.5 million messages for simple orders, and 12.1 million messages for complex orders).³⁰ The Exchange states that it's full depth of book feed requires the customer to process over 200 times more messages than the orders feed over the course of a day; replacing a depth of book feed with an orders feed allows a customer to reduce the maximum number of daily messages it receives by 99.6%.³¹ The Exchange states that, to cite another example, the 1

²⁷ See Notice, 89 FR at 21649.

²⁸ See Notice, 89 FR at 21649 (citing Options 3 (Options Trading Rules), Section 23(a)(3) (Data Feeds and Trade Information) (“PHLX Depth of Market is a data product that provides: (i) order *and quotation* information for *individual quotes* and orders on the order book . . .”) (emphasis added); Section 4(b) (Entry and display of Quotes) (identifying the market participants authorized to submit quotes to the Exchange)).

²⁹ See Notice, 89 FR at 21649.

³⁰ See Notice, 89 FR at 21649 (citing Nasdaq, “December 2023 Bandwidth Report,” available at <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.nasdaqtrader.com%2Fcontent%2Ftechnicalsupport%2Fspecifications%2Fdataproducts%2Fbandwidthreport.xls&wdOrigin=BROWSELINK>).

³¹ See Notice, 89 FR at 21649.

millisecond bandwidth peak for PHLX Depth of Market was 13.96 million messages; the comparable number of messages for orders was 1.45 million (891 thousand for simple and 561 thousand for complex orders).³² The Exchange states that replacing depth of book with orders can therefore reduce the number of messages processed at peak at the 1 millisecond bandwidth by nearly 90%.³³ The Exchange further states that approximately 56% of customers who take any data feed at all from the PHLX exchange take an orders feed (either Orders only or TOPO Plus Orders) without depth of book, another 38% of customers take both orders and depth feeds, and the remaining 6% take either top of book or depth of book alone.³⁴

The Exchange states that in general, firms that only need information on actively trading options takes an order feed in lieu of depth.³⁵ The Exchange explains that there are a great number of use cases that fit this broad description, but, for purposes of illustration, the Exchange is aware of at least two such types of customers.³⁶ The Exchange states that the first is the market participant that does not engage in order routing – and that these are broker dealers that use third parties to route orders, either because the originating broker-dealer is not a member of the exchange or to save costs.³⁷ The Exchanges states that without the need for additional information to inform routing decisions, such customers often focus on active trading alone, and therefore purchase the orders feed.³⁸ The Exchange states that a second category of customers

³² See Notice, 89 FR at 21649.

³³ See Notice, 89 FR at 21649.

³⁴ See Notice, 89 FR at 21649.

³⁵ See Notice, 89 FR at 21649.

³⁶ See Notice, 89 FR at 21649.

³⁷ See Notice, 89 FR at 21649.

³⁸ See Notice, 89 FR at 21649.

are those that use options data to analyze trends in other markets.³⁹ The Exchange explains that one example of this type of customer is the equity trader that analyzes equity-based options to gauge market sentiment in the underlying equity.⁴⁰ The Exchange states that for such customers, there is relatively little utility in the full depth feed, given that market sentiment is best gauged using options that are being actively traded, rather than those that are dormant.⁴¹

The Exchange states that there are some customers that purchase both orders and depth and that vendors are one example of this type of customer, purchasing market data solely for resale, not for trading on behalf of themselves or others.⁴² The Exchange explains that another example is the firm that uses orders for analysis and depth for order routing.⁴³ The Exchange states that the orders feed can be useful for assessing sentiment in equity markets, while depth is often used in order routing decisions.⁴⁴ The Exchange states that firms that engage in both functions can lower overall processing requirements by using orders for analytics and depth for routing.⁴⁵

The Exchange states that purchase of PHLX Orders is optional and that customers can obtain all of the data contained in PHLX Orders from PHLX Depth of Market feed, and may purchase the latter if they do not realize the cost savings offered by PHLX Orders.⁴⁶ The Exchange states that PHLX Orders is a derivative product designed as a lower-cost alternative to

³⁹ See Notice, 89 FR at 21649.

⁴⁰ See Notice, 89 FR at 21649.

⁴¹ See Notice, 89 FR at 21649.

⁴² See Notice, 89 FR at 21649.

⁴³ See Notice, 89 FR at 21649.

⁴⁴ See Notice, 89 FR at 21649.

⁴⁵ See Notice, 89 FR at 21649.

⁴⁶ See Notice, 89 FR at 21650.

a depth of book feed.⁴⁷ The Exchange further states that it is not a complement to any other product offered by the Exchange or any of its competitors.⁴⁸ The Exchange explains that customers are free to purchase PHLX Orders or not, and can reject the feed for any reason, including the fee charged.⁴⁹ The Exchange states that the current monthly fees for PHLX Orders are \$3,000 for Internal Distributors, \$3,500 for External Distributors, \$1 for a Non-Professional Subscriber, and \$40 for a Professional Subscriber.⁵⁰ The Exchange further states that none of these fees have changes for over a decade since January 2013.⁵¹

The Exchange states that TOPO Plus is a direct market data product that offers subscribers both TOPO and PHLX Orders for a consolidated fee that is less than the combined fee of the two products.⁵² The Exchange states that the monthly fees for TOPO Plus Orders are currently \$4,500 for Internal Distributors, \$5,000 for External Distributors, \$1 for a Non-Professional Subscriber, and \$40 for a Professional Subscriber.⁵³ The Exchange states that Internal Distributor fees for TOPO Plus Orders were modified in January 2018, over five years ago,⁵⁴ but the other TOPO Plus Orders fees have not changed since January 2013.⁵⁵

⁴⁷ See Notice, 89 FR at 21650.

⁴⁸ See Notice, 89 FR at 21650.

⁴⁹ See Notice, 89 FR at 21650.

⁵⁰ See Notice, 89 FR at 21650.

⁵¹ See Notice, 89 FR at 21650 (citing Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145)).

⁵² See Notice, 89 FR at 21650 (citing PHLX, TOPO Plus PHLX Orders, available at <https://www.nasdaqtrader.com/Micro.aspx?id=TOPOPlusOrders>).

⁵³ See Notice, 89 FR at 21650.

⁵⁴ See Notice, 89 FR at 21650 (citing Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR-Phlx-2018-08)).

⁵⁵ See Notice, 89 FR at 21650 (citing Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145)).

The Exchange states that different types of market participants purchase TOPO, PHLX Orders and TOPO Plus Orders, including market makers, vendors, banks, proprietary traders, agency brokers (brokers that route trades on behalf of other market participants), hedge funds, index providers and other firms.⁵⁶ The Exchange states that in characterizing market participants, it must be clear that firms use data feeds for multiple tasks.⁵⁷ The Exchange states that a market maker, for example, may use market data for order routing, or for risk analysis used in quoting in their assigned option series.⁵⁸ The Exchange states that banks may use market data for prime brokerage services, proprietary trading, or risk management.⁵⁹ The Exchange states that market data vendors do not directly use the data at all, but rather disseminate data to market participants that use the data for a multiplicity of purposes.⁶⁰ The Exchange states that other firms purchase options data to assess the value of equity securities.⁶¹

The Exchange explains that, characterizing firms based on what the Exchange understands to be their primary market activity, and understanding that firms play multiple roles, the Exchange estimates that approximately half of the customers that take top of book data in any form, in combination with other products or alone, are market makers, and the remaining half are market data vendors, banks, proprietary traders, agency brokers, hedge funds, index providers, and others.⁶² The Exchange explains that roughly the same distribution applies to customers that

⁵⁶ See Notice, 89 FR at 21650.

⁵⁷ See Notice, 89 FR at 21650.

⁵⁸ See Notice, 89 FR at 21650.

⁵⁹ See Notice, 89 FR at 21650.

⁶⁰ See Notice, 89 FR at 21650.

⁶¹ See Notice, 89 FR at 21650. The Exchange states that it does not include “High Frequency Trading Firm” as a distinct category because many market participant may engage in low latency trading strategies to some degree, but the Exchange does not have sufficient information to be able to characterize any particular firm as a high frequency trader. Id.

⁶² See Notice, 89 FR at 21650.

purchase PHLX Orders, whether alone or in combination with other products.⁶³ The Exchange states that although the distributions are roughly similar, different customers are purchasing different products in different combinations.⁶⁴

The Exchange states that firms generally purchase PHLX Orders rather than depth of book data to lower technology costs and reduce processing time, while still providing customers insight into open executable orders that could impact the BBO.⁶⁵ The Exchange states that a more specific explanation of how TOPO, PHLX Orders and TOPO Plus Orders is used will vary based on use case, with many firms employing multiple use cases.⁶⁶ The Exchange states that market makers, banks, hedge funds, and proprietary traders often use top of book and orders feeds for trading, order routing and analysis.⁶⁷ The Exchange states that banks may use market data for prime brokerage services, proprietary trading, or risk management.⁶⁸ The Exchange states that clients of market data vendors will utilize the data for many different purposes.⁶⁹ The Exchange explains that it does not have sufficient visibility into customers' businesses and proprietary processes to be able to determine precise data usage by customer category.⁷⁰

The Exchange states that: for TOPO, it proposes to increase the monthly charge for Internal Distributors from \$2,000 to \$2,500, and the monthly charge for External Distributors from \$2,500 to \$3,000; For PHLX Orders, it proposes to increase the monthly charge for Internal

⁶³ See Notice, 89 FR at 21650.

⁶⁴ See Notice, 89 FR at 21650.

⁶⁵ See Notice, 89 FR at 21650.

⁶⁶ See Notice, 89 FR at 21650.

⁶⁷ See Notice, 89 FR at 21650.

⁶⁸ See Notice, 89 FR at 21650.

⁶⁹ See Notice, 89 FR at 21650.

⁷⁰ See Notice, 89 FR at 21650.

Distributors from \$3,000 to \$3,500, and the monthly charge for External Distributors from \$3,500 to \$4,000; and for TOPO Plus Orders, it proposes to increase the monthly charge for Internal Distributors from \$4,500 to \$5,500, and the monthly charge for External Distributors from \$5,000 to \$6,000.⁷¹ The Exchange states that no changes are proposed for Non-Professional and Professional Subscriber fees for TOPO, Phlx Orders, or TOPO Plus.⁷² The Exchange further states that the proposed changes are designed to update data fees to reflect their current value, rather than their value when these fees were set 5 or 10 years ago.⁷³

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,⁷⁴ at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,⁷⁵ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. A temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

A. Exchange Statements In Support of the Proposal

In support of the Proposal, the Exchange states that it believes that its proposal is consistent with Section 6(b) of the Act,⁷⁶ in general, and furthers the objectives of Sections

⁷¹ See Notice, 89 FR at 21650.

⁷² See Notice, 89 FR at 21650.

⁷³ See Notice, 89 FR at 21650.

⁷⁴ 15 U.S.C. 78s(b)(3)(C).

⁷⁵ 15 U.S.C. 78s(b)(1).

⁷⁶ 15 U.S.C. 78f(b).

6(b)(4) and 6(b)(5) of the Act,⁷⁷ 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.⁷⁸ The Exchange explains that this belief is based on several factors: First, the Exchange states that exchange fees are constrained because market participants can choose among seventeen different venues for options trading, and therefore no single venue can charge excessive fees without losing customers and market share.⁷⁹ Second, the Exchange states that fees for TOPO are constrained because the identical top of book data is sent to OPRA, and certain market participants may choose to rely exclusively on OPRA rather than purchasing the proprietary data product.⁸⁰ Third, the Exchange states that the purchase of PHLX Orders is optional, that it is designed as a lower-cost alternative to depth of book – and, as such, is not a complement to any other product offered by the Exchange or any of its competitors, and that customers may purchase PHLX Orders or not, and can reject the feed for any reason – including the fee charged.⁸¹ Fourth, the Exchange states that the proposed fees are comparable to, and in some cases less than, those of similarly situated exchanges.⁸² Fifth, the Exchange states that the current fees do not properly reflect the value of the underlying product, as fees for the products in question have been static in nominal terms, and therefore falling in real terms (due to inflation), while the amount of information transmitted in those fees have more than doubled in just the past five years, reflecting a substantial increase in customer value due to the significantly

⁷⁷ 15 U.S.C. 78f(b)(4) and (5).

⁷⁸ See Notice, 89 FR at 21650.

⁷⁹ See Notice, 89 FR at 21650.

⁸⁰ See Notice, 89 FR at 21650.

⁸¹ See Notice, 89 FR at 21650.

⁸² See Notice, 89 FR at 21650.

higher levels of liquidity currently available on the Exchange.⁸³ Sixth, the Exchange states that higher fees for the external distribution of TOPO, PHLX Orders, and TOPO Plus Orders are based on the additional value vendors receive from distributing data to their own customers and typically charging for the service.⁸⁴

The Exchange states that customers face many choices in where to trade options. The Exchange explains that until recently, sixteen exchanges have offered options trading services, and they are now being joined by a 17th member.⁸⁵ The Exchange states that not a single options exchange trades more than 11 percent of the options market by volume.⁸⁶ The Exchange states that PHLX, the second largest options exchange by volume, only has 9 percent of the options market.⁸⁷ The Exchange states that only one of the 17 options exchanges have a market share over 10 percent.⁸⁸ The Exchange states that this broad dispersion of market share demonstrates that market participants can and do exercise choice in options trading venues.⁸⁹ The Exchange

⁸³ See Notice, 89 FR at 21650-51.

⁸⁴ See Notice, 89 FR at 21651.

⁸⁵ See Notice, 89 FR at 21651 (citing OPRA Plan, list of OPRA Participant Exchanges, available at <https://www.opraplan.com/faqs>, and Securities Exchange Act Release No. 98388 (September 14, 2023), 88 FR 64963 (September 20, 2023) (File No. 4-443) (“Joint Industry Plan; Notice of Filing and Immediate Effectiveness of Amendment to the Plan for the Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options To Add MEMX LLC as a Plan Sponsor”)). The Exchange states that all options exchanges are members of the OPRA Plan. Id.

⁸⁶ See Notice, 89 FR at 21651 (citing Nasdaq, Options Market Statistics (Last updated November 3, 2023), available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>). The Exchange states that on November 3, 2023, the total percentage of options market volume by exchange was as follows: ARCA: 11%; PHLX: 9%; CBOE: 9%; BOX: 8%; ISE: 7%; EDGX: 7%; AMEX: 7%; MIAAX: 7%; MPRL: 7%; NOM: 6%; BATS: 6%; C2: 5%; EMLD: 4%; MRX: 3%; GEMX: 3%; BXOP: 3%; MEMX: 0%. Id.

⁸⁷ See Notice, 89 FR at 21651.

⁸⁸ See Notice, 89 FR at 21651.

⁸⁹ See Notice, 89 FR at 21651.

also states that as the number of exchanges continues to grow, competition will become fiercer and customer choice will continue to expand.⁹⁰

The Exchange states that most option contracts on the TOPO, TOPO Plus, and Orders data feeds are traded on multiple exchanges.⁹¹ The Exchange states that a sample of trading on March 7, 2024, from The Options Clearing Corporation shows that 5,836 symbols were traded on PHLX's options exchange, of which only 53 symbols were listed on the PHLX options exchange only, and another 33 symbols were listed on multiple Nasdaq-affiliated options exchanges.⁹²

The Exchange states that, in order to remain competitive with other options exchanges, PHLX, like some options exchanges, offers several proprietary options products that are only traded on Nasdaq-affiliated exchanges.⁹³ The Exchange states that these include products based on the Nasdaq 100[®] Index, such as NDX (Nasdaq 100 Index on PHLX, Nasdaq GEMX, LLC ("GEMX") and Nasdaq ISE, LLC ("ISE")), XND (Nasdaq 100 Micro Index on PHLX and ISE), and NQX (Nasdaq 100 Micro Index on ISE), as well as volatility products such as VOLQ (Nasdaq-100[®] Volatility Index), foreign currency options, and other products.⁹⁴

The Exchange states that some Nasdaq option proprietary products are subject to direct, substitution-based competition from other options exchanges and that all Nasdaq option proprietary products are subject to the competition among exchanges for membership and market

⁹⁰ See Notice, 89 FR at 21651.

⁹¹ See Notice, 89 FR at 21651.

⁹² See Notice, 89 FR at 21651.

⁹³ See Notice, 89 FR at 21651.

⁹⁴ See Notice, 89 FR at 21651. The Exchange states that the NASDAQ-100 is an index which includes 100 of the world's largest non-financial companies listed on the wider NASDAQ Stock market, based on their market capitalization. See Notice, 89 FR at 21651.

share.⁹⁵ The Exchange states that examples of substitution-based competition include the VOLQ, which can be substituted with the Cboe Volatility Index[®] (“VIX”).⁹⁶ The Exchange states that NDX (listed in PHLX, GEMX and ISE), XND (listed on PHLX and ISE) and NQX (listed on ISE) all offer different ways of gaining exposure to the Nasdaq 100[®] Index, are therefore each serves as a direct substitute for the others.⁹⁷ The Exchange also states that the Nasdaq 100[®] Index products also have alternatives among other exchanges.⁹⁸

The Exchange states that exchange proprietary products are also subject to competition among exchanges for membership and market share.⁹⁹ The Exchange states that there are many factors that may cause a market participant to decide to become a member of a particular exchange; among these are product offerings.¹⁰⁰ The Exchange states that introducing new and innovative products to the marketplace designed to meet customer demands may attract market participants to become a member of a particular options venue by allowing market participants

⁹⁵ See Notice, 89 FR at 21651.

⁹⁶ See Notice, 89 FR at 21651 (citing Securities Exchange Act Release No. 95170 (June 29, 2022), 87 FR 40295 (July 6, 2022) (SR-Phlx-2022-27) (explaining that the Nasdaq-100[®] Volatility Index (“VOLQ”) is subject to “significant substitution-based competitive forces; market participants can substitute options on VOLQ for products offered by other exchanges, for example, the options on the Cboe Volatility Index[®] (“VIX”).”).

⁹⁷ See Notice, 89 FR at 21651 (citing Securities Exchange Act Release No. 99141 (December 12, 2023), 88 FR 87466 (December 18, 2023) (SR-Phlx-2023-55) (“[M]arket participants are offered different ways to gain exposure to the Nasdaq 100 Index, whether through the Exchange’s proprietary products like options overlying NDX, NDPX, or XND, or separately through multi-listed options overlying Invesco QQQ Trust (“QQQ”); Securities Exchange Act Release No. 99171 (December 14, 2023), 88 FR 88206 (December 20, 2023) (SR-ISE-2023-36) (explaining that NDX, XND and NQX provide “market participants with a variety of choices in selecting the product they desire to utilize in order to gain exposure to the Nasdaq 100 Index.”)).

⁹⁸ See Notice, 89 FR at 21651 (citing Securities Exchange Act Release No. 99141 n.7 (December 12, 2023), 88 FR 87466 (December 18, 2023) (SR-Phlx-2023-55) (explaining that the fees for NDX and NDXP are in line with fees assessed by Cboe on its MXEA and MXEF options products)).

⁹⁹ See Notice, 89 FR at 21651 (citing Securities Exchange Act Release No. 95170 (June 29, 2022), 87 FR 40295 (July 6, 2022) (SR-Phlx-2022-27) (discussing the role of proprietary data products in the competition among exchanges)).

¹⁰⁰ See Notice, 89 FR at 21651.

greater trading opportunities and new avenues to manage risks.¹⁰¹ The Exchange states that an exchange’s proprietary product offering may attract order flow to a particular exchange to trade a particular options product and generally make that exchange a more desirable venue to transaction options, thereby attracting membership to that exchange.¹⁰²

The Exchange states that, in light of the number of trading venues available to customers, the Exchange must price its products, including TOPO, PHLX Orders, and TOPO Plus Orders (as well as other products), competitively, otherwise customers would move to other venues.¹⁰³ The Exchange states that, “[i]f competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior” and, accordingly, “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.”¹⁰⁴

The Exchange states that the top of book data in TOPO is sent to OPRA; under OPRA rules, proprietary options information is available to customers that have equivalent access to OPRA information, and therefore is supplementary to the OPRA feed.¹⁰⁵ The Exchange states that, specifically, Section 5.2(c)(iii) of the OPRA Plan provides that “[a] Member [of the OPRA Plan] may disseminate its Proprietary Information,” provided that “such dissemination is limited to other Members and to persons who also have equivalent access to consolidated Options

¹⁰¹ See Notice, 89 FR at 21651.

¹⁰² See Notice, 89 FR at 21651.

¹⁰³ See Notice, 89 FR at 21651.

¹⁰⁴ See Notice, 89 FR at 21651 (citing Securities Exchange Act Release No. 59039 (December 2, 2008), 73 Fed. Reg. 74,770 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹⁰⁵ See Notice, 89 FR at 21651 (citing Limited Liability Company Agreement of Options Price Reporting Authority, LLC § 5.2(c)(iii) (January 1, 2010), available at https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Update%20Exhibit%20A%20-%202006-19-2019.pdf (“OPRA Plan”)).

Information disseminated by OPRA for the same classes or series of options that are included in the Proprietary Information. . . .”¹⁰⁶ The Exchange states that “Consolidated Options Information” refers to “consolidated Last Sale Reports combined with either consolidated Quotation Information or the BBO furnished by OPRA” and that access is deemed to be “equivalent” “if both if both kinds of information are equally accessible on the same terminal or work station”¹⁰⁷

The Exchange states that any customer that purchases proprietary options data from the Exchange, including TOPO and TOPO Plus Orders, must also have equivalent access to the OPRA Plan.¹⁰⁸ The Exchange states that the best bid and offer and last sale information available from TOPO and TOPO Plus Orders fees is identical to the information simultaneously sent to OPRA by the Exchange and that OPRA provides NBBO and last sale information on options transactions.¹⁰⁹ The Exchange states that TOPO and TOPO Plus Orders provide additional administrative information unique to trading on the Exchange, and also reduce the transmission and processing latencies generated through the process of consolidating data into the OPRA feed.¹¹⁰ The Exchange states that because top of book and last sale information is available on OPRA as well as TOPO, and customers who purchase TOPO have equivalent

¹⁰⁶ See Notice, 89 FR at 21651 (citing Section 5.2(c)(iii) of the OPRA Plan).

¹⁰⁷ See Notice, 89 FR at 21652 (citing Section 5.2(c)(iii) of the OPRA Plan).

¹⁰⁸ See Notice, 89 FR at 21652.

¹⁰⁹ See Notice, 89 FR at 21652. The Exchange states that the TOPO feed includes administrative information (but not data) that is not provided on the OPRA feed, such as symbol directory messages. See Notice, 89 FR at 21652 (citing Nasdaq, “Top of Phlx Options Interface Specifications, Version 3.4” Section 4.3 available at <https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topofphlx.pdf> (describing the start of day options directory message, which lists all symbols eligible for the auction process)).

¹¹⁰ See Notice, 89 FR at 21652. The Exchange states that bid and offer and last sale information provided with the TOPO Plus Orders product is identical to the data sent to OPRA, although the “orders” component of TOPO Plus Orders is not. Id.

access to the OPRA feed, certain customers may choose to rely on the OPRA feed in lieu of purchasing PHLX data, thereby limiting the ability of the Exchange from charging excessive fees for its TOPO and TOPO Plus Orders feeds.¹¹¹

The Exchange states that purchase of PHLX Orders is optional and that customers can obtain all of the data contained in PHLX Orders from PHLX Depth of Market feed, and may purchase the latter if they do not realize the cost savings offered by PHLX Orders.¹¹² The Exchange states that PHLX Orders is not a complement to any other product offered by the Exchange or any of its competitors; customers are free to purchase PHLX Orders or not, and can reject the feed for any reason, including the fee charged.¹¹³

The Exchange states that the proposed fees are comparable to, and in some cases less than, those of other similarly situated exchange fees.¹¹⁴ The Exchange states that options market statistics show that PHLX has a market share of approximately 9%, and that ARCA, with an 11% market share, and CBOE, with a 9% market share, are its closest competitors.¹¹⁵ The Exchange states that to obtain top of book and depth of book information for internal distribution (including both simple and complex options) from ARCA, a customer would be required to pay an Access Fee of \$3,000 per month, a Non-Display fee of at least \$5,000 per month for simple options, and a Non-Display fee of \$1,000 for Complex Options, for a total of \$9,000 per

¹¹¹ See Notice, 89 FR at 21652.

¹¹² See Notice, 89 FR at 21652.

¹¹³ See Notice, 89 FR at 21652.

¹¹⁴ See Notice, 89 FR at 21652.

¹¹⁵ See Notice, 89 FR at 21652 (citing Nasdaq, Options Market Statistics (Last updated November 3, 2023), available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>).

month.¹¹⁶ The Exchange states that to obtain the same information from PHLX under the new proposal, a customer would pay the Internal Distributor fee of \$2,500 for TOPO, and an Internal Distributor fee of \$4,000 for PHLX Depth Data, for a total of \$6,500 per month.¹¹⁷ The Exchange states that to obtain comparable information for Cboe Options, a customer would be required to pay a combined fee of \$9,000 per month.¹¹⁸ The Exchange states that a PHLX customer would pay the Internal Distributor fee of \$2,500 for TOPO, and an Internal Distributor fee of \$4,000 for PHLX Depth Data, for a total of \$6,500 per month.¹¹⁹ The Exchange states that as such, the proposed fees are comparable to fees charged by industry peers, and therefore presumptively reasonable.¹²⁰

The Exchange states that the Internal Distributor fee for TOPO Plus Orders was increased in 2018, while none of the other fees have changed for over a decade, since January 2013, and that this means that fees for TOPO, PHLX Orders, and TOPO Plus Orders have fallen in real terms due to inflation.¹²¹ The Exchange explains that, using data generated by the Department of Commerce to estimate inflation in the market for portfolio management and investment

¹¹⁶ See Notice, 89 FR at 21652 (citing NYSE Arca Options Proprietary Market Data Fees (as of July 3, 2023), available at https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf).

¹¹⁷ See Notice, 89 FR at 21652 (citing Options 7, Section 10 (Proprietary Data Feed Fees) (PHLX Depth Data)). The Exchange states that ARCA does not charge separately for top of book and depth of book. Id. The Exchange states that although PHLX is not proposing to change fees for depth of book information, PHLX depth of book information is included here to maintain comparability. Id.

¹¹⁸ See Notice, 89 FR at 21652 (citing Cboe Data Services (CDS), Market Data Product Price List (updated July 1, 2023), available at https://cdn.cboe.com/resources/membership/US_Market_Data_Product_Price_List.pdf).

¹¹⁹ See Notice, 89 FR at 21652 (citing Options 7, Section 10 (Proprietary Data Feed Fees) (PHLX Depth Data)). The Exchange states that ARCA does not charge separately for top of book and depth of book. Although PHLX is not proposing to change fees for depth of book information, PHLX depth of book information is included here to ensure comparability. Id.

¹²⁰ See Notice, 89 FR at 21652.

¹²¹ See Notice, 89 FR at 21652 (citing Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR-Phlx-2018-08) and Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145)).

services, inflation has increased prices by 63.9% since January 2013, when most of the fees at issue were set, and 15.7% since January 2018, when internal distributor fees for TOPO Plus Orders were last modified.¹²² The Exchange states that, at the same time, the average daily message count of PHLX has more than doubled in just five years, from approximately 3.0 billion messages per day in 2018 to approximately 8.2 billion messages in 2023.¹²³ The Exchange states that PHLX grew in conjunction with options trading overall, which in the aggregate grew at a faster pace than PHLX alone – specifically stating that between January 2018 and December 2023, options volume on PHLX grew by 31%, while options volume on all exchanges nearly doubled, from 467 million options to 912 million instruments.¹²⁴

The Exchange states that growth in options trading means better value for the consumer, that the greater variety of options contracts traded means that customers have more choice, and that the greater number of buyers and sellers in the market means that there is more liquidity, resulting in tighter spreads and better consumer value on each trade.¹²⁵ The Exchange further states that greater choice and tighter spreads mean that the consumer obtains more value from options markets overall, which should be reflected in fees for exchange services, including market data.¹²⁶ The Exchange concludes that the proposal is therefore reasonable in light of the

¹²² See Notice, 89 FR at 21652 (citing Bureau of Economic Analysis, U.S. Department of Commerce, “Personal Consumption Expenditures Price Index,” available at <https://www.bea.gov/data/personal-consumption-expenditures-price-index>).

¹²³ See Notice, 89 FR at 21652 (citing PHLX Data (Average Daily Message Count was 2,979,919,551.32 in 2018, and 8,243,516,029.17 thus far in 2023)). The Exchange states that the significant increases in data traffic have also required technological upgrades to manage the larger traffic volume and to respond to overall technological change in the industry. See Notice, 89 FR at 21652 (citing See, e.g., Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR-Phlx-2018-08) (discussing a number of functional enhancements to both TOPO and PHLX Orders)).

¹²⁴ See Notice, 89 FR at 21652 (citing Options Clearing Corporation, “Volume and Open Interest,” available at <https://www.theocc.com/market-data/market-data-reports/volume-and-open-interest/volume-by-exchange>).

¹²⁵ See Notice, 89 FR at 21652.

¹²⁶ See Notice, 89 FR at 21652.

substantial increase in customer value generate by the higher levels of liquidity now available on the Exchange, coupled with the fall in real prices due to inflation.¹²⁷

The Exchange states that External Distributors receive additional value not available to Internal Distributors by disseminating information externally and typically charging for the service and that this additional value supports higher fees for external distribution for TOPO, PHLX Orders, and TOPO Plus Orders.¹²⁸ The Exchange states that higher fees for external distribution of data are common throughout the industry, and nearly universal among exchanges and that the difference in value between internal and external distribution is also reflected in the current fee schedule.¹²⁹

The Exchange states that, in summary, the proposal represents an equitable allocation of reasonable dues, fees and other charges because: (i) customers have a choice in trading venue, and will exercise that choice and trade at another venue if exchange fees are not set competitively; (ii) the top of book data sent in the TOPO feed are also sent to OPRA, and customers have the option of relying on OPRA data; (iii) the purchase of PHLX Orders is entirely optional as it is a low-cost alternative to the PHLX Depth of Market product; (iv) the proposed fees are comparable to those of other exchanges; (v) exchange fees have fallen in real terms while the amount of liquidity available on the exchange has increased, and (vi) external vendors receive additional value from distributing data to their own customers and typically charging for the service, and therefore charging higher fees for external distribution is fair and reasonable.¹³⁰

¹²⁷ See Notice, 89 FR at 21652-53.

¹²⁸ See Notice, 89 FR at 21653.

¹²⁹ See Notice, 89 FR at 21653.

¹³⁰ See Notice, 89 FR at 21653.

The Exchange also states that the Proposal is not unfairly discriminatory.¹³¹ The Exchange states that the three market data feeds at issue here—TOPO, PHLX Orders, and TOPO Plus Orders—are used by a variety of market participants for a variety of purposes, and states that users include regulators, market makers, competing exchanges, media, retail, academics, portfolio managers.¹³² The Exchange states that market data feeds will be available to members of all of these groups on a non-discriminatory basis.¹³³ The Exchange also 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.¹³⁴ The Exchange states that nothing in the Proposal burdens inter-market competition (the competition among self-regulatory organizations) because approval of the Proposal does not impose any burden on the ability of other options exchanges to compete.¹³⁵ The Exchange states that PHLX fees are comparable to, and in some cases less than, those of other exchanges.¹³⁶ The Exchange finally states that nothing in the Proposal burdens intra-market competition (the competition among consumers of exchange data) because PHLX market data is available to any customer under the same fee schedule as any other customer, and any market participant that wishes to purchase PHLX market data can do so on a non-discriminatory basis.¹³⁷

B. Suspension

¹³¹ See Notice, 89 FR at 21653.

¹³² See Notice, 89 FR at 21653.

¹³³ See Notice, 89 FR at 21653.

¹³⁴ See Notice, 89 FR at 21653.

¹³⁵ See Notice, 89 FR at 21653.

¹³⁶ See Notice, 89 FR at 21653.

¹³⁷ See Notice, 89 FR at 21653.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.¹³⁸ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”¹³⁹

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;¹⁴⁰ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;¹⁴¹ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁴²

In temporarily suspending the Exchange’s proposed rule change, the Commission intends to further consider whether the Proposal to increase market data fees is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange’s rules provide for

¹³⁸ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”). To date, the Commission has received one comment letter on proposed rule change, which does not appear to be relevant to the instant filing. See Ross Letter.

¹³⁹ See *id.*

¹⁴⁰ 15 U.S.C. 78f(b)(4).

¹⁴¹ 15 U.S.C. 78f(b)(5).

¹⁴² 15 U.S.C. 78f(b)(8).

the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁴³

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.¹⁴⁴

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Changes

In addition to temporarily suspending the Proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)¹⁴⁵ and 19(b)(2)(B) of the Act¹⁴⁶ to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,¹⁴⁷ the Commission is providing notice of the grounds for possible disapproval under consideration:

¹⁴³ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

¹⁴⁴ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴⁵ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

¹⁴⁶ 15 U.S.C. 78s(b)(2)(B).

¹⁴⁷ Id. Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;¹⁴⁸
- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;¹⁴⁹ and
- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”¹⁵⁰

As discussed in Section III above, the Exchange made various arguments in support of the Proposal. There are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposed fees are consistent with the Act and the rules thereunder. The Commission will specifically consider, among other things, whether the Exchange has provided sufficient evidence to demonstrate that the proposed market data fees are reasonable and equitably allocated, are not unfairly discriminatory, and do not impose any

days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

¹⁴⁸ 15 U.S.C. 78f(b)(4).

¹⁴⁹ 15 U.S.C. 78f(b)(5).

¹⁵⁰ 15 U.S.C. 78f(b)(8).

burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”¹⁵¹ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,¹⁵² and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.¹⁵³

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.¹⁵⁴

V. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER

¹⁵¹ 17 CFR 201.700(b)(3).

¹⁵² See id.

¹⁵³ See id.

¹⁵⁴ See 15 U.S.C. 78f(b)(4), (5), and (8).

DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.¹⁵⁵

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the Proposal, in addition to any other comments they may wish to submit about the proposed rule changes.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-Phlx-2024-15 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-2024-15. This file number should be included on the subject line if email is used. To help the Commission process and review

¹⁵⁵ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-Phlx-2024-15 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,¹⁵⁶ that File No. SR-Phlx-2024-15, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵⁷

Sherry R. Haywood

Assistant Secretary

¹⁵⁶ 15 U.S.C. 78s(b)(3)(C).

¹⁵⁷ 17 CFR 200.30-3(a)(57).