

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-85152; File Nos. SR-BX-2018-066 and SR-Phlx-2018-83)

February 15, 2019

Self-Regulatory Organizations; Nasdaq BX, Inc.; Nasdaq PHLX LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the Exchanges' Port Fee Schedules

I. Introduction

On December 20, 2018, Nasdaq BX, Inc. (“BX”) and Nasdaq PHLX LLC (“Phlx”) (each an “Exchange,” and collectively the “Exchanges”) each filed with the Securities and Exchange Commission (“Commission”), 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 to amend its port fee schedule. Each proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ Each proposed rule change was published for comment in the Federal Register on January 31, 2019.⁴ The Commission has received no comment letters on the proposed rule changes. Under Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (i) temporarily suspending the proposed rule changes; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule changes.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release Nos. 84965 (December 26, 2018), 84 FR 842 (“BX Notice”); 84967 (December 26, 2018), 84 FR 861 (“Phlx Notice”).

⁵ 15 U.S.C. 78s(b)(3)(C).

II. Description of the Proposed Rule Changes

Equity 7, Section 115 of BX's rules and Equity 7, Section 3 of Phlx's rules set forth the Exchanges' port fee schedules. These port fee schedules provided that the fees for specified ports are assessed on a per port per month basis.

In their proposals, each Exchange states that it currently assesses ports fees in two ways. First, for certain port types (i.e., Multicast TotalView-ITCH, TCP ITCH data feed, DROP, and their corresponding disaster recovery ports), the Exchange assigns a port only to the MPID of the customer that requested it.⁶ Even if, as a practical matter, others also utilize the port, the Exchange only bills the MPID of the customer that requested the port.⁷ According to the Exchanges, the requesting customer may then, at its discretion, subsequently bill any other users for their shared usage of the port.⁸ Second, for other port types (i.e., OUCH, FIX trading ports (FIX and FIX Lite), RASH, and their corresponding disaster recovery ports), the Exchange assigns the port to the MPID of the customer that requested it, as well as to any other MPIDs that the requester had specified.⁹ In these instances, the Exchange does not only bill the port-requesting MPID. Instead, the Exchange assesses a separate monthly fee to each of the MPIDs it assigned to the port.¹⁰

Each Exchange proposes to reorganize its port fee schedule into two sections. The first section would provide that, for OUCH, FIX trading ports (FIX and FIX Lite), RASH, and their corresponding disaster recovery ports, where a customer has requested that the Exchange assign

⁶ See BX Notice, supra note 4, at 842; Phlx Notice, supra note 4, at 861.

⁷ See BX Notice, supra note 4, at 842; Phlx Notice, supra note 4, at 861.

⁸ See BX Notice, supra note 4, at 842; Phlx Notice, supra note 4, at 861.

⁹ See BX Notice, supra note 4, at 842; Phlx Notice, supra note 4, at 861.

¹⁰ See BX Notice, supra note 4, at 842; Phlx Notice, supra note 4, at 861.

more than one MPID to a particular port, the Exchange will assess a separate monthly fee to each MPID assigned to the port. Each Exchange also proposes to revise its price formula for these port types from “\$X/port/month” to “\$X/each MPID assigned to port/month.” The second section would provide that, for Multicast TotalView-ITCH (software-based), TCP ITCH data feed, DROP, DROP disaster recovery, and trading ports used in test mode, the Exchange will assess the monthly fee to the single MPID that requested that particular port. For these ports, each Exchange would maintain its existing price formula of “\$X/port/month.”¹¹

Each Exchange represents that its proposal would merely codify the existing practices of the Exchange with respect to port fees and would not make any substantive changes to the port fees that the Exchange’s customers have been paying to date.¹²

III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,¹³ at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,¹⁴ 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.

¹¹ The second section of each Exchange’s amended port fee schedule would also include the ports for which the Exchange charges no fee: data retransmission ports (production and disaster recovery), disaster recovery ports for Multicast TotalView-ITCH (software-based), and disaster recovery ports for TCP ITCH data feed. Moreover, each Exchange proposes to add a parenthetical with the word “Glimpse” next to data retransmission ports to provide that such ports include access to the “Glimpse” product, which allows a subscriber to replay market data from the current trading day.

¹² See BX Notice, supra note 4, at 842-43; Phlx Notice, supra note 4, at 862. BX also proposes to correct a typographical error in the port fee schedule. Phlx also proposes to remove an expired fee waiver from the port fee schedule.

¹³ 15 U.S.C. 78s(b)(3)(C).

¹⁴ 15 U.S.C. 78s(b)(1).

As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes' consistency with the Act and the rules thereunder.

The Commission notes that, in connection with the proposals, each Exchange states its belief that the existing per port per month language is accurate, but the language should be more descriptive so as to avoid confusion as to the circumstances in which a customer will incur port fees.¹⁵ Moreover, in describing why its proposal is consistent with Sections 6(b)(4) and 6(b)(5) of the Act,¹⁶ each Exchange relies on the argument that its proposal would clarify and more fully describe the port fees, codify the Exchange's existing practices for assessing port fees, avoid potential confusion among customers, and would not change the fees that port users currently pay.¹⁷ Similarly, in discussing why its proposal would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, each Exchange relies on the argument that its proposal would merely codify existing practice and would not change the fees that the Exchange currently charges.¹⁸

The Commission notes that the Exchanges do not provide other explanations for why the proposals are consistent with the Act, such as why it is consistent with the Act to charge a fee for each MPID assigned to certain port types offered by the Exchange (i.e., OUCH, FIX trading port, RASH, and corresponding disaster recovery ports), rather than simply charging one fee per port for all port types. As noted above, the proposals would amend the Exchanges' price formulas for these port types from "\$X/port/month" to "\$X/each MPID assigned to port/month," which

¹⁵ See BX Notice, supra note 4, at 842; Phlx Notice, supra note 4, at 861.

¹⁶ See 15 U.S.C. 78f(b)(4), (5).

¹⁷ See BX Notice, supra note 4, at 842-43; Phlx Notice, supra note 4, at 862.

¹⁸ See BX Notice, supra note 4, at 843; Phlx Notice, supra note 4, at 862.

reflects that if there are multiple MPIDs assigned to one of these ports, rather than charging one “\$X/port/month” fee for the port, the Exchanges charge a multiple of the “\$X/port/month” fee for the port (i.e., a separate fee for each MPID assigned).¹⁹ The Commission also notes that, while the Exchanges state that the proposals would reflect their existing practices for assessing port fees, the Exchanges do not reference previous Exchange rule filings that explained why their existing practices (i.e., for a subset of the port types offered, charging a fee for each MPID assigned to the port) are consistent with the Act.

When exchanges file proposed rule changes with the Commission, 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.²⁰ 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.”²¹

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which 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;²² (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

¹⁹ See supra Section II.

²⁰ See Form 19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

²¹ Id.

²² 15 U.S.C. 78f(b)(4).

discrimination between customers, issuers, brokers, or dealers;²³ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁴

In temporarily suspending the changes to the Exchanges' fee schedules, the Commission intends to further consider whether the proposed changes to the Exchanges' port fee schedules are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for 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.²⁵

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 changes.²⁶

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

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)²⁷ and 19(b)(2)(B) of the Act²⁸ to determine whether the proposed rule changes should be approved or

²³ 15 U.S.C. 78f(b)(5).

²⁴ 15 U.S.C. 78f(b)(8).

²⁵ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²⁶ For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁷ 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

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 changes to inform the Commission’s analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,²⁹ the Commission is providing notice of the grounds for possible disapproval under consideration:

- 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,”³⁰
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to “perfect the mechanism of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers,”³¹ and
- 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].”³²

proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

²⁸ 15 U.S.C. 78s(b)(2)(B).

²⁹ 15 U.S.C. 78s(b)(2)(B).

³⁰ 15 U.S.C. 78f(b)(4).

³¹ 15 U.S.C. 78f(b)(5).

³² 15 U.S.C. 78f(b)(8).

As noted above, the proposals would, among other things, amend the Exchanges' port fee schedules to provide that certain port fees are charged on a "\$X/each MPID assigned to port/month" basis rather than a "\$X/port/month" basis.³³ Also as discussed above, in connection with the proposals, each Exchange states that its proposal would clarify and more fully describe the port fees, codify the Exchange's existing practices for assessing port fees, avoid potential confusion among customers, and would not change the fees that port users currently pay.³⁴ The Exchanges do not provide other explanations for why the proposals are consistent with the Act, and do not reference previous Exchange rule filings that provided such explanations.

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."³⁵ 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,³⁶ 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 thereunder.³⁷

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed rule changes are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable

³³ See supra Section II.

³⁴ See supra Section III.

³⁵ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³⁶ See id.

³⁷ See id.

and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; and not impose an unnecessary or inappropriate burden on competition.³⁸

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 from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which 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.³⁹

The Commission asks that commenters address the sufficiency and merit of the Exchanges' statements in support of the proposals, 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 proposed rule changes, including whether the proposed rule changes are 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

³⁸ See 15 U.S.C. 78f(b)(4), (5), and (8).

³⁹ 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).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BX-2018-066, SR-Phlx-2018-83, or both on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-BX-2018-066, SR-Phlx-2018-83, or both. 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 submissions, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 filings 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-BX-2018-066, SR-Phlx-2018-83, or both and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁴⁰ that File Numbers SR-BX-2018-066 and SR-Phlx-2018-83 be and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

Eduardo A. Aleman
Deputy Secretary

⁴⁰ 15 U.S.C. 78s(b)(3)(C).

⁴¹ 17 CFR 200.30-3(a)(57), (58).