

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61878; File No. SR-Phlx-2010-48)

April 8, 2010

Self-Regulatory Organizations; Notice of Filing of a Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Market Data Fees

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 April 6, 2010, NASDAQ OMX PHLX, Inc. (“Phlx” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend its fee schedule by establishing fees for a direct data product, Top of Phlx Options Plus Orders (“TOPO Plus Orders”), which currently provides disseminated Exchange top-of-market data (including orders, quotes and trades), together with all information that is included in the Exchange’s Specialized Order Feed (“SOF”), as described more fully below. The proposed fees would become effective on and after June 1, 2010.

The Exchange anticipates that it will generally phase out SOF as of June 1, 2010, and instead offer TOPO Plus Orders to participants that wish to continue to receive the data currently included in SOF. Accordingly, current SOF users must migrate to TOPO Plus Orders by June 1, 2010. In the event that an SOF user is unable to migrate to TOPO Plus Orders by June 1, 2010 due to circumstances beyond their control, the Exchange will apply the same monthly fee

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

applicable to TOPO Plus Orders users that are Internal Distributors (as defined below) to such SOF users.

The text of the proposed rule change is available on the Exchange's Website at <http://nasdaqtrader.com/micro.aspx?id=PHLXfilings>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to raise revenue for the Exchange by establishing fees for the TOPO Plus Orders market data product.

Beginning in June, 2009, the Exchange launched its enhanced electronic trading platform for options, Phlx XL II, on which all options on the Exchange are currently traded.³

TOPO

In conjunction with the launch and rollout of the Phlx XL II system, the Exchange developed the Top of Phlx Options data feed ("TOPO")⁴ which provides to subscribers a direct

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

data feed that includes the Exchange's best bid and offer position, with aggregate size, based on displayable order and quoting interest on the Phlx XL II system. The data contained in the TOPO data feed is identical to the data sent to the processor for the Options Price Regulatory Authority ("OPRA"), and the TOPO and OPRA data leave the Phlx XL II system at the same time.

Specialized Order Feed

Specialized Order Feed ("SOF") is the Exchange's real-time full limit order book data feed. SOF is currently available to any Exchange quoting participant (*i.e.*, specialists, Streaming Quote Traders ("SQTs"),⁵ and Remote Streaming Quote Traders ("RSQTs")⁶ (collectively, "users")) and is available to users on an issue-by-issue basis at the user's request. A user does not have to be assigned in an issue for the Exchange to provide SQF to such user in that issue.

The SOF provides real-time information to keep track of the single order book(s), single and complex orders, complex strategy and Live Auction for all symbols for which the user is configured. Users may be configured for one or more symbols. SOF provides real-time data for the entire book to its users. It is a compilation of limit order data resident in the Exchange's limit order book for options traded on the Exchange that the Exchange provides through a real-time

⁴ See Securities Exchange Act Release No. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR-Phlx-2009-54).

⁵ An SQT is an Exchange Registered Options Trader ("ROT") who has received permission from the Exchange to generate and submit option quotations electronically through an electronic interface with AUTOM via an Exchange approved proprietary electronic quoting device in eligible options to which such SQT is assigned. See Exchange Rule 1014(b)(ii)(A).

⁶ An RSQT is an ROT that is a member or member organization with no physical trading floor presence who has received permission from the Exchange to generate and submit option quotations electronically through AUTOM in eligible options to which such RSQT has been assigned. An RSQT may only submit such quotations electronically from off the floor of the Exchange. See Exchange Rule 1014(b)(ii)(B).

data feed. The Exchange updates SOF information upon receipt of each displayed limit order. For every limit price, the SOF includes the aggregate order volume.

TOPO Plus Orders

In October, 2009, the Exchange made the TOPO Plus Orders data feed available to all market participants.⁷ TOPO Plus Orders provides disseminated Exchange top-of-market data (including orders, quotes and trades) together with all information that is included in SOF. Currently, the Exchange does not charge fees for the use of TOPO Plus Orders. When it established TOPO Plus Orders, the Exchange represented that it would submit a proposed rule change to the Commission in order to implement fees for the use of TOPO Plus Orders. The instant proposed rule change is intended to establish and implement such fees.

The Exchange proposes to charge monthly fees to distributors for use of TOPO Plus Orders. The amount of the monthly distributor fee will depend on whether the distributor is an “Internal Distributor” or an “External Distributor,” as defined below.

The Exchange’s fee schedule currently reflects that a “distributor” of NASDAQ OMX PHLX data is any entity that receives a feed or data file of data directly from NASDAQ OMX PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity), and that all distributors would be required to execute a NASDAQ OMX PHLX distributor agreement.⁸

⁷ See Securities Exchange act Release No. 60877 (October 26, 2009), 74 FR 56255 (October 30, 2009) (SR-Phlx-2009-92).

⁸ The Exchange notes that the proposed definition of “distributor” and references to internal and external distribution are identical to those set forth in NASDAQ Rule 7019(c).

Discontinuation of SOF

As an incentive for SOF users to migrate to TOPO Plus Orders, the Exchange anticipates that it will generally phase out SOF as of June 1, 2010. The Exchange recognizes, however, that some SOF users may encounter issues beyond their control that render them unable to migrate from SOF to the TOPO Plus Orders feed on or before that date. Accordingly, the Exchange will make SOF available only to current SOF users that have not migrated to TOPO Plus Orders for a period of time after June 1, 2010. Beginning June 1, 2010, such SOF users will be charged for SOF at the same monthly rate as TOPO Plus Orders users that are Internal Distributors, as defined below.

Once migrated from SOF to TOPO Plus Orders, a user will not have the option of reverting to SOF. New subscribers currently do not have, and will not be given, the option to use SOF. New subscribers must subscribe to TOPO Plus Orders to receive the market data feed.

Internal Distributor

An Internal Distributor is an organization that subscribes to the Exchange for the use of TOPO or TOPO Plus Orders, and is permitted by agreement with the Exchange to provide TOPO or TOPO Plus Orders data to internal users (*i.e.*, users within their own organization). Under the proposal, Internal Distributors of TOPO Plus Orders would be charged a monthly fee of \$4,000 per organization.⁹ This charge will also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.¹⁰

⁹ Internal Distributors of TOPO are currently charged a monthly fee of \$2,000 per organization. This fee will continue to apply to Internal Distributors that distribute the TOPO feed.

¹⁰ SOF users do not distribute SOF to any external users. Therefore, the Exchange will assess the lesser fee applicable to internal distributors of TOPO Plus Orders on SOF users that have not migrated as of June 1, 2010.

External Distributor

An External Distributor is an organization that subscribes to the Exchange for the use of TOPO Plus Orders, and is permitted by agreement with the Exchange to provide TOPO Plus Orders data to both internal users and to external users (*i.e.*, users outside of their own organization). External Distributors will be charged a monthly fee of \$5,000 per organization.¹¹

Monthly Subscriber Fee

The Exchange proposes to assess a monthly Subscriber Fee on External Distributors of TOPO Plus Orders. A “subscriber” is a person or entity to whom the External Distributor provides the TOPO Plus Orders data feed. The monthly Subscriber Fee would be assessed on a per-subscriber basis depending upon whether the subscriber is a Non-Professional Subscriber or a Professional Subscriber.

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.¹² The monthly Subscriber Fee assessed to External Distributors would be \$1 per Non-Professional Subscriber.

¹¹ External Distributors of TOPO are currently charged a monthly fee of \$2,500 per organization. This fee will continue to apply to External Distributors that distribute the TOPO feed.

¹² This definition of “non-professional” is based on Nasdaq Options Market (“NOM”) Rule 7011(B)(2).

This Monthly Subscriber Fee will also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.

A Professional Subscriber is any subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX PHLX distributor agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber. The monthly Subscriber Fee assessed to External Distributors would be \$20 per Professional Subscriber. This Monthly Subscriber Fee will also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,¹³ in general and with Sections 6(b)(4) of the Act,¹⁴ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system which Phlx operates or controls.

The Exchange believes that the proposed rule change is also consistent with the provisions of Section 6(b)(5) of the Act,¹⁵ in that it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78f(b)(5).

regulate by virtue of any authority conferred by the Act matters not related to the purposes of the Act or the administration of the Exchange.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act¹⁶ in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act, as set forth in more detail below.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission has recently issued an order firmly establishing that in reviewing non-core data products such as TOPO Plus Orders, the Commission will utilize a market-based approach that relies primarily on competitive forces to determine the terms on which non-core data is made available to investors.¹⁷ The Commission adopted a two-part test:

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

¹⁶ 15 U.S.C. 78f(b)(8).

¹⁷ See Securities Exchange Act Release No. 57917 (Dec. 2, 2008) [sic] (“NetCoalition Order” resolving File No. SR-NYSEArca-2006-21).

demonstrating that the terms of the proposal are equitable, fair, reasonable, and not unreasonably discriminatory.¹⁸

This standard begins from the premise that no Commission rule requires exchanges or market participants either to distribute non-core data to the public or to display non-core data to investors.¹⁹

In its NetCoalition Order, the Commission concluded that “at least two broad types of significant competitive forces applied to NYSE Arca in setting the terms of its Proposal to distribute the ArcaBook data: (1) NYSE Arca’s compelling need to attract order flow from market participants; and (2) the availability to market participants of alternatives to purchasing the ArcaBook data. The Commission conducted an exhaustive 14-page review of these two competitive forces before concluding that the availability of alternatives, as well as the compelling need to attract order flow, imposed significant competitive pressure on the exchange’s need to act equitably, fairly, and reasonably in setting the terms of the fees for its non-core data product.²⁰

The market data provided in TOPO Plus Orders is non-core data that is governed by the same analysis the Commission set forth in the NetCoalition Order. As with the NYSE Arca depth-of-book product, no rule requires Phlx or any other exchange to offer depth of book data; nor are vendors required to purchase or display that data.

Additionally, Phlx is constrained by the same two competitive forces in the options market as the Commission found are present in the proposal of the International Securities

¹⁸ Id. at 48 – 49 [sic].

¹⁹ Id. at 4 [sic].

²⁰ Id. at 51 – 65 [sic]. The Commission then spent an additional 36 pages (65 – 101 [sic]) analyzing and refuting comments challenging the Commission’s competition analysis.

Exchange, Inc. (“ISE”) to establish fees for a real-time depth of market data offering, the ISE Depth of Market Data Feed (“Depth of Market”).²¹

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

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

Phlx currently trades options on 7 proprietary index products that are not traded on any other exchange. These 7 options currently represent less than 0.04% of Phlx’s total contract volume. Given the small percentage of Phlx’s total contract volume represented by these 7 products, the Exchange believes that the inclusion of data on these products in the TOPO Plus Orders product should not confer market power on Phlx to compel market participants to

²¹ See Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR-ISE-2007-97) (Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to Market Data Fees).

purchase the entire Phlx data feed. The Exchange therefore believes that the inclusion of depth-of-book data for these products in Phlx's TOPO Plus Orders product does not undermine the fact that Phlx is subject to significant competitive forces in setting the terms of its proposal.

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

If the Commission finds that Phlx is subject to significant competitive forces in setting the terms of TOPO Plus Orders pricing, then the Commission should approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. Phlx submits that no such countervailing basis exists.

To the contrary, Phlx's considerations in setting the fees for TOPO Plus Orders are virtually identical to those the Commission approved in the NetCoalition Order. First, the proposed fees for TOPO Plus Orders are lower for Internal Distributors than for External Distributors. Because Internal Distributors are by definition more limited in the scope of their distribution of TOPO Plus Orders data than External Distributors, it is reasonable to expect that

Internal Distributors will provide TOPO Plus Orders data to a smaller number of internal subscribers. Conversely, External Distributors can reasonably be expected to distribute the TOPO Plus Orders data to a higher number of subscribers because they do not have the same limitation. Accordingly, the Exchange will charge a higher fee to External Distributors than to Internal Distributors. The fees therefore do not unreasonably discriminate among types of distributors, such as by favoring participants in the Phlx market or penalizing participants in other markets. Second, Phlx projects that the total revenues generated by the TOPO Plus Orders fee initially will amount to \$1.2 million per year, which is significantly less than the \$8 million per year that NYSE Arca projected would be generated by its ArcaBook data.²²

The Exchange also reasonably believes that External Distributors will distribute TOPO Plus Orders market data to Professional Subscribers who would use the data for commercial purposes, whereas Non-Professional Subscribers may not by definition use the data for any commercial purpose. Therefore, the Exchange will assess on External Distributors a monthly subscriber fee of \$20 per Professional Subscriber, and \$1 per Non-Professional Subscriber. The monthly subscriber fees assessed upon External Distributors are based upon the manner in which the data will ultimately be used, *i.e.*, for commercial vs. non-commercial purposes, and therefore do not unreasonably discriminate among types of distributors, such as by favoring participants in the Phlx market or penalizing participants in other markets.

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

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the market for options orders and executions is already highly

²² Id. at 101 – 104 [sic].

competitive and Phlx's proposal is itself pro-competitive in several ways. First, the TOPO Plus Orders depth of book data feed offers a comprehensive, competitive alternative to the consolidated data OPRA feed for users and situations where consolidated data is unnecessary. Second, the Phlx believes that offering the TOPO Plus Orders data feed will help attract new users and new order flow to the Phlx market, thereby improving Phlx's ability to compete in the market for options order flow and executions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2010-48 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-Phlx-2010-48. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission,²³ 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 Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to

²³ The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/rules/sro.shtml>.

make available publicly. All submissions should refer to File Number SR-Phlx-2010-48 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.²⁴

Florence E. Harmon
Deputy Secretary

²⁴ 17 CFR 200.30-3(a)(12).