

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-99183; File No. SR-Phlx-2023-57)

December 14, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Exchange's Proprietary Data Fees for Top of PHLX Options ("TOPO"), PHLX Orders, and TOPO Plus Orders at Options 7, Section 10

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 5, 2023, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the Exchange's proprietary data fees for Top of PHLX Options ("TOPO"), PHLX Orders, and TOPO Plus Orders at Options 7, Section 10, as described further below.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, 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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposed rule change is to amend the Exchange’s proprietary data fees for Top of PHLX Options (“TOPO”), PHLX Orders, and TOPO Plus Orders at Options 7, Section 10.<sup>3</sup>

**Top of PHLX Options (“TOPO”)**

TOPO is a direct data feed that provides subscribers with PHLX Best Bid and Offer (“BBO”)<sup>4</sup> and last sale information.<sup>5</sup> The data distributed on TOPO is identical to the data simultaneously sent to the Options Price Reporting Authority (“OPRA”).<sup>6</sup> The TOPO feed also provides administrative information to facilitate trading on the Exchange such as, for example, the list of symbols trading on a particular day.<sup>7</sup> TOPO reduces the transmission and processing

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<sup>3</sup> 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 the instant filing to provide additional detail regarding the proposal.

<sup>4</sup> The Best Bid and Offer includes aggregate size information based on displayable order and quoting interest on the Exchange.

<sup>5</sup> See 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.)

<sup>6</sup> See 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.”).

<sup>7</sup> See, e.g., 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).

latencies for top of book information relative to the OPRA feed by avoiding the latencies generated by the latter in consolidating data.

Monthly fees for TOPO are currently \$2,000 for Internal Distributors,<sup>8</sup> \$2,500 for External Distributors,<sup>9</sup> \$1 for a Non-Professional Subscriber,<sup>10</sup> and \$40 for a Professional Subscriber.<sup>11</sup> None of these fees have changed for over a decade, since January 2013.<sup>12</sup>

### **PHLX Orders**

PHLX Orders is a real-time order book feed with pricing information for displayed orders on the PHLX order book.<sup>13</sup> The data 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. It also provides the real-time status of simple and complex orders<sup>14</sup> on the order book, including new orders and changes to orders resting on the PHLX book for all PHLX-listed

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<sup>8</sup> See 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.”).

<sup>9</sup> See id.

<sup>10</sup> See id. (“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.”).

<sup>11</sup> See id. (“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.”).

<sup>12</sup> See Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145).

<sup>13</sup> See Options 3 (Options Trading Rules), Section 23(a)(2) (Data Feeds and Trade Information).

<sup>14</sup> See 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.”).

options.<sup>15</sup> The PHLX Orders feed includes data on the opening imbalance, Price Improvement XL (PIXL),<sup>16</sup> and Complex Order Live Auction (COLA).<sup>17</sup> A notification message is sent for symbols entering an auction.<sup>18</sup> PHLX Orders also furnishes an historical record of all simple and complex order message data from the PHLX Orders data feed. PHLX Orders information is not sent to OPRA.<sup>19</sup>

PHLX Orders is an alternative to PHLX Depth of Market. It 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. PHLX Orders excludes quotations by market makers and other authorized entities that is included in PHLX Depth of Market.<sup>20</sup>

In October 2023, the one millisecond average peak for PHLX Depth of Market was approximately 13.5 million messages. PHLX Orders transmitted only about 2.6 million messages

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<sup>15</sup> See Nasdaq, “PHLX Orders,” available at <https://www.nasdaqtrader.com/Micro.aspx?id=PHLXOrders>.

<sup>16</sup> See 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.”).

<sup>17</sup> See Options 3, Section 14(e) (describing the process for the Complex Order Live Auction (“COLA”)).

<sup>18</sup> Nasdaq, “PHLX Orders Interface Specification,” (Version 1.92) available at <https://www.nasdaqtrader.com/content/technicalsupport/specifications/dataproducts/topoplusorders.pdf> (describing auction notification message).

<sup>19</sup> See 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-%202006-19-2019.pdf](https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Update%20Exhibit%20A%20-%202006-19-2019.pdf) (describing last sale and best bid and offer information disseminated by OPRA).

<sup>20</sup> See 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).

on average over the same period.<sup>21</sup> In that month, purchase of PHLX Orders in lieu of PHLX Depth of Market would have lowered the bandwidth required for peak messaging by over 80 percent. This would have decreased the load on the customer's information processing infrastructure, reduced processing time, and facilitated the ingestion of Exchange information, while still providing the customer with a view of active buy and sell orders.

Purchase of PHLX Orders is optional. 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.

PHLX Orders is a derivative product designed as a lower-cost alternative to a depth of book feed. It 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.

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. None of these fees have changes for over a decade, since January 2013.<sup>22</sup>

### **TOPO Plus Orders**

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.<sup>23</sup>

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<sup>21</sup> See Nasdaq, "October 2023 Bandwidth," available at <https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F%2Fwww.nasdaqtrader.com%2Fcontent%2Ftechnicalsupport%2Fspecifications%2Fdataproducs%2Fbandwidthreport.xls&wdOrigin=BROWSELINK>.

<sup>22</sup> See Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145).

<sup>23</sup> See PHLX, TOPO Plus PHLX Orders, available at <https://www.nasdaqtrader.com/Micro.aspx?id=TOPOPlusOrders>.

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.

Internal Distributor fees for TOPO Plus Orders were modified in January 2018, over five years ago,<sup>24</sup> but the other TOPO Plus Orders fees have not changed since January 2013.<sup>25</sup>

### **Proposed Changes**

For TOPO, the Exchange 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. No changes are proposed for Non-Professional and Professional Subscriber fees.

For PHLX Orders, the Exchange proposes to increase the monthly charge for Internal Distributors from \$3,000 to \$3,500, and the monthly charge for External Distributors from \$3,500 to \$4,000. No changes are proposed for Non-Professional and Professional Subscriber fees.

For TOPO Plus Orders, the Exchange 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. No changes are proposed for Non-Professional and Professional Subscriber fees.

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.

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<sup>24</sup> See Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR-Phlx-2018-08).

<sup>25</sup> See Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145).

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>26</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>27</sup> 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.

This belief is based on several factors.

First, 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.

Second, 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.

Third, the purchase of PHLX Orders is optional. 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. Customers may purchase PHLX Orders or not, and can reject the feed for any reason, including the fee charged.

Fourth, the proposed fees are comparable to, and in some cases less than, those of similarly-situated exchanges.

Fifth, 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

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<sup>26</sup> 15 U.S.C. 78f(b).

<sup>27</sup> 15 U.S.C. 78f(b)(4) and (5).

(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 higher levels of liquidity currently available on the Exchange.

Sixth, 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.

### **Customers Have A Choice in Trading Venue**

Customers face many choices in where to trade options. Until recently, sixteen exchanges have offered options trading services,<sup>28</sup> and they are now being joined by a 17<sup>th</sup> member.<sup>29</sup> Not a single options exchange trades more than 11 percent of the options market by volume.<sup>30</sup> PHLX, the second largest options exchange by volume, only has 9 percent of the options market.<sup>31</sup> Only one of the 17 options exchanges have a market share over 10 percent.<sup>32</sup> This broad dispersion of market share demonstrates that market participants can and do exercise choice in options trading venues. As the number of exchanges continues to grow, competition will become fiercer and customer choice will continue to expand.

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<sup>28</sup> See OPRA Plan, list of OPRA Participant Exchanges, available at <https://www.opraplan.com/faqs>. (All options exchanges are members of the OPRA Plan.).

<sup>29</sup> See 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”).

<sup>30</sup> See Nasdaq, Options Market Statistics (Last updated November 3, 2023), available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>. 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%; MIAX: 7%; MPRL: 7%; NOM: 6%; BATS: 6%; C2: 5%; EMLD: 4%; MRX: 3%; GEMX: 3%; BXOP: 3%; MEMX: 0%.

<sup>31</sup> See id.

<sup>32</sup> See id.



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. If not, customers would move to other venues. “If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”<sup>33</sup> 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.”<sup>34</sup>

### **The Top of Book Data in TOPO Is Sent to OPRA**

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.<sup>35</sup> 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 Information disseminated by OPRA for the same classes or series of options that are included in the Proprietary Information. . . .”<sup>36</sup> “Consolidated Options Information” refers to “consolidated Last Sale Reports combined with either consolidated Quotation Information or the BBO furnished by OPRA.”<sup>37</sup> Access is deemed

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<sup>33</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 Fed. Reg. 74,770 (December 9, 2008) (SR-NYSEArca-2006-21).

<sup>34</sup> Id.

<sup>35</sup> See 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-%2006-19-2019.pdf](https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5d0bd57d87d3ccca102102d7_OPRA%20Plan%20with%20Update%20Exhibit%20A%20-%2006-19-2019.pdf) (“OPRA Plan”).

<sup>36</sup> Id.

<sup>37</sup> Id.

to be “equivalent” “if both if both kinds of information are equally accessible on the same terminal or work station . . . .”<sup>38</sup>

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. As noted above, 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.<sup>39</sup> OPRA provides NBBO and last sale information on options transactions. 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.<sup>40</sup> Because top of book and last sale information is available on OPRA as well as TOPO, and customers who purchase TOPO have equivalent 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.

### **The Purchase of PHLX Orders is Optional**

Purchase of PHLX Orders is optional. As explained above, 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. PHLX Orders is not a

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<sup>38</sup> Id.

<sup>39</sup> As noted above, the TOPO feed includes administrative information (but not data) that is not provided on the OPRA feed, such as symbol directory messages. See 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).

<sup>40</sup> The 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.

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.

### **The Proposed Fees are Comparable to those of Other Exchanges**

The proposed fees are comparable to, and in some cases less than, those of other similarly-situated exchange fees. Options market statistics show that PHLX has a market share of approximately 9%. ARCA, with an 11% market share, and CBOE, with a 9% market share, are its closest competitors.<sup>41</sup>

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 month.<sup>42</sup> 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,<sup>43</sup> for a total of \$6,500 per month.

To obtain comparable information for Cboe Options, a customer would be required to pay a combined fee of \$9,000 per month.<sup>44</sup> As noted above, a PHLX customer would pay the

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<sup>41</sup> See Nasdaq, Options Market Statistics (Last updated November 3, 2023), available at <https://www.nasdaqtrader.com/Trader.aspx?id=OptionsVolumeSummary>.

<sup>42</sup> See, 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](https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf).

<sup>43</sup> See Options 7, Section 10 (Proprietary Data Feed Fees) (PHLX Depth Data). 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 maintain comparability.

<sup>44</sup> See 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](https://cdn.cboe.com/resources/membership/US_Market_Data_Product_Price_List.pdf).

Internal Distributor fee of \$2,500 for TOPO, and an Internal Distributor fee of \$4,000 for PHLX Depth Data,<sup>45</sup> for a total of \$6,500 per month.

As such, the proposed fees are comparable to fees charged by industry peers, and therefore presumptively reasonable.

### **Real Exchange Fees Have Fallen While Traffic Has Increased**

As explained above, the Internal Distributor fee for TOPO Plus Orders was increased in 2018,<sup>46</sup> while none of the other fees have changed for over a decade, since January 2013.<sup>47</sup> This means that fees for TOPO, PHLX Orders, and TOPO Plus Orders have fallen in real terms due to inflation. 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.<sup>48</sup> The proposal is reasonable in light of the substantial increase in customer value generate by the higher levels of liquidity now available on the Exchange.

### **External Distributors Receive Additional Value**

External Distributors receive additional value not available to Internal Distributors by disseminating information externally and typically charging for the service. This additional value supports higher fees for external distribution for TOPO, PHLX Orders, and TOPO Plus Orders. Higher fees for external distribution of data are common throughout the industry, and nearly

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<sup>45</sup> See Options 7, Section 10 (Proprietary Data Feed Fees) (PHLX Depth Data). 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.

<sup>46</sup> See Securities Exchange Act Release No. 82495 (January 12, 2018), 83 FR 2839 (January 19, 2018) (SR-Phlx-2018-08).

<sup>47</sup> See Securities Exchange Act Release No. 68576 (January 3, 2013), 78 FR 1886 (January 9, 2013) (SR-Phlx-2012-145).

<sup>48</sup> 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 significant increases in data traffic has also required technological upgrades to manage the larger traffic volume and to respond to overall technological change in the industry. 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).

universal among exchanges. The difference in value between internal and external distribution is also reflected in the current fee schedule, which has previously been shown to be consistent with the Exchange Act.

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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.

#### **No Unfair Discrimination**

The Proposal is not unfairly discriminatory. 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. Users include regulators, market makers, competing exchanges, media, retail, academics, portfolio managers. Market data feeds will be available to members of all of these groups on a non-discriminatory basis.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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. PHLX fees are comparable to, and in some cases less than, those of other exchanges, as discussed above.

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.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>49</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

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<sup>49</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

#### 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-Phlx-2023-57 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-2023-57. This file number should be included on the subject line if email 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 (<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-2023-57 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>50</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>50</sup> 17 CFR 200.30-3(a)(12).