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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-81117; File No. SR-Phlx-2017-53]

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Nasdaq Phlx Pricing Schedule, Section IX

July 11, 2017.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 29, 2017, NASDAQ PHLX LLC (“Phlx” or the “Exchange”) filed with the Securities and Exchange Commission (the “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 the Substance of the Proposed Rule Change

The Exchange proposes to amend Nasdaq PHLX Rules, Section IX (“Proprietary Data Feed Fees”) to make a sample of PHLX Options Trade Outline (“PHOTO”) Historical Data for the period January 1 through June 30, 2014, available free of charge; current charges will continue to be assessed for PHOTO Historical Data for any other period.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 allow the Exchange to make a sample of PHOTO Historical Data for the period January 1 through June 30, 2014, available free of charge; current charges will continue to be assessed for PHOTO Historical Data for any other period. The proposed change will allow potential customers an opportunity to inspect the product, and the Exchange expects that the resulting greater familiarity with the product will lead to greater sales and wider dissemination of the data.

PHOTO Historical Data

PHOTO Historical Data provides information about the past activity of all option series traded on the Exchange for each trading session conducted during a particular prior calendar month, as selected by the subscriber.³ The data is intended to enhance a purchaser's ability to analyze option trade and volume data, evaluate historical trends in the trading activity of a particular option series, and create and test trading models and analytical strategies. The product provides the following data:

³ See Securities Exchange Act Release 63351 (November 19, 2010) 75 FR 73140 (November 29, 2010) (SR-Phlx-2010-154).

- Aggregate number of buy and sell transactions in the affected series for each trading session conducted during the specified calendar month(s);
- Aggregate volume traded electronically on the Exchange in the affected series for each trading session conducted during the specified calendar month(s);
- Aggregate number of trades effected on the Exchange to open a position⁴ for each trading session conducted during the specified calendar month(s);
- Aggregate number of trades effected on the Exchange to close a position⁵ for each trading session conducted during the specified calendar month(s);
- Origin of the orders involved in trades on the Exchange in the affected series for each trading session conducted during the specified calendar month(s), specifically aggregated in the following categories of participants: customers, broker-dealers,

⁴ PHOTO Historical Data provides subscribers with the aggregate number of “opening purchase transactions” in the affected series for each trading session conducted during the calendar month(s) selected. An opening purchase transaction is an Exchange options transaction in which the purchaser’s intention is to create or increase a long position in the series of options involved in such transaction. See Exchange Rule 1000(b)(24). PHOTO Historical Data will also provide subscribers with the aggregate number of “opening writing transactions” in the affected series for each trading session conducted during the calendar month(s) selected. An opening writing transaction is an Exchange options transaction in which the seller’s (writer’s) intention is to create or increase a short position in the series of options involved in such transaction. See Exchange Rule 1000(b)(25).

⁵ PHOTO Historical Data provides subscribers with the aggregate number of “closing purchase transactions” in the affected series for each trading session conducted during the calendar month(s) selected. A closing purchase transaction is an Exchange options transaction in which the purchaser’s intention is to reduce or eliminate a short position in the series of options involved in such transaction. See Exchange Rule 1000(b)(27). PHOTO Historical Data will also provide subscribers with the aggregate number of “closing sale transactions” in the affected series for each trading session conducted during the calendar month(s) selected. A closing sale transaction is an Exchange options transaction in which the seller’s intention is to reduce or eliminate a long position in the series of options involved in such transaction. See Exchange Rule 1000(b)(26).

market makers (including specialists, Registered Options Traders (“ROTs”), Streaming Quote Traders (“SQTs”)⁶ and Remote Streaming Quote Traders (“RSQTs”)⁷, and professionals.⁸

PHOTO Historical Data is composed of an End of Day Product and an Intra-Day Product. The End of Day product provides the aggregate data described above for the entire trading session. The Intra-Day product includes periodic, cumulative data for a particular trading session, updated every ten minutes during the trading day. The fee for the PHOTO Historical Data End of Day product is \$400.00 per calendar month selected; the fee for the PHOTO Historical Data Intra-Day product is \$750.00 per calendar month selected. Data is available starting in January 2009.

⁶ An SQT is an ROT that has received permission from the Exchange to generate and submit option quotations electronically in options to which such SQT is assigned. See Exchange Rule 1014(b)(ii)(A).

⁷ An RSQT is an ROT that is a member or member organization with no physical trading floor presence that has received permission from the Exchange to generate and submit option quotations electronically in 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).

⁸ The term “professional” means any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). A professional will be treated in the same manner as an off-floor broker-dealer for purposes of Rules 1014(g) (except with respect to all-or-none orders, which will be treated like customer orders except that orders submitted pursuant to Rule 1080(n) for the beneficial account(s) of professionals with an all-or-none designation will be treated in the same manner as off-floor broker-dealer orders), 1033(e), 1064.02 (except professional orders will be considered customer orders subject to facilitation), 1080(n) and 1080.07 as well as Options Floor Procedure Advices B-6 and F-5. Member organizations must indicate whether orders are for professionals. See Exchange Rule 1000(b)(14).

The PHOTO Historical Data product is available to any person or entity that wishes to subscribe to it, whether or not the person or entity is a member of the Exchange. Data is available for internal use only.

Proposed Change

The Exchange proposes to make a sample of PHOTO Historical Data available for the period January 1 through June 30, 2014, on the Nasdaq Trader website (www.nasdaqtrader.com) or a successor website free of charge as an FTP (File Transfer Protocol) file. The purpose of the proposed change is to allow potential customers an opportunity to inspect and test the value of the product in analyzing option trade and volume data, evaluating historical trends in the trading activity of a particular option series, and creating and testing trading models and analytical strategies. The Exchange expects that providing potential customers an opportunity to become acquainted with the benefits of the product will lead to greater sales and wider dissemination of PHOTO Historical Data.

Any person or entity, including both subscribers and non-subscribers, will be able to download the FTP file of PHOTO Historical Data for the period January 1 through June 30, 2014, free of charge. Fees for other periods of PHOTO Historical Data will remain \$400.00 for the End of Day product and \$750.00 for the Intra-Day product.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposal provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility because all persons and entities will have equal access to the sample data, and none will be charged for the sample product.

In adopting Regulation NMS,¹¹ the Commission granted SROs 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 PHOTO Historical Data product—which provides historical information about option series traded on the Exchange—is the type of market data product that the Commission envisioned when it adopted regulation NMS. The Commission concluded that Regulation NMS—deregulating the market in proprietary data—would further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.¹²

By removing unnecessary regulatory restrictions on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history.

¹¹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

¹² Id.

In NetCoalition v. Securities and Exchange Commission¹³ (“NetCoalition”), the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹⁴ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹⁵ “No one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹⁶

Data products such as PHOTO Historical Data are a means by which exchanges compete to attract order flow. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they provide. The need to compete for order flow places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.¹⁷ The very existence of a

¹³ NetCoalition v. SEC, 615 F.3d 525 (D.C. Cir. 2010).

¹⁴ See NetCoalition, at 534 - 535.

¹⁵ Id. at 537.

¹⁶ Id. at 539 (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹⁷ See Sec. Indus. Fin. Mkts. Ass’n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

proposal to provide PHOTO Historical Data free of charge to generate potential customer interest is itself evidence of a competitive market.

The proposed changes are consistent with Section 6(b)(5) of the Act because the free sample of historical data will encourage additional customers to purchase the product, thereby increasing the availability of market information to the investing public. The proposed changes would not permit unfair discrimination because all persons and entities will have access to the data for free.

There will be no charge for the sample PHOTO Historical Data; persons and firms will be free to choose whether or not to download the data. Fees for PHOTO Historical Data not included in the free sample are optional in that they apply only to firms that elect to purchase the product, which, like all proprietary data products, they may cancel at any time.

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. Indeed, the Exchange believes that offering certain PHOTO Historical Data free of charge will enhance competition by encouraging sales, which will make analytical data more readily available to investors.

The market for data products is extremely competitive and firms may freely choose alternative venues and data vendors based on the aggregate fees assessed, the data offered, and the value provided. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products

with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price, and distribution of its data products. Without trade executions, exchange data products cannot exist. Moreover, data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, the operation of the exchange is characterized by high fixed costs and low marginal costs. This cost structure is common in content distribution industries such as software, where developing new software typically requires a large initial investment (and continuing large investments to upgrade the software), but once the software is developed, the incremental cost of providing that software to an additional user is typically small, or even zero (e.g., if the software can be downloaded over the internet after being purchased).¹⁸ In the case of any exchange, it is costly to build and maintain a trading platform, but the incremental cost of trading each additional share on an existing platform, or distributing an additional instance of data, is very low. Market information and executions are each produced jointly (in the sense that the activities of trading and placing

¹⁸ See William J. Baumol and Daniel G. Swanson, "The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power," Antitrust Law Journal, Vol. 70, No. 3 (2003).

orders are the source of the information that is distributed) and are each subject to significant scale economies.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products. The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, as well as internalizing BDs and various forms of alternative trading systems (“ATs”), including dark pools and electronic communication networks (“ECNs”). Each SRO market competes to produce transaction reports via trade executions. It is common for BDs to further and exploit this competition by sending their order flow and transaction reports to multiple markets, rather than providing them all to a single market. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATs that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATs, and BD is currently permitted to produce proprietary data products, and many currently do or have announced plans to do so, including Nasdaq, NYSE, NYSE MKT, NYSE Arca, and the BATS exchanges. As noted above, the very fact that the Exchange is proposing to provide a sample of PHOTO Historical Data free of charge to generate potential customer interest is itself evidence of a competitive market.

In this competitive environment, an “excessive” price for one product will have to be reflected in lower prices for other products sold by the Exchange, or otherwise the Exchange may experience a loss in sales that may adversely affect its profitability. In this case, the proposed rule change enhances competition by lowering the price of the product through

distribution of free samples. As such, the Exchange believes that the proposed changes will enhance, and not impair, competition in the financial markets.

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.¹⁹

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.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2017-53 on the subject line.

¹⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2017-53. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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 make available publicly. All submissions should refer

to File Number SR-Phlx-2017-53, 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.²⁰

Jill M. Peterson
Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).

