

Required fields are shown with yellow backgrounds and asterisks.

Filing by NASDAQ PHLX LLC  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial *	Amendment *	Withdrawal	Section 19(b)(2) *	Section 19(b)(3)(A) *	Section 19(b)(3)(B) *
<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
			Rule		
Pilot	Extension of Time Period for Commission Action *	Date Expires *	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
<input type="checkbox"/>	<input type="checkbox"/>	<input type="text"/>	<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) *	Section 806(e)(2) *
<input type="checkbox"/>	<input type="checkbox"/>
	Section 3C(b)(2) *
	<input type="checkbox"/>

Exhibit 2 Sent As Paper Document	Exhibit 3 Sent As Paper Document
<input type="checkbox"/>	<input type="checkbox"/>

**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

A proposal to amend Section VIII of the Phlx Pricing Schedule (PSX Last Sale and NASDAQ Last Sale Plus Data Feeds) to clarify the framework for sale of the data contained in the Nasdaq Last Sale Plus data feed to Professional Subscribers.

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name *	John	Last Name *	Yetter
Title *	Vice President and Deputy General Counsel		
E-mail *	John.Yetter@nasdaq.com		
Telephone *	(301) 978-8497	Fax	<input type="text"/>

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date	02/15/2017	Executive Vice President and General Counsel
By	Edward S. Knight	<input type="text"/>
	(Name *)	

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) under the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> NASDAQ PHLX LLC (“Phlx” or “Exchange”) is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend Section VIII of the Phlx Pricing Schedule (PSX Last Sale and NASDAQ Last Sale Plus Data Feeds)<sup>3</sup> to clarify the framework for sale of the data contained in the Nasdaq Last Sale Plus (“NLS Plus”) data feed to Professional Subscribers.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1 and a copy of the applicable rule is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange on August 15, 2016. Exchange staff will advise the Board of Directors of any action taken pursuant to delegated authority. No other action by the Exchange is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to:

John M. Yetter  
Vice President and Deputy General Counsel

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

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

<sup>3</sup> References to rules are to Phlx rules, unless otherwise noted.

Nasdaq, Inc.  
(301) 978-8497

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

a. Purpose

The purpose of this proposal is to amend the Phlx Pricing Schedule to clarify the framework for sale of the data contained in the NLS Plus data feed to Professional Subscribers. Provisions of the Phlx Pricing Schedule applicable to NLS Plus do not currently contain a definition of "Professional Subscribers" or "Non-Professional Subscribers"; with respect to numerous other data products, however, these terms are well-established concepts with consistently defined definitions.<sup>4</sup> Thus, under these definitions, a "Non-Professional Subscriber" is defined as "a natural person who is not (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or (ii) any commodities or futures contract market or association; engaged as an "investment adviser" as that term is defined in Section 201(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (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

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<sup>4</sup> See, e.g., Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileged Basis ("Nasdaq UTP Plan") (available at <http://www.utpplan.com/DOC/Nasdaq-UTP%20Plan%20after%2035th%20Amendment%20%20Excluding%2021st%20Amendment%20%20i.e.%20Effective%20Plan%20as%20of%209-151.pdf>); Section VIII of the Phlx Pricing Schedule (PSX TotalView). See also Nasdaq Rule 7047 (Nasdaq Basic).

such functions were performed for an organization not so exempt.” A “Professional Subscriber” is defined as any Subscriber other than a Non-Professional Subscriber.

As described in the Phlx Pricing Schedule, NLS Plus combines information available through the PSX Last Sale product with information available through similar products – NASDAQ Last Sale (“NLS”) and BX Last Sale – offered by Nasdaq’s affiliates, The NASDAQ Stock Market LLC (“Nasdaq”) and NASDAQ BX, Inc. (“BX”). Moreover, as provided in that provision, NLS Plus may be received either by itself or in combination with another Nasdaq data product, Nasdaq Basic. The fees charged for NLS Plus incorporate the underlying fees for the data elements combined through NLS Plus, together with an additional data consolidation fee of \$350 per month. There are currently no fees charged for PSX Last Sale (including as included in NLS Plus), but because a distributor of NLS Plus is distributing each of the underlying components of NLS Plus, it also pays the administrative fees charged for distribution of Nasdaq, BX, and PSX data feeds.<sup>5</sup> In addition, a distributor receiving NLS Plus by itself (*i.e.*, without Nasdaq Basic) would need to select a fee model under Nasdaq Rule 7039 to determine the applicable charges for the NLS component of NLS Plus (including the distributor fee provided for by Nasdaq Rule 7039(c)). On the other hand, a distributor receiving NLS Plus with Nasdaq Basic would select a fee model for Nasdaq Basic and pay the fees (including

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<sup>5</sup> See Nasdaq Rule 7035; BX Rule 7035; and Phlx Pricing Schedule Section VIII. All administrative fees are charged on a per distributor, rather than a per product, basis. Thus, if a distributor is already paying the fee with respect to a product other than NLS Plus, it would not incur an additional administrative fee if it also began to distribute NLS Plus. Currently, there are no user or distributor fees applicable to BX Last Sale or PSX Last Sale. However, if BX or Phlx were to adopt fees for these products in the future, the fees would also apply to persons receiving these products by means of NLS Plus.

distributor fees) applicable to that product, as well the NLS Plus data consolidation fee and applicable administrative fees for each NLS Plus component.

#### Nasdaq Last Sale

NLS is a non-core market data product that provides recipients with real-time last-sale transaction information, including execution price, volume, and time of execution, for transactions reported by the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility (“FINRA/Nasdaq TRF”).<sup>6</sup> As such, NLS is a “non-core” product that provides a subset of the “core” last-sale data provided by securities information processors (“SIPs”) under the CTA Plan and the Nasdaq UTP Plan.

As reflected in the filing that originally established it,<sup>7</sup> NLS was designed to enable market-data “distributors to provide free access to the data [contained in NLS] to millions of individual investors via the internet and television” and was expected to “increase[s] the availability of NASDAQ proprietary market data to individual investors.”<sup>8</sup> Similarly, in its filing to offer NLS on a permanent, rather than a pilot, basis, Nasdaq stated that “[d]uring the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon

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<sup>6</sup> See Nasdaq Rule 7039(a)-(c) See also Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006) (notice of filing and immediate effectiveness regarding permanent approval of NLS).

<sup>7</sup> See SR-NASDAQ-2006-060 (Amendment No. 2, June 10, 2008) (available at [http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060\\_Amendment\\_2.pdf](http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060_Amendment_2.pdf)). See also Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approving SR-NASDAQ-2006-060, as amended by Amendment Nos. 1 and 2, to implement NLS on a pilot basis).

<sup>8</sup> Id. at 3.

data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by millions of investors on Web sites operated by Google, Interactive Data, and Dow Jones, among others.”<sup>9</sup>

The fee schedule for NLS offers distributors several different pricing models from which they may select in determining the fees applicable to distribution of the product. Specifically, in keeping with the goal of NLS to promote the accessibility of data to individual investors, distributors may choose to distribute NLS in an uncontrolled fashion via television or the internet and pay under pricing models that require them to estimate the number of households or website visitors to which the data is provided (with such estimates to be validated by a third-party vendor approved by Nasdaq). This pricing model is used by television broadcasters (such as CNBC) or internet portals (such as Google). Alternatively, a distributor may opt for a pricing model that requires it to count its customers based on a username and password system, or under which data is supplied on an ad hoc basis in response to customer queries. In both these cases, the pricing model assumes distribution through a website, such as might be provided by a broker-dealer (“BD”) to customers who log in using a username and password, or who enter ticker symbols into a website to query for last sale information.<sup>10</sup> Thus, consistent with the stated purpose of NLS, the fee structure under which NLS is made available reflects a model of widespread distribution to individual investors. Notably, the fee structure for

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<sup>9</sup> Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006).

<sup>10</sup> The Exchange notes that BDs may provide NLS data to customers in circumstances where they are not required to provide a consolidated display by SEC Rule 603(c), 17 CFR 242.603(c). See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 35569-37570 (June 29, 2005) (File No. S7-10-04) (“Reg NMS Adopting Release”).

NLS does not contain provisions that contemplate internal distribution of the product to BD employees or other Professional Subscribers.<sup>11</sup>

### Nasdaq Basic

Nasdaq Basic is a non-core market data product that contains both last sale transaction reports *and* best bid and offer information.<sup>12</sup> Thus, Nasdaq Basic includes both the data included in NLS and Nasdaq best bid and offer information. In contrast to the fee structure for NLS, the fee structure for Nasdaq Basic includes fees for distribution to Professional Subscribers and lower fees for distribution to Non-Professional Subscribers, as well as per query fees that are capped based on the Professional or Non-Professional identity of the user. Finally, Nasdaq Basic is available under two different “enterprises licenses” that distributors may use to cap their costs when making Nasdaq Basic available to a large number of subscribers. First, Nasdaq offers an enterprise license under which a BD may make Nasdaq Basic available to Professional Subscribers who are its employees. Second, there is an enterprise license under which a BD may distribute Nasdaq Basic to an unlimited number of its customers. Thus, in contrast to NLS, whose fee structure reflects a model of widespread distribution to individual investors through BD websites or through uncontrolled internet or television

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<sup>11</sup> Regardless of the fee structure selected, NLS distributors pay a monthly distributor fee of \$1500, as provided in Nasdaq Rule 7039(c). In addition, as provided in Nasdaq Rule 7035, all market data distributors pay a monthly administrative fee (formerly a higher annual fee) of \$50 (for delayed distribution) or \$100 (for real-time, or real-time and delayed distribution). The administrative fee is paid on a per distributor basis.

<sup>12</sup> See Securities Exchange Act Release No. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR-NASDAQ-2008-102) (order approving Nasdaq Basic on a pilot basis). See also Securities Exchange Act Release No. 65527 (October 11, 2011), 76 FR 64147 (October 17, 2011) (SR-NASDAQ-2011-129) (notice of filing and immediate effectiveness of permanent approval of Nasdaq Basic).



dissemination, the fee structure for Nasdaq Basic reflects a model of controlled distribution to both Professional and Non-Professional subscribers, either on a per subscription basis or through enterprise licenses focused on BD employees or customers.<sup>13</sup>

### The Proposal

The fee structures and distribution models of Nasdaq Basic and NLS reflect Nasdaq's assumption that Nasdaq Basic, with its inclusion of both pre-trade quotation information and last-sale information, would be a data product primarily of use to Professional Subscribers, as well as Non-Professional Subscribers who employ relatively sophisticated trading strategies, while the reduced scope of information available through NLS would make it a product of interest to a broad range of individual investors. However, in some instances, Professional Subscribers have expressed an interest in receiving Nasdaq last-sale information without also receiving quotation information. Because the fee and distribution framework for NLS is not structured in a manner that clearly applies to usage by Professional Subscribers, these subscribers have taken an approach of purchasing Nasdaq Basic through any of the fee structures that apply to Professional Subscribers but opting not to receive the quotation information available through the product. Accordingly, Nasdaq is adopting Nasdaq Rule 7039(d), which provides that a Professional Subscriber that wishes to receive the information contained in NLS may do so by subscribing to Nasdaq Basic and paying fees applicable under

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<sup>13</sup> Similar to NLS, distributors of Nasdaq Basic pay a monthly distributor fee of \$1500, and may also pay an additional monthly fee of \$1500 for the right to distribute data derived from Nasdaq Basic to an unlimited number of Non-Professional Subscribers. The administrative fee under Nasdaq Rule 7035 would also apply to distributors of Nasdaq Basic or other Nasdaq data products on a per distributor basis.

Nasdaq Rule 7047 (including any applicable distributor fee), while opting not to receive the quotation information ordinarily available through Nasdaq Basic.<sup>14</sup> The proposed new rule would further provide that such a Professional Subscriber may also opt to start receiving the full scope of information available through Nasdaq Basic at any time. The proposed new rule also defines “Professional Subscriber” by means of a cross-reference to Nasdaq Rule 7047(d)(3). Since such a Professional Subscriber is a subscriber to Nasdaq Basic and paying fees applicable under Nasdaq Rule 7047, it would not also pay any fees under Nasdaq Rule 7039, including the NLS distributor fee provided for under Nasdaq Rule 7039(c).

Since the fees for NLS Plus sold without Nasdaq Basic incorporate the fees for NLS, the product presents the same issue with respect to usage by Professional and Non-Professional Subscribers as NLS. Thus, because the fee structure for NLS does not clearly contemplate usage by Professional Subscribers such as BD employees, Professional Subscribers to NLS Plus who do not wish to receive quotation information have taken an approach of purchasing NLS Plus with Nasdaq Basic through any of the Nasdaq Basic fee structures that apply to Professional Subscribers, while opting not to receive the quotation information available through the product. Accordingly, Nasdaq is also adopting proposed new Nasdaq Rule 7039(e)(4), which provides that a Professional Subscriber that wishes to receive the information contained in NLS Plus without the quotation information provided through Nasdaq Basic may do so by subscribing to NLS

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<sup>14</sup> See SR-NASDAQ-2017-019 (February 13, 2017).

Plus with Nasdaq Basic and paying fees applicable under Nasdaq Rule 7039<sup>15</sup> and Nasdaq Rule 7047,<sup>16</sup> while opting not to receive the quotation information ordinarily available through Nasdaq Basic. Such a Professional Subscriber may, however, also opt to start receiving the full scope of information available through Nasdaq Basic at any time. The proposed new rule also defines “Professional Subscriber” by means of a cross-reference to Nasdaq Rule 7047(d)(3). Phlx is proposing to make identical changes to Section VIII of the Phlx Pricing Schedule with respect to NLS Plus, since the inclusion of PSX Last Sale in NLS Plus may be construed to make the product a facility of Phlx.

Phlx is also amending the relevant provision of the Pricing Schedule to reflect the recent change in the assessment period for administrative fees under Nasdaq Rule 7035, BX Rule 7035, and the Phlx Pricing Schedule from annual to monthly.

b. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>17</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>18</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

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<sup>15</sup> Specifically, this would include the consolidation fee and applicable administrative fees, as provided in Nasdaq Rule 7039(d)(1) (to be redesignated as Nasdaq Rule 7039(e)(1)).

<sup>16</sup> Specifically, this would include user fees, enterprise license fees, and distributor fees described in Nasdaq Rule 7047, as applicable to a particular Professional Subscriber.

<sup>17</sup> 15 U.S.C. 78f.

<sup>18</sup> 15 U.S.C. 78f(b)(4) and (5).

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers (“BDs”) 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. Phlx believes that NLS Plus is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself 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.<sup>19</sup>

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. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

To the extent that the Phlx Pricing Schedule incorporates the fees established for NLS under Nasdaq Rule 7039, they do not clearly contemplate usage of NLS Plus by Professional Subscribers. Phlx believes that the fee structure for NLS reflects Nasdaq’s expectation, in creating the product, that it would be used by market data distributors and

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<sup>19</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

retail BDs to provide widespread distribution of last-sale information to individual investors by means of websites and television. Phlx believes that the fee structure also reflects Nasdaq's assumption that BDs and others seeking proprietary data for Professional usage would purchase data with more content than NLS or NLS Plus, such as Nasdaq Basic or Nasdaq TotalView. Because, however, some Professionals have in fact opted to purchase NLS Plus with Nasdaq Basic while also opting not to receive quotation data through that product – thereby receiving a data feed that replicates the data available through NLS Plus without Nasdaq Basic – Phlx believes that it is appropriate to submit a proposed rule change that clearly reflects the availability of this option and the associated fees. Given the limited scope of demand for NLS Plus for use by Professionals in comparison to the scope of distribution of the product to Non-Professionals, however, Phlx believes that it is not necessary or appropriate at this time to establish specialized Professional fees for the product. Rather, the proposed rule change reflects an approach under which Professionals purchase NLS Plus with Nasdaq Basic, but have the option to decide how much of the purchased data they wish to consume.

Phlx believes that the applicable fees are reasonable because the fees for NLS Plus with Nasdaq Basic have long been established, and the choice to purchase the product but receive less than all available data is within the control of the customer. Likewise, Phlx believes that the fee structure is equitable and not unfairly discriminatory because the established fees for NLS and NLS Plus reflect the intended use of those products for widespread distribution to individual investors. Phlx does not believe that it is required to create an alternative fee schedule for Professional usage. At the same time, Phlx does not believe that it would be equitable to bar Professionals from acquiring last-

sale data without quotation data if they wish. Therefore, the proposed rule change reflects an equitable and non-discriminatory approach under which Non-Professionals receive the benefit of a distribution model that contemplates widespread availability of last-sale data that is ultimately free of charge to website and television users, while Professionals may purchase a data feed that provides a wider array of data but also provides choice regarding the amount of data to be consumed, as dictated by the customer's individual use cases.<sup>20</sup>

Phlx also notes that NLS Plus is a voluntary product for which market participants can readily substitute core data feeds that provide quotation and last sale information not available through that feed. Accordingly, Phlx is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. Moreover, the fees for the product, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow.

Finally, the Exchange notes that the conforming change regarding administrative fees is non-substantive in nature and does not affect the equitable allocation of reasonable dues, fees, and other charges.

4. 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. The proposed fee structure is designed to ensure a fair and reasonable use of

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<sup>20</sup> It should be noted that the distribution framework for NLS and NLS Plus does not restrict individuals who are Professionals from receiving these products through television viewing, access to websites such as Google, or through personal brokerage accounts. The framework does not contemplate, however, widespread distribution by a firm to its Professional employees. Accordingly, the filing clarifies the terms and conditions for that use case.

Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

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. This rule proposal does not burden competition, since other SROs and data vendors continue to offer alternative data products and, like the Exchange, set fees, but rather reflects the competition between data feed vendors and will further enhance such competition. NLS Plus competes directly with existing similar products and potential products of market data vendors. These products are part of the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. 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. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/Nasdaq TRF data that is a component of these products, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

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 and 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).<sup>21</sup>

In Phlx's case, 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 orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Phlx would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating, and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD will disfavor a particular exchange if the expected revenues from executing trades on the exchange do not exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to

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<sup>21</sup> 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).

that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing more orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS Plus that may be distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail BDs, such as Schwab and Fidelity, offer their retail customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. Exchanges, TRFs, and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, Phlx believes that products such as NLS Plus can enhance order flow to PSX by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by

investors with access to the internet or television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Some exchanges pay rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an “excessive” price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in

the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.<sup>22</sup>

The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

5. 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.

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>23</sup> the Exchange has designated this proposal as establishing or changing a due, fee, or other charge imposed on any person,

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<sup>22</sup> Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing BDs and various forms of alternative trading systems ("ATSS"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. 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 ATSS 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 BATS/Direct Edge.

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

whether or not the person is a member of the self-regulatory organization, which renders the proposed rule change effective upon filing.

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.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of proposed rule change for publication in the Federal Register.

5. Proposed rule text.

**EXHIBIT 1**

SECURITIES AND EXCHANGE COMMISSION  
(Release No. \_\_\_\_\_ ; File No. SR-Phlx-2017-17)

February \_\_, 2017

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Section VIII of the Phlx Pricing Schedule.

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 February 15, 2017, 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 Section VIII of the Phlx Pricing Schedule (PSX Last Sale and NASDAQ Last Sale Plus Data Feeds)<sup>3</sup> to clarify the framework for sale of the data contained in the Nasdaq Last Sale Plus (“NLS Plus”) data feed to Professional Subscribers.

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.

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

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

<sup>3</sup> References to rules are to Phlx rules, unless otherwise noted.

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 this proposal is to amend the Phlx Pricing Schedule to clarify the framework for sale of the data contained in the NLS Plus data feed to Professional Subscribers. Provisions of the Phlx Pricing Schedule applicable to NLS Plus do not currently contain a definition of “Professional Subscribers” or “Non-Professional Subscribers”; with respect to numerous other data products, however, these terms are well-established concepts with consistently defined definitions.<sup>4</sup> Thus, under these definitions, a “Non-Professional Subscriber” is defined as “a natural person who is not (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or (ii) any commodities or futures contract market or association; engaged as an

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<sup>4</sup> See, e.g., Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileged Basis (“Nasdaq UTP Plan”) (available at <http://www.utpplan.com/DOC/Nasdaq-UTP%20Plan%20after%2035th%20Amendment%20%20Excluding%201st%20Amendment%20%20i.e.%20Effective%20Plan%20as%20of%209-151.pdf>); Section VIII of the Phlx Pricing Schedule (PSX TotalView). See also Nasdaq Rule 7047 (Nasdaq Basic).

“investment adviser” as that term is defined in Section 201(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (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 “Professional Subscriber” is defined as any Subscriber other than a Non-Professional Subscriber.

As described in the Phlx Pricing Schedule, NLS Plus combines information available through the PSX Last Sale product with information available through similar products – NASDAQ Last Sale (“NLS”) and BX Last Sale – offered by Nasdaq’s affiliates, The NASDAQ Stock Market LLC (“Nasdaq”) and NASDAQ BX, Inc. (“BX”). Moreover, as provided in that provision, NLS Plus may be received either by itself or in combination with another Nasdaq data product, Nasdaq Basic. The fees charged for NLS Plus incorporate the underlying fees for the data elements combined through NLS Plus, together with an additional data consolidation fee of \$350 per month. There are currently no fees charged for PSX Last Sale (including as included in NLS Plus), but because a distributor of NLS Plus is distributing each of the underlying components of NLS Plus, it also pays the administrative fees charged for distribution of Nasdaq, BX, and PSX data feeds.<sup>5</sup> In addition, a distributor receiving NLS Plus by itself (i.e., without Nasdaq Basic) would need to select a fee model under Nasdaq Rule 7039 to determine the applicable

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<sup>5</sup> See Nasdaq Rule 7035; BX Rule 7035; and Phlx Pricing Schedule Section VIII. All administrative fees are charged on a per distributor, rather than a per product, basis. Thus, if a distributor is already paying the fee with respect to a product other than NLS Plus, it would not incur an additional administrative fee if it also began to distribute NLS Plus. Currently, there are no user or distributor fees applicable to BX Last Sale or PSX Last Sale. However, if BX or Phlx were to adopt fees for these products in the future, the fees would also apply to persons receiving these products by means of NLS Plus.



charges for the NLS component of NLS Plus (including the distributor fee provided for by Nasdaq Rule 7039(c)). On the other hand, a distributor receiving NLS Plus with Nasdaq Basic would select a fee model for Nasdaq Basic and pay the fees (including distributor fees) applicable to that product, as well the NLS Plus data consolidation fee and applicable administrative fees for each NLS Plus component.

#### Nasdaq Last Sale

NLS is a non-core market data product that provides recipients with real-time last-sale transaction information, including execution price, volume, and time of execution, for transactions reported by the Nasdaq Market Center and the FINRA/Nasdaq Trade Reporting Facility (“FINRA/Nasdaq TRF”).<sup>6</sup> As such, NLS is a “non-core” product that provides a subset of the “core” last-sale data provided by securities information processors (“SIPs”) under the CTA Plan and the Nasdaq UTP Plan.

As reflected in the filing that originally established it,<sup>7</sup> NLS was designed to enable market-data “distributors to provide free access to the data [contained in NLS] to millions of individual investors via the internet and television” and was expected to “increase[s] the availability of NASDAQ proprietary market data to individual

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<sup>6</sup> See Nasdaq Rule 7039(a)-(c) See also Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006) (notice of filing and immediate effectiveness regarding permanent approval of NLS).

<sup>7</sup> See SR-NASDAQ-2006-060 (Amendment No. 2, June 10, 2008) (available at [http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060\\_Amendment\\_2.pdf](http://nasdaq.cchwallstreet.com/NASDAQ/pdf/nasdaq-filings/2006/SR-NASDAQ-2006-060_Amendment_2.pdf)). See also Securities Exchange Act Release No. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060) (approving SR-NASDAQ-2006-060, as amended by Amendment Nos. 1 and 2, to implement NLS on a pilot basis).

investors.”<sup>8</sup> Similarly, in its filing to offer NLS on a permanent, rather than a pilot, basis, Nasdaq stated that “[d]uring the pilot period, the program has vastly increased the availability of NASDAQ proprietary market data to individual investors. Based upon data from NLS distributors, NASDAQ believes that since its launch in July 2008, the NLS data has been viewed by millions of investors on Web sites operated by Google, Interactive Data, and Dow Jones, among others.”<sup>9</sup>

The fee schedule for NLS offers distributors several different pricing models from which they may select in determining the fees applicable to distribution of the product. Specifically, in keeping with the goal of NLS to promote the accessibility of data to individual investors, distributors may choose to distribute NLS in an uncontrolled fashion via television or the internet and pay under pricing models that require them to estimate the number of households or website visitors to which the data is provided (with such estimates to be validated by a third-party vendor approved by Nasdaq). This pricing model is used by television broadcasters (such as CNBC) or internet portals (such as Google). Alternatively, a distributor may opt for a pricing model that requires it to count its customers based on a username and password system, or under which data is supplied on an ad hoc basis in response to customer queries. In both these cases, the pricing model assumes distribution through a website, such as might be provided by a broker-dealer (“BD”) to customers who log in using a username and password, or who enter

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<sup>8</sup> Id. at 3.

<sup>9</sup> Securities Exchange Act Release No. 71351 (January 17, 2014), 79 FR 4200 (January 24, 2014) (SR-NASDAQ-2014-006).

ticker symbols into a website to query for last sale information.<sup>10</sup> Thus, consistent with the stated purpose of NLS, the fee structure under which NLS is made available reflects a model of widespread distribution to individual investors. Notably, the fee structure for NLS does not contain provisions that contemplate internal distribution of the product to BD employees or other Professional Subscribers.<sup>11</sup>

### Nasdaq Basic

Nasdaq Basic is a non-core market data product that contains both last sale transaction reports *and* best bid and offer information.<sup>12</sup> Thus, Nasdaq Basic includes both the data included in NLS and Nasdaq best bid and offer information. In contrast to the fee structure for NLS, the fee structure for Nasdaq Basic includes fees for distribution to Professional Subscribers and lower fees for distribution to Non-Professional Subscribers, as well as per query fees that are capped based on the Professional or Non-Professional identity of the user. Finally, Nasdaq Basic is available under two different “enterprises licenses” that distributors may use to cap their costs when making Nasdaq

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<sup>10</sup> The Exchange notes that BDs may provide NLS data to customers in circumstances where they are not required to provide a consolidated display by SEC Rule 603(c), 17 CFR 242.603(c). See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 35569-37570 (June 29, 2005) (File No. S7-10-04) (“Reg NMS Adopting Release”).

<sup>11</sup> Regardless of the fee structure selected, NLS distributors pay a monthly distributor fee of \$1500, as provided in Nasdaq Rule 7039(c). In addition, as provided in Nasdaq Rule 7035, all market data distributors pay a monthly administrative fee (formerly a higher annual fee) of \$50 (for delayed distribution) or \$100 (for real-time, or real-time and delayed distribution). The administrative fee is paid on a per distributor basis.

<sup>12</sup> See Securities Exchange Act Release No. 59582 (March 16, 2009), 74 FR 12423 (March 24, 2009) (SR-NASDAQ-2008-102) (order approving Nasdaq Basic on a pilot basis). See also Securities Exchange Act Release No. 65527 (October 11, 2011), 76 FR 64147 (October 17, 2011) (SR-NASDAQ-2011-129) (notice of filing and immediate effectiveness of permanent approval of Nasdaq Basic).

Basic available to a large number of subscribers. First, Nasdaq offers an enterprise license under which a BD may make Nasdaq Basic available to Professional Subscribers who are its employees. Second, there is an enterprise license under which a BD may distribute Nasdaq Basic to an unlimited number of its customers. Thus, in contrast to NLS, whose fee structure reflects a model of widespread distribution to individual investors through BD websites or through uncontrolled internet or television dissemination, the fee structure for Nasdaq Basic reflects a model of controlled distribution to both Professional and Non-Professional subscribers, either on a per subscription basis or through enterprise licenses focused on BD employees or customers.<sup>13</sup>

#### The Proposal

The fee structures and distribution models of Nasdaq Basic and NLS reflect Nasdaq's assumption that Nasdaq Basic, with its inclusion of both pre-trade quotation information and last-sale information, would be a data product primarily of use to Professional Subscribers, as well as Non-Professional Subscribers who employ relatively sophisticated trading strategies, while the reduced scope of information available through NLS would make it a product of interest to a broad range of individual investors. However, in some instances, Professional Subscribers have expressed an interest in receiving Nasdaq last-sale information without also receiving quotation information. Because the fee and distribution framework for NLS is not structured in a manner that

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<sup>13</sup> Similar to NLS, distributors of Nasdaq Basic pay a monthly distributor fee of \$1500, and may also pay an additional monthly fee of \$1500 for the right to distribute data derived from Nasdaq Basic to an unlimited number of Non-Professional Subscribers. The administrative fee under Nasdaq Rule 7035 would also apply to distributors of Nasdaq Basic or other Nasdaq data products on a per distributor basis.

clearly applies to usage by Professional Subscribers, these subscribers have taken an approach of purchasing Nasdaq Basic through any of the fee structures that apply to Professional Subscribers but opting not to receive the quotation information available through the product. Accordingly, Nasdaq is adopting Nasdaq Rule 7039(d), which provides that a Professional Subscriber that wishes to receive the information contained in NLS may do so by subscribing to Nasdaq Basic and paying fees applicable under Nasdaq Rule 7047 (including any applicable distributor fee), while opting not to receive the quotation information ordinarily available through Nasdaq Basic.<sup>14</sup> The proposed new rule would further provide that such a Professional Subscriber may also opt to start receiving the full scope of information available through Nasdaq Basic at any time. The proposed new rule also defines “Professional Subscriber” by means of a cross-reference to Nasdaq Rule 7047(d)(3). Since such a Professional Subscriber is a subscriber to Nasdaq Basic and paying fees applicable under Nasdaq Rule 7047, it would not also pay any fees under Nasdaq Rule 7039, including the NLS distributor fee provided for under Nasdaq Rule 7039(c).

Since the fees for NLS Plus sold without Nasdaq Basic incorporate the fees for NLS, the product presents the same issue with respect to usage by Professional and Non-Professional Subscribers as NLS. Thus, because the fee structure for NLS does not clearly contemplate usage by Professional Subscribers such as BD employees, Professional Subscribers to NLS Plus who do not wish to receive quotation information have taken an approach of purchasing NLS Plus with Nasdaq Basic through any of the Nasdaq Basic fee structures that apply to Professional Subscribers, while opting not to

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<sup>14</sup> See SR-NASDAQ-2017-019 (February 13, 2017).

receive the quotation information available through the product. Accordingly, Nasdaq is also adopting proposed new Nasdaq Rule 7039(e)(4), which provides that a Professional Subscriber that wishes to receive the information contained in NLS Plus without the quotation information provided through Nasdaq Basic may do so by subscribing to NLS Plus with Nasdaq Basic and paying fees applicable under Nasdaq Rule 7039<sup>15</sup> and Nasdaq Rule 7047,<sup>16</sup> while opting not to receive the quotation information ordinarily available through Nasdaq Basic. Such a Professional Subscriber may, however, also opt to start receiving the full scope of information available through Nasdaq Basic at any time. The proposed new rule also defines “Professional Subscriber” by means of a cross-reference to Nasdaq Rule 7047(d)(3). Phlx is proposing to make identical changes to Section VIII of the Phlx Pricing Schedule with respect to NLS Plus, since the inclusion of PSX Last Sale in NLS Plus may be construed to make the product a facility of Phlx.

Phlx is also amending the relevant provision of the Pricing Schedule to reflect the recent change in the assessment period for administrative fees under Nasdaq Rule 7035, BX Rule 7035, and the Phlx Pricing Schedule from annual to monthly.

## 2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>17</sup> in general, and with Sections 6(b)(4) and (5) of the Act,<sup>18</sup> in

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<sup>15</sup> Specifically, this would include the consolidation fee and applicable administrative fees, as provided in Nasdaq Rule 7039(d)(1) (to be redesignated as Nasdaq Rule 7039(e)(1)).

<sup>16</sup> Specifically, this would include user fees, enterprise license fees, and distributor fees described in Nasdaq Rule 7047, as applicable to a particular Professional Subscriber.

<sup>17</sup> 15 U.S.C. 78f.

particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, and does not unfairly discriminate between customers, issuers, brokers or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers (“BDs”) 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. Phlx believes that NLS Plus is precisely the sort of market data product that the Commission envisioned when it adopted Regulation NMS. The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself 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.<sup>19</sup>

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. If the free market should determine whether proprietary data is sold to BDs at all, it follows that the price at which such data is sold should be set by the market as well.

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<sup>18</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>19</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (“Regulation NMS Adopting Release”).

To the extent that the Phlx Pricing Schedule incorporates the fees established for NLS under Nasdaq Rule 7039, they do not clearly contemplate usage of NLS Plus by Professional Subscribers. Phlx believes that the fee structure for NLS reflects Nasdaq's expectation, in creating the product, that it would be used by market data distributors and retail BDs to provide widespread distribution of last-sale information to individual investors by means of websites and television. Phlx believes that the fee structure also reflects Nasdaq's assumption that BDs and others seeking proprietary data for Professional usage would purchase data with more content than NLS or NLS Plus, such as Nasdaq Basic or Nasdaq TotalView. Because, however, some Professionals have in fact opted to purchase NLS Plus with Nasdaq Basic while also opting not to receive quotation data through that product – thereby receiving a data feed that replicates the data available through NLS Plus without Nasdaq Basic – Phlx believes that it is appropriate to submit a proposed rule change that clearly reflects the availability of this option and the associated fees. Given the limited scope of demand for NLS Plus for use by Professionals in comparison to the scope of distribution of the product to Non-Professionals, however, Phlx believes that it is not necessary or appropriate at this time to establish specialized Professional fees for the product. Rather, the proposed rule change reflects an approach under which Professionals purchase NLS Plus with Nasdaq Basic, but have the option to decide how much of the purchased data they wish to consume.

Phlx believes that the applicable fees are reasonable because the fees for NLS Plus with Nasdaq Basic have long been established, and the choice to purchase the product but receive less than all available data is within the control of the customer. Likewise, Phlx believes that the fee structure is equitable and not unfairly discriminatory



because the established fees for NLS and NLS Plus reflect the intended use of those products for widespread distribution to individual investors. Phlx does not believe that it is required to create an alternative fee schedule for Professional usage. At the same time, Phlx does not believe that it would be equitable to bar Professionals from acquiring last-sale data without quotation data if they wish. Therefore, the proposed rule change reflects an equitable and non-discriminatory approach under which Non-Professionals receive the benefit of a distribution model that contemplates widespread availability of last-sale data that is ultimately free of charge to website and television users, while Professionals may purchase a data feed that provides a wider array of data but also provides choice regarding the amount of data to be consumed, as dictated by the customer's individual use cases.<sup>20</sup>

Phlx also notes that NLS Plus is a voluntary product for which market participants can readily substitute core data feeds that provide quotation and last sale information not available through that feed. Accordingly, Phlx is constrained from pricing the product in a manner that would be inequitable or unfairly discriminatory. Moreover, the fees for the product, like all proprietary data fees, are constrained by the Exchange's need to compete for order flow.

Finally, the Exchange notes that the conforming change regarding administrative fees is non-substantive in nature and does not affect the equitable allocation of reasonable dues, fees, and other charges.

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<sup>20</sup> It should be noted that the distribution framework for NLS and NLS Plus does not restrict individuals who are Professionals from receiving these products through television viewing, access to websites such as Google, or through personal brokerage accounts. The framework does not contemplate, however, widespread distribution by a firm to its Professional employees. Accordingly, the filing clarifies the terms and conditions for that use case.

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. The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

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. This rule proposal does not burden competition, since other SROs and data vendors continue to offer alternative data products and, like the Exchange, set fees, but rather reflects the competition between data feed vendors and will further enhance such competition. NLS Plus competes directly with existing similar products and potential products of market data vendors. These products are part of the existing market for proprietary last sale data products that is currently competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. 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. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market. Similarly, with respect to the FINRA/Nasdaq TRF data that is a component of these products, allowing exchanges to operate TRFs has permitted them to earn revenues by providing technology and data in support of the non-exchange segment of the market. This revenue opportunity has also resulted in fierce competition between the two current

TRF operators, with both TRFs charging extremely low trade reporting fees and rebating the majority of the revenues they receive from core market data to the parties reporting trades.

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 and 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).<sup>21</sup>

In Phlx's case, 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 orders are the source of the information that is distributed) and are each subject to significant scale economies. In such cases, marginal cost pricing is not feasible because if all sales were priced at the margin, Phlx would be unable to defray its platform costs of providing the joint products. Similarly, data products cannot make use of TRF trade reports without the raw material of the trade reports themselves, and therefore necessitate the costs of operating, regulating, and maintaining a trade reporting system, costs that must be covered through the fees charged for use of the facility and sales of associated data.

An exchange's BD customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A BD will disfavor a particular exchange if the expected revenues from executing trades on the exchange do not exceed net transaction execution costs and the cost of data that the BD chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the BD will choose not to buy it. Moreover, as a BD chooses to direct fewer orders to a particular exchange, the value of the product to

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<sup>21</sup> 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).

that BD decreases, for two reasons. First, the product will contain less information, because executions of the BD's trading activity will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that BD because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the BD is directing more orders will become correspondingly more valuable.

Similarly, in the case of products such as NLS Plus that may be distributed through market data vendors, the vendors provide price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract "eyeballs" that contribute to their advertising revenue. Retail BDs, such as Schwab and Fidelity, offer their retail customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors' pricing discipline is the same: they can simply refuse to purchase any proprietary data product that fails to provide sufficient value. Exchanges, TRFs, and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully. Moreover, Phlx believes that products such as NLS Plus can enhance order flow to PSX by providing more widespread distribution of information about transactions in real time, thereby encouraging wider participation in the market by

investors with access to the internet or television. Conversely, the value of such products to distributors and investors decreases if order flow falls, because the products contain less content.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. Some exchanges pay rebates to attract orders, charges relatively low prices for market information and charges relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower liquidity rebates to attract orders, setting relatively low prices for accessing posted liquidity, and setting relatively high prices for market information. Still others may provide most data free of charge and rely exclusively on transaction fees to recover their costs. Finally, some platforms may incentivize use by providing opportunities for equity ownership, which may allow them to charge lower direct fees for executions and data.

In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering. Such regulation is unnecessary because an “excessive” price for one of the joint products will ultimately have to be reflected in lower prices for other products sold by the firm, or otherwise the firm will experience a loss in the volume of its sales that will be adverse to its overall profitability. In other words, an increase in

the price of data will ultimately have to be accompanied by a decrease in the cost of executions, or the volume of both data and executions will fall.<sup>22</sup>

The proposed fee structure is designed to ensure a fair and reasonable use of Exchange resources by allowing the Exchange to recoup costs while continuing to offer its data products at competitive rates to firms.

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>23</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

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<sup>22</sup> Moreover, the level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including SRO markets, internalizing BDs and various forms of alternative trading systems ("ATSS"), including dark pools and electronic communication networks ("ECNs"). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated TRFs compete to attract internalized transaction reports. 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 ATSS 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 BATS/Direct Edge.

<sup>23</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2017-17 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-Phlx-2017-17. 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, 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 10:00 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 make available publicly.

All submissions should refer to File Number SR-Phlx-2017-17 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.<sup>24</sup>

Robert W. Errett  
Deputy Secretary

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<sup>24</sup> 17 CFR 200.30-3(a)(12).

**EXHIBIT 5**

Deleted text is [bracketed]. New text is underlined.

**NASDAQ PHLX LLC Pricing Schedule**

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**VIII. NASDAQ PSX Fees**

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**PSX Last Sale and NASDAQ Last Sale Plus Data Fees**

(a) No Change.

(b) NASDAQ Last Sale Plus (“NLS Plus”). NLS Plus is a comprehensive data feed produced by NASDAQ Information LLC. It provides last sale data as well as consolidated volume of NASDAQ U.S. equity markets (PSX, The NASDAQ Stock Market ("NASDAQ"), and NASDAQ BX (“BX”)) and the NASDAQ/FINRA Trade Reporting Facility ("TRF"). NLS Plus also reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape C securities. NLS Plus also contains: Trade Price, Trade Size, Sale Condition Modifiers, Cumulative Consolidated Market Volume, End of Day Trade Summary, Adjusted Closing Price, IPO Information, and Bloomberg ID. Additionally, pertinent regulatory information such as Market Wide Circuit Breaker, Reg SHO Short Sale Price Test Restricted Indicator, Trading Action, and Symbol Directory are included. NLS Plus may be received by itself or in combination with NASDAQ Basic. Additionally, NLS Plus reflects cumulative volume real-time trading activity across all U.S. exchanges for Tape A securities and Tape B securities.

(1) Firms that receive NLS Plus shall pay the [annual]monthly administrative fees for NLS, BX Last Sale, and PSX Last Sale. Additionally, Internal Distributors or External Distributors shall pay a data consolidation fee of \$350 per month. "Internal Distributors" are Distributors that receive NLS Plus data and then distribute that data to one or more Subscribers within the Distributor's own entity. "External Distributors" are Distributors that receive NLS Plus data and then distribute that data to one or more Subscribers outside the Distributor's own entity.

(2) No Change.

(3) In the event that NASDAQ BX and/or NASDAQ PHLX adopt user fees for BX Last Sale and/or PSX Last Sale, firms that receive NLS Plus would also be liable for such fees.

(4) A Professional Subscriber that wishes to receive the information contained in NLS Plus without the quotation information provided through Nasdaq Basic may do so by subscribing to NLS Plus with Nasdaq Basic, while opting not to receive the quotation information ordinarily available through Nasdaq Basic. As provided in (b)(1)-(3), such a Professional Subscriber would pay applicable fees for Nasdaq Basic under Nasdaq Rule 7047 (including any applicable distributor fee), as well as the administrative and consolidation fees described in (b)(1). Such a Professional Subscriber may, however, also opt to start receiving the full scope of information available through Nasdaq Basic at any time. For purposes of this provision, the term “Professional Subscriber” shall have the meaning provided in Nasdaq Rule 7047(d)(3).

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