

or otherwise in furtherance of the purposes of the Act.

#### 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-CBOE-2010-052 on the subject line.

##### *Paper Comments*

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

All submissions should refer to File Number SR-CBOE-2010-052. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-CBOE-2010-052 and should be submitted on or before June 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-13438 Filed 6-3-10; 8:45 am]

**BILLING CODE 8010-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62194; File No. SR-Phlx-2010-48]

### Self-Regulatory Organizations; Order Approving Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Market Data Fees

May 28, 2010.

#### I. Introduction

On April 6, 2010, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to establish fees for a data product, Top of Phlx Options Plus Orders ("TOPO Plus Orders" or "TOPO Plus"), which currently provides disseminated Exchange top-of-market data (including orders, quotes and trades), together with all information that is included in the Exchange's Specialized Order Feed ("SOF"). The proposed rule change was published for comment in the **Federal Register** on April 16, 2010.<sup>3</sup> The Commission received three comment letters on the proposed rule change.<sup>4</sup> The Exchange submitted one letter in response to these comment letters.<sup>5</sup>

This order approves the proposed rule change.

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 61878 (April 8, 2010), 75 FR 20023 (April 16, 2010) ("Notice").

<sup>4</sup> See Letter from Lawrence Lempert, Bullock Trading, LP, Michael Waber, Fairview Trading Corp., Andy Yang, Cutler Group, LP, Theodore Raven, TSR Associates, LLC, and Tim Lobach, Keystone Trading Partners to Mary Schapiro, Chairman, Commission, dated May 3, 2010 ("Lempert Letter") and Letter from Robert Sullivan, Empire Options Corporation to Mary Schapiro, Chairman, Commission, received May 3, 2010 ("Sullivan Letter"). See also Letter from Michael Waber, Fairview Trading, Inc., to Elizabeth M. Murphy, Secretary, Commission, dated May 23, 2010 ("Waber Letter") (responding to the Phlx Letter, *infra* note 5).

<sup>5</sup> See Letter from Richard S. Rudolph, Assistant General Counsel, NASDAQ OMX PHLX, Inc. to Elizabeth M. Murphy, Secretary, Commission, dated May 13, 2010 ("Phlx Letter").

## II. Description of the Proposed Rule Change

In June 2009, the Exchange launched Phlx XL II, an electronic trading platform on which all options on the Exchange are currently traded.<sup>6</sup> In conjunction with the launch and rollout of the Phlx XL II system, the Exchange developed the Top of Phlx Options direct data feed ("TOPO"),<sup>7</sup> which provides to subscribers the Exchange's best bid and offer position, with aggregate size, based on displayable order and quoting interest on the Phlx XL II system.

In October 2009, the Exchange made the TOPO Plus Orders data feed available to all market participants for free.<sup>8</sup> According to the Exchange, TOPO Plus Orders provides disseminated Exchange top-of-market data (including orders, quotes and trades) together with all information that is included in SOF, the Exchange's real-time full limit order book data feed. When it established TOPO Plus Orders, the Exchange stated that it planned to submit a proposed rule change to the Commission in order to implement fees for the use of TOPO Plus Orders.

SOF is currently available to any Exchange quoting participant (*i.e.*, specialists, Streaming Quote Traders, and Remote Streaming Quote Traders (collectively, "users")) and is available to users on an issue-by-issue basis at the user's request. A user does not have to be assigned in an issue for the Exchange to provide SOF to such user in that issue. The SOF provides real-time information to keep track of the single order book(s), single and complex orders, complex strategy and Live Auction for all symbols for which the user is configured. Users may be configured for one or more symbols. SOF provides real-time data for the entire book to its users. It is a compilation of limit order data resident in the Exchange's limit order book for options traded on the Exchange that the Exchange provides through a real-time data feed. The Exchange updates SOF information upon receipt of each displayed limit order. For every limit

<sup>6</sup> See Securities Exchange Act Release No. 59995 (May 28, 2009), 74 FR 26750 (June 3, 2009) (SR-Phlx-2009-32).

<sup>7</sup> See Securities Exchange Act Release No. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR-Phlx-2009-54). The Exchange represents that the data contained in the TOPO data feed is identical to the data sent to the processor for the Options Price Regulatory Authority ("OPRA"), and the TOPO and OPRA data leave the Phlx XL II system at the same time.

<sup>8</sup> See Securities Exchange Act Release No. 60877 (October 26, 2009), 74 FR 56255 (October 30, 2009) (SR-Phlx-2009-92).

price, the SOF includes the aggregate order volume.

The Exchange anticipates that it will generally phase out SOF as of June 1, 2010, and instead offer only TOPO Plus Orders to participants that wish to continue to receive the data currently included in SOF. Thus, current SOF users must migrate to TOPO Plus Orders by June 1, 2010. The Exchange recognizes, however, that some SOF users may encounter issues beyond their control that render them unable to migrate from SOF to the TOPO Plus Orders feed on or before that date. Accordingly, the Exchange would make SOF available for a period of time after June 1, 2010 to current SOF users that have not migrated to TOPO Plus Orders. In the event that an SOF user is unable to migrate to TOPO Plus Orders due to circumstances beyond their control, by June 1, 2010, the Exchange would apply the same monthly fee applicable to TOPO Plus Orders users that are Internal Distributors (as defined below) to such SOF users. Once a user has migrated from SOF to TOPO Plus Orders, they would not have the option of reverting to SOF. New subscribers currently do not have, and would not be given, the option to use SOF. New subscribers must subscribe to TOPO Plus Orders to receive the market data feed.

The Exchange proposes to charge monthly fees to distributors for use of TOPO Plus Orders. The amount of the monthly distributor fee would depend on whether the distributor is an "Internal Distributor" or an "External Distributor." The Exchange's fee schedule currently reflects that a "distributor" of NASDAQ OMX PHLX data is any entity that receives a feed or data file of data directly from NASDAQ OMX PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity), and that all distributors would be required to execute a NASDAQ OMX PHLX distributor agreement.

An Internal Distributor is an organization that subscribes to the Exchange for the use of TOPO or TOPO Plus Orders, and is permitted by agreement with the Exchange to provide TOPO or TOPO Plus Orders data to internal users (*i.e.*, users within their own organization). Under the proposal, Internal Distributors of TOPO Plus Orders would be charged a monthly fee of \$4,000 per organization.<sup>9</sup> This charge

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

would also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.<sup>10</sup>

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

The Exchange also proposes to assess a monthly Subscriber Fee<sup>12</sup> on External Distributors of TOPO Plus Orders. The monthly Subscriber Fee would be assessed on a per-subscriber basis depending upon whether the subscriber is a Non-Professional Subscriber<sup>13</sup> or a Professional Subscriber.<sup>14</sup> The monthly Subscriber Fee assessed to External Distributors would be \$1 per Non-Professional Subscriber. The monthly Subscriber Fee assessed to External Distributors would be \$20 per Professional Subscriber. The Monthly Subscriber Fee would also apply to SOF users that have not migrated to TOPO Plus Orders on or before June 1, 2010.

### III. Summary of Comments and Phlx's Response

The commenters argue that, contrary to the Exchange's claim in the Notice, at least some of the information contained in TOPO Plus should not qualify as "non-core." In addition, the commenters

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

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

<sup>12</sup> A "subscriber" is a person or entity to whom the External Distributor provides the TOPO Plus Orders data feed.

<sup>13</sup> A Non-Professional Subscriber is a natural person who is neither: (i) Registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.

<sup>14</sup> A Professional Subscriber is any subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX PHLX distributor agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.

argue that the proposed fees for TOPO Plus are not fair and reasonable.<sup>15</sup>

#### A. Core Data vs. Non-Core Data

The commenters argue that the TOPO Plus Order feed should not be considered non-core data, but instead that portions of it (*e.g.*, single and complex order book, and Live Auction data) should be viewed as core data.<sup>16</sup> For example, the Lempert Letter states that TOPO Plus epitomizes the type of essential data that should be included in core data, and believes that Phlx's TOPO Plus is distinguishable from other data products approved by the Commission<sup>17</sup> because the SOF portion of TOPO Plus is critical information not available anywhere else.<sup>18</sup> In addition, the Lempert Letter states that the complex order book should be classified as core data because "customers have an expectation that those orders are displayed to all market participants in a transparent manner just as single option orders must be disseminated to OPRA."<sup>19</sup>

Phlx disagrees and states in its response letter that the Commission has defined "core data" as "the best priced quotations and comprehensive last sale reports of all market data," which is reported to OPRA and then disseminated to the market place as a whole.<sup>20</sup> Phlx states that non-core data is defined as anything other than core data that an exchange produces on a voluntary basis, such as depth-of-market data, and notes that data such as TOPO Plus is not required to be produced by Phlx.<sup>21</sup> The Exchange also notes that, while it provides last sale data regarding complex orders to OPRA as core data pursuant to the requirements of the OPRA Plan, it does not provide top of the complex order book data to the OPRA Plan because OPRA does not currently support such order types and the OPRA Plan explains that such information should not be reported to OPRA.<sup>22</sup>

<sup>15</sup> In addition to the issues discussed here, the Commission notes the comment letters raise additional issues that are not pertinent or applicable to the subject matter of the current proposed rule change, and which are not discussed in this order.

<sup>16</sup> See Lempert Letter at 2-3; Sullivan Letter at 1; see also Waber Letter at 1-2.

<sup>17</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) ("NYSE Arca Order").

<sup>18</sup> See Lempert Letter at 2.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> See Phlx Letter at 2 (citing the NYSE Arca Order).

<sup>21</sup> *Id.* at 2.

<sup>22</sup> *Id.* at 2-3.

### B. Fees and Costs

The commenters also argue that the proposed fees are not fair and reasonable, and believe that the proposed fees discriminate against smaller broker-dealers because they would charge the same amount per broker-dealer regardless of the quantity of issues traded.<sup>23</sup> In addition, one commenter also expresses concern regarding the cost for broker-dealers of acquiring the technology necessary if they opt to receive the TOPO Plus raw data stream.<sup>24</sup>

In its response letter, Phlx contends that its TOPO Plus fees represent an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities.<sup>25</sup> Phlx states that the commenters in the Sullivan and Lempert Letters would be considered Internal Distributors, and thereby subject to the \$4,000 fee, only if they choose to receive a raw data feed from Phlx or any other vendor where the subscriber can interact with data in its raw form.<sup>26</sup> In the Phlx Letter, the Exchange states that, based “upon the use of TOPO Plus by [the commenters] and the manner in which External Distributors would distribute TOPO Plus to them, Phlx concludes that [they] are neither Internal Distributors nor External Distributors of TOPO Plus,” and therefore not subject to the monthly \$4,000 (for Internal Distributors) or \$5,000 (for External Distributors) in monthly fees.<sup>27</sup> Instead, Phlx believes they would be Professional Subscribers and subject to the fees charged them by the External Distributor from which they receive the feed. Such External Distributor would be assessed a \$20 monthly fee for each of its Professional Subscribers, which Phlx believes would likely be passed through to subscribers, along with any other fees agreed upon by such External Distributor and its subscribers.<sup>28</sup>

### IV. Discussion and Commission Findings

After careful review, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>29</sup> In particular, the

Commission finds that the proposed rule change is consistent with the requirements of Section 6(b)(4) of the Act,<sup>30</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using its facilities. The Commission also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>31</sup> which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Commission further believes that the proposed rule change is consistent with Section 6(b)(8) of the Act,<sup>32</sup> in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>33</sup> There, the Commission stated that “core” data related to data “that Commission rules require to be consolidated and distributed to the public by a single central processor” whereas “no Commission rule requires exchange or market participants either to distribute non-core data to the public or to display non-core data to investors.”<sup>34</sup> In the NYSE Arca Order, the Commission also stated that, “when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.”<sup>35</sup> It noted that the “existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably

or unfairly discriminatory.”<sup>36</sup> If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the Commission will approve a proposal unless it determines that “there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”<sup>37</sup>

As noted in the NYSE Arca Order, the standards in Section 6 of the Act do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.<sup>38</sup> All U.S. options exchanges are required pursuant to the OPRA Plan to provide core data—the best-priced quotations and comprehensive last sale reports—to OPRA, which data is then distributed to the public pursuant to the OPRA Plan.<sup>39</sup> In contrast, individual exchanges and other market participants distribute non-core data voluntarily.<sup>40</sup> The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.<sup>41</sup> Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to rely on competitive forces in its determination of whether an exchange’s proposal to distribute non-core data meets the standards of Section 6.<sup>42</sup>

The Commission agrees with Phlx that, contrary to the commenters’ assertions, the Exchange’s instant proposal relates to the distribution of non-core data. The Commission will, therefore, apply the market-based approach set forth in the NYSE Arca Order. Pursuant to this approach, the first step is to determine whether Phlx was subject to significant competitive forces in setting the terms of its non-core market data proposal, including the level of any fees. As in the Commission’s NYSE Arca Order, in determining whether Phlx was subject to significant competitive forces in setting the terms of its proposal, the Commission has analyzed Phlx’s need to attract order flow from market participants, and the availability to market participants of alternatives to purchasing Phlx’s non-core market data.

The Commission believes that the options industry is currently subject to

<sup>23</sup> See Lempert Letter at 3; see also Sullivan Letter at 1 and Waber Letter at 1–2.

<sup>24</sup> See Lempert Letter at 3–4.

<sup>25</sup> See Phlx Letter at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 4.

<sup>29</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s

impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>30</sup> 15 U.S.C. 78f(b)(4).

<sup>31</sup> 15 U.S.C. 78f(b)(5).

<sup>32</sup> 15 U.S.C. 78f(b)(8).

<sup>33</sup> See NYSE Arca Order, *supra* note 17.

<sup>34</sup> *Id.* at 74771.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 74782.

<sup>37</sup> *Id.* at 74781.

<sup>38</sup> *Id.* at 74779.

<sup>39</sup> See Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information (“OPRA Plan”), Sections V(a)–(c).

<sup>40</sup> See NYSE Arca Order at 74779.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

significant competitive forces.<sup>43</sup> It is generally accepted that the start of wide-spread multiple listing of options across exchanges in August 1999 greatly enhanced competition among the exchanges.<sup>44</sup> The launch of four new options exchanges since that time, numerous market structure innovations, and the start of the options penny pilot<sup>45</sup> have all further intensified intermarket competition for order flow.

Phlx currently competes with seven other options exchanges for order flow.<sup>46</sup> Attracting order flow is an essential part of Phlx's competitive success.<sup>47</sup> If Phlx cannot attract order flow to its market, it will not be able to execute transactions. If Phlx cannot execute transactions on its market, it will not generate transaction revenue. If Phlx cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. This compelling need to attract order flow imposes significant pressure on Phlx to act reasonably in setting its fees for Phlx market data,

<sup>43</sup> The Commission has previously stated that the options industry is subject to significant competitive forces. See Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR-ISE-2007-97) (order approving the International Stock Exchange's proposal establishing fees for a real-time depth of market data offering).

<sup>44</sup> See, generally, *Concept Release: Competitive Developments in the Options Markets*, Securities Exchange Act Release No. 49175 (date), 69 FR 6124 (February 9, 2004); see also Battalio, Robert, Hatch, Brian, and Jennings, Robert, *Toward a National Market System for U.S. Exchange-Listed Equity Options*, *The Journal of Finance* 59 (933-961); De Fontnouvelle, Patrick, Fische, Raymond P., and Harris, Jeffrey H., *The Behavior of Bid-Ask Spreads and Volume in Options Markets During the Competition for Listings in 1999*, *The Journal of Finance* 58 (2437-2463); and Mayhew, Stewart, *Competition, Market Structure, and Bid-Ask Spreads in Stock Option Markets*, *The Journal of Finance* 57 (931-958).

<sup>45</sup> See, e.g., Securities Exchange Act Release Nos. 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (SR-Amex-2006-106); 55073 (January 9, 2007), 72 FR 4741 (February 1, 2007) (SR-BSE-2006-48); 55154 (January 23, 2007), 72 FR 4743 (February 1, 2007) (SR-CBOE-2006-92); 55161 (January 24, 2007), 72 FR 4754 (February 1, 2007) (SR-ISE-2006-62); 55156 (January 23, 2007), 72 FR 4759 (February 1, 2007) (SR-NYSEArca-2006-73); and 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006-74).

<sup>46</sup> In its filing, Phlx discusses "the intensity of the competition for order flow," and states that "Phlx currently competes with seven other options exchanges for order flow" and "the ISE and CBOE enjoy close to thirty percent market share of volume, followed by NYSE Arca and Phlx at close to fifteen percent market share, followed by four other exchanges with meaningful market share." See Notice at 20025.

<sup>47</sup> Phlx states in its filing that "it has a compelling need to attract order flow from market participants \* \* \* in order to maintain its share of trading volume." *Id.*

particularly given that the market participants that will pay such fees often will be the same market participants from whom Phlx must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.

Phlx also notes that it currently trades options on seven proprietary index products that are not traded on any other exchange. These seven options currently represent less than 0.04% of Phlx's total contract volume.<sup>48</sup> The Commission believes that, given the small percentage of Phlx's total contract volume represented by these seven products, the inclusion of data on these products in the TOPO Plus Orders product does not confer market power on Phlx to compel market participants to purchase the entire Phlx data feed and the inclusion of depth-of-book data for these products in Phlx's TOPO Plus Orders product does not undermine the fact that Phlx is subject to significant competitive forces in setting the TOPO Plus fees.

In addition to the need to attract order flow, the availability of alternatives to Phlx's TOPO Plus product significantly affect the terms on which Phlx can distribute this market data.<sup>49</sup> In setting the fees for its TOPO Plus product, Phlx must consider the extent to which market participants would choose one or more alternatives instead of purchasing its data.<sup>50</sup> The most basic source of information concerning the depth generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.<sup>51</sup> In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.<sup>52</sup> Further, other options exchanges can produce their own data products, and thus are sources of potential competition for Phlx.<sup>53</sup> In addition, one or more securities firms could act independently and distribute

<sup>48</sup> Notice at 20025.

<sup>49</sup> See NYSE Arca Order at 74784.

<sup>50</sup> See NYSE Arca Order at 74783.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* Information on transactions executed on Phlx is available through OPRA.

<sup>53</sup> For example, ISE and CBOE each enjoy greater market shares than Phlx and thus have the ability to offer data products that could compete favorably with the Exchange's products.

their own order data, with or without a fee.

The Commission believes that there are a number of alternative sources of information that impose significant competitive pressures on Phlx in setting the terms for distributing its TOPO Plus product. The Commission believes that the availability of those alternatives, as well as Phlx's compelling need to attract order flow, impose significant competitive pressure on Phlx to act equitably, fairly, and reasonably in setting the terms of its proposal.<sup>54</sup>

Because Phlx was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that the terms of the proposal fail to meet the applicable requirements of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis. The fees do not unreasonably discriminate among types of distributors, such as by favoring participants in the Phlx market or penalizing participants in other markets.<sup>55</sup> The Commission notes that the Exchange will assess on External Distributors a monthly subscriber fee of \$20 per Professional Subscriber, and \$1 per Non-Professional Subscriber. The monthly subscriber fees assessed upon External Distributors are based upon the manner in which the data will ultimately be used, *i.e.*, for commercial vs. non-commercial purposes.<sup>56</sup>

As discussed above, the commenters also argue that the proposed TOPO Plus fees are not fair and reasonable, and that the fee amounts discriminate against smaller broker-dealers because the proposed fees would charge the same

<sup>54</sup> The Commission stated in the NYSE Arca Order that broker-dealers are not required to obtain depth-of-book order data to meet their duty of best execution. See *id.* at 74788 for a more detailed discussion. Likewise, the Commission does not view obtaining depth-of-book data as a necessary prerequisite to broker-dealers satisfying the duty of best execution with respect to the trading of standardized options.

<sup>55</sup> Phlx notes that TOPO Plus Orders are lower for Internal Distributors than for External Distributors. Because Internal Distributors are by definition more limited in the scope of their distribution of TOPO Plus Orders data than External Distributors, it is reasonable to expect that Internal Distributors will provide TOPO Plus Orders data to a smaller number of internal subscribers. Conversely, External Distributors can reasonably be expected to distribute the TOPO Plus Orders data to a higher number of subscribers because they do not have the same limitation. See Notice at 20025.

<sup>56</sup> The Commission notes that the CTA participants' fees have long provided for a lower fee for non-professional subscribers, and that the fees approved by the Commission in the NYSE Arca Order also provided for lower fees for non-professional subscribers. See NYSE Arca Order at 74772.

amount per broker-dealer regardless of the quantity of issues traded, and concern regarding the cost of acquiring the technology necessary if they opt to receive the TOPO Plus raw data stream.<sup>57</sup> The Commission believes that, in the Phlx Letter, the Exchange addressed the commenters' concerns in clarifying that the Exchange would only consider them to be Internal Distributors (and thus subject to a \$4,000 monthly fee) if they opt to receive the TOPO Plus data as a raw data feed. The Exchange noted that the commenters could opt to receive TOPO Plus from an External Distributor, whereby they would be considered Professional Subscribers. In such a case, the proposal would charge an External Distributor \$20 per month for each Professional Subscriber to whom it distributes the feed and Phlx notes that the External Distributor may pass through the Professional Subscriber fee to its subscribers, along with any other fees agreed upon, which should be significantly less than the monthly distributor fees proposed under the proposed rule change.

Though the Commission notes the commenters cost concerns regarding receiving the TOPO Plus raw data stream, if the commenters choose to receive the raw data stream, they would be subject to the same technology constraints and costs in dealing with the data as other market participants. In addition, the Commission notes that the Exchange has stated that it would make the SOF data feed available for those current SOF users that may encounter issues beyond their control that render them unable to migrate to TOPO Plus before June 1, 2010.

## V. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange and, in particular, with Section 6(b)(4), (5), and (8) of the Act.<sup>58</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>59</sup> that the proposed rule change (SR-Phlx-2010-48) is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>60</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-13461 Filed 6-3-10; 8:45 am]

**BILLING CODE 8010-01-P**

## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### Adoption of Environmental Impact Statement; Availability of an Environmental Reevaluation

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Adoption and Recirculation of Final Environmental Impact Statement and Notice of Availability of Environmental Reevaluation.

**SUMMARY:** FRA is issuing this notice to advise the public and interested agencies that FRA has decided to adopt portions of the Environmental Impact Statement (EIS) issued by the Federal Transit Administration (FTA) in 2004 for the construction of the Transbay Transit Center (TTC) in San Francisco, California, in order to satisfy FRA's National Environmental Policy Act obligations related to funding the train box element of the TTC. Additionally, FRA has made available an Environmental Reevaluation of the EIS, updating certain relevant sections of the environmental analysis and describing design modifications to the train box. Under applicable Council on Environmental Quality (CEQ) regulations, FRA may adopt and recirculate the FTA's Final EIS since FRA's proposed action is substantially the same as the action covered by the FTA's EIS, and FRA has determined that the FTA EIS meets the standard for an adequate statement under the CEQ Regulations. In addition, under FRA's environmental procedures, FRA is required to issue a reevaluation of the adequacy, accuracy and validity of a final EIS in certain circumstances, which the agency has also done for this project.

**FOR FURTHER INFORMATION CONTACT:** Melissa DuMond, Environmental Protection Specialist, Federal Railroad Administration, 1200 New Jersey Ave., SE, MS-20, Washington, DC 20590, Telephone: (202) 493-6366.

**SUPPLEMENTARY INFORMATION:** The FTA and the Transbay Joint Powers Authority ("TJPA") prepared a joint environmental impact statement/environmental impact report for the Transbay Terminal/Caltrain Downtown/Extension Redevelopment Project ("2004 EIS"). The 2004 EIS included an analysis of the environmental impacts of the Caltrain Downtown Extension, the establishment of a redevelopment area plan, and the construction of the TTC on the site of the existing Transbay Terminal at First and Mission Streets in

San Francisco, California. The purpose of the project is to improve public access to bus and rail services, modernize the Transbay Terminal and improve service, reduce non-transit vehicle usage, alleviate blight, and revitalize the Transbay Terminal area. The TTC will replace the existing Transbay Terminal, which was first built in 1939, because the existing Terminal does not currently meet seismic safety or space utilization standards. In addition to the above mentioned benefits, the 2004 EIS contemplated a future high-speed rail system at the TTC in the form of a rail box that could accommodate high-speed rail trains. On the basis of the 2004 EIS, the FTA issued a Record of Decision (ROD) in 2005. In response to project modifications and refinements, the TJPA adopted five addenda to the EIS, which are described in the Environmental Reevaluation.

The Transbay Terminal project is divided into two construction phases, which have been refined through the five addenda to the 2004 EIS. Phase 1, which relates to the portion of the 2004 EIS adopted by FRA, includes the above-grade portion of the TTC and limited below-grade structural support work including the train box. Phase 2 includes the construction of the Downtown Extension. Under this notice, the FRA is adopting the portions of the 2004 EIS dealing with Phase 1 construction as it directly relates to the FRA's funding of the train box under the High-Speed Intercity Passenger Rail Program.

The American Recovery and Reinvestment Act ("Recovery Act") provided \$8 billion to the FRA as initial funding for the High-Speed Intercity Passenger Rail Program. The Secretary of Transportation selected the California High-Speed Rail Authority ("CHSRA") to receive up to \$2.25 billion from the Recovery Act to fund the development of high-speed intercity passenger rail service in California. As the TTC has been demonstrated to be the only feasible and practicable site in downtown San Francisco for the northern terminus of the California high-speed rail system, FRA proposes to provide up to \$400 million of the CHSRA Recovery Act funding to the TJPA in order to construct the train box designed to accommodate the future high-speed rail service at the TTC. Constructing the train box now results in substantial savings over options involving later construction of high-speed rail facilities under an already completed TTC.

The CEQ regulations allow Federal agencies, such as the FRA, to adopt

<sup>57</sup> See *supra* notes 23-24 and accompanying text.

<sup>58</sup> 15 U.S.C. 78f(b)(4), (5), and (8).

<sup>59</sup> 15 U.S.C. 78s(b)(2).

<sup>60</sup> 17 CFR 200.30-3(a)(12).