

December 1, 2011

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: SEC Release No. 34-65706 – File No. SR-Phlx-2011-143

Dear Ms. Murphy:

NYSE Euronext Inc., on behalf of its subsidiary options exchanges, NYSE Arca Inc. (“NYSE Arca”) and NYSE Amex LLC (“NYSE Amex”) (collectively “NYSE”), appreciates the opportunity to comment on the NASDAQ OMX PHLX (“Phlx”) proposal (“Proposal”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) to modify the criteria for listing an option on an underlying “covered security,” as that term is defined in Section 18(b)(1)(A) of the Securities Act of 1933.¹ The Phlx Proposal seeks to reduce the price qualification time period for the underlying security from five days to one day. For the reasons set forth below, we believe the Commission should disapprove the Phlx Proposal.

As Phlx noted in its Proposal, an underlying covered security currently must have a closing market price of \$3.00 per share for five consecutive business days preceding the day on which the exchange submits a listing certificate to OCC.² This \$3.00 per share/five day standard for covered securities was adopted in 2003 by the options exchanges as an alternative to the original standard of \$7.50 per share for the majority of business days over a three month period.³ At the time the alternative standard was adopted, Phlx stated that the original \$7.50

¹ See Release No. 34-65706 (November 8, 2011), 76 FR 70520 (November 14, 2011) (SR-PHLX-2011-143).

² NYSE Arca Rule 5.3(a)(4)(A), NYSE Amex Rule 915 Commentary .01 1.(4), and the listings rules of other options exchanges are uniform in requiring a closing price of \$3 for five consecutive days.

³ See Release Nos. 34-47190 (January 15, 2003), 68 FR 3072 (January 22, 2003) (SR-CBOE-2002-62); 34-47352 (February 11, 2003), 68 FR 8319 (February 20, 2003) (SR-PCX-2003-06); 34-47483 (March 11, 2003), 68 FR 13352 (March 19, 2003) (SR-ISE-2003-04); 34-47613 (April 1, 2003), 68 FR 17120 (April 8, 2003) (SR-Amex-2003-19);



per share/three month standard was intended to prevent “the proliferation of option issues on overlying securities that lack liquidity needed to maintain fair and orderly markets.”⁴ In addition, Phlx noted that the five-day look-back period “would provide a sufficient measure of protection from any attempts to manipulate the market price of the underlying security,” and that both the \$3.00 price standard and the five-day look-back period “would provide a reliable test for stability, would present a more reasonable time period for qualifying the price of an underlying security, and makes sense in today’s economic conditions.”⁵

NYSE notes that there has not been a significant change in the economic conditions that would relieve concerns related to price stability or possible manipulation. In fact, given today’s market volatility, such concerns may be amplified. Within the past year, NYSE Amex reviewed for listing two issues that met all necessary criteria for listing options other than the price test. Each issue closed above \$3 per share for a small number of days, but not for five consecutive days.⁶ If a rule similar to the Phlx Proposal were in effect, both would have been listed, and the Exchange would have options on two issues that have languished near \$1 per share for most of the year.

An additional concern for NYSE regarding the PHLX Proposal is that our experience has been that it is difficult to verify the number of shareholders in the days immediately following an initial public offering (“IPO”). For instance, three highly anticipated IPOs occurred this year: LinkedIn Corporation (LNKD), Pandora Media Inc. (P), and Groupon Inc. (GRPN). Each of these required confirmation that there were a minimum of 2,000 shareholders. When IPOs are listed, the entities such as Broadridge Financial Solutions, Inc. that track shareholder counts do not have such data immediately available after the IPO. Because of three day settlement for equities, it is not possible for them to verify from The Depository Trust and Clearing Corporation (“DTCC”) the number of shareholders of record before the third day after trading.

An alternative method of determining the shareholder count is to check with various broker-dealer firms that have a large retail customer clientele. Such firms can verify the number of individual customers who have a position in the new issue. This also takes time as firms have varying policies and procedures to provide such numbers. The earliest such verification can take place is usually the afternoon of the day after the first day of trading (“T+1”); others

and 34-47794 (May 5, 2003) 68 FR 25076 (May 9, 2003) (SR-Phlx-2003-27) (“Phlx Release”).

⁴ See Phlx Release at 25077.

⁵ See Phlx Release at 25078.

⁶ USA Technologies Inc. (USAT) closed above \$3 per share for four days, April 26, 2011 – April 29, 2011. Zalicus, Inc. (ZLCS) also closed above \$3 per share on the same four days. NYSE Amex received requests from clients to list options on both issues.



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cannot verify until the afternoon of the fourth day of trading (“T+3”), while others will not verify until the morning of the fifth day (“T+4”).

For LNKD, our Securities Qualification staff could not verify the shareholder count until the fourth day of trading the stock on its primary exchange, while P and GRPN could not be verified until the afternoon of T+3.

With either of the methods described above, a reliable shareholder count cannot be made for an IPO on the second day of trading before the OCC certification deadline time of 11 a.m. Central Time (“CT”). Because of this, we believe the Phlx Proposal does not provide for an adequate safeguard that the number of shareholders can be verified before submitting certification to OCC.

In this respect, the Options Listing and Procedures Plan (“OLPP”) provides a method for requesting a review by OCC of whether an options exchange properly listed an options class.⁷ A Petition for Review must be submitted no later than 3 p.m. CT on the first day the options in question are traded.

Given the time frames for listing and trading options outlined in the Phlx Proposal, the time restrictions on submitting a Petition for Review, and the difficulty in verifying a shareholder count, we believe approval of the Phlx Proposal will place other options exchanges in an impossible position. For instance, they will be unable to verify the number of shareholders in time to submit a Petition for Review to OCC.

For these reasons, we believe the Phlx Proposal does not further the objectives of Section 6(b)(5) of the Securities Exchange Act of 1934 (“Exchange Act”), nor does it protect investors and the public interest, because it would allow for the listing of issues without demonstrated price stability, without adequately addressing concerns about the ability to manipulate the market price of the underlying security, and without sufficient verification of the number of shareholders.

Accordingly, we believe that the Proposal is inconsistent with the Exchange Act, and strongly urge the Commission to disapprove it.

Very truly yours,

⁷ See Release No. 34-44521, (July 6, 2001) 66 FR 36809 (July 13, 2001).