

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60873; File No. SR-Phlx-2009-91)

October 23, 2009

Self-Regulatory Organizations; The NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Expansion and Extension of the Exchange's Penny Pilot Program

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, and Rule 19b-4 thereunder,² notice is hereby given that on October 16, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II 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 is filing with the Commission a proposal to amend its Rule 1034 to: (1) extend through December 31, 2010, the Penny Pilot in options classes in certain issues ("Pilot Program" or "Pilot"); (2) expand the number of issues included in the Pilot Program; and (3) replace, on a semi-annual basis, any Pilot Program issues that have been delisted.³

The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b-4(f)(6)(iii).⁴

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007)(SR-Phlx-2006-74)(notice of filing and approval order establishing Penny Pilot). See also Securities Exchange Act Release No. 60211 (January 1, 2009), 74 FR 33001 (January 9, 2009)(SR-Phlx-2009-51)(notice of filing and immediate effectiveness extending Penny Pilot through October 31, 2009).

⁴ 17 CFR 240.19b-4(f)(6)(iii).

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

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of the proposal is to: extend the time period of the Pilot Program, which is currently scheduled to expire on October 31, 2009, through December 31, 2010; expand the number of issues included in the Pilot Program; and enable the Exchange to replace, on a semi-annual basis, any Pilot Program issues that have been delisted.

Top 300

Phlx proposes to add the top 300 most actively traded multiply listed options classes that are not yet included in the Pilot Program (the "Top 300"). The Exchange proposes to determine the identity of the Top 300 based on national average daily volume ("ADV") in the prior six calendar months preceding their addition to the Pilot Program, except that the month immediately preceding their addition to the Pilot Program would not be utilized for purposes of

the analysis.⁵ In determining the identity of the Top 300, the Exchange will exclude options classes with high premiums. Pursuant to Rule 1034(a)(i)(B), the Pilot Program issues will be announced to the Exchange's membership via an Options Trader Alert (“OTA”) posted by the Exchange on its web site.⁶ This will bring the total number of options classes traded pursuant to the Pilot Program to 363. Phlx represents that the Exchange has the necessary system capacity to support any additional series listed as part of the Pilot Program.

Phlx believes that it is appropriate to exclude high priced underlying securities, as the benefit to the public from including such issues is minimal because of the high price of “at-the-money” options.⁷ The Exchange believes an appropriate threshold for designation as “high priced” at the time of selection of new issues to be included in the Pilot is \$200 per share or a calculated index value of 200. At \$200 per share strike prices are in \$10 increments, and at a calculated index value of 200 strike prices are in \$5 increments,⁸ so the at-the-money strike is more likely to carry an intrinsic value of \$3 or more, and thus not trade in a penny increment. With a greater distance between strikes, there are generally fewer series that are actively traded. The determination of whether a security is trading above \$200 or above a calculated index value

⁵ The Exchange will not include options classes in which the issuer of the underlying security is subject to an announced merger or is in the process of being acquired by another company, or if the issuer is in bankruptcy. For purposes of assessing ADV, the Exchange will use data compiled and disseminated by The Options Clearing Corporation (“OCC”).

⁶ The Exchange shall also identify the classes to be added to the Pilot Program, per each phase, in a filing with the Commission.

⁷ For instance, as of August 12, 2009, the near term at-the-money call in GOOG (August 460 Calls) was trading at \$6.50 with the underlying at \$459.84. The lowest strike price September call trading below \$3 (with the underlying at the same price) was the September 500 Call.

⁸ Regarding strike price increments for non-index options, see Commentary .05 to Rule 1012. Regarding strike price increments for index options, see Rule 1101A(a).

of 200 shall be based on the price at the close of trading on the Expiration Friday prior to being added to the Pilot.

Phased Implementation

The Exchange proposes to phase-in the additional classes to the Pilot Program over four successive quarters. Specifically, the Exchange proposes to add 75 classes in November 2009, February 2010, May 2010, and August 2010. In order to reduce operational confusion and provide for appropriate time to update databases, the Exchange proposes to add the eligible issues to the Pilot Program effective for trading on the Monday ten days after Expiration Friday. Thus, the quarterly additions would be effective on November 2, 2009; February 1, 2010; May 3, 2010; and August 2, 2010. For purposes of identifying the issues to be added per quarter, the Exchange shall use data from the prior six calendar months preceding the implementation month, except that the month immediately preceding their addition to the Pilot Program would not be utilized for purposes of the analysis.⁹

Delistings

Additionally, the Exchange proposes that any Pilot Program issues that have been delisted may be replaced on a semi-annual basis by the next most actively traded multiply listed options classes that are not yet included in the Pilot, based on trading activity in the previous six months. The replacement issues would be added to the Pilot on the second trading day following

⁹ The issues to be added on November 2, 2009, will be based on the most actively traded multiply listed issues for the six month period from April 1, 2009, through September 30, 2009. The issues to be added on February 1, 2010, will be based on the most actively traded multiply listed issues for the six month period from July 1, 2009, through December 31, 2009. The issues to be added on May 3, 2010, will be based on the most actively traded multiply listed issues for the six month period from October 1, 2009, through March 31, 2010. And the issues to be added on August 2, 2010, will be based on the most actively traded multiply listed issues for the six month period from January 1, 2010, through June 30, 2010.

January 1, 2010, and July 1, 2010.¹⁰ The Exchange will employ the same parameters in respect of prospective replacement issues as approved and applicable under the Pilot Program, including excluding high-priced underlying securities.

Reports

The Exchange agrees to submit semi-annual reports to the Commission that will include sample data and analysis of information collected from April 1 through September 30, and from October 1 through March 31, for each year, for the ten most active and twenty least active options classes added to the Pilot Program.¹¹ As the Pilot Program matures and expands, the Exchange believes that this proposed sampling approach provides an appropriate means by which to monitor and assess the Pilot Program's impact. The Exchange will also identify, for comparison purposes, a control group consisting of the ten least active options classes from the existing 63 Pilot Program classes. This report will include, but is not limited to: (1) data and analysis on the number of quotations generated for options included in the report; (2) an assessment of the quotation spreads for the options included in the report; (3) an assessment of the impact of the Pilot Program on the capacity of Phlx's automated systems; (4) data reflecting the size and depth of markets, and (5) any capacity problems or other problems that arose related to the operation of the Pilot Program and how the Exchange addressed them.

The Exchange believes the benefits to public customers and other market participants who will be able to express their true prices to buy and sell options have been demonstrated to outweigh the increase in quote traffic.

¹⁰ The replacement issues will be announced to the Exchange's membership via an OTA posted on the Exchange's web site.

¹¹ The Exchange will continue to provide data concerning the existing 63 Pilot Program classes.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹² in general, and furthers the objectives of Section 6(b)(5) of the Act¹³ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system. The Exchange believes that the Pilot Program promotes just and equitable principles of trade by enabling public customers and other market participants to express their true prices to buy and sell options.

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.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁴ and Rule 19b-4(f)(6) thereunder.¹⁵ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁵ 17 CFR 240.19b-4(f)(6).

investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁶ and Rule 19b-4(f)(6)(iii) thereunder.¹⁷

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of the filing.¹⁸ However, pursuant to Rule 19b-4(f)(6)(iii),¹⁹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange notes that the proposed rule change is substantially similar to a proposal submitted by another options exchange that was recently approved by the Commission and also incorporates a change to the initial expansion date filed by the other exchange. The Exchange further states that waiving the 30-day operative delay will allow the Pilot Program to continue uninterrupted and allow Nasdaq to adopt the same expansion schedule as other exchanges.

The Commission believes waiving the 30-day operative delay²⁰ is consistent with the protection of investors and the public interest because such waiver will allow Nasdaq to implement the 75 additional classes on November 2, 2009 and permit the Pilot Program to

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this pre-filing requirement.

¹⁸ 17 CFR 240.19b-4(f)(6).

¹⁹ 17 CFR 240.19b-4(f)(6)(iii).

²⁰ For the purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78(c)(f).

continue uninterrupted, consistent with other exchanges.²¹ For these reasons, the Commission designates the proposal to be operative upon filing with the Commission.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, 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. Please include File Number SR-Phlx-2009-91 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-Phlx-2009-91. 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

²¹ See Securities Exchange Act Release Nos. 60711 (September 23, 2009), 74 FR 49419 (September 28, 2009) (SR-NYSEArca-2009-44); and 60833 (October 16, 2009), 74 FR 54617 (October 22, 2009) (SR-NYSEArca-2009-91).

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 inspection and copying 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-Phlx-2009-91 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Florence E. Harmon
Deputy Secretary

²² 17 CFR 200.30-3(a)(12).