

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91887; File No. SR-Phlx-2021-30)

May 13, 2021

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Options 6, Section 7

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 May 6, 2021, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“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 proposes to amend Options 6, Section 7 to permit in-kind transfers of positions off of the Exchange in connection with unit investment trusts (“UITs”).

The text of the proposed rule change is available on the Exchange’s Website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Exchange proposes to amend Options 6, Section 7, which permits off-Exchange, in-kind transfers of options positions in connection with exchange-traded funds (“ETFs”) organized as open-ended management investments companies under the Investment Company Act of 1940 (the “1940 Act”), to also permit in-kind transfers of options positions in connection with entities registered as UITs under the 1940 Act. This is a competitive filing that is substantially similar to rules in place on Cboe Exchange, Inc. (“Cboe”) and its affiliates.³

Today, the Exchange allows members and member organizations to transfer their options positions off of the Exchange in limited, specified circumstances.⁴ For instance, Options 6, Section 7 permits positions in options listed on the Exchange to be transferred off the Exchange by a member or member organization in connection with transactions to purchase or redeem creation units of ETF shares between an authorized participant⁵ and the issuer of such ETF

³ See Cboe Rule 6.9 (the “Cboe Rule”); see also Securities Exchange Act Release No. 88786 (April 30, 2020), 85 FR 26998 (May 6, 2020) (SR-CBOE-2020-042). See also Cboe C2 Exchange (“C2”) Rule 6.63; Securities Exchange Act Release No. 89056 (June 12, 2020), 85 FR 36888 (June 18, 2020) (SR-C2-2020-006). See also Cboe BZX Exchange (“BZX”) Rule 20.12; Securities Exchange Act Release No. 89313 (July 14, 2020), 85 FR 43907 (July 20, 2020) (SR-CboeBZX-2020-054). See also Cboe EDGX Exchange (“EDGX”) Rule 20.12; Securities Exchange Act Release No. 89312 (July 14, 2020), 85 FR 43887 (July 20, 2020) (SR-CboeEDGX-2020-031).

⁴ See Options 6, Section 5(a) (Transfer of Positions), Section 6 (Off-Exchange RWA Transfers), and Section 7 (In-Kind Exchange of Options Positions and ETF Shares).

⁵ An “authorized participant” is an entity that has a written agreement with the issuer of ETF shares or one of its service providers, which allows the authorized participant to

shares.⁶ Such transfers pursuant to Section 7 occur between two different parties, off the Exchange, and are considered position transfers from an account with one clearing firm to the account of another clearing firm.⁷ Each of these transfers occurs at the price used to calculate the net asset value (“NAV”) of such ETF shares. The ability to effect in-kind transfers is a key component of the operational structure of an ETF and Options 6, Section 7 allows options-based ETFs to be more tax-efficient investment vehicles, to the benefit of their shareholders, and potentially resulting in transaction cost savings, which may be passed along to investors.

The Exchange now proposes to expand Options 6, Section 7 to mirror the Cboe Rule, which would permit in-kind transfers in connection with the creation or redemption of units issued by a UIT, another type of investment company registered under the 1940 Act. Although UITs operate differently than ETFs in certain respects, as described below, the anticipated potential benefits to UIT investors (i.e., greater tax efficiencies and transaction cost savings) from the proposed changes would be similar as discussed below. Furthermore, allowing the Exchange to permit such in-kind transfers would enable the Exchange to compete more effectively with other options exchanges that already allow such transfers.⁸

place orders for the purchase and redemption of creation units (*i.e.*, specified numbers of ETF shares). See Options 6, Section 7(a).

⁶ An “issuer of ETF shares” is an entity registered with the Commission as an open-ended management investment company under the Investment Company Act of 1940. See Options 6, Section 7(b).

⁷ These back-office transfers of options positions are in accordance with the rules of The Options Clearing Corporation (“OCC”), as the transferred positions are held in an account of an OCC member. Accordingly, all transfers pursuant to proposed Options 6, Section 7 would be required to comply with OCC rules. See Options 1, Section 1(b)(10) and Options 6, Section 8 (which, taken together, effectively requires all members and member organizations that are OCC members to comply with OCC’s rules).

⁸ See supra note 3.

Under the 1940 Act,⁹ a UIT is an investment company organized under a trust indenture or similar instrument that issues redeemable securities, each of which represents an undivided interest in a unit of specified securities.¹⁰ A UIT’s investment portfolio is relatively fixed and, unlike an ETF, a UIT has a fixed life (a termination date for the trust is established when the trust is created). Similar to other types of investment companies (including ETFs), UITs invest their assets in accordance with their investment objectives and investment strategies, and UIT units represent interests in a UIT’s underlying assets. Like ETFs, UITs do not sell or redeem individual shares, but instead, through the creation and redemption process, a UIT’s sponsor (a broker-dealer) may purchase and redeem shares directly from the UIT’s trustee in aggregations known as “units.” A broker-dealer purchases a unit of UIT shares from the UIT trustee by depositing a basket of securities and/or other assets identified by the UIT. These transactions are largely effected by “in-kind” transfers, or the exchange of securities, non-cash assets, and/or other non-cash positions. The basket deposited by the broker-dealer is generally expected to be representative of the UIT’s units and will be equal in value to the aggregate NAV of the shares of the UIT comprising a unit.¹¹ The UIT then issues units that are publicly offered and sold.

⁹ 15 U.S.C. 80a-4(2).

¹⁰ The Exchange also notes that although a majority of ETFs are structured as open-ended funds (i.e., those ETFs covered by Options 6, Section 7), some ETFs are structured as UITs, and currently represent a significant amount of assets within the ETF industry. These include, for example, SPDR S&P 500 ETF Trust (“SPY”) and PowerShares QQQ Trust, Series 1 (“QQQ”).

¹¹ The NAV is an investment company’s total assets minus its total liabilities. UITs must calculate their NAV at least once every business day, typically after market close. See §270.2a-4(c), which provides that any interim determination of current net asset value between calculations made as of the close of the New York Stock Exchange on the preceding business day and the current business day may be estimated so as to reflect any change in current net asset value since the closing calculation on the preceding business day. This, however, is notwithstanding the requirements of §270.2a-4(a), which provides for other events that would trigger computation of a UIT’s NAV.

Unlike ETFs, UITs typically do not continuously offer their shares for sale, but rather, make a one-time or limited public offering of only a specific, fixed number of units like a closed-end fund (i.e., the primary period, which may range from a single day to a few months). Similar to the process for ETFs, UITs allow investor-owners of units to redeem their units back to the UIT's trustee on a daily basis and, upon redemption, such investor-owners are entitled to receive the redemption price at the UIT's NAV. While UITs provide for daily redemptions directly with the UIT's trustee, UIT sponsors frequently maintain a secondary market for units, also like that of ETFs, and will buy back units at the applicable redemption price per unit. To satisfy redemptions, a UIT typically sells securities and/or other assets, which results in negative tax implications and an incurrence of trading costs borne by remaining unit holders.

Although ETFs and UITs operate differently in certain respects, the ability to effect in-kind transfers is significant to both types of investment vehicles. Currently, in-kind transfers of options pursuant to Options 6, Section 7 protect ETF shareholders from certain undesirable tax consequences and improve the overall tax efficiency of the products. Indeed, by effecting redemptions on an in-kind basis, as permitted by Options 6, Section 7, there is no need for an ETF to sell assets and potentially realize capital gains that would be distributed to shareholders. Additionally, by transacting on an in-kind basis, ETFs may currently avoid certain transaction costs they would otherwise incur in connection with the purchase and sale of securities and other assets (including options). Options 6, Section 7 does not currently permit these in-kind transfers for UITs as they are still generally required to sell options on an exchange to obtain the requisite cash when effecting redemption transactions with broker-dealers.

In light of the foregoing, the Exchange proposes to extend Options 6, Section 7 to UITs. As amended, Options 6, Section 7 will provide that positions in options listed on the Exchange

may be transferred off the Exchange by a member or member organization in connection with transactions (1) to purchase or redeem creation units of ETF shares between an authorized participant and the issuer of such ETF shares or (2) to create or redeem units of a unit investment trust (“UIT”) between a broker-dealer and the issuer of such UIT units, which transfers would occur at the price(s) used to calculate the net asset value of such ETF shares or UIT units, respectively. An “issuer of UIT units” will be defined in new paragraph (c) of the Rule as a trust registered with the Commission as a unit investment trust under the Investment Company Act of 1940.

As described above, UITs and ETFs are situated in substantially the same manner; the key differences being a UIT’s fixed duration, and that a UIT generally makes a one-time public offering of only a specific, fixed number of units. Negative tax implications and trading costs for remaining unit holders would be mitigated by allowing a UIT sponsor or another broker-dealer to receive an in-kind distribution of options upon redemption. Accordingly, permitting off-Exchange in-kind transfers for UITs would benefit investors by potentially providing tax efficiencies and transaction cost savings similar to those that investors in ETFs may enjoy today.

The Exchange does not believe that the proposed extension of Options 6, Section 7 will compromise price discovery or transparency. To note, this Rule is already applicable to options in connection with ETF creations and redemptions. Although options positions in connection with ETF and UIT (as proposed) creations and redemptions are transferred off the Exchange, they are not closed or “traded,” and instead, merely reside in a different clearing account until closed in a trade on the Exchange or until they expire. The Exchange also notes that just like the Cboe Rule, amended Options 6, Section 7 will continue to be clearly delineated and limited in scope, given that the Rule will continue to apply only to transfers of options effected in

connection with the creation and redemption process, and for certain investment companies registered under the 1940 Act. Other than the transfers covered by the amended Rule, options transactions, whether held by an ETF or an authorized participant, or a UIT or a broker-dealer, would be fully subject to all applicable trading Rules on the Exchange.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Section 6(b)(5) of the Act,¹³ in particular, in that it is designed to promote just and equitable principles of trade, 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.

The Exchange believes that permitting off-Exchange transfers in connection with the in-kind UIT creation and redemption process promotes just and equitable principles of trade and helps remove impediments to and perfect the mechanism of a free and open market and a national market system, as it would permit UITs that invest in options traded on the Exchange to utilize the in-kind creation and redemption process that is currently available for ETFs under Options 6, Section 7. Furthermore, the Exchange believes that permitting a comparable investment vehicle, also registered as an investment company under the 1940 Act, to be covered by Options 6, Section 7 removes impediments to and perfects the mechanism of a free and open market and national market system as it would enable UITs to compete more effectively with other investment vehicles that, based on their portfolio holdings, may effect in-kind creations and redemptions without restriction. The Exchange notes that the ability to effect in-kind transfers is

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

significant to both ETFs and UITs as investment vehicles. By permitting UITs that invest in options traded on the Exchange to benefit from potential tax efficiencies and transaction cost savings similar to those that ETFs may currently enjoy, the proposed rule change would protect investors and the public interest by passing along such potential benefits to investors that participate in UITs. The Exchange does not believe that the proposed rule change affects the protection of investors or the maintenance of a fair and orderly market because Options 6, Section 7, as amended, would continue to be clearly delineated and limited in scope. The Rule already applies to ETFs, which operate in a similar manner as UITs, and the proposed rule change to extend the Rule to UITs is based on a similar rationale and does not raise any new or novel issues. In this regard, as with in-kind, off-exchange transfers of options in connection with ETFs, those transfers in connection with UITs would also occur at a price related to the NAV of the applicable UIT units, which removes the need for price discovery on an exchange. The Exchange expects that off-exchange options transfers in connection with the creation and redemption process for UITs will comprise a minimal percentage of average daily volume (“ADV”), just as such transfers currently permissible in connection with ETFs comprise a minimal percentage of ADV. Further, the general price at which UIT-related transfers are effected will be publicly available as they are based on the disseminated closing prices and are generally expected to include corresponding transactions by a broker-dealer that would occur on an exchange and be reported to OPRA.¹⁴

¹⁴ The Exchange notes that in conjunction with depositing options with a UIT’s trustee and creating units, the necessary options positions will be acquired in an on-exchange transaction that is reported to OPRA. In conjunction with redemptions, the sponsor or other broker-dealer will generally acquire both the units redeemed by a redeeming unit holder and an options position to offset the position that it will receive as proceeds for the redemption. Such an options position is likely acquired in an on-exchange transaction that would be reported to OPRA. Thus, while the transfer of options positions between

Finally, the proposed rule change would align the Exchange's Rule with that of other options exchanges, thereby allowing the Exchange to compete on equal footing.¹⁵

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 that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Utilizing the proposed in-kind process under Options 6, Section 7 would be voluntary. The proposed rule change would provide market participants with an efficient and effective means to transfer positions as part of the creation and redemption process for UITs under the same specified circumstances currently applicable to the ETF creation and redemption process. The proposed expansion of Options 6, Section 7 to UITs would enable this investment vehicle, which is comparable to ETFs, to enjoy the benefits of off-Exchange, in-kind creations and redemptions already available to ETFs, and to pass these benefits along to investors. The proposed rule change would apply in the same manner to all broker-dealers that opt to invoke the proposed in-kind process.

The Exchange does not believe the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed rule would continue to provide a clearly delineated and limited circumstance in which options positions can be transferred off an exchange. Furthermore, as

the sponsor or other broker-dealer and the UIT would not necessarily be reported, there are generally corresponding transactions that would be reported, providing transparency into the transactions.

¹⁵ See supra note 3.

indicated above, in light of the significant benefits provided (e.g., tax efficiencies and potential transaction cost savings), the proposed expansion may lead to further development of UITs that invest in options, thereby fostering competition and resulting in additional choices for investors, which ultimately benefits the marketplace and the public. Lastly, the Exchange notes that proposed rule change is based rules already in place on other options exchanges.¹⁶ As such, the Exchange believes that its proposal enhances fair competition between markets by providing for additional listing venues for UITs that hold options to utilize the in-kind transfers proposed herein.

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

Because the foregoing 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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁷ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁸

¹⁶ See supra note 3.

¹⁷ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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 requirement.

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days from the date of filing. However, Rule 19b-4(f)(6)(iii)¹⁹ permits the Commission to 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 it may adopt the proposed transfer rule as soon as possible, which, according to the Exchange, may lead to further development of UITs that invest in options and foster competition. The proposed rule change does not present any unique or novel regulatory issues and is substantively similar to the Cboe Rule.²⁰ Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.²¹

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 necessary or appropriate in the public interest, for the protection of investors, or 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:

¹⁹ 17 CFR 240.19b-4(f)(6)(iii).

²⁰ See supra note 3.

²¹ For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2021-30 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Phlx-2021-30. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to

make available publicly. All submissions should refer to File Number SR-Phlx-2021-30 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.²²

J. Matthew DeLesDernier
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).