

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81814; File No. SR-Phlx-2017-75)

October 4, 2017

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing of Proposed Rule Change to Amend Rule 1009 to Modify the Criteria for Listing an Option on an Underlying Covered Security

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 September 27, 2017, NASDAQ PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“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 Commentary .01 to Rule 1009 to modify the criteria for listing an option on an underlying covered security.

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.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Commentary .01 to Rule 1009 to modify the criteria for listing options on an underlying security as defined in Section 18(b)(1)(A) of the Securities Act of 1933 (hereinafter "covered security" or "covered securities"). In particular, the Exchange proposes to modify Rule 1009, Commentary .01(4)(i) to permit the listing of an option on an underlying covered security that has a market price of at least \$3.00 per share for the previous three consecutive business days preceding the date on which the Exchange submits a certificate to the Options Clearing Corporation ("OCC") for listing and trading. The Exchange does not intend to amend any other criteria for listing options on an underlying security in Rule 1009 and accompanying Commentary.

Currently the underlying covered security must have a closing market price of \$3.00 per share for the previous five consecutive business days preceding the date on which the Exchange submits a listing certificate to OCC. In the proposed amendment, the market price will still be measured by the closing price reported in the primary market in which the underlying covered security is traded, but the measurement will be the price over the prior three consecutive business day period preceding the submission of the listing certificate to OCC, instead of the prior five business day period.

The Exchange acknowledges that the Options Listing Procedures Plan³ requires that the listing certificate be provided to OCC no earlier than 12:01 a.m. and no later than 11:00 a.m. (Chicago time) on the trading day prior to the day on which trading is to begin.⁴ The proposed amendment will still comport with that requirement. For example, if an initial public offering (“IPO”) occurs at 11 a.m. on Monday, the earliest date the Exchange could submit its listing certificate to OCC would be on Thursday by 12:01 a.m. (Chicago time), with the market price determined by the closing price over the three-day period from Monday through Wednesday. The option on the IPO would then be eligible for trading on the Exchange on Friday. The proposed amendment would essentially enable options trading within four business days of an IPO becoming available instead of six business days (five consecutive days plus the day the listing certificate is submitted to OCC).

At the time the Exchange adopted the “look back” period of five consecutive business days, it determined that the five-day period was sufficient to protect against attempts to manipulate the market price of the underlying security and would provide a reliable test for stability.⁵ Surveillance technologies and procedures concerning manipulation have evolved

³ The Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11a(2)(3)(B) of the Securities Exchange Act of 1934 (a/k/a the Options Listing Procedures Plan (“OLPP”)) is a national market system plan that, among other things, sets forth procedures governing the listing of new options series. See Securities Exchange Act Release No. 44521 (July 6, 2001), 66 FR 36809 (July 13, 2001) (Order approving OLPP). The sponsors of OLPP include Phlx; OCC; BATS Exchange, Inc.; BOX Options Exchange LLC; C2 Options Exchange, Incorporated; Chicago Board Options Exchange, Incorporated; EDGX Exchange, Inc.; Miami International Securities Exchange, LLC; MIAX PEARL, LLC; The NASDAQ Stock Market LLC; NASDAQ BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; NYSE American, LLC; and NYSE Arca, Inc.

⁴ See OLPP at page 3.

⁵ See Securities Exchange Act Release No. 47794 (May 5, 2003), 68 FR 25076 (May 9,

since then to provide adequate prevention or detection of rule or securities law violations within the proposed time frame, and the Exchange represents that its existing trading surveillances are adequate to monitor the trading in the underlying security and subsequent trading of options on the Exchange.⁶

Furthermore, The NASDAQ Stock Market (“Nasdaq”), the Exchange’s affiliated listing market, had no cases within the past five years where an IPO-related issue for which it had pricing information qualified for the \$3.00 price requirement during the first three days of trading and did not qualify for the \$3.00 price requirement during the first five days.⁷ In other words, none of these qualifying issues fell below the \$3.00 threshold within the first three or five days of trading. As such, the Exchange believes that its existing surveillance technologies and procedures, coupled with its findings related to the IPO-related issues on Nasdaq as described herein, adequately address potential concerns regarding possible manipulation or price stability within the proposed timeframe.

2003) (SR-Phlx-2003-27).

⁶ Such surveillance procedures generally focus on detecting securities trading subject to opening price manipulation, closing price manipulation, layering, spoofing or other unlawful activity impacting an underlying security, the option, or both. As it relates to IPOs, the Exchange has price movement alerts, unusual market activity and order book alerts active for all trading symbols. These real-time patterns are active for the new security as soon as the IPO begins trading. The Nasdaq MarketWatch group, which provides such real-time surveillance on the Exchange and its affiliated markets, monitors trading activity in IPOs to see whether the new issue moves substantially above or below the public offering price in the first day or several days of trading.

⁷ There were over 750 IPO-related issues on Nasdaq within the past five years. Out of all of the issues with pricing information, there was only one issue that had a price below \$3 during the first five consecutive business days. The Exchange notes, however, that Nasdaq allows for companies to list on the Nasdaq Capital Market at \$2.00 or \$3.00 per share in some instances, which was the case for this particular issue. See Nasdaq Rule 5500 Series for initial listing standards on the Nasdaq Capital Market.

The Exchange also believes that the proposed look back period can be implemented in connection with the other initial listing criteria for underlying covered securities. In particular, the Exchange recognizes that it may be difficult to verify the number of shareholders in the days immediately following an IPO due to the fact that stock trades generally clear within two business days (T+2) of their trade date and therefore the shareholder count will generally not be known until T+2.⁸ The Exchange notes that the current T+2 settlement cycle was recently reduced from T+3 on September 5, 2017 in connection with the Commission's amendments to Exchange Rule 15c6-1(a) to adopt the shortened settlement cycle,⁹ and the look back period of three consecutive business days proposed herein reflects this shortened T+2 settlement period. As proposed, stock trades would clear within T+2 of their trade date (i.e., within three business days) and therefore the number of shareholders could be verified within three business days, thereby enabling options trading within four business days of an IPO (three consecutive business days plus the day the listing certificate is submitted to OCC).

Furthermore, the Exchange notes that it can verify the shareholder count with various brokerage firms that have a large retail customer clientele. Such firms can confirm the number of individual customers who have a position in the new issue. The earliest that these firms can provide confirmation is usually the day after the first day of trading (T+1) on an unsettled basis, while others can confirm on the third day of trading (T+2). The Exchange has confirmed with some of these brokerage firms who provide shareholder numbers to the Exchange that they are

⁸ The number of shareholders of record can be verified from large clearing agencies such as The Depository Trust and Clearing Corporation ("DTCC") upon the settlement date (i.e., T+2).

⁹ See Securities Exchange Act Release No. 78962 (September 28, 2016), 81 FR 69240 (October 5, 2016) (Amendment to Securities Transaction Settlement Cycle) (File No. S7-22-16).

able to provide these numbers within T+2 after an IPO. For the foregoing reasons, the Exchange believes that basing the proposed three business day look back period on the T+2 settlement cycle would allow for sufficient verification of the number of shareholders.

The proposed rule change will apply to all covered securities that meet the criteria of Rule 1009. Pursuant to Rule 1009, the Exchange's Board of Directors (the "Board") establishes guidelines to be considered by the Exchange in evaluating the potential underlying securities for Exchange option transactions.¹⁰ However, the fact that a particular security may meet the guidelines established by the Board does not necessarily mean that it will be approved as an underlying security.¹¹ As part of the established criteria, the issuer must be in compliance with any applicable requirement of the Securities Exchange Act of 1934.¹² Additionally, in considering the underlying security, the Exchange relies on information made publicly available by the issuer and/or the markets in which the security is traded.¹³ Also, in determining whether to list an option that otherwise meets the objective listing criteria, the Chairman of the Board or his designee may consider, *inter alia*, the name recognition of the option or underlying security.¹⁴ Even if the proposed option meets the objective criteria, the Chairman of the Board or his designee may decide not to list, or place limitations or conditions upon listing.¹⁵ The Exchange believes that these measures, together with its existing surveillance procedures,

¹⁰ See Exchange Rule 1009(b). The Board established specific criteria to consider by the Exchange in evaluating potential underlying securities for Exchange Option Transactions in its Commentary to Exchange Rule 1009.

¹¹ Id.

¹² See Exchange Rule 1009, Commentary .01(5)

¹³ See Exchange Rule 1009, Commentary .02(d).

¹⁴ See Exchange Rule 1009, Commentary .02(e).

¹⁵ See Exchange Rule 1009, Commentary .02(c).

provide adequate safeguards in the review of any covered security that may meet the proposed criteria for consideration of the option within the timeframe contained in this proposal.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁷ 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 the proposed changes to its listing standards for covered securities would allow the Exchange to more quickly list options on a qualifying covered security that has met the \$3.00 eligibility price without sacrificing investor protection. As discussed above, the Exchange believes that its existing trading surveillances provide a sufficient measure of protection against potential price manipulation within the proposed three consecutive business day timeframe. The Exchange also believes that the proposed three consecutive business day timeframe would continue to be a reliable test for price stability in light of its findings that none of the IPO-related issues on Nasdaq within the past five years that qualified for the \$3.00 per share price standard during the first three trading days fell below the \$3.00 threshold during the fourth or fifth trading day. Furthermore, the established guidelines to be considered by the Exchange in evaluating the potential underlying securities for Exchange option transactions,¹⁸ together with existing trading surveillances, provide adequate safeguards in the

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ See notes 10-15 above.

review of any covered security that may meet the proposed criteria for consideration of the option within the proposed timeframe.

In addition, the Exchange believes that basing the proposed timeframe on the T+2 settlement cycle adequately addresses the potential difficulties in confirming the number of shareholders of the underlying covered security. Having some of the largest brokerage firms that provide these shareholder counts to the Exchange confirm that they are able to provide these numbers within T+2 further demonstrates that the 2,000 shareholder requirement can be sufficiently verified within the proposed timeframe. For the foregoing reasons, the Exchange believes that the proposed amendments will remove and perfect the mechanism of a free and open market and a national market system by providing an avenue for investors to swiftly hedge their investment in the stock in a shorter amount of time than what is currently in place.¹⁹

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 rule change reduces the number of days to list options on an underlying security, and is intended to bring new options listings to the marketplace quicker.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds

¹⁹ This proposed rule change does not alter any obligations of issuers or other investors of an IPO that may be subject to a lock-up or other restrictions on trading related securities.

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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. Please include File Number SR-Phlx-2017-75 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-2017-75. 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; 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-2017-75, 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.²⁰

Eduardo A. Aleman
Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).