

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86695; File No. SR-Phlx-2019-28)

August 16, 2019

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Exchange Rules 605 and 1049

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 August 5, 2019, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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 Exchange Rules 605 and 1049, titled “Advertisements, Market Letters, Research Reports and Sales Literature” and “Options Communications.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this rule change is to adopt advertising requirements within Rules 605 and 1049, titled, “Advertisements, Market Letters, Research Reports and Sales Literature” and “Options Communications”. The changes are described in more detail below.

Definitions

The Exchange proposes to amend Rules 605 and 1049 to incorporate by reference Financial Industry Regulatory Authority (“FINRA”) Rules 2210 (“FINRA 2210”) and 2220 (“FINRA 2220”), respectively, as rules of Phlx. These proposed rule changes will apply the same advertising requirements applicable to members of Nasdaq Stock Market LLC (“Nasdaq”) and Nasdaq Options Market (“NOM”) to Phlx. Nasdaq incorporated FINRA 2210 by reference in 2006.³ Similarly, Section 22 of Chapter XI of NOM Rules incorporated FINRA rules regarding communications with the public in 2008.⁴ The proposed rule changes will require members of Phlx to comply with FINRA 2210 and FINRA 2220 when issuing any

³ See Securities Exchange Act Release No. 53128, (January 13, 2006), 71 FR 3550 (January 23, 2006) (In the Matter of the Application of the Nasdaq Stock Market LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission), which approved the incorporation by reference of NASD rule 2210, among others, into the Nasdaq rulebook. See also Securities Exchange Act Release No. 85188 (February 25, 2019), 84 FR 7138 (March 1, 2019) (SR-NASDAQ-2019-008), approving Nasdaq rule change updating references to NASD Rule 2210 to FINRA Rule 2210.

⁴ See Securities Exchange Act Release No. 57478, (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080), which approved, among other changes, the incorporation by reference of certain FINRA rules as NOM rules.

communication to the public. Specifically, Phlx Rule 605 would require a Phlx member to comply with FINRA 2210 as if it were a rule of Phlx itself.⁵ Likewise, Phlx Rule 1049 would require a Phlx member to comply with FINRA 2220 as if it were a rule of Phlx itself.⁶

The Exchange believes that requiring Phlx members to comply with FINRA 2210 and FINRA 2220 will provide consistency of marketing materials used by members of Nasdaq, NOM and Phlx as well as harness the knowledge and expertise of FINRA in their review of marketing materials.⁷ Furthermore, the proposed rule change will impose a heightened standard on Phlx members in comparison to existing Phlx Rule 605 which simply calls for either the Phlx member, a general partner or holder of voting stock in the member to have endorsed their approval of the communication prior to publication or distribution.⁸

⁵ We note that Phlx members will not be required to comply with FINRA 2210(c). This is consistent with Nasdaq Rule 2210 which excludes FINRA 2210(c) from the public communications rules applicable to Nasdaq members.

⁶ The Exchange notes that the proposed rule change would not subject Phlx members to compliance with FINRA 2210c. As most Phlx members are currently members of FINRA, those members have already been subject to FINRA 2210 in its entirety, including sub-part (c). Only those Phlx members that are not FINRA members, and as a result do not conduct securities transactions and business with the investing public, will be relieved of the obligation to comply with FINRA 2210c (the portion of the rule requiring submission of communications for review prior to publication). The proposed rule change will not relieve any existing FINRA member of the obligation to comply with rules regarding communications with the public.

⁷ The Nasdaq OMX Group and FINRA entered into a Regulatory Services Agreement (RSA) dated January 1, 2013. Pursuant to this agreement, FINRA has performed member regulation for all Nasdaq exchanges. As a result of the proposed rule change, FINRA will now review all public marketing materials produced by Phlx members.

⁸ Phlx Rule 605 also calls for retention of a copy of the communication for a period of three years. Rule 605 also imposes obligations on firms for whom Phlx serves as the designated examining authority. Continued application of these requirements would be superfluous once FINRA Rule 2210 becomes effective.

FINRA 2210(b)(1)(A) requires an appropriately qualified registered principal to approve each retail communication before the earlier of its use or filing with FINRA's Advertising Regulation Department. The requirements of FINRA 2210(b)(1)(A) may be satisfied by a Supervisory Analyst approved pursuant to FINRA Rule 1220(a)(14)⁹ with respect to (i) research reports on debt and equity securities as described in FINRA Rule 2241(a)(11) and FINRA Rule 2242(a)(3); (ii) retail communications as described in FINRA Rule 2241(a)(11)(A) and FINRA Rule 2242(a)(3)(A); and (iii) other research communications, provided that the Supervisory Analyst has technical expertise in the particular product area. A Supervisory Analyst may not approve a retail communication that requires a separate registration unless the Supervisory Analyst also has such other registration.

The Exchange believes the application of FINRA 2210 to the Exchange's membership will benefit the broader marketplace by adopting FINRA's requirement that marketing materials be reviewed by appropriately qualified registered principals of a member. This will promote the public interest by helping to prevent inaccurate or misleading information going to investors.

We note that Phlx Rule 1049 is similar in substance to FINRA Rule 2220.¹⁰

⁹ FINRA Rule 1220(a)(14) lists the Principal Registration Category of Supervisory Analyst. Each principal as defined in paragraph (a)(1) of Rule 1220 may register with FINRA as a Supervisory Analyst if his or her activities are limited to approving the following: (i) the content of a member's research reports on equity securities; (ii) the content of a member's research reports on debt securities; (iii) the content of third-party research reports; (iv) retail communications as described in Rule 2241(a)(11)(A); or (v) other research communications that do not meet the definition of "research report" under Rule 2241, provided that the Supervisory Analyst has technical expertise in the particular product area. The activities of a Supervisory Analyst engaged in equity research shall be supervised by a Research Principal registered pursuant to paragraph (a)(6) of Rule 1220.

¹⁰ While Phlx Rule 1049 and FINRA 2220 are substantively similar, there are differences in the rules regarding review of communications by members found to have departed from the standards of FINRA 2220. In the event FINRA finds a member to have departed

The proposed rule change will not create a burdensome compliance obligation for Phlx members. Of the existing one hundred sixteen members of Phlx, ninety-one are also members of Nasdaq. In light of the overlap in membership of the two exchanges, the proposed rule changes will allow for easier compliance with rules of both exchanges since members of both exchanges will now have identical compliance obligations with respect to communications with the public.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹² in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by bringing greater transparency and consistency to its rules. Requiring Phlx members to comply with FINRA 2210 and FINRA 2220 will add conformity to the advertising requirements for members of Nasdaq, NOM and Phlx exchanges. Conformity in marketing rules will aide member firms as they will have a uniform set of rules to adhere to when issuing communications to their customers across multiple markets. This will reduce the likelihood of confusion as to compliance obligations and promote compliance with Exchange rules and the delivery of clear, accurate information to the public. Both outcomes are in the public interest and further the objectives of Section 6(b)(5) of the Act. Compliance with FINRA 2210 and FINRA 2220 will also provide greater protection to the public as FINRA has significant experience in reviewing marketing and advertising material having done so for various Nasdaq exchanges and

from the standards of FINRA 2220, FINRA may require the member to file some or all options communications with the Advertising Regulation Department at least ten calendar days prior to first use.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

FINRA's own membership. FINRA review of marketing materials will help protect investors, further meeting the goals of Section 6(b)(5) of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposed rule changes will not impose an undue burden on competition because the requirement to comply with FINRA Rules 2210 and FINRA 2220 will apply to all Phlx members equally.

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 Act¹³ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴

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

¹³ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁴ 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.

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:

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-2019-28 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-2019-28. 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-2019-28 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.¹⁵

Jill M. Peterson
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).