SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97624; File No. SR-Phlx-2023-07)

May 31, 2023

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Make Permanent Certain P.M.-Settled Pilots

I. Introduction

On February 23, 2023, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to make permanent the pilot program to permit the listing and trading of options based on 1/100 the value of the Nasdaq-100 Index ("XND") and the Exchange's nonstandard expirations pilot program (collectively, the "Programs"). The proposed rule change was published for comment in the Federal Register on March 2, 2023.[3] On April 7, 2023, pursuant to Section 19(b)(2) of the Exchange Act,[4] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.[5] On May 11, 2023, the Exchange submitted Amendment No. 1 to the proposed rule change ("Amendment No. 1").[6] The Commission has

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 96980 (February 24, 2023), 88 FR 13161 ("Notice").

4 15 U.S.C. 78s(b)(2).

5 See Securities Exchange Act Release No. 97260, 88 FR 22498 (April 13, 2023). The Commission designated May 31, 2023, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

6 In Amendment No. 1, the Exchange inserts two footnotes and amends a sentence in order to further clarify parts of the empirical analysis performed by the Exchange. Amendment

received no comment letters on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons, and is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposed Rule Change, as Modified by Amendment No. 1

The Exchange proposes to make permanent two pilot programs: (1) the Exchange's nonstandard expirations pilot program ("Nonstandard Pilot"), and (2) the Exchange's pilot to permit the listing and trading of options based on 1/100 the value of the Nasdaq-100 Index ("XND Pilot"). The Nonstandard Pilot permits the Exchange to open P.M.-settled options on broad-based indexes that expire (1) on the last day of the trading month ("EOM expirations") and (2) on any Monday, Wednesday, or Friday (other than the third Friday-of-the-month or days that coincide with an end-of-month ("EOM") expiration) and, with respect to options on the Nasdaq-100 Index ("NDX") and XND options, any Tuesday or Thursday (other than days that coincide with the third Friday-of-the-month or an EOM expiration). The XND Pilot permits the listing of XND options, which are European-style and cash-settled, and have a contract multiplier of 100. The contract specifications for XND options mirror those of the NDX options contract listed on the Exchange, except that XND options are based on 1/100 of the value of the Nasdaq-100 Index, and are P.M.-settled pursuant to Options 4A, Section 12(a)(5) of the Phlx Rules.

No. 1 is available at: https://www.sec.gov/comments/sr-phlx-2023-07/srphlx202307.htm.

7 15 U.S.C. 78s(b)(2)(B).

In December 2017, the Commission approved the Nonstandard Pilot on a pilot basis.[8] In April 2021, the Commission approved the XND Pilot on a pilot basis.[9] In approving both Programs, the Commission noted its concern about the potential impact on the market at expiration for the underlying component stocks for a P.M.-settled, cash-settled index options. [10] However, the Commission also recognized the potential impact was unclear.[11] The Commission approved the Programs on a pilot basis to allow the Exchange and the Commission to monitor for and assess any potential for adverse market effects.[12] The Nonstandard Pilot was extended on multiple occasions, including recently, and is set to expire on November 6, 2023.[13] Similarly, the XND Pilot was extended on multiple occasions and is set to expire on November 6, 2023.[14]

In order to facilitate assessment of the Programs, the Exchange committed to provide the Commission with data and analysis for each pilot.[15] Among other things, the Exchange

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8 See Securities Exchange Act Release No. 82341 (December 15, 2017), 82 FR 60651 (December 21, 2017) (SR-Phlx-2017-79) ("Nonstandard Approval Order").

9 See Securities Exchange Act Release No. 91524 (April 9, 2021), 86 FR 19909 (April 15, 2021) (SR-Phlx-2021-07) ("XND Approval Order").

10 See Nonstandard Approval Order, supra note 8, at 60653 and XND Approval Order, supra note 9, at 19911. See also Securities Exchange Act Release Nos. 64599 (June 3, 2011), 76 FR 33798, 33801-02 (June 9, 2011) (order instituting proceedings to determine whether to approve or disapprove a proposed rule change to allow the listing and trading of SPXPM options); 65256 (September 2, 2011), 76 FR 55969, 55970-76 (September 9, 2011) (order approving proposed rule change to establish a pilot program to list and trade SPXPM options); and 68888 (February 8, 2013), 78 FR 10668, 10669 (February 14, 2013) (order approving the listing and trading of SPXPM on CBOE).

11 See XND Approval Order, supra note 9, at 19909.

12 See Nonstandard Approval Order, supra note 8, at 60653, XND Approval Order, supra note 9, at 19911.

13 See Securities Exchange Act Release No. 97385 (April 26, 2023), 88 FR 27549 (May 2, 2023) (SR-Phlx-2023-13) ("Programs Extension").

14 See Programs Extension, supra note 13.

15 See XND Approval Order, supra note 12, at 19910-19911 and Nonstandard Approval Order, supra note 8, at 60652-60653.

committed to provide an annual report containing an analysis of volume, open interest and trading patterns.[16] In addition, for series that exceed certain minimum open interest parameters, the annual report provides analysis of index price volatility and, if needed, share trading activity.[17] The Exchange also provides monthly data to the Commission and makes public on its website the data and analysis previously submitted to the Commission in connection with the Programs and will continue to make public any data or analysis it submits under the Programs while the Programs are still in effect.[18]

As set forth more fully in the Notice, the Exchange concludes that P.M.-settled index option expirations are unlikely to cause any disruptive effect on the market.[19] The Exchange further concludes there is no evidence that XND options contract that are P.M.-settled would result in reduced trading activity or degradation in market quality of the A.M.-settled index options.[20] In order to support its overall assessment of the Program, the Exchange provides an empirical assessment of the impact of P.M.-settled NDX options on options market quality and examines market capacity around the market close.[21] The Exchange also includes an assessment of a study conducted at the direction of the staff of the Commission's Division of Economic and Risk Analysis.[22]

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16 See Notice, supra note 3, at 13175.

17 See Notice, supra note 3, at 13175.

18 See Programs Extension, supra note 13, at 27549-27550.

19 See Notice, supra note 3, at 13163.

20 See Notice, supra note 3, at 13163.

21 See Notice, supra note 3, at 13162-13169, 13173-13176.

22 See Notice, supra note 3, at 13163.

The Exchange's analysis presents data that the introduction of P.M.-settlement corresponds to an increase in options trading tied to the Nasdaq-100 Index. The Exchange notes within its analysis that it seems unlikely that the introduction of XND option contracts had a significant impact on the market quality of the full-sized Nasdaq-100 Index option contracts.[23] The Exchange observed a consistent decrease in relative quoted spread from 2017 to 2022 for NDX options. When the Exchange compared the spread trend of NDX monthly contracts to that of QQQ monthly contracts, the Exchange states that the results suggest that there is gradual decrease in both the NDX monthly contracts spread and the QQQ contracts spread during the sample period.[24]

The Exchange also considered whether the move from A.M.-settlement to P.M.-settlement for Friday NDX weekly expirations led to changes in spreads for those contracts.[25] The Exchange states that it sees no evidence of deterioration of spreads associated with the introduction of P.M.-settled products.[26]

The Exchange provides analysis on market capacity around the market close, and concludes that the equity closing auctions have grown to be substantial liquidity events that are

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23 The Exchange states that given that the size of the market (measured in volume) for XND options volume is small compared to that of other P.M.-settled NDX options, the Exchange believes the introduction of XND option contracts is unlikely to adversely impact the market quality of A.M.-settled NDX options. See Amendment No. 1, supra note 6.

24 See Notice, supra note 3 at 13175-13176.

25 See Notice, supra note 3 at 13170-13173. The Exchange used a regression analysis to test whether the spread of NDX contracts changed after the introduction of P.M.-settled index options. See id. at 13171. In Amendment No. 1, the Exchange clarifies that the *Post* variable in its regression model is meant to capture the effect of the introduction of Friday P.M.-settled NDX options expirations (on all but the third-Friday of the month) that occurred in January 2018. See Amendment No. 1, supra note 6.

26 See Notice, supra note 3 at 13173-13176.

much larger than the opening auctions, and would therefore be better suited for handling the excess liquidity demand created by index options settlement.[27] The Exchange believes the expiration of P.M.-settled options would not adversely affect the options market or the underlying cash equities market.[28]

Lastly, the Exchange states that it has sufficient systems capacity to handle P.M.-settled options on broad-based indexes with nonstandard expirations dates and has not encountered any issues or adverse market effects as a result of listing them.[29]

III. Proceedings to Determine Whether to Approve or Disapprove SR-Phlx-2023-07, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[30] to determine whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange has proposed to

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27 See id. at 13176.

28 See id.

29 See id.

30 15 U.S.C. 78s(b)(2)(B).

31 Id.

make permanent: (1) a pilot program that permits the listing and trading of P.M.-settled Weekly Expirations and EOM expirations and, (2) a pilot program that permits the listing and trading of P.M.-settled XND options. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule change's consistency with the Act, and in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, 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.[32]

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, as modified by Amendment No. 1, is consistent with Sections 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,[33] any request for an opportunity to make an oral presentation.[34]

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32 15 U.S.C. 78f(b)(5).

33 17 CFR 240.19b-4.

34 Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94-29 (Jun. 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change, as modified by Amendment No. 1, should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

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-2023-07 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-2023-07. 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

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Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR-Phlx-2023-07 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[35]

Sherry R. Haywood,

Assistant Secretary

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35 17 CFR 200.30-3(a)(57).