

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58929; File No. SR-Phlx-2008-75)

November 12, 2008

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASDAQ OMX PHLX, Inc. Relating to the Definition of "Market for the Underlying Security"

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on November 3, 2008, the 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, pursuant to Section 19(b)(1) of the Act<sup>3</sup> and Rule 19b-4 thereunder,<sup>4</sup> proposes to amend Exchange Rule 1017, Openings in Options, to replace references to the "primary market" in respect of an underlying security with references to the "market for the underlying security."

The text of the proposed rule change is available on the Exchange's Web site at [http://www.phlx.com/regulatory/reg\\_rulefilings.aspx](http://www.phlx.com/regulatory/reg_rulefilings.aspx).

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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(1).

<sup>4</sup> 17 CFR 240.19b-4.

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 proposed rule change is to clarify the circumstances under which the Exchange's electronic trading platform for options, Phlx XL,<sup>5</sup> would initiate an automated opening in a particular option series upon receipt of the opening trade or quote in the primary market for the underlying security, by more specifically defining "primary market" in the Exchange's rules.

Current Definition of "Primary Market"

Currently, Exchange Rule 100(b)31 defines the term "primary market" in respect of an underlying stock or Exchange-Traded Fund Share as the principal market in which the underlying stock or Exchange-Traded Fund Share is traded.

The Exchange believes that the current definition of "primary market" in respect of an underlying security is not sufficiently specific to capture the various marketplaces that might be determined to be the "primary market" for such underlying security. Because underlying securities trade on multiple exchange platforms and various Electronic Commerce Networks ("ECNs") and other venues, the term "primary market"

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<sup>5</sup> See Securities Exchange Act Release No. 50100 (July 27, 2004), 69 FR 44612 (August 3, 2004) (SR-Phlx-2003-59).

has become increasingly difficult to define in determining the principal market in which the underlying stock or Exchange-Traded Fund Share is traded. In order to account for this respecting openings in options, the Exchange intends to code its automated opening system to open trading in options upon receipt of an opening price on the “market for the underlying security,” as defined more specifically below.

#### Market for the Underlying Security

The Exchange proposes to amend Exchange Rule 1017 by eliminating the requirement that the Phlx XL automated opening system must receive an opening price in the “primary” market for the underlying security in order to open trading in the overlying options, and accordingly, to adopt a definition of “market for the underlying security” in proposed Rule 1017(k). Under the proposal, the term “market for the underlying security” would mean either the primary listing market, the primary volume market (defined as the market with the most liquidity in that underlying security for the previous two calendar months), or the first market to open the underlying security, as determined by the Exchange on an issue-by-issue basis and communicated to members on the Exchange’s web site.

#### Openings in Options

The Exchange believes that this proposed definition should more accurately capture the manner in which the Phlx XL system determines to open a particular option series based on the opening trade or quote on the primary market in the underlying security.

Exchange Rule 1017, Openings in Options, currently lists various scenarios that take place when a quote or trade has been disseminated by the primary market for the

underlying security. For example, respecting the pre-opening phase of the Phlx XL automated opening system, Rule 1017(b) states that the system will calculate an Anticipated Opening Price (“AOP”) and Anticipated Opening Size (“AOS”) in equity options when a quote or trade has been disseminated by the primary market for the underlying security.<sup>6</sup> Other sections of Rule 1017 require an opening quote or trade in the “primary market” for the underlying security in order to open, and base the timing of the opening on the dissemination of such a quote or trade by the primary market for the underlying security.<sup>7</sup>

The Exchange has experienced situations where the “primary market” for the underlying security in a particular series has been delayed in disseminating an opening quote or trade when other markets for the underlying security for the series have already disseminated an opening quote or trade in such underlying security. If the Exchange were to limit its definition of “primary market” for the underlying security to mean the “principal market in which the underlying stock or Exchange-Traded Fund Share is traded,” it would risk the possibility that other options markets with more specific

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<sup>6</sup> The rule goes on to state generally that an AOP can only be calculated when either (A) the specialist's quote has been submitted; (B) the quotes of at least two Phlx XL participants have been submitted within two minutes of the opening trade or quote on the primary market for the underlying security in the case of equity options; or (C) if neither the specialist's quote nor the quotes of two Phlx XL participants have been submitted within two minutes of the opening trade or quote on the primary market for the underlying security in the case of equity options, one Phlx XL participant has submitted their quote.

<sup>7</sup> Rule 1017(b)(iii) provides that the system will open the series for trading within a time period not to exceed 5 seconds (as determined by the Exchange and disseminated to membership via Exchange circular) following: (A) respecting equity options, the dissemination of an opening quote or trade in the primary market for the underlying security; or (B) respecting index options, following the dissemination of a quote or trade by the primary markets for underlying securities constituting 100% of the index value.

definitions of the market in the underlying security whose opening quote or trade would initiate an automated opening<sup>8</sup> could open the particular series, while the Exchange could not. This would place (and has placed) the Exchange and its market participants at a distinct competitive disadvantage concerning openings in options, because market prices for options trading on other options exchanges would be established through free trading while the Exchange establishes its options pricing on the “primary market” for the underlying security, which may not yet be open for the affected series. Exchange participants could thus open an option series at an opening price that is inferior to the price established in free trade on away markets.

The Exchange believes that the elimination of the term “primary market” from the rule, together with the proposed definition of “market for the underlying security,” should capture the manner in which the Phlx XL system will evaluate underlying prices, thus preserving the Exchange’s ability to compete with other options exchanges respecting openings.

## 2. Statutory Basis

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<sup>8</sup> For example, Chicago Board Options Exchange Rule 6.2B, on which the instant proposal is based, states, “[U]nless unusual circumstances exists (sic), at a randomly selected time within a number of seconds after the opening trade and/or the opening quote is disseminated in the market for the underlying security (or after 8:30 a.m. for index options), the System initiates the opening rotation procedure and sends a notice (“Rotation Notice”) to market participants. For purposes of this paragraph, the “market for the underlying security” shall be either the primary listing market, the primary volume market (defined as the market with the most liquidity in that underlying security for the previous two calendar months), or the first market to open the underlying security, as determined by the Exchange on a class-by-class basis and announced to the membership via Regulatory Circular.”

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>10</sup> 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, by adopting a definition of “market for the underlying security,” thus ensuring that the Exchange is on an even playing field with competing options exchanges concerning openings.

The Exchange believes that the proposed definition of “market for the underlying security” should enable Exchange options participants to price options promptly and accurately at the opening of trading, resulting in narrower spreads and deeper markets on the Exchange.

The Exchange further believes that the proposed rule change will provide it with more flexibility to determine when to permit the Phlx XL automated opening system to begin, which should contribute to the Exchange’s ability to conduct openings in a fairly and orderly manner.

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.

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

**III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The proposed rule change is being designated by the Exchange as a “non-controversial” rule pursuant to Section 19(b)(3)(A)<sup>11</sup> of the Act and subparagraph (f)(6) of Rule 19b-4 thereunder,<sup>12</sup> because the proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for 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 investors and the public interest, provided that the Exchange has given the Commission written notice of its intent to file the proposed rule change at least five business days prior to the filing of the proposed rule change.<sup>13</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>14</sup> normally does not become operative for 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>15</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange requests that the Commission waive the 30-day operative delay. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. The proposed

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> As required under Rule 19b-4(f)(6)(iii), the Exchange has provided the Commission with written notice of its intent to file the proposed rule change at least five business days prior to the filing of the proposed rule change.

<sup>14</sup> 17 CFR 240.19b-4(f)(6).

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii).

rule change is based on the rules of another self-regulatory organization,<sup>16</sup> and this proposal does not raise any novel issues. In addition, the Exchange states that it is being placed at a competitive disadvantage because other exchanges are able to open trading in an options series at times when the Exchange cannot. Allowing the proposed rule change to become operative on filing will ensure that the Exchange is on an even playing field with competing options exchanges concerning openings. For these reasons, the Commission designates the proposed rule change as operative upon filing.<sup>17</sup>

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](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2008-75 on the subject line.

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<sup>16</sup> See Securities Exchange Act Release No. 56600 (October 2, 2007), 72 FR 57619 (October 10, 2007)(SR-CBOE-2007-88).

<sup>17</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's effect on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-2008-75. 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 Web site (<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 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 the filing will also be available for inspection and copying at the principal office of the self-regulatory organization. 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-2008-75 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.<sup>18</sup>

Florence E. Harmon  
Acting Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).