

EXHIBIT 5

New text is underlined; deleted text is in brackets.

NASDAQ PHLX Rules**RULES OF THE EXCHANGE**

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Rule 1049. Options Communications [to Customers]

[(a) *General Rule.* No member or member organization or person associated with a member shall utilize any advertisement, educational material, sales literature or other communications to any customer or member of the public concerning options which:

- (i) contains any untrue statement or omission of a material fact or is otherwise false or misleading;
- (ii) contains promises of specific results, exaggerated or unwarranted claims, opinions for which there is no reasonable basis or forecasts of future events which are unwarranted or which are not clearly labelled as forecasts;
- (iii) contains hedge clauses or disclaimers which are not legible, which attempt to disclaim responsibility for the content of such literature or for opinions expressed therein, or which are otherwise inconsistent with such communication; or
- (iv) would constitute a prospectus as that term is defined in the Securities Act of 1933, unless it meets the requirements of Section 10 of said Act.]

(a) Definitions. For purposes of this Rule and any interpretation thereof, "options communications" consist of:

(i) Correspondence. The term "correspondence" shall include any written (including electronic) communication distributed or made available to 25 or fewer retail customers within any 30 calendar-day period.

(ii) Institutional Communication. The term "institutional communication" shall include any written (including electronic) communication concerning options that is distributed or made available only to institutional investors, but does not include a member's internal communications. The term institutional investor shall mean any qualified investor as defined in Section 3(a)(54) of the Securities Exchange Act of 1934.

(iii) Retail Communication. The term "retail communication" means any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.

(b) Approval by Registered Options Principal. [All advertisements, sales literature (except completed worksheets) and educational material issued by a member or member organization pertaining to options shall be approved in advance by a Registered Options Principal designated by the member or member organization's written supervisory procedures. Copies thereof, together with the names of the persons who approved the material and, in the case of sales literature, the source of any recommendations contained therein, shall be retained by the member or member organization and be kept at an easily accessible place for examination by the Exchange for a period of three years.]

(i) All retail communications (except completed worksheets) issued by a member or member organization pertaining to options shall be approved in advance by a Registered Options Principal designated by the member or member organization's written supervisory procedures.

(ii) Correspondence need not be approved by a Registered Options Principal prior to use. All correspondence is subject to the supervision and review requirements of Rule 1025.

(iii) Institutional communications. Each member or member organization shall establish written procedures that are appropriate to its business, size, structure, and customers for review by a Registered Options Principal of institutional communications used by the member or member organization.

(iv) Copies of the options communications shall be retained by the member or member organization in accordance with Rule 17a-4 under the Securities Exchange Act of 1934. The names of the persons who prepared the options communications, the names of the persons who approved the options communications, and the source of any recommendations contained therein shall be retained by the member or member organization and kept in the form and for the time periods required for options communications by Rule 17a-4.

(c) Exchange Approval Required[for Options Advertisements and Educational Material]. In addition to the approval required by paragraph (b) of this Rule, [every advertisement and all educational material of a member or member organization pertaining to options] retail communications of a member or member organization pertaining to standardized options that is not accompanied or preceded by the applicable current options disclosure document ("ODD") shall be submitted to the Exchange at least ten calendar days prior to use (or such shorter period as the Exchange may allow in particular instances) for approval and, if changed or expressly disapproved by the Exchange, shall be withheld from circulation until any changes specified by the Exchange have been made or, in the event of disapproval, until the [advertisement or

educational material] communication has been resubmitted for, and has received, Exchange approval. The requirements of this paragraph shall not be applicable to:

[(i) advertisements or educational material submitted to another self-regulatory organization having comparable standards pertaining to advertisements or educational material; and

(ii) advertisements or educational material in which the only reference to options is contained in a listing of the services of a member organization.]

(i) options communications submitted to another self-regulatory organization having comparable standards pertaining to such communications and

(ii) communications in which the only reference to options is contained in a listing of the services of the member organization;

(iii) the ODD; and

(iv) the prospectus.

(d) General Rule. No member or member organization or associated person shall use any options communication which:

(i) Contains any untrue statement or omission of a material fact or is otherwise false or misleading.

(ii) Contains promises of specific results, exaggerated or unwarranted claims, opinions for which there is no reasonable basis or forecasts of future events which are unwarranted or which are not clearly labeled as forecasts.

(iii) Contains cautionary statements or caveats that are not legible, are misleading, or are inconsistent with the content of the materials.

(iv) Contains statements suggesting the certain availability of a secondary market for options.

(v) Fails to reflect the risks attendant to options transactions and the complexities of certain options investment strategies.

(vi) Fails to include a warning to the effect that options are not suitable for all investors or contains suggestions to the contrary.

(vii) Fails to include a statement that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of sales persons), comparisons, recommendations, statistics, or other technical data, will be supplied upon request.

(viii) would constitute a prospectus as that term is defined in the Securities Act of 1933, unless it meets the requirements of Section 10 of the Securities Act of 1933. Paragraphs (vi) and (vii) shall not apply to institutional communications as defined in this Rule 1049. Any statement in any options communications referring to the potential opportunities or advantages presented by options shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities must be avoided.

Paragraphs (vi) and (vii) shall not apply to institutional sales material as defined in this Rule 1049.

[(d) Except as otherwise provided in the Commentary hereunder, no written materials respecting options may be disseminated to any person who has not previously or contemporaneously received one or more current Options Disclosure Documents.]

[(e) *Definitions.* For purposes of this Rule, the following definitions shall apply:

- (i) The term "advertisement" shall include any sales material that reaches a mass audience through public media such as newspapers, periodicals, magazines, radio, television, telephone recording, motion picture, audio or video device, telecommunications device, billboards, signs, or through written communications to customers or the public not required to be accompanied or preceded by one or more current Options Disclosure Documents.
- (ii) The term "educational material" shall include any explanatory material distributed or made generally available to customers or the public that is limited to information describing the general nature of the standardized options markets or one or more strategies.
- (iii) The term "sales literature" shall include any written communication (not defined as an "advertisement" or as "educational material") distributed or made available to customers or the public that contains any analysis, performance report, projection or recommendation with respect to options, underlying securities or market conditions, any standard forms of worksheets, or any seminar text which pertains to options and which is communicated to customers or the public at seminars, lectures or similar such events, or any Exchange-produced materials pertaining to options.]

(e) Standards Applicable to Options Communications

(i) Unless preceded or accompanied by the ODD, options communications shall:

(A) Be limited to general descriptions of the options being discussed.

(B) Contain contact information for obtaining a copy of the ODD.

(C) Not contain recommendations or past or projected performance figures, including annualized rates of return, or names of specific securities.

(ii) Options communications used prior to ODD delivery may:

(A) Contain a brief description of options, including a statement that identifies registered clearing agencies for options. The text may also contain a brief description of the general attributes and method of operation of the exchanges on which options are traded, including a discussion of how an option is priced.

(B) Include any statement required by any state law or administrative authority.

(C) Include advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics, provided such material is not misleading.

(f) The provisions of this Rule are applicable to index warrants.

• • • *Commentary:* -----

.01 The Rule 1049(e)(i)(B) requirement to include contact information for obtaining a copy of the ODD may be satisfied by providing a name and address or one or more telephone numbers from which the current options disclosure document may be obtained; directing existing clients to contact their registered representative; or including a response card through which a current options disclosure document may be obtained. An internet address may also be used, however, such an address must be accompanied by either a telephone number or mailing address for use by those investors who do not have access to the internet.[The special risks attendant to options transactions and the complexities of certain options investment strategies shall be reflected in any advertisement, educational material or sales literature which discusses the uses or advantages of options. Such communications shall include a warning to the effect that options are not suitable for all investors. In the preparation of written communications respecting options, the following guidelines should be observed:

A. Any statement referring to the potential opportunities or advantages presented by options shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities should be avoided. Thus, a statement such as "with options, an investor has an opportunity to earn profits while limiting his risk of

loss", should be balanced by a statement such as "of course, an options investor may lose the entire amount committed to options in a relatively short period of time".

- B. It shall not be suggested that options are suitable for all investors.
- C. Statements suggesting the certain availability of a secondary market for options shall not be made.]

.02 Projections.

Options communications may contain projected performance figures (including projected annualized rates of return), provided that:

(i) All such communications are accompanied or preceded by the ODD.

(ii) No suggestion of certainty of future performance is made.

(iii) Parameters relating to such performance figures are clearly established (e.g., to indicate exercise price of option, purchase price of the underlying stock and its market price, option premium, anticipated dividends, etc.).

(iv) All relevant costs, including commissions, fees and interest charges (as applicable) are disclosed.

(v) Such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation.

(vi) All material assumptions made in such calculations are clearly identified (e.g., "assume option expires", "assume option unexercised", "assume option exercised," etc.).

(vii) The risks involved in the proposed transactions are also discussed.

(viii) In communications relating to annualized rates of return, that such returns are not based upon any less than a sixty-day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

[Advertisements pertaining to options shall conform to the following standards:

- A. Advertisements may only be used (and copies of the advertisements may be sent to persons who have not received one or more Options Disclosure Documents) if the material meets the requirements of rule 134 under the Securities Exchange Act of 1933, as that rule has been interpreted as applying to options. Under rule 134, advertisements must be limited to general descriptions of the security being offered and of its issuer. Advertisements under this Rule shall state the name and address of the person from whom a current Options Disclosure Document(s) may be obtained. Such advertisements may have the following characteristics:
- (i) The text of the advertisement may contain a brief description of such options, including a statement that the issuer of every such option is the Options Clearing Corporation. The text may also contain a brief description of the general attributes and method of operation of the exchange or exchanges on which such options are traded and of the Option Clearing Corporation, including a discussion of how the price of an option is determined on the trading floor(s) of such exchange(s):
 - (ii) The advertisement may include any statement required by any State law or administrative authority;
 - (iii) Advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics may be used, provided such material is not misleading.
- B. The use of recommendations or of past or projected performance figures, including annualized rates of return, is not permitted in any advertisement pertaining to options.]

.03 Historical Performance

Options communications may feature records and statistics which portray the performance of past recommendations or of actual transactions, provided that:

- (i) All such communications are accompanied or preceded by the ODD.
- (ii) Any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific "universe" that can be fully isolated and circumscribed and that covers at least the most recent 12-month period.

(iii) Such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request.

(iv) All relevant costs, including commissions, fees, and interest charges (as applicable) are disclosed.

(v) Whenever such communications contain annualized rates of return, all material assumptions used in the process of annualization are disclosed.

(vi) An indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid.

(vii) Such communications state that the results presented should not and cannot be viewed as an indicator of future performance.

(viii) A Registered Options Principal determines that the records or statistics fairly present the status of the recommendations or transactions reported upon and so initials the report.

[Educational material, including advertisements, pertaining to options may be used if the material meets the requirements of rule 134a under the Securities Act of 1933 (the "Act"). Those requirements are as follows:

- (i) The potential risks related to options trading generally and to each strategy addressed are explained;
- (ii) No past or projected performance figures, including annualized rates of return are used;
- (iii) No recommendation to purchase or sell any option contract is made;
- (iv) No specific security is identified other than

- (a) a security which is exempt from registration under the Act or an option on such exempt security, or
- (b) an index option, including the component securities of the index, or
- (c) a foreign currency option and
- (v) The material contains the name and address of a person or persons from whom the appropriate current Options Disclosure Documents(s), as defined in rule 9b-1 of the Securities Exchange Act of 1934, may be obtained.]

.04 Options Programs. In communications regarding an options program (i.e., an investment plan employing the systematic use of one or more options strategies), the cumulative history or unproven nature of the program and its underlying assumptions shall be disclosed. [Sales literature pertaining to options shall conform to the following standards:

- A. Sales literature shall state that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of salespersons), comparisons, recommendations, statistics or other technical data, will be supplied upon request.
- B. Such communications may contain projected performance figures (including projected annualized rates of return), provided that:
 - (i) no suggestion of certainty of future performance is made;
 - (ii) parameters relating to such performance figures are clearly established (e.g., to indicate exercise price of option, purchase price of the underlying stock and its market price, option premium, anticipated dividends, etc.);
 - (iii) all relevant costs, including commissions and interest charges (if applicable with regard to margin transactions) are disclosed;
 - (iv) such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation;
 - (v) all material assumptions made in such calculations are clearly identified (e.g., "assume option exercised", etc.);
 - (vi) the risks involved in the proposed transactions are also discussed;
 - (vii) in communications relating to annualized rates of return, that such returns are not based upon any less than a sixty- day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect

that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

- C. Such communications may feature records and statistics which portray the performance of past recommendations or of actual transactions provided that:
- (i) any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific "universe" that can be fully isolated and circumscribed and that covers at least the most recent 12-month period;
 - (ii) such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request;
 - (iii) such communications disclose all relevant costs, including commissions and interest charges (if applicable with regard to margin transactions) and, whenever annualized rates of return are used, all material assumptions used in the process of annualization;
 - (iv) an indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid;
 - (v) such communications state that the results presented should not and cannot be viewed as an indicator of future performance; and
 - (vi) a Registered Options Principal determines that the records or statistics fairly present the status of the recommendations or transactions reported upon and so initials the report.
- D. In the case of an options program (i.e., an investment plan employing the systematic use of one or more options strategies), the cumulative history or unproven nature of the program and its underlying assumptions shall be disclosed.
- E. Standard forms of options worksheets utilized by member organizations, in addition to complying with the requirements applicable to sales literature, must be uniform within a member organization for each product type (e.g. equity, foreign currency, index, etc.).

F. If a member organization has adopted a standard form of worksheet for a particular options strategy, nonstandard worksheets for that strategy may not be used.

G. Communications that portray performance of past recommendations or actual transactions and completed worksheets shall be kept at a place easily accessible to the sales office for the accounts or customers involved.]

.05 For purposes of this Rule, the term "option" shall be deemed to include index warrants, and the term "The Options Clearing Corporation" shall be deemed to mean the issuer(s) of such warrants.

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