

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80972; File No. SR-Phlx-2017-39)

June 19, 2017

Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 1049, Communications to Customers

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 June 8, 2017, 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 Rule 1049, Communications to Customers. The proposed rule change is intended to update and modernize Rule 1049, to be retitled “Options Communications,” and to conform it to rules of other options exchanges regarding communications to customers. It makes both organizational and substantive changes that have previously been made by other options exchanges.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 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 Exchange is a party to a 17d-2 agreement with the Financial Industry Regulatory Authority, Inc. (“FINRA”) and other options exchanges (the “Options Multiparty 17d-2 Agreement” or the “17d-2 Agreement”).³ The 17d-2 Agreement allocates regulatory responsibilities with respect to broker-dealers, and persons associated therewith, that are members of more than one Participant (the “Common Members”) and conduct a public business for compliance with specified common rules relating to the conduct by broker-dealers and associated persons of accounts for listed options, index warrants, currency index warrants, and currency warrants (collectively, “Covered Securities”). Pursuant to the 17d-2 Agreement, FINRA is the Designated Options

³ See Agreement by and among Bats BZX Exchange, Inc., BOX Options Exchange, LLC, the Chicago Board Options Exchange, Incorporated, C2 Options Exchange, Incorporated, the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., Miami International Securities Exchange, LLC, the NYSE MKT LLC, the NYSE Arca, Inc., The NASDAQ Stock Market LLC, NASDAQ BX, Inc., the NASDAQ PHLX LLC, ISE Gemini, LLC, Bats EDGX Exchange, Inc., ISE Mercury, LLC and MIAX PEARL, LLC, Pursuant to Rule 17d-2 under the Securities Exchange Act of 1934. See also Securities Exchange Act Release No. 79929 (February 2, 2017), 82 FR 9757 (February 8, 2017).

Examining Authority (“DOEA”) for its broker-dealer members that also are members of Phlx. Thus, FINRA has certain examination and enforcement responsibilities relating to compliance by Common Members with the rules of Phlx that are substantially similar to the rules of FINRA (the “Common Rules”) identified in the 17d-2 Agreement.

Phlx Rule 1049, Communications to Customers, is not currently a Common Rule under the 17d-2 Agreement. Rule 1049 sets forth a range of requirements applicable to members, member organizations, or persons associated with a member organization utilizing any advertisement, educational material, sales literature or other communications to any customer or member of the public. The purpose of this proposed rule change is to update, clarify and conform Rule 1049 to the rules of FINRA and other options exchanges regarding options communications to customers that are included as Common Rules under the 17d-2 Agreement, so that it too may qualify as a Common Rule under the 17d-2 Agreement. The proposed rule change would make both organizational and substantive changes that have previously been made by other exchanges in order to conform to FINRA rules.⁴

Specifically, this proposed rule change is based upon, and makes changes that have previously been made to, Chicago Board Options Exchange (“CBOE”) Rule 9.21 (a Common Rule) over the past ten years, on a cumulative basis, by SR-CBOE-2013-043⁵; SR-CBOE-2010-035⁶ and SR-CBOE-2007-30.⁷ Current Phlx Rule 1049 is very similar

⁴ See, e.g., FINRA Rule 2220, CBOE Rule 9.21, MIAX Rule 1322, and ISE Rule 623.

⁵ See Securities Exchange Act Release 69807 (June 20, 2013), 78 FR 38423 (June 26, 2013) (SR-CBOE-2013-043)

⁶ See Securities Exchange Act Release No. 62034 (May 4, 2010), 75 FR 26303 (May 10, 2010) (SR-CBOE-2010-35). This was an interim rule change relating to

in content and organization to CBOE Rule 9.21 as it existed prior to approval of SR-CBOE-2007-30. Upon implementation of the amendments proposed herein, Exchange Rule 1049 would once again track CBOE Rule 9.21 nearly word for word.⁸ The amendments, if adopted, would provide a more uniform approach to communications to customers regarding standardized options. The proposed changes are discussed below.

Redesignation of Rule 1049(e) to Proposed Rule 1049(a) and New Definitions

Rule 1049(e) currently defines terms used in Rule 1049. Phlx proposes to redesignate paragraph (e) as paragraph (a). Phlx also proposes to delete the existing definitions of “advertisement”⁹, “educational material”¹⁰ and “sales literature”¹¹, and to

market letters which are no longer addressed in CBOE rules and are thus not addressed in this proposed rule change.

⁷ See Securities Exchange Act Release No. 58823 (October 21, 2008), 73 FR 63747 (October 28, 2008) (SR-CBOE-2007-30).

⁸ The only substantive difference between CBOE Rule 9.21 and proposed Phlx Rule 1049 is with respect to index warrants. Current Phlx Rule 1049 states at section (f) that the provisions of Rule 1049 are applicable to index warrants, and at Commentary .05 that, for purposes of the rule the term “option” is deemed to include index warrants and the term “The Options Clearing Corporation” is deemed to mean the issuer(s) of such warrants. CBOE Rule 9.21 does not contain comparable provisions. No changes are proposed with respect to these provisions. Provisions relating to index warrants were added to Rule 1049 by Phlx in 1994 as part of a comprehensive proposed rule change establishing rules for the listing and trading of stock index, currency and currency index warrants. See Securities Exchange Act Release No. 36167 (August 29, 1995), 60 FR 46667 (September 7, 1995).

⁹ The term “advertisement” is currently defined in Rule 1049(e) as including 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.

add new definitions of “correspondence”, “institutional communication” and “retail communication” which collectively would constitute “options communications” under the revised rule. These new terms are necessary because FINRA, in reframing its customer communications rule, previously adopted these new terms to describe various categories of communications. The term "correspondence" would include any written (including electronic) communication distributed or made available to 25 or fewer retail customers within any 30 calendar-day period. The term "institutional communication" would include any written (including electronic) communication concerning options that is distributed or made available only to institutional investors, but would not include a member’s internal communications.¹² Finally, "retail communication" would be defined to mean any written (including electronic) communication that is distributed or made available to more than 25 retail investors within any 30 calendar-day period.

The Exchange proposes corresponding amendments throughout Rule 1049 to the provisions referring to advertisement, educational material and sales literature, including deletion of Commentary .02A of Rule 1049, which outlines what is permitted in an

¹⁰ The term "educational material" is currently defined in Rule 1049(e)(ii) as including 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.

¹¹ The term "sales literature" is currently defined in Rule 1049(e)(iii) as including 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.

¹² The term institutional investor would mean any qualified investor as defined in Section 3(a)(54) of the Securities Exchange Act of 1934.

advertisement, and Commentary .03 of Rule 1049, which concerns the content of educational material.

Relocation of Rule 1049(a) to Proposed Rule 1049(d)

Rule 1049(a) currently contains an outline of the "General Rule" for options communications. Phlx proposes to redesignate Rule 1049(a) as Rule 1049(d), and to incorporate limitations on the use of options communications currently contained in Commentary .01 of Rule 1049 into proposed Rule 1049(d).¹³ In addition, proposed Rule 1049(d)(iii) would amend current Rule 1049(a)(iii) by clarifying the types of cautionary statements and caveats that are prohibited. The Exchange is proposing to relocate to Rule 1049(d), and slightly modify, language currently found in Rule 1049 Commentary .01 governing acceptable content of options communications. Section A of Rule 1049 Commentary .04 currently sets forth the requirement that "sales literature" shall state that supporting documentation for any claims, comparisons, recommendations, statistics or other technical data, will be supplied upon request. The Exchange proposes to redesignate Section A of Rule 1049 Commentary .04 as proposed Rule 1049(d)(vii), which would have the effect of making those conditions applicable to options communications as defined in proposed Rule 1049 rather than to the deleted term "sales literature." Proposed Rule 1049(d)(viii) would provide that certain aspects of the General Rule set forth in paragraphs (vi) and (vii) are inapplicable to institutional communications.

¹³ Current Rule 1049(d), which limits the dissemination of written materials respecting options to persons who have not received the current Options Disclosure Document ("ODD"), would be deleted. Rules governing communications prior to or after delivery of the current ODD would be set forth in new Rule 1049(e).

Proposed Amendments to Rule 1049(b)

Phlx proposes to amend Rule 1049(b) to include the types of communications proposed to be added to the definition of "options communications" in proposed Rule 1049(a). Current Rule 1049(b) which imposes an obligation to obtain advance approval by a Registered Options Principal ("ROP") for most options communications, would be replaced by new language set forth in Rule 1049(b)(i)-(iv). Rule 1049(b)(i) would preserve this requirement with respect to retail communications. However, proposed Rule 1049(b)(ii) would remove correspondence, as defined in Rule 1049(a), from the pre-approval requirement. All correspondence would, however, be subject to general supervision and review requirements.¹⁴ Additionally, proposed Rule 1049(b)(iii) would remove institutional communications, as defined in Rule 1049(a), from the pre-approval requirement, but would require each member or member organization to establish written procedures that are appropriate to its business, size, structure, and customers for review by a ROP of institutional communications used by the member or member organization.

Finally, proposed Rule 1049(b)(iv) would require copies of the options communications to be retained by the member or member organization in accordance with Rule 17a-4¹⁵ 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 would also be required to 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.

¹⁴ See Phlx Rule 1025.

¹⁵ 17 CFR 240.17a-4.

Proposed Amendments to Rule 1049(c)

Rule 1049(c) currently requires members to obtain approval from the Exchange for every advertisement and all educational material. This requirement applies regardless of whether the options communications are used before or after the delivery of a current ODD. Phlx proposes to amend this provision to require Exchange approval only with respect to retail communications of a member or member organization pertaining to standardized options that is not accompanied or preceded by the applicable current ODD. Such retail communications would be required to be submitted at least ten calendar days prior to use (or such shorter period as the Exchange may allow in particular instances). The Exchange pre-approval requirement for options communications used subsequent to the delivery of the ODD is being eliminated because the ODD is designed to alert the customer to the characteristics and risks associated with trading in options.

Rule 1049(c) would also be amended to delete references to “advertisements” and “educational material,” which as discussed above would no longer be defined, and to include instead the types of communications added to the definition of “options communications” in proposed Rule 1049(a). The Exchange is also proposing to add language which would further exempt the ODD and a prospectus from Exchange review as these documents have other further requirements under the Securities Act of 1933.

Proposed Rule 1049(e)

Proposed new Rule 1049(e) would set forth (i) standards for options communications that are not preceded or accompanied by an ODD and (ii) standards for options communications used prior to delivery of an ODD. These requirements generally

would clarify and restate the requirements contained in the current Commentary .02A of Rule 1049 which, as noted above, would be deleted.

Proposed Amendments to Rule 1049 Commentary Sections

Proposed new Commentary .01 would include and amend the provisions found in current Section A of Commentary .02 regarding how the Rule 1049(e)(i)(B) requirement that options communications contain contact information for obtaining a copy of the ODD may be satisfied. As noted above, the current provisions of Commentary .01 regarding limitations on the use of options communications are proposed to be incorporated into proposed Rule 1049(d).¹⁶

Proposed Commentary .02, Projections, would be revised to amend and include the provisions currently located in Section B of Commentary .04, which pertain to standards for “Sales Literature” that contains projected performance figures. These provisions would be amended to apply to options communications rather than to the deleted defined term Sales Literature. As previously noted, the provisions of Commentary .02 that outline what is permitted in an advertisement are proposed to be deleted, and the provisions relating to standards for options communications used prior to delivery of the ODD are proposed to be incorporated into proposed Rule 1049(e)(ii). Proposed Rule 1049(e)(i) would limit all options communications that are not preceded or accompanied by the ODD.

Proposed Commentary .03, Historical Performance, would be revised to amend and include the provisions currently found in Section C of Commentary .04 pertaining to standards for sales literature that contains historical performance figures. These

¹⁶ Commentary .01 Section A contains an example which is not being incorporated into proposed Rule 1049(d), as it is not found in CBOE Rule 9.21(d).

provisions would be amended to apply to options communications rather than to the deleted defined term sales literature. Existing Commentary .03, which concerns the content of educational material (another defined term proposed to be deleted), is proposed to be deleted as noted above. Proposed Rule 1049(e)(i) would limit all options communications that are not preceded or accompanied by the ODD.

Proposed Commentary .04, Options Programs, would contain the provisions of current Section D of Commentary .04, and would require 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 to be disclosed. Commentary .04 currently sets forth the standards applicable to “Sales Literature.” The Exchange proposes to delete existing Sections E, F and G of Commentary .04 dealing with worksheets and recordkeeping with respect to communications that portray performance of past recommendations or actual transactions, in favor of the new customer communications rules applicable to options communications generally that are consistent with those of other options exchanges

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,¹⁷ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁸ 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 to protect investors and the public interest, by conforming Rule 1049

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

more closely to the Common Rules regarding options communications under the 17d-2 Agreement. By doing so, the proposal also furthers the objectives of Section 6(b)(1)¹⁹ of the Act as the amendments would better enable the Exchange to be so organized as to have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange.

In its most recent approval order for the 17d-2 Agreement²⁰ the Commission noted that Section 19(g)(1) of the Act,²¹ among other things, requires every self-regulatory organization (“SRO”) registered as either a national securities exchange or national securities association to examine for, and enforce compliance by, its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO’s own rules, unless the SRO is relieved of this responsibility pursuant to Section 17(d)²² or Section 19(g)(2)²³ of the Act.

Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO (“common members”). In its decision, the Commission noted that such regulatory duplication would add unnecessary expenses for common members and their SROs. Finally, it observed that under paragraph (c) of Rule 17d-2, the Commission may

¹⁹ 15 U.S.C. 78f(b)(1).

²⁰ See Securities and Exchange Act Release No. 79929 (February 2, 2017).

²¹ 15 U.S.C. 78s(g)(1).

²² 15 U.S.C. 78q(d)(1).

²³ 15 U.S.C. 78s(g)(2).

declare joint plans for the allocation of regulatory responsibilities with respect to their common members effective if, after providing for notice and comment, it determines that the plan is necessary or appropriate in the public interest and for the protection of investors, to foster cooperation and coordination among the SROs, to remove impediments to, and foster the development of, a national market system and a national clearance and settlement system, and is in conformity with the factors set forth in Section 17(d) of the Act.

The 17d-2 Plan covering the Common Rules is designed to eliminate regulatory duplication and unnecessary expense for common members and the SROs including Phlx, with respect to the Common Rules. By amending Rule 1049 so that it, like CBOE Rule 9.21, is “substantially similar” to the FINRA rules of similar purpose and therefore eligible to become a Common Rule for purposes of the 17d-2 Agreement, the Exchange is eliminating regulatory duplication and unnecessary expense as contemplated by Commission Rule 17d-2, and facilitating more efficient regulatory compliance by its members.²⁴

Additionally, the modernization of Rule 1049 promotes just and equitable principles of trade, removes impediments to and perfects the mechanism of a free and open market and a national market system, and protects investors and the public interest, because it is designed to alert members to requirements with respect to options communications and to bring clarity to its members and the public regarding the Exchange’s options communications rule. The Exchange therefore believes that the

²⁴ CBOE Rule 9.21 and FINRA Rules 2360(b)(18) and 2354 are designated as Common Rules under the 17d-2 Agreement.

proposed rule change will help ensure that investors are protected from potentially false or misleading communications with the public distributed by Exchange members.

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

The Exchange does not believe that the amendments to Rule 1049 proposed herein will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act inasmuch as the amendments conform Rule 1049 more closely to the Common Rules regarding options communications to customers under the 17d-2 Agreement.

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 Act²⁵ and subparagraph (f)(6) of Rule 19b-4 thereunder.²⁶

²⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁶ 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.

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: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the 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-2017-39 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-2017-39. 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 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-2017-39 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.²⁷

Eduardo A. Aleman
Assistant Secretary

²⁷ 17 CFR 200.30-3(a)(12).