

Required fields are shown with yellow backgrounds and asterisks.

Filing by NASDAQ PHLX LLC  
Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input checked="" type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010	Security-Based Swap Submission pursuant to the Securities Exchange Act of 1934
Section 806(e)(1) * <input type="checkbox"/>	Section 806(e)(2) * <input type="checkbox"/>
Section 3C(b)(2) * <input type="checkbox"/>	

Exhibit 2 Sent As Paper Document <input type="checkbox"/>	Exhibit 3 Sent As Paper Document <input type="checkbox"/>
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**Description**

Provide a brief description of the action (limit 250 characters, required when Initial is checked \*).

proposed rule change to update and modernize Rule 1049, to be retitled Options Communications.

**Contact Information**

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name \* Carla Last Name \* Behnfeldt  
 Title \* Associate General Counsel  
 E-mail \* Carla.Behnfeldt@nasdaq.com  
 Telephone \* (215) 496-5208 Fax

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title \*)

Date 06/08/2017 Executive Vice President and General Counsel  
 By Edward S. Knight

edward.knight@nasdaq.com

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFF website.

**Form 19b-4 Information \***

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies \***

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

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Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

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The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

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If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) NASDAQ PHLX LLC (“Phlx” or “Exchange”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal 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.

A notice of the proposed rule change for publication in the Federal Register is attached as Exhibit 1. The text of the proposed rule change is attached as Exhibit 5.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The proposed rule change was approved by the Board of Directors of the Exchange (the “Board”) on July 25, 2016. No other action is necessary for the filing of the rule change.

Questions and comments on the proposed rule change may be directed to

Carla Behnfeldt  
Associate General Counsel  
Nasdaq, Inc.  
(215) 496-5208

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

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

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

a. 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”).<sup>3</sup> 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 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

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<sup>3</sup> 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).

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.<sup>4</sup>

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-2013-043<sup>5</sup>; SR-CBOE-2010-035<sup>6</sup> and SR-CBOE-2007-30.<sup>7</sup> Current Phlx Rule 1049 is very similar 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

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

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

<sup>6</sup> 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 market letters which are no longer addressed in CBOE rules and are thus not addressed in this proposed rule change.

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

Rule 1049 would once again track CBOE Rule 9.21 nearly word for word.<sup>8</sup> 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”<sup>9</sup>, “educational material”<sup>10</sup> and “sales literature”<sup>11</sup>, and to

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<sup>8</sup> 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).

<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> 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

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.<sup>12</sup> 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 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

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communicated to customers or the public at seminars, lectures or similar such events, or any Exchange-produced materials pertaining to options.

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

incorporate limitations on the use of options communications currently contained in Commentary .01 of Rule 1049 into proposed Rule 1049(d).<sup>13</sup> 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.

*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

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<sup>13</sup> 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).

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.<sup>14</sup> 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-4<sup>15</sup> 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.

*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

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<sup>14</sup> See Phlx Rule 1025.

<sup>15</sup> 17 CFR 240.17a-4.

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).<sup>16</sup>

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 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.

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<sup>16</sup> 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).

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.

b. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>17</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>18</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 to protect investors and the public interest, by conforming Rule 1049 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)<sup>19</sup> 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

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<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>19</sup> 15 U.S.C. 78f(b)(1).

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 Agreement<sup>20</sup> the Commission noted that Section 19(g)(1) of the Act,<sup>21</sup> 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)<sup>22</sup> or Section 19(g)(2)<sup>23</sup> 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 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

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

<sup>21</sup> 15 U.S.C. 78s(g)(1).

<sup>22</sup> 15 U.S.C. 78q(d)(1).

<sup>23</sup> 15 U.S.C. 78s(g)(2).

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.<sup>24</sup>

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

#### 4. 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

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

to the Common Rules regarding options communications to customers under the 17d-2 Agreement.

5. 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.

6. Extension of Time Period for Commission Action

Not Applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(iii)<sup>25</sup> of the Act and Rule 19b-4(f)(6) thereunder<sup>26</sup> in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest. As discussed above, the proposed rule change is intended to eliminate regulatory duplication and unnecessary expense as contemplated by Commission Rule 17d-2, and to facilitate more efficient regulatory compliance by Exchange members. It is also designed to help ensure that investors are protected from potentially false or misleading communications with the public distributed by Exchange members.

Furthermore, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file a proposed rule change under that

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<sup>25</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>26</sup> 17 CFR 240.19b-4(f)(6).

subsection at least five business days prior to the date of filing, or such shorter time as designated by the Commission. The Exchange has provided such notice.

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.

7. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

As noted above the proposed rule change is based on the CBOE Rule 9.21. As amended, Rule 1049 will be nearly identical to CBOE Rule 9.21. The Phlx rule will continue to contain provisions for index warrants that do not appear in the CBOE rule. As addressed above, Phlx adopted these rules as part of a part of a comprehensive proposed rule change establishing rules for the listing and trading of stock index, currency and currency index warrants which may not have been necessary for CBOE.

9. Security-Based Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

1. Notice of proposed rule for publication in the Federal Register.
5. Text of the proposed rule change.

**EXHIBIT 1**

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

June \_\_, 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”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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.

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

<sup>2</sup> 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").<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup>

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-2013-043<sup>5</sup>; SR-CBOE-2010-035<sup>6</sup> and SR-CBOE-2007-30.<sup>7</sup> Current Phlx Rule 1049 is very similar

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

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

<sup>6</sup> 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.<sup>8</sup> 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”<sup>9</sup>, “educational material”<sup>10</sup> and “sales literature”<sup>11</sup>, and to

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

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

<sup>8</sup> 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).

<sup>9</sup> 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.<sup>12</sup> 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

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<sup>10</sup> 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.

<sup>11</sup> 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.

<sup>12</sup> 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).<sup>13</sup> 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.

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<sup>13</sup> 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.<sup>14</sup> 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-4<sup>15</sup> 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.

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<sup>14</sup> See Phlx Rule 1025.

<sup>15</sup> 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).<sup>16</sup>

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

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<sup>16</sup> 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,<sup>17</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>18</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 to protect investors and the public interest, by conforming Rule 1049

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<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 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)<sup>19</sup> 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 Agreement<sup>20</sup> the Commission noted that Section 19(g)(1) of the Act,<sup>21</sup> 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)<sup>22</sup> or Section 19(g)(2)<sup>23</sup> 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

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<sup>19</sup> 15 U.S.C. 78f(b)(1).

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

<sup>21</sup> 15 U.S.C. 78s(g)(1).

<sup>22</sup> 15 U.S.C. 78q(d)(1).

<sup>23</sup> 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.<sup>24</sup>

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

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<sup>24</sup> 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 Act<sup>25</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>26</sup>

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<sup>25</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>26</sup> 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](mailto: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.<sup>27</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>27</sup> 17 CFR 200.30-3(a)(12).

**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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