

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Eduardo A. Aleman,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-84536; File No. SR-Phlx-2018-63]

### Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 1101A, Terms of Option Contracts

November 5, 2018.

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 October 23, 2018, Nasdaq PHLX LLC (“Phlx” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 1101A, Terms of Option Contracts.

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.

#### 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 purpose of the proposed rule change is to adopt new Exchange Rules 1101A(e)(I), 1101A(f) and 1101A(g). Proposed Rules 1101A(e)(I) and 1101A(g) would establish the manner of determining an underlying index component security’s price for purposes of calculating the current index value at expiration of an overlying index option when (i) the primary market for that security does not open for trading on a given day, and (ii) the Options Clearing Corporation (“OCC”) does not exercise its authority to establish the index option settlement value.<sup>3</sup> They also acknowledge OCC’s authority under its own rules and by-laws to establish settlement prices in certain circumstances. Proposed new Rule 1101A(f) clarifies an issue relating to the level of indexes underlying A.M.-settled index options at expiration.

##### Proposed Rules 1101A(e)(I) and (g)

Exchange Rule 1101A(e) currently states that the current index value at the expiration of an A.M.-settled index option shall be determined, for all purposes under Exchange rules and OCC rules, on the last day of trading in the underlying securities prior to expiration, by reference to the reported level of such index as derived from first reported sale (opening) prices of the underlying securities on such day, *except* that in the event that the primary market for an underlying security is open for trading on that day, but that particular security does not open for trading on that day, the price of that security, for the purposes of calculating the current index value at expiration, shall be the last reported sale price of the security. The Exchange now proposes to add new Rule 1101A(g) to deal expressly with cases where the entire primary market for an underlying component security is *not* open on that day. Rule 1101A(g) would apply to both A.M.-settled and P.M.-settled index options.<sup>4</sup>

<sup>3</sup> Three of the Exchange’s affiliated options exchanges, Nasdaq ISE, LLC (“ISE”), The Nasdaq Stock Market LLC (“Nasdaq”) and Nasdaq BX, Inc. (“BX”), will also be proposing rule changes relating to the manner of determining an underlying index component security’s price for purposes of calculating the current index value at expiration of an index option under these circumstances. See SR-NASDAQ-2018-081, SR-BX-2018-049, and SR-ISE-2018-88. The Exchange desires its rules to be aligned with those of the affiliated exchanges.

<sup>4</sup> P.M.-settled options are settled based upon the closing index value for the day on which the index

Proposed Rule 1101A(g) would add an exception and would state that when the primary market for a security underlying the current index value of an index option does not open for trading on a given day which is an expiration day, for the purposes of calculating the settlement price at expiration, the last reported sale price of the security from the previous trading day shall be used. Proposed new Rule 1101A(g) would permit market participants the certainty of knowing the settlement value on the day on which the primary market fails to open. Additionally, the provision would eliminate the potential difficulties that could arise if the reporting authority for the index were unwilling or unable to calculate the settlement value using prices for the relevant security(ies) on the next day that its primary market is open for trading.<sup>5</sup>

The new rule would also state that this procedure shall not be used if the current index value at expiration is fixed in accordance with OCC rules and by-laws. This language recognizes that OCC is authorized under its rules and by-laws to take certain actions relating to settlement in the event of the unavailability or inaccuracy of the current underlying interest value.<sup>6</sup> The proposed language makes clear that Rule 1101A(g) would *not* apply in the event that OCC exercises its authority to determine settlement prices. Rather, the proposed new language would apply only when a primary market does not open and OCC elects not to exercise its authority to intervene and take action to establish a settlement price. The Exchange would otherwise defer to

options contract is exercised in accordance with OCC rules or, if such day is not a business day, for the most recent business day. See Phlx Rule 1101A(d).

<sup>5</sup> The index calculator for the NDX, MNX and BKX indexes, which are products traded on Nasdaq affiliated exchanges, uses the previous day’s closing price if components of the index do not open.

<sup>6</sup> See OCC By-Laws Article XVII, Section 4(a), which provides in relevant part that if OCC shall determine that the primary market for one or more index components did not open or remain open for trading (or that any such components did not open or remain open for trading on such market(s)) on a trading day at or before the time when the current index value for that trading day would ordinarily be determined, or that a current index value or other value or price to be used as, or to determine, the exercise settlement amount (a “required value”) for a trading day is otherwise unreported, inaccurate, unreliable, unavailable or inappropriate for purposes of calculating the exercise settlement amount, then, in addition to any other actions that OCC may be entitled to take under OCC’s bylaws and rules, the, OCC is empowered to take any or all of a range of permitted actions with respect to any series of options on such index, including fixing the exercise settlement amount. Proposed Rule 1101A(g) would apply to both A.M.-settled and P.M.-settled index options.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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

OCC. A cross-reference to Rule 1101A(g) would be added to Rule 1101A(e) by adding new Rule 1101A(e)(I).

Proposed Rule 1101A(e)(I) is based upon Chapter XIV, Section 11(a)(5)(i) of the Nasdaq Rulebook.

#### Proposed Rule 1101A(f)

Separately, the Exchange proposes to adopt new Rule 1101A(f), Index Level, intended to alert investors to the fact that the exercise settlement value of an index option that is derived from opening prices of the constituent securities (an "A.M.-settled index option") may not be reported for several hours following the opening of trading in those securities. A number of updated index levels may be reported at and after the opening before the exercise settlement value is reported, and there could be a substantial divergence between those reported index levels and the reported exercise settlement value. The proposed new rule would provide that the reported level of the underlying index that is calculated by the reporting authority for purposes of determining the current index value at the expiration of an A.M.-settled index option may differ from the level of the index that is separately calculated and reported by the reporting authority and that reflects trading activity subsequent to the opening of trading in any of the underlying securities. Proposed new Rule 1101A(f) is based upon Chapter XIV, Section 11(d) of the Nasdaq rulebook.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>8</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

As noted above, proposed Rules 1101A(e)(I) and (g) would establish clearly the procedure for determination of an index component security's price in the event that the primary market for the security fails to open. By adopting the proposed rule, the Exchange would provide certainty to the market regarding the procedure it would follow in the absence of action by OCC. Additionally, it would provide market participants with the certainty of knowing the settlement value on the day

on which the primary market fails to open.

It would also acknowledge clearly, however, that OCC may, under its rules and by-laws, establish settlement prices for expiring index options that may differ from the settlement prices that would otherwise be provided for in Exchange rules, thereby protecting investors and the public interest by reducing potential for confusion in that regard.

Likewise, proposed Rule 1101A(f) states clearly that the reported level of the underlying index that is calculated by the reporting authority for purposes of determining the current index value at the expiration of an A.M.-settled index option may differ from the level of the index that is separately calculated and reported by the reporting authority and that reflects trading activity subsequent to the opening of trading in any of the underlying securities, again protecting investors and the public interest by reducing potential for confusion arising from the fact that the exercise settlement value of an index option derived from opening prices of constituent securities may diverge from reported index levels.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. On the contrary, the Exchange believes that the proposed amendment will benefit investors, market participants, and the marketplace in general by setting forth clearly the manner in which index option settlement values will be determined if the primary market for a security underlying the current index value of an index option does not open for trading, and by stating that the Exchange will defer to OCC in the determination of settlement prices when and if OCC exercises its authority under its own settlement price procedures in accordance with its rules and by-laws. The proposal also provides clarity regarding the calculation of the index level, as distinct from the exercise settlement value, on the last day of trading in the underlying component securities of an A.M.-settled index option.

#### 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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup> Because the 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) of the Act and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>12</sup> normally does not become operative for 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>13</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. In its filing with the Commission, the Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing to provide certainty regarding the determination of settlement prices for index options when the primary market for a security underlying the current index value of an index option does not open for trading on an expiration day, including in instances in which OCC exercises its authority to determine the settlement price. The Exchange also noted that the proposed rule change will provide clarity by informing the market that the reported level of the underlying index that is calculated by the reporting authority for purposes of determining the current index value at the expiration of an A.M.-settled index option may differ from the level of the index that is separately calculated and reported by the reporting authority and that reflects trading activity subsequent to the opening of trading in the underlying securities. As such, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> In addition, Rule 19b-4(f)(6)(iii) 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.

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

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

interest and designates the proposed rule change operative upon filing.<sup>14</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>15</sup> of the Act to determine whether the proposed rule change 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-Phlx-2018-63 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-2018-63. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2018-63, and should be submitted on or before November 30, 2018.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Eduardo A. Aleman,**  
*Assistant Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

**[Investment Company Act Release No. 33288; 812-14924]**

#### **Toroso Investments, LLC and Tidal ETF Trust**

November 5, 2018.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice.

Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 2(a)(32), 5(a)(1), 22(d), and 22(e) of the Act and rule 22c-1 under the Act, under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act, and under section 12(d)(1)(J) of the Act for an exemption from sections 12(d)(1)(A) and 12(d)(1)(B) of the Act. The requested order would permit (a) actively-managed series of certain open-end management investment companies ("Funds") to issue shares redeemable in large aggregations only ("Creation Units"); (b) secondary market transactions in Fund shares to occur at negotiated market prices rather than at net asset value ("NAV"); (c) certain Funds to pay redemption proceeds, under certain circumstances, more than seven days after the tender of shares for redemption; (d) certain affiliated persons of a Fund to deposit securities into, and receive securities from, the Fund in connection with the purchase and redemption of Creation Units; (e)

certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the Funds ("Funds of Funds") to acquire shares of the Funds; (f) certain Funds ("Feeder Funds") to create and redeem Creation Units in-kind in a master-feeder structure; and (g) the Funds to issue shares in less than Creation Unit size to investors participating in a distribution reinvestment program.

**APPLICANTS:** Toroso Investments, LLC ("Initial Adviser"), a Delaware limited liability company that will be registered as an investment adviser under the Investment Advisers Act of 1940, and Tidal ETF Trust ("Trust"), a Delaware statutory trust that will be registered under the Act as an open-end management investment company with multiple series.

**FILING DATES:** The application was filed on June 22, 2018, and amended on October 16, 2018. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on November 30, 2018, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090; Applicants, 898 N. Broadway, Suite 2, Massapequa, NY 11758.

**FOR FURTHER INFORMATION CONTACT:** Christine Y. Greenlees, Senior Counsel, at (202) 551-6879, or Andrea Ottomanelli Magovern, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's website by searching for the file number, or for an applicant using the

<sup>14</sup> For purposes only of waiving the operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>15</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>16</sup> 17 CFR 200.30-3(a)(12).