

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 *).

A proposal to amend Exchange Rules 605 and 1049

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 * Aravind Last Name * Menon
 Title * Senior Associate General Counsel
 E-mail * aravind.menon@nasdaq.com
 Telephone * (301) 978-8416 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 08/05/2019 Global Chief Legal & Policy Officer
 By Edward S. Knight edward.knight@nasdaq.com
 (Name *)

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 *

Add Remove View

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 *

Add Remove View

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

Add Remove View

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

Add Remove View

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”)¹ and Rule 19b-4 thereunder,² is filing with the Securities and Exchange Commission (“SEC” or “Commission”) a proposal to amend Exchange Rules 605 and 1049, titled “Advertisements, Market Letters, Research Reports and Sales Literature” and “Options Communications.”

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 senior management of the Exchange pursuant to authority delegated by the Board of Directors of the Exchange (the “Board”) on September 26, 2018. Exchange staff will advise the Board of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change.

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

Aravind Menon
Senior Associate General Counsel
Nasdaq, Inc.
301-978-8416

¹ 15 U.S.C. 78s(b)(1).

² 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 purpose of this rule change is to adopt advertising requirements within Rules 605 and 1049, titled, "Advertisements, Market Letters, Research Reports and Sales Literature" and "Options Communications". The changes are described in more detail below.

Definitions

The Exchange proposes to amend Rules 605 and 1049 to incorporate by reference Financial Industry Regulatory Authority ("FINRA") Rules 2210 ("FINRA 2210") and 2220 ("FINRA 2220"), respectively, as rules of Phlx. These proposed rule changes will apply the same advertising requirements applicable to members of Nasdaq Stock Market LLC ("Nasdaq") and Nasdaq Options Market ("NOM") to Phlx. Nasdaq incorporated FINRA 2210 by reference in 2006.³ Similarly, Section 22 of Chapter XI of NOM Rules incorporated FINRA rules regarding communications with the public in 2008.⁴ The proposed rule changes will require members of Phlx to comply with FINRA 2210 and FINRA 2220 when issuing any communication to the public. Specifically, Phlx Rule 605

³ See Securities Exchange Act Release No. 53128, (January 13, 2006), 71 FR 3550 (January 23, 2006) (In the Matter of the Application of the Nasdaq Stock Market LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission), which approved the incorporation by reference of NASD rule 2210, among others, into the Nasdaq rulebook. See also Securities Exchange Act Release No. 85188 (February 25, 2019), 84 FR 7138 (March 1, 2019) (SR-NASDAQ-2019-008), approving Nasdaq rule change updating references to NASD Rule 2210 to FINRA Rule 2210.

⁴ See Securities Exchange Act Release No. 57478, (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080), which approved, among other changes, the incorporation by reference of certain FINRA rules as NOM rules.

would require a Phlx member to comply with FINRA 2210 as if it were a rule of Phlx itself.⁵ Likewise, Phlx Rule 1049 would require a Phlx member to comply with FINRA 2220 as if it were a rule of Phlx itself.⁶

The Exchange believes that requiring Phlx members to comply with FINRA 2210 and FINRA 2220 will provide consistency of marketing materials used by members of Nasdaq, NOM and Phlx as well as harness the knowledge and expertise of FINRA in their review of marketing materials.⁷ Furthermore, the proposed rule change will impose a heightened standard on Phlx members in comparison to existing Phlx Rule 605 which simply calls for either the Phlx member, a general partner or holder of voting stock in the member to have endorsed their approval of the communication prior to publication or distribution.⁸

⁵ We note that Phlx members will not be required to comply with FINRA 2210(c). This is consistent with Nasdaq Rule 2210 which excludes FINRA 2210(c) from the public communications rules applicable to Nasdaq members.

⁶ The Exchange notes that the proposed rule change would not subject Phlx members to compliance with FINRA 2210c. As most Phlx members are currently members of FINRA, those members have already been subject to FINRA 2210 in its entirety, including sub-part (c). Only those Phlx members that are not FINRA members, and as a result do not conduct securities transactions and business with the investing public, will be relieved of the obligation to comply with FINRA 2210c (the portion of the rule requiring submission of communications for review prior to publication). The proposed rule change will not relieve any existing FINRA member of the obligation to comply with rules regarding communications with the public.

⁷ The Nasdaq OMX Group and FINRA entered into a Regulatory Services Agreement (RSA) dated January 1, 2013. Pursuant to this agreement, FINRA has performed member regulation for all Nasdaq exchanges. As a result of the proposed rule change, FINRA will now review all public marketing materials produced by Phlx members.

⁸ Phlx Rule 605 also calls for retention of a copy of the communication for a period of three years. Rule 605 also imposes obligations on firms for whom Phlx serves

FINRA 2210(b)(1)(A) requires an appropriately qualified registered principal to approve each retail communication before the earlier of its use or filing with FINRA's Advertising Regulation Department. The requirements of FINRA 2210(b)(1)(A) may be satisfied by a Supervisory Analyst approved pursuant to FINRA Rule 1220(a)(14)⁹ with respect to (i) research reports on debt and equity securities as described in FINRA Rule 2241(a)(11) and FINRA Rule 2242(a)(3); (ii) retail communications as described in FINRA Rule 2241(a)(11)(A) and FINRA Rule 2242(a)(3)(A); and (iii) other research communications, provided that the Supervisory Analyst has technical expertise in the particular product area. A Supervisory Analyst may not approve a retail communication that requires a separate registration unless the Supervisory Analyst also has such other registration.

The Exchange believes the application of FINRA 2210 to the Exchange's membership will benefit the broader marketplace by adopting FINRA's requirement that marketing materials be reviewed by appropriately qualified registered principals of a member. This will promote the public interest by helping to prevent inaccurate or

as the designated examining authority. Continued application of these requirements would be superfluous once FINRA Rule 2210 becomes effective.

⁹ FINRA Rule 1220(a)(14) lists the Principal Registration Category of Supervisory Analyst. Each principal as defined in paragraph (a)(1) of Rule 1220 may register with FINRA as a Supervisory Analyst if his or her activities are limited to approving the following: (i) the content of a member's research reports on equity securities; (ii) the content of a member's research reports on debt securities; (iii) the content of third-party research reports; (iv) retail communications as described in Rule 2241(a)(11)(A); or (v) other research communications that do not meet the definition of "research report" under Rule 2241, provided that the Supervisory Analyst has technical expertise in the particular product area. The activities of a Supervisory Analyst engaged in equity research shall be supervised by a Research Principal registered pursuant to paragraph (a)(6) of Rule 1220.

misleading information going to investors. We note that Phlx Rule 1049 is similar in substance to FINRA Rule 2220.¹⁰

The proposed rule change will not create a burdensome compliance obligation for Phlx members. Of the existing one hundred sixteen members of Phlx, ninety-one are also members of Nasdaq. In light of the overlap in membership of the two exchanges, the proposed rule changes will allow for easier compliance with rules of both exchanges since members of both exchanges will now have identical compliance obligations with respect to communications with the public.

b. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹² in particular, in that it is designed to promote just and equitable principles of trade and to protect investors and the public interest by bringing greater transparency and consistency to its rules. Requiring Phlx members to comply with FINRA 2210 and FINRA 2220 will add conformity to the advertising requirements for members of Nasdaq, NOM and Phlx exchanges. Conformity in marketing rules will aide member firms as they will have a uniform set of rules to adhere to when issuing communications to their customers across multiple markets. This will reduce the likelihood of confusion as to compliance

¹⁰ While Phlx Rule 1049 and FINRA 2220 are substantively similar, there are differences in the rules regarding review of communications by members found to have departed from the standards of FINRA 2220. In the event FINRA finds a member to have departed from the standards of FINRA 2220, FINRA may require the member to file some or all options communications with the Advertising Regulation Department at least ten calendar days prior to first use.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

obligations and promote compliance with Exchange rules and the delivery of clear, accurate information to the public. Both outcomes are in the public interest and further the objectives of Section 6(b)(5) of the Act. Compliance with FINRA 2210 and FINRA 2220 will also provide greater protection to the public as FINRA has significant experience in reviewing marketing and advertising material having done so for various Nasdaq exchanges and FINRA's own membership. FINRA review of marketing materials will help protect investors, further meeting the goals of Section 6(b)(5) of the Act.

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

The Exchange believes that the proposed rule changes will not impose an undue burden on competition because the requirement to comply with FINRA Rules 2210 and FINRA 2220 will apply to all Phlx members equally.

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)¹³ of the Act and Rule 19b-4(f)(6) thereunder¹⁴ in that it effects a change that: (i) does not significantly affect the protection of investors or the public interest; (ii)

¹³ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁴ 17 CFR 240.19b-4(f)(6).

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.

The Exchange believes that this proposal does not significantly affect the protection of investors or the public interest because the rule change is intended to bring greater transparency and consistency to the Exchange's rules. The proposed rule change does not impose any significant burden on competition because the rule change will apply to all members equally.

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 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.

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

The proposed rule change is based on FINRA 2210 and FINRA 2220, two rules that have already been applied to Nasdaq and NOM.

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 Change 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-2019-28)

August __, 2019

Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Exchange Rules 605 and 1049

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on August 5, 2019, 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 Exchange Rules 605 and 1049, titled “Advertisements, Market Letters, Research Reports and Sales Literature” and “Options Communications.

The text of the proposed rule change is available on the Exchange’s Website at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

The purpose of this rule change is to adopt advertising requirements within Rules 605 and 1049, titled, “Advertisements, Market Letters, Research Reports and Sales Literature” and “Options Communications”. The changes are described in more detail below.

Definitions

The Exchange proposes to amend Rules 605 and 1049 to incorporate by reference Financial Industry Regulatory Authority (“FINRA”) Rules 2210 (“FINRA 2210”) and 2220 (“FINRA 2220”), respectively, as rules of Phlx. These proposed rule changes will apply the same advertising requirements applicable to members of Nasdaq Stock Market LLC (“Nasdaq”) and Nasdaq Options Market (“NOM”) to Phlx. Nasdaq incorporated FINRA 2210 by reference in 2006.³ Similarly, Section 22 of Chapter XI of NOM Rules

³ See Securities Exchange Act Release No. 53128, (January 13, 2006), 71 FR 3550 (January 23, 2006) (In the Matter of the Application of the Nasdaq Stock Market LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission), which approved the incorporation by reference of NASD rule 2210, among others, into the Nasdaq rulebook. See also Securities Exchange Act Release No. 85188 (February 25, 2019), 84 FR 7138 (March 1,

incorporated FINRA rules regarding communications with the public in 2008.⁴ The proposed rule changes will require members of Phlx to comply with FINRA 2210 and FINRA 2220 when issuing any communication to the public. Specifically, Phlx Rule 605 would require a Phlx member to comply with FINRA 2210 as if it were a rule of Phlx itself.⁵ Likewise, Phlx Rule 1049 would require a Phlx member to comply with FINRA 2220 as if it were a rule of Phlx itself.⁶

The Exchange believes that requiring Phlx members to comply with FINRA 2210 and FINRA 2220 will provide consistency of marketing materials used by members of Nasdaq, NOM and Phlx as well as harness the knowledge and expertise of FINRA in their review of marketing materials.⁷ Furthermore, the proposed rule change will impose

2019) (SR-NASDAQ-2019-008), approving Nasdaq rule change updating references to NASD Rule 2210 to FINRA Rule 2210.

⁴ See Securities Exchange Act Release No. 57478, (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080), which approved, among other changes, the incorporation by reference of certain FINRA rules as NOM rules.

⁵ We note that Phlx members will not be required to comply with FINRA 2210(c). This is consistent with Nasdaq Rule 2210 which excludes FINRA 2210(c) from the public communications rules applicable to Nasdaq members.

⁶ The Exchange notes that the proposed rule change would not subject Phlx members to compliance with FINRA 2210c. As most Phlx members are currently members of FINRA, those members have already been subject to FINRA 2210 in its entirety, including sub-part (c). Only those Phlx members that are not FINRA members, and as a result do not conduct securities transactions and business with the investing public, will be relieved of the obligation to comply with FINRA 2210c (the portion of the rule requiring submission of communications for review prior to publication). The proposed rule change will not relieve any existing FINRA member of the obligation to comply with rules regarding communications with the public.

⁷ The Nasdaq OMX Group and FINRA entered into a Regulatory Services Agreement (RSA) dated January 1, 2013. Pursuant to this agreement, FINRA has performed member regulation for all Nasdaq exchanges. As a result of the

a heightened standard on Phlx members in comparison to existing Phlx Rule 605 which simply calls for either the Phlx member, a general partner or holder of voting stock in the member to have endorsed their approval of the communication prior to publication or distribution.⁸

FINRA 2210(b)(1)(A) requires an appropriately qualified registered principal to approve each retail communication before the earlier of its use or filing with FINRA's Advertising Regulation Department. The requirements of FINRA 2210(b)(1)(A) may be satisfied by a Supervisory Analyst approved pursuant to FINRA Rule 1220(a)(14)⁹ with respect to (i) research reports on debt and equity securities as described in FINRA Rule 2241(a)(11) and FINRA Rule 2242(a)(3); (ii) retail communications as described in FINRA Rule 2241(a)(11)(A) and FINRA Rule 2242(a)(3)(A); and (iii) other research communications, provided that the Supervisory Analyst has technical expertise in the particular product area. A Supervisory Analyst may not approve a retail communication

proposed rule change, FINRA will now review all public marketing materials produced by Phlx members.

- ⁸ Phlx Rule 605 also calls for retention of a copy of the communication for a period of three years. Rule 605 also imposes obligations on firms for whom Phlx serves as the designated examining authority. Continued application of these requirements would be superfluous once FINRA Rule 2210 becomes effective.
- ⁹ FINRA Rule 1220(a)(14) lists the Principal Registration Category of Supervisory Analyst. Each principal as defined in paragraph (a)(1) of Rule 1220 may register with FINRA as a Supervisory Analyst if his or her activities are limited to approving the following: (i) the content of a member's research reports on equity securities; (ii) the content of a member's research reports on debt securities; (iii) the content of third-party research reports; (iv) retail communications as described in Rule 2241(a)(11)(A); or (v) other research communications that do not meet the definition of "research report" under Rule 2241, provided that the Supervisory Analyst has technical expertise in the particular product area. The activities of a Supervisory Analyst engaged in equity research shall be supervised by a Research Principal registered pursuant to paragraph (a)(6) of Rule 1220.

that requires a separate registration unless the Supervisory Analyst also has such other registration.

The Exchange believes the application of FINRA 2210 to the Exchange's membership will benefit the broader marketplace by adopting FINRA's requirement that marketing materials be reviewed by appropriately qualified registered principals of a member. This will promote the public interest by helping to prevent inaccurate or misleading information going to investors. We note that Phlx Rule 1049 is similar in substance to FINRA Rule 2220.¹⁰

The proposed rule change will not create a burdensome compliance obligation for Phlx members. Of the existing one hundred sixteen members of Phlx, ninety-one are also members of Nasdaq. In light of the overlap in membership of the two exchanges, the proposed rule changes will allow for easier compliance with rules of both exchanges since members of both exchanges will now have identical compliance obligations with respect to communications with the public.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹² in particular, in that it is designed to promote just and equitable principles of trade and to

¹⁰ While Phlx Rule 1049 and FINRA 2220 are substantively similar, there are differences in the rules regarding review of communications by members found to have departed from the standards of FINRA 2220. In the event FINRA finds a member to have departed from the standards of FINRA 2220, FINRA may require the member to file some or all options communications with the Advertising Regulation Department at least ten calendar days prior to first use.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

protect investors and the public interest by bringing greater transparency and consistency to its rules. Requiring Phlx members to comply with FINRA 2210 and FINRA 2220 will add conformity to the advertising requirements for members of Nasdaq, NOM and Phlx exchanges. Conformity in marketing rules will aide member firms as they will have a uniform set of rules to adhere to when issuing communications to their customers across multiple markets. This will reduce the likelihood of confusion as to compliance obligations and promote compliance with Exchange rules and the delivery of clear, accurate information to the public. Both outcomes are in the public interest and further the objectives of Section 6(b)(5) of the Act. Compliance with FINRA 2210 and FINRA 2220 will also provide greater protection to the public as FINRA has significant experience in reviewing marketing and advertising material having done so for various Nasdaq exchanges and FINRA's own membership. FINRA review of marketing materials will help protect investors, further meeting the goals of Section 6(b)(5) of the Act.

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

The Exchange believes that the proposed rule changes will not impose an undue burden on competition because the requirement to comply with FINRA Rules 2210 and FINRA 2220 will apply to all Phlx members equally.

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 Act¹³ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴

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 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 to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2019-28 on the subject line.

¹³ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁴ 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.

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-2019-28. 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-2019-28 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.¹⁵

Eduardo A. Aleman
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).

EXHIBIT 5

New text is underlined; deleted text is in brackets.

Nasdaq PHLX Rules

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Rule 605. Advertisements, Market Letters, Research Reports and Sales Literature

(a) Nasdaq PHLX members and persons associated with a member shall comply with FINRA Rule 2210 (except FINRA Rule 2210(c)) as if such Rule were part of Nasdaq PHLX's Rules. Nasdaq PHLX and FINRA are parties to the Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of Nasdaq PHLX. Therefore, Nasdaq PHLX members are complying with Nasdaq PHLX Rule 605 by complying with FINRA Rule 2210 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Nasdaq Phlx Rule 605 are being performed by FINRA on Nasdaq's behalf. [No member or member organization shall issue any advertisement, market letter, research report, telemarketing script or sales literature unless such member organization or a general partner or a holder of voting stock in such organization shall have endorsed his approval prior to publication or distribution thereof on an exact copy thereof bearing the name of the person who wrote such material. Such copy so endorsed shall be made part of the permanent records of such member organization and shall be retained for three years, two years in an easily accessible location.

(b) Member organizations for which the Exchange is the designated examining authority ("DEA") desiring to broadcast Exchange quotations on radio or television programs, or in public telephone market reports, or make use of radio or television broadcasts or print advertising for any business purpose, or to make use of the Internet for the purpose of providing market quotations or advertising to the general public must first obtain the consent of the Exchange by submitting an outline of the program material to the Exchange.

(c) The text of all commercials, advertisements and program material (except lists of market quotations) about securities or investing sponsored by an Exchange designated member organization on radio, television, or public telephone reports, or on the Internet, or program material supplied to these media must be sent to the Exchange promptly following the program in which it is used.]

••• *Supplementary Material:* -----

No change.

Rule 1049. Options Communications

(a) Nasdaq PHLX members and persons associated with a member shall comply with FINRA Rule 2220 (except FINRA Rule 2220(c)) as if such Rule were part of Nasdaq PHLX's Rules. Nasdaq PHLX and FINRA are parties to the Regulatory Contract pursuant to which FINRA has agreed to perform certain functions on behalf of Nasdaq PHLX. Therefore, Nasdaq PHLX members are complying with Nasdaq PHLX Rule 1049 by complying with FINRA Rule 2220 as written, including, for example, filing requirements and notifications. In addition, functions performed by FINRA, FINRA departments, and FINRA staff under Nasdaq Phlx Rule 1049 are being performed by FINRA on Nasdaq's behalf.[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.

- (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.* In addition to the approval required by paragraph (b) of this Rule, 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 communication has been resubmitted for, and has received, Exchange approval. The requirements of this paragraph shall not be applicable to:

- (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.

(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.

.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.

.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.

.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.

.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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