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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77341; File No. SR-Phlx-2015-94)

March 10, 2016

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, to Make Permanent the Pilot Program Eliminating Minimum Value Sizes for Opening Transactions in New Series of FLEX Options

I. Introduction

On November 25, 2015, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to make permanent its pilot program (“Pilot Program”) eliminating minimum value sizes for requests for quotes (“RFQs”) for opening transactions in new series of flexible exchange options (“FLEX Options” or “FLEX”). The proposed rule change was published for comment in the Federal Register on December 14, 2015.³ The Commission received no comments on the proposal. On January 28, 2016, the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁴ The Exchange filed Amendment No. 1 to the proposed rule change on February 22, 2016, in order to transmit an updated pilot report that supplements Exhibit 3 to the filing, and to provide additional information regarding

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 76593 (December 8, 2015), 80 FR 77399 (“Notice”).

⁴ See Securities Exchange Act Release No. 76989, 81 FR 5811 (February 3, 2016). The Commission designated March 13, 2016, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.

transactions covered by the Pilot Program and FLEX Option trading on the Exchange.⁵ The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Amended Proposal

FLEX Options, unlike traditional standardized options, allow investors to customize basic option terms, including size, expiration date, exercise style, and certain exercise prices.⁶ Pursuant to Commentary .01 to Rule 1079, the Exchange currently has in place a Pilot Program under which the minimum size requirements set forth in Rules 1079(a)(8)(A)(i) and (ii), which apply to RFQs for opening transactions in new series of FLEX Options, are eliminated.⁷ Prior to

⁵ The Exchange attached an Exhibit 3 to its proposed rule change that contains an initial report summarizing pilot data collected for the period December 1, 2014 through July 31, 2015. Specifically, the report summarizes the trading volume and underlying value of opening transactions in new series of FLEX Options with a size below the minimum value thresholds in force before the pilot, as well as the types of customers initiating such transactions. In Amendment No. 1, the Exchange submitted an updated report as an amendment to Exhibit 3 that supplements the original Exhibit 3 with summary pilot data for the period August 1, 2015 through December 31, 2015 (together with the initial report, “Pilot Report”). In addition, in Amendment No. 1 the Exchange compares the total volume and value of opening transactions in new series of FLEX Options covered by the Pilot Program during the period December 2014 through December 2015 to the total volume and value of all opening FLEX Option transactions in new series during the same period. Further, in Amendment No. 1 the Exchange also compares the Exchange’s FLEX Option trading volume to the Exchange’s overall, combined trading volume for standardized options and FLEX Options.

⁶ See Notice; see also Phlx Rule (“Rule”) 1079. FLEX equity, FLEX index, and FLEX currency options are traded on the Exchange, but the Pilot Program encompasses only FLEX equity and FLEX index options, and does not encompass FLEX currency options. See Notice; Commentary .01 to Rule 1079; References to “FLEX Options” or “FLEX” for purposes of this filing are meant to refer only to FLEX equity and FLEX index options.

⁷ See Commentary .01 to Rule 1079; see also Securities Exchange Act Release Nos. 62900 (September 13, 2010), 75 FR 57098 (September 17, 2010) (SR-Phlx-2010-123) (establishing Pilot Program); and 77153 (February 17, 2016) 81 FR 9039 (February 23, 2016) (SR-Phlx-2016-19) (extending Pilot Program until the earlier of March 15, 2016,

the Pilot Program, pursuant to Rules 1079(a)(8)(A)(i) and (ii), the minimum value size for a RFQ for an opening transaction in a FLEX series in which there was no open interest at the time the RFQ was submitted was: (i) for FLEX index options, \$10 million underlying equivalent value with respect to FLEX market index options and \$5 million underlying equivalent value with respect to FLEX industry index options; and (ii) for FLEX equity options, the lesser of 250 contracts or the number of contracts overlying \$1 million in the underlying securities.⁸

By proposing to make the Pilot Program permanent, the Exchange is seeking to establish a one-contract minimum size for RFQs for opening transactions in new series of FLEX Options.⁹ Specifically, the Exchange's proposal would make the Pilot Program permanent by amending Rules 1079(a)(8)(A)(i) and (ii) to replace the current minimum sizes specified therein with a one contract minimum size for all FLEX Options,¹⁰ and by eliminating the Pilot Program rule text set forth in Commentary .01 to Rule 1079.¹¹ In connection with its proposal to make the Pilot Program permanent, the Exchange submitted to the Commission a Pilot Report summarizing

or approval of the Pilot Program on a permanent basis). The term "request for quotes" is defined in Rule 1079(a)(11).

⁸ See Rules 1079(a)(8)(A)(i) and (ii). The term "underlying equivalent value" is defined in Rule 1079(a)(8)(D).

⁹ The Commission notes, as originally proposed, that the pilot program set forth no minimum contract sizes for opening transactions. In proposing to permanently approve the pilot, the Exchange is adopting a one contract size minimum, which essentially is the same as having no minimum contract size.

¹⁰ The new one contract minimum size would apply to FLEX market index options (which are designed to be representative of a stock market as a whole or a range of companies in unrelated industries), FLEX industry index options (which are designed to be representative of a particular industry or a group of related industries), and FLEX equity options. See Rule 1000A (providing definitions for market and industry indexes). Because, as noted above (see *supra* note 6), the Pilot Program did not encompass FLEX currency options, such options would continue to have the 50-contract minimum size requirement set forth in Rule 1079(a)(8)(A)(iii). See Notice.

¹¹ See Notice; see also proposed Rules 1079(a)(8)(A)(i) and (ii).

Pilot Program data collected for the period December 2014 through December 2015.¹² In addition, the Exchange states that its proposal to make the Pilot Program permanent and thereby eliminate the minimum size requirements applicable to RFQs for opening transactions in new FLEX series on the Exchange is similar to rule changes by NYSE Arca and CBOE adopting similar pilot programs on a permanent basis.¹³

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as amended, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁴ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹⁵ which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect

¹² See supra note 5. Specifically, as noted above, the Pilot Report contains data and analysis on open interest and trading volume, and as well as on the types of investors that initiated opening FLEX Options transactions (i.e., institutional, high net worth, or retail) in new FLEX Option series. Id. As is also noted above, Amendment No. 1 contains additional data regarding transactions covered by the Pilot Program and FLEX Option trading on the Exchange. Id.

¹³ See Notice (citing Securities Exchange Act Release Nos. 72537 (July 3, 2014), 79 FR 39442 (July 10, 2014) (SR-NYSEArca-2014-25) (order approving NYSE Arca's proposal to make permanent its pilot program eliminating minimum value sizes for FLEX Options) and 67624 (August 8, 2012), 77 FR 48580 (August 14, 2012) (order approving CBOE's proposal to make permanent its pilot program eliminating minimum value sizes for FLEX Options)).

¹⁴ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78f(b)(5).

investors and the public interest; and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

FLEX Options were originally designed for use by institutional and high net worth customers, rather than retail investors.¹⁶ In approving CBOE's pilot eliminating minimum value sizes for FLEX Options, which was the first such pilot to be approved on a permanent basis, the Commission noted that it had received several comment letters stating that the proposal would assist institutional customers, but it also noted that the elimination of the minimum value size requirements raised the possibility that retail customers would access the FLEX Options market.¹⁷ One of the risks to retail investors outlined in the ODD¹⁸ is that, because of the customized nature of FLEX Options and lack of continuous quotes, trading in FLEX Options is often less deep and liquid than trading in standardized options on the same underlying interest.¹⁹ Additionally, the Commission notes in the CBOE Permanent Approval Order that reducing the minimum value size for opening FLEX Option transactions increases the potential for the FLEX

¹⁶ See Notice; see also Securities Exchange Act Release No. 36841 (February 14, 1996), 61 FR 6666 (February 21, 1996) (order approving SR-PSE-95-24). As noted in the Options Disclosure Document ("ODD"), which explains the characteristics and risks of exchange-traded options, flexibly structured options may be useful to sophisticated investors seeking to manage particular portfolio and trading risks. Rule 9b-1 under the Act requires that broker-dealers furnish the ODD to a customer before accepting an order from the customer to purchase or sell an option contract relating to an options class that is the subject of the ODD, or approving the customer's account for the trading of such option. See 17 CFR 240.9b-1(d).

¹⁷ See Securities Exchange Act Release No. 61439 (January 28, 2010), 75 FR 5831 (February 4, 2010) (order approving SR-CBOE-2009-087) ("CBOE Permanent Approval Order").

¹⁸ See supra note 16.

¹⁹ In particular, the ODD states that because many of the terms of FLEX Options are not standardized, it is less likely that there will be an active secondary market in which holders and writers of such options will be able to close out their positions by offsetting sales and purchases. Also, the ODD states that certain margin requirements for positions in flexibly structured options may be significantly greater than the margin requirements applicable to similar positions in other options on the same underlying interest.

Options market to act as a surrogate for the standardized options market, and expressed concern in this regard because the standardized market contains certain protections for investors not present in the FLEX Options market.²⁰ The Commission stated that, in the event CBOE proposed making its pilot program permanent, information regarding the types of customers initiating opening FLEX Option transactions during the pilot would enable the Commission to evaluate how market participants have responded to CBOE's pilot program and what types of customers are using the FLEX Options market.²¹ For these same reasons, at the Commission's request, the Exchange included in its Pilot Report information regarding the types of customers that initiated opening FLEX Option transactions under its Pilot Program.²²

The Commission believes that these considerations and concerns that informed its analysis of whether to permanently approve CBOE's pilot are equally germane to its analysis here. As such, the Commission has carefully reviewed the Pilot Report data and other information that the Exchange provided to the Commission as Exhibit 3 to its rule filing, as amended by Amendment No. 1.²³ The Pilot Report reflects that, for the period December 1, 2014 through December 31, 2015, there were 457 opening transactions in new series of FLEX equity options initiated on the Exchange with small minimum value sizes made possible by the Pilot Program, 12 of which were initiated by retail customers, 37 of which were initiated by high

²⁰ See CBOE Permanent Approval Order, supra note 17. In particular, the Commission noted that continuous quotes may not always be available in the FLEX Options market and that FLEX Options do not have trading rotations at either the opening or closing of trading. Id.

²¹ Id. The Exchange has submitted a Pilot Report to the Commission as Exhibit 3 to its filing, as well as other, confidential reports of data collected during the Pilot Program.

²² See Exhibit 3 to the Exchange's rule filing, as amended by Amendment No. 1, supra note 5.

²³ Id.

net worth customers, and 409 of which were initiated by institutional customers.²⁴ In addition, the Pilot Report reflects that there were 12 opening transactions in new series of FLEX index options initiated on the Exchange pursuant to the Pilot Program, none of which were initiated by retail customers, 5 of which were initiated by high net worth customers, and 7 of which were initiated by institutional customers.²⁵ Overall, only a limited number of retail customers, as defined by the Exchange, appear to have availed themselves of the pilot and entered into opening transactions in new series of FLEX Options with small minimum value sizes. Moreover, the Exchange has stated that, during the period December 2014 through December 2015, the 457 opening transactions in new series of FLEX equity options covered by the Pilot Program accounted for approximately 6.3% of the total volume and approximately 3.7% of the total value of all opening FLEX equity options transactions in new series – i.e., opening transactions covered by the Pilot Program as well as opening transactions with value sizes above the pre-pilot minimum.²⁶ The Exchange has also stated that, during the period December 2014 through December 2015, the 12 opening transactions in new series of FLEX index options covered by the Pilot Program accounted for approximately 8.8% of the total volume and approximately 4.1% of the total value of all opening FLEX index option transactions in new series.²⁷ Furthermore, it is

²⁴ Id. The Exchange categorized a trade as initiated by a retail customer if the option premium was less than \$5,000, as initiated by a high net worth customer if the option premium was between \$5,000 and \$49,000, and as initiated by an institutional customer if the option premium was greater than \$50,000. Id.

²⁵ Id.

²⁶ Id.

²⁷ Id. The Exchange notes that the Pilot Report covers only RFQs for opening transactions in new series of FLEX Options, as per the Pilot Program. The Pilot Report does not cover RFQs for transactions in currently-opened FLEX Option series or responsive quotes for FLEX Options pursuant to Rules 1079(a)(8)(B) or (C), respectively, as transactions in currently-opened FLEX Option series and responsive quotes were not part of the Pilot Program. See Notice.

the Commission's understanding that FLEX Option trading on the Exchange accounts for less than 1.37% of the Exchange's combined trading volume for standardized and FLEX options.²⁸ Notably, the Exchange represents that it has not experienced any adverse market effects with respect to the Pilot Program.²⁹

On balance, the Commission believes that it is consistent with the Act to make the Pilot Program permanent and thus eliminate, on a permanent basis, the minimum value size requirements currently set forth in Rules 1079(a)(8)(A)(i) and (ii) for RFQs for opening transactions in new series of FLEX Options. The protections noted below, including heightened options suitability requirements, should help to address any concerns about the potential for retail participation in the Exchange's FLEX Options market in the future. Moreover, the Commission is not aware of any data or analysis to date suggesting that the trading of FLEX Options has acted as a surrogate for the trading of standardized options on the Exchange as a result of the Pilot Program. Indeed, as is stated above, the Commission understands that FLEX Option trading on the Exchange accounts for less than 1.37% of the Exchange's combined trading volume for standardized and FLEX options.³⁰ In addition, the Exchange has indicated that Pilot Program FLEX Option trades account for a very small proportion of the total volume and total value of all FLEX Option trades.³¹ Thus, it appears that the Pilot Program has not caused significant trading interest to migrate from the Exchange's standardized options market to its FLEX Options market, nor caused, to the best of our knowledge, a large number of investors to use FLEX Options to avoid certain requirements in the standardized market. Based on the

²⁸ See Exhibit 3 to the Exchange's rule filing, as amended by Amendment No. 1, supra note 5.

²⁹ Id.

³⁰ Id.

³¹ Id.

current data and size of the FLEX Options market, and the lack of any evidence to the contrary, it would appear that investors are using the FLEX Options market for its intended purpose – to be able to customize certain terms not available in the standardized options market. Further, the Commission notes that it is not aware of any problems resulting from the permanent approval of NYSE Arca’s and CBOE’s similar pilots eliminating FLEX Option minimum value sizes. As a result, the Commission believes that it is appropriate under the Act, and would promote just and equitable principles of trade, as well as remove impediments to and perfect the mechanism of a free and open market and a national market system, to permanently eliminate the current minimum value size requirements for RFQs for opening transactions in new series of FLEX Options and replace them with a one-contract minimum size.

Existing safeguards – such as position reporting requirements and margin requirements – will continue to apply to FLEX Options.³² Further, as noted above, under Rule 9b-1 under the Act,³³ all customers of a broker-dealer with options accounts approved to trade FLEX Options must receive the ODD, which contains specific disclosures about the characteristics and special risks of trading FLEX Options.³⁴ In addition, similar to other options, FLEX Options are subject to Trading Permit Holder supervision and suitability requirements, such as in Rules 1025 and 1026, respectively.³⁵ In addition to ensuring that FLEX Options are suitable for their customers, broker-dealers also must take into account the characteristics of the FLEX market, as compared to the standardized market, when satisfying their best execution obligations. The Commission

³² Certain position limit, aggregation and exercise limit requirements continue to apply to FLEX Options in accordance with Rule 1079(d) (Position Limits) and Rule 1079(e) (Exercise Limits). But the Commission notes that certain FLEX Options do not have position or exercise limits.

³³ 17 CFR 240.9b-1.

³⁴ See supra notes 16 and 19.

³⁵ See Notice.

believes that the safeguards in place are reasonably designed to help mitigate potential risks for retail investors and other market participants investing in FLEX Options.

The Exchange believes that permanently removing the minimum value size requirements for RFQs for opening transactions in new series of FLEX Options and replacing them with a one-contract minimum size will give investors a more viable, exchange-traded alternative to customized options in the OTC market, which are not subject to minimum value size requirements.³⁶ Furthermore, the Exchange has represented that broker-dealers have indicated to the Exchange that the minimum value size requirements have prevented them from bringing transactions on the Exchange that are already taking place in the OTC market.³⁷ Therefore, it appears possible that eliminating the minimum value sizes for RFQs for opening transactions in new series of FLEX Options could further incent trading interest in customized options to move from the OTC market to the Exchange. To the extent investors choose to trade FLEX Options on the Exchange in lieu of the OTC market as a result of the permanent removal of the minimum value size requirements, such action should benefit investors. As the Commission has previously noted, there are certain benefits to trading on an exchange, such as enhanced efficiency in initiating and closing out positions, increased market transparency, and heightened contra-party creditworthiness due to the role of the Options Clearing Corporation as issuer and guarantor of FLEX Options.³⁸

³⁶

Id.

³⁷

Id.

³⁸

See Securities Exchange Act Release No. 57429 (March 4, 2008), 73 FR 13058 (March 11, 2008) (order approving SR-CBOE-2006-36).

IV. Solicitation of Comments on Amendment No. 1

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to 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-2015-94 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-2015-94. 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 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 10:00 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-2015-94 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposal, as Modified by Amendment No. 1

In Amendment No. 1, the Exchange submitted additional Pilot Program data to supplement Exhibit 3 to the Exchange's rule filing, which initially contained a report of Pilot Program data for the period December 2014 through July 2015. Amendment No. 1 contains an updated pilot report that provides data regarding FLEX Option transactions under the Pilot Program for the period August 2015 through December 2015, as well as additional information regarding transactions covered by the Pilot Program and FLEX Option trading on the Exchange.³⁹ The Commission believes that the supplemental Pilot Program data set forth in Amendment No. 1 further supports approval of the Pilot Program because, collectively with the Pilot Program data initially submitted as Exhibit 3 to the rule filing, the data reflects that there is minimal usage of FLEX Options by retail customers on the Exchange, and that market participants appear to be utilizing FLEX Options for their intended purpose – i.e., customization of certain terms not available in the standardized options market – and not as a surrogate for standardized option trading. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,⁴⁰ for approving the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice in the Federal Register.

³⁹ See Exhibit 3 to the Exchange's rule filing, as amended by Amendment No. 1, supra note 5.

⁴⁰ 15 U.S.C. 78s(b)(2).

VI. Conclusion

In summary, the Commission believes, for the reasons noted above, that the proposed rule change to permanently approve the Pilot Program, thereby permanently implementing a one-contract minimum size requirement in place of the pre-existing minimum size requirements for RFQs for opening transactions in new series of FLEX Options on the Exchange, is consistent with the Act and Section 6(b)(5) thereunder in particular, and should be approved, as amended. The Exchange has committed, and the Commission expects the Exchange, to continue to monitor the usage of FLEX Options, whether changes need to be made to its rules or the ODD to address any changes in retail FLEX Option participation, and for any other issues that may occur as a result of the elimination of the minimum value sizes on a permanent basis, including whether FLEX Option trades are being used as a surrogate for trading options in the standardized market.⁴¹

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴² that the

⁴¹ See Notice (Exchange representing that it will continue to monitor the usage of FLEX Options and whether any changes to its rules or the ODD are necessary).

⁴² 15 U.S.C. 78s(b)(2).

proposed rule change (SR-Phlx-2015-94) be, and it hereby is, approved, on an accelerated basis, as amended.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴³

Robert W. Errett
Deputy Secretary

⁴³ 17 CFR 200.30-3(a)(12).

