

or otherwise in furtherance of the purposes of the Act.

#### IV. Solicitation of Comments

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-Phlx-2010-13 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File No. SR-Phlx-2010-13. 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 inspection and copying 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 Phlx. 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 No. SR-Phlx-2010-13 and should be submitted on or before February 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-2335 Filed 2-3-10; 8:45 am]

**BILLING CODE 8011-01-P**

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61443; File No. SR-NASDAQ-2010-007]

#### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Relating To Elimination of Market Maker Requirement for Each Option Series**

January 29, 2010.

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 January 14, 2009, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. On January 26, 2009, the Exchange filed Amendment No. 1 to the proposal. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

NASDAQ is filing a proposal for the NASDAQ Options Market ("NOM" or "Exchange") to delete from the NASDAQ rulebook Section 5, Minimum Participation Requirement for Opening Trading of Option Series,<sup>3</sup> of Chapter IV, Securities Traded on NOM.

The text of the proposed rule change is available from NASDAQ's website at <http://nasdaq.cchwallstreet.com>, at NASDAQ's principal office, 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

NASDAQ is proposing the elimination of a requirement that at least one Options Market Maker be registered for trading a particular series before it may be opened for trading on NOM.

An Options Market Maker is a Participant<sup>4</sup> registered with NASDAQ as a Market Maker.<sup>5</sup> Market Makers on NOM have certain obligations such as maintaining two-sided markets and participating in transactions that are "reasonably calculated to contribute to the maintenance of a fair and orderly market."<sup>6</sup> To register as a Market Maker, a Participant must file a written application with NASDAQ Regulation, which will consider an applicant's market making ability and other factors it deems appropriate in determining whether to approve an applicant's registration.<sup>7</sup> All Market Makers are designated as specialists on NOM for all purposes under the Act or rules thereunder.<sup>8</sup> The NOM Rules place no limit on the number of qualifying entities that may become Market Makers.<sup>9</sup> The good standing of a Market Maker may be suspended, terminated, or withdrawn if the conditions for approval cease to be maintained or the Market Maker violates any of its agreements with NASDAQ or any provisions of the NOM Rules.<sup>10</sup> A Participant that has qualified as a Market Maker may register to make markets in individual series of options.<sup>11</sup>

Currently Section 5 of Chapter IV of the NOM rulebook provides in relevant part that after a particular class of options has been approved for listing on

<sup>4</sup> The term "Options Participant" or "Participant" means a firm, or organization that is registered with the Exchange pursuant to Chapter II of the NOM Rules for purposes of participating in options trading on NOM as a "NASDAQ Options Order Entry Firm" or "NASDAQ Options Market Maker."

<sup>5</sup> See NOM Rules, Chapter VII, Section 2.

<sup>6</sup> See NOM Rules, Chapter VII, Section 5(a).

<sup>7</sup> See NOM Rules, Chapter VII, Section 2(a).

<sup>8</sup> See NOM Rules, Chapter VII, Section 2.

<sup>9</sup> See NOM Rules, Chapter VII, Rule 2(c).

<sup>10</sup> See NOM Rules, Chapter VII, Section 4(b).

<sup>11</sup> See NOM Rules, Chapter VII, Section 3(a).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> 15 U.S.C. 78s(b)(1).

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

<sup>3</sup> See Amendment No. 1.

NOM by NASDAQ Regulation, NASDAQ will allow trading in series of options in that class only if there is at least one Market Maker registered for trading that particular series. The Exchange is proposing to eliminate this requirement in order to expand the number of series available to investors for trading and for hedging risks associated with securities underlying those options, as well as to enhance markets in products which are likely to receive customer order flow. The Exchange places a high value on its Market Makers and believes that eliminating the listing requirement to have a Market Maker in every series would permit Market Makers, who currently may choose to serve as Market Makers solely to permit an options to trade on NOM, to focus their expertise on the products that are more consistent with their business objectives or more likely to receive customer order flow.

Eliminating the Market Maker listing requirement would provide the Exchange the opportunity to trade options that may have occasional interest but that do not necessarily require a two-sided market at all times. The lack of a two-sided or tight market would not cause customer orders to receive prices inferior to the best prices available across all exchanges. In fact, NOM is designed to systematically avoid trading through protected quotations on other options exchanges, and as such, orders accepted into NOM in options that do not have Market Makers will not trade at inferior prices even if there is not a two-sided market on NOM. As a result of NOM's design, incoming orders are protected from receiving dislocated execution prices simply by the fact that there is robust quote competition in the exchange listed options business with seven competing options exchanges and a multitude of competing Market Makers and liquidity providers. Additionally, the Options Order Protection and Locked/Crossed Market Plan requires plan participants to "establish, maintain and enforce written policies and procedures that are reasonably designed to prevent Trade-Throughs in that participant's market in Eligible Options Classes."<sup>12</sup> With the implementation of this plan, a more robust network of private routing has been constructed that ensures routable customer orders

<sup>12</sup> See Securities Exchange Act Release Nos. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4-546) (approval order for the Protection and Locked/Crossed Plan); and 60525 (August 18, 2009), 74 FR 43188 (August 26, 2009) (approval order for NOM's proposed rule change to implement the Protection and Locked/Crossed Plan).

can access the best prevailing prices in the market.

Moreover, in its approval order for the proposed rule change establishing NOM, the Commission agreed that the Act does not mandate a particular market model for national securities exchanges, and stated that it believed that many different types of market models could satisfy the requirements of the Act. The Commission stated that it does not believe that the Act requires an exchange to have Market Makers.<sup>13</sup> It noted that although Market Makers could be an important source of liquidity on NOM, they likely would not be the only source.<sup>14</sup> It observed that, in particular, the NOM System is designed to match buying and selling interest of all Participants on NOM. The Exchange here is proposing simply to remove the Market Maker participation requirement as superfluous to the existence of a vibrant options market, nevertheless acknowledging the value Market Makers provide to the Exchange.

With regard to the impact on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the additional traffic associated with the listing and trading of an expanded number of series as proposed by this filing.

The Exchange also proposes to delete paragraph (b) of Section 5, Chapter IV, which states that a class of options will be put into a non-regulatory halt if at least one series for that class is not open for trading. Originally, this provision was put in place so that the exchange could approve underlying securities for the listing of options but delay the listing if the Market Makers on the Exchange were not yet ready to register in any series of options for that class. With the elimination of the other paragraphs in Section 5 requiring a Market Maker, the Exchange will no longer need to delay the listings of

<sup>13</sup> See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (File No. SR-NASDAQ-2007-004). As the Commission noted in its approval order for the NOM market, in its release adopting Regulation ATS, the Commission rejected the suggestion that a guaranteed source of liquidity was a necessary component of an exchange. See Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844 (December 22, 1998) ("Regulation ATS Release"). See also Securities Exchange Act Release No. 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (File No. SR-PCX-00-25) (order approving Archipelago Exchange as the equities trading facility of the Pacific Exchange).

<sup>14</sup> Indeed, NASDAQ believes that Market Makers are valuable sources of liquidity and important components of a highly competitive marketplace with various Participant types who provide liquidity.

particular series and thus will no longer need this provision.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>16</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, by expanding the ability of investors to hedge risks associated with securities underlying options which are not currently listed.

### 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.

### 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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) by order approve such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

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

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

Number SR–NASDAQ–2010–007 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2010–007. 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 inspection and copying 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; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR–NASDAQ–2010–007 and should be submitted on or before February 25, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. 2010–2337 Filed 2–3–10; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61439; File No. SR–CBOE–2009–087]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Order Approving Proposed Rule Change To Establish a Pilot Program To Modify FLEX Option Exercise Settlement Values and Minimum Value Sizes

January 28, 2010.

On December 3, 2009, Chicago Board Options Exchange, Incorporated (“CBOE”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to establish a pilot program to modify exercise settlement values and minimum value sizes for Flexible Exchange Options (“FLEX Options”).<sup>3</sup> The proposed rule change was published for comment in the **Federal Register** on December 24, 2009.<sup>4</sup> The Commission received six comments regarding the proposal. One commenter provided background information about financial derivatives as they related to variable annuity products,<sup>5</sup> and five commenters supported the proposed rule change.<sup>6</sup>

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> A FLEX option is a customized option that provides parties to the transaction with the ability to fix terms including the exercise style, expiration date, and certain exercise prices. See CBOE Rule 24A.4(a). A FLEX Option may be either a FLEX Index Option or a FLEX Equity Option.

<sup>4</sup> See Securities Exchange Act Release No. 61183 (December 16, 2009), 74 FR 68435 (“Notice”).

<sup>5</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Mark E. White, Assistant Superintendent, Regulation Sector, Office of the Superintendent of Financial Institutions Canada, dated January 7, 2010 (noting that the Office did “not feel comfortable making comments on the particular proposal,” but wanted to “provide some information related to variable annuity products that the SEC may find helpful when considering the CBOE’s submission.”).

<sup>6</sup> See Submissions via SEC WebForm from Miller Blew, CEO, Safe Haven Advisors, LLC, dated January 12, 2010 (supporting proposal to eliminate minimum size requirements); Charles L. Gilbert, President, Nexus Risk Management, dated January 8, 2010 (supporting the elimination of the p.m. settlement restriction and minimum size requirements as a means to enable insurers to more effectively hedge their risks); Ram Kelkar, Capital Markets and Trading, Milliman, Inc., dated January 8, 2010 (the ability to use FLEX Options as a hedging tool for life insurers “should be enhanced by reducing the minimum size requirements and by allowing p.m. settlements for all days of the month”); Kannoo Ravindran, dated January 14, 2010 (stating that the elimination of the p.m. settlement restriction and minimum size requirements will contribute to more effective risk management by institutions); Donald C. Smyth, dated January 12, 2010 (noting that “the more flexibility/granularity

The Exchange is proposing two pilots with this proposed rule change. First, CBOE is proposing to implement a fourteen-month pilot program to permit p.m. and specified average price settlements of FLEX Index Options that expire on, or within two business days of, a third-Friday-of-the-month expiration (“Blackout Period”).<sup>7</sup> Under current FLEX Option rules, only a.m. settlements based on opening prices of the underlying components of an index can be used to settle a FLEX Index Option if it expires within the Blackout Period. In its proposal, CBOE has stated that, at least two months prior to the expiration of the pilot program, it will provide the Commission with an annual report analyzing volume and open interest for each broad-based FLEX Index Options class overlying an Expiration Friday, p.m.-settled FLEX Index Options series.<sup>8</sup> The annual report will also contain information and analysis of FLEX Options trading patterns, and index price volatility and underlying share trading activity for each broad-based index class overlying an Expiration Friday, p.m.-settled FLEX Index Option that exceeds certain minimum open interest parameters.<sup>9</sup> The Exchange will also provide to the Commission, on a periodic basis, interim reports of volume and open interest.

CBOE also proposes to eliminate the minimum value size requirements for all FLEX Options on a fourteen-month pilot basis. CBOE will submit a pilot program report if it elects to extend or expand the pilot program, or to make the program permanent. The pilot program report would include data and analysis of open interest and trading volume, and analysis of the types of investors that initiated opening FLEX

we have in terms of FLEX option dates with p.m. expirations and small minimum notionals (preferably \$0), the more effectively we can [tailor] and use FLEX options for our [equity indexed annuity] hedging needs.”)

<sup>7</sup> A third-Friday-of-the-month expiration is generally referred to as “Expiration Friday”.

<sup>8</sup> The annual report would also contain analyses of volume and open interest for Expiration Friday Non-FLEX Index series, where a broad-based Non-FLEX Index class overlies the same index as an Expiration Friday, p.m.-settled FLEX Index option. See Notice, *supra* note 4, 74 FR at 68436.

<sup>9</sup> See Notice, *supra* note 4, 74 FR at 68437. Any positions established under the pilot would not be impacted by the expiration of the pilot. For example, a position in a p.m.-settled FLEX Index Option series that expires on Expiration Friday in January 2015 could be established during the 14-month pilot. If the pilot program were not extended, then the position could continue to exist. However, any further trading in the series would be restricted to transactions where at least one side of the trade is a closing transaction. The Exchange stated that it would notify members of this restriction in a circular to members. See Notice, *supra* note 4, 74 FR at 68436.

<sup>17</sup> 17 CFR 200.30–3(a)(12).