

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-75734; File No. SR-NASDAQ-2015-097]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Surveillance Agreements

August 19, 2015.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on August 17, 2015, The NASDAQ Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend NOM Chapter IV, Section 3 to allow the listing of options overlying ETFs<sup>3</sup> that are listed pursuant to generic listing standards on equities exchanges for series of ETFs based on international or global indexes, pursuant to which a comprehensive surveillance agreement is not required.<sup>4</sup>

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

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

The Exchange proposes to amend NOM Chapter IV, Section 3 to allow the listing of options overlying ETFs<sup>5</sup> that are listed pursuant to generic listing standards on equities exchanges for series of ETFs based on international or global indexes, pursuant to which a comprehensive surveillance agreement is not required.<sup>6</sup>

This proposal is based on a recent immediately effective filing of Phlx that added exactly the same language as proposed herein, as well as that of other exchanges,<sup>7</sup> and serves to align the rules of Phlx and the Exchange and other markets. Adding the proposed language to NOM Chapter IV, Section 3(i) will enable the Exchange to list and trade options on ETFs without a CSSA provided that the underlying ETF is listed on an equities exchange pursuant to the generic listings standards that do not require a CSSA pursuant to Rule 19b-4(e) of the Exchange Act.<sup>8</sup>

Rule 19b-4(e) provides that the listing and trading of a new derivative

securities product by an SRO shall not be deemed a proposed rule change, pursuant to paragraph (c)(1) of Rule 19b-4<sup>9</sup> if the Commission has approved, pursuant to Section 19(b) of the Act,<sup>10</sup> the SRO’s trading rules, procedures and listing standards for the product class that would include the new derivatives securities product, and the SRO has a surveillance program for the product class.<sup>11</sup> This proposal allows the Exchange to list and trade options on ETFs based on international or global indexes that meet the generic listing standards.<sup>12</sup>

##### The Surveillance Agreement Requirement for Options on Exchange-Traded Funds

The surveillance agreement requirement (also known as the “requirement” or “regime”) was initially put into effect on Phlx, which is the oldest options exchange within the Group, for options on ETFs well over a decade ago but has proven to have anti-competitive effects that are detrimental to investors.<sup>13</sup> Specifically, the requirement limits the investing public’s ability to hedge risk or engage in options strategies that may be afforded to other investors in domestic securities.<sup>14</sup>

The Exchange allows for the listing and trading of options on ETFs. NOM Chapter IV, Section 3(i) provides the listings standards for options on ETFs, which includes ETFs with non-U.S. component securities, such as ETFs based on international or global indexes. Currently, NOM Chapter IV, Section 3(i) regarding options on ETFs has a three-level surveillance agreement requirement (reproduced in relevant part):

(i) Any non-U.S. component stocks of the index or portfolio on which the Fund Shares are based that are not

<sup>9</sup> 17 CFR 240.19b-4(c)(1).

<sup>10</sup> 15 U.S.C. 78s(b).

<sup>11</sup> When relying on Rule 19b-4(e), the SRO must submit Form 19b-4(e) to the Commission within five business days after the SRO begins trading the new derivative securities products. See Securities Exchange Act Release No. 40761 (December 8, 1998), 63 FR 70952 (December 22, 1998).

<sup>12</sup> See NASDAQ Rule 5705(a)(3)(A)(ii) and (b)(3)(A)(ii); NYSE MKT Rule 1000, Commentary .03(a)(B); NYSE Arca Equities Rule 5.20(j)(3) [sic], Commentary .01(a)(B); and BATS Rule 14.11(b)(3)(A)(ii).

<sup>13</sup> See Securities Exchange Act Release No. 43921 (February 2, 2001), 66 FR 9739 (February 9, 2001) (SR-Phlx-2000-107) (notice of filing and approval order regarding trading of options on ETFs with surveillance agreements) (the “ETF approval order”). The changes proposed herein relate only to surveillance agreements for options on global or international ETFs.

<sup>14</sup> Moreover, as noted below the surveillance agreement requirement is present for the derivative options on ETFs but not for the underlying ETFs.

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

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

<sup>3</sup> ETFs are also referred to in Exchange rules as “Fund Shares.” See, e.g., NOM Chapter IV, Sections 3 and 6.

<sup>4</sup> NASDAQ is the principal exchange within the Group for listing ETFs. NASDAQ has generic listing standards for Portfolio Depository Receipts (“PDRs”) and Index Fund Shares (“IFSs”). See NASDAQ Rule 5705(b)(3)(A)(ii) regarding IFSs and 5705(a)(3)(A)(ii) regarding PDRs (IFSs and PDRs are together known as ETFs in NASDAQ Rule 5705). See also NYSE MKT Rule 1000 Commentary .03(a)(B); NYSE Arca Equities Rule 5.2(j)(3) Commentary .01(a)(B); and BATS Rule 14.11(b)(3)(A)(ii).

<sup>5</sup> ETFs are also referred to in Exchange rules as “Fund Shares.” See, e.g., NOM Chapter IV, Sections 3 and 6.

<sup>6</sup> NASDAQ is the principal exchange within the Group for listing ETFs. NASDAQ has generic listing standards for Portfolio Depository Receipts (“PDRs”) and Index Fund Shares (“IFSs”). See NASDAQ Rule 5705(b)(3)(A)(ii) regarding IFSs and 5705(a)(3)(A)(ii) regarding PDRs (IFSs and PDRs are together known as ETFs in NASDAQ Rule 5705). See also NYSE MKT Rule 1000 Commentary .03(a)(B); NYSE Arca Equities Rule 5.2(j)(3) Commentary .01(a)(B); and BATS Rule 14.11(b)(3)(A)(ii).

<sup>7</sup> See Securities Exchange Act Release No. 74553 (March 20, 2015), 80 FR 16072 (March 26, 2015) (SR-Phlx-2015-27) (notice of filing and immediate effectiveness to amend Phlx Rule 1009). See also Securities Exchange Act Release No. 74509 (March 13, 2015), 80 FR 14425 (March 19, 2015) (SR-MAX-2015-04) (order approving proposal to amend MIA Rule 402). The language proposed in these Phlx and MIA filings, as also the language proposed in this proposal, is similar in all material respects. Other exchanges have submitted similar immediately effective filings. See, e.g., Securities Exchange Act Release Nos. 75132 (June 9, 2015), 80 FR 34175 (June 15, 2015) (SR-BOX-2015-21); 74832 (April 29, 2015), 80 FR 25738 (May 5, 2015) (SR-ISE-2015-16); 75296 (June 25, 2015), 80 FR 37692 (July 1, 2015) (SR-CBOE-2015-052); and 75440 (July 13, 2015), 80 FR 42587 (July 17, 2015) (SR-NYSEArca-2015-60).

<sup>8</sup> 17 CFR 240.19b-4(e).

subject to comprehensive surveillance agreements do not in the aggregate represent more than 50% of the weight of the index or portfolio;

(ii) stocks for which the primary market is in any one country that is not subject to a comprehensive surveillance agreement do not represent 20% or more of the weight of the index;

(iii) stocks for which the primary market is in any two countries that are not subject to comprehensive surveillance agreements do not represent 33% or more of the weight of the index.<sup>15</sup>

The Exchange proposes to modify the surveillance agreement requirement for options on ETFs that are listed pursuant to generic listing standards for series of ETFs, based on international or global indexes—for which case a comprehensive surveillance agreement is not required.

When the surveillance agreement requirement was instituted in 2001 on Phlx as discussed, ETFs were, comparatively speaking, in a developmental state.<sup>16</sup> The first ETF introduced in 1993 was a broad-based domestic equity fund tracking the S&P 500 index. The development of ETF products was very limited during the first decade of their existence, such that at the end of 2001, there was a total of only 102 ETFs listed on U.S. markets. Since 2001, however, the ETF market has matured tremendously and grown exponentially, such that at the end of 2012 there were a total of 1,194 listed ETFs.<sup>17</sup> Many of these are very well known, highly traded and liquid products, such as, for example, SPDR S&P 500 Trust ETF (SPY), iShares MSCI Emerging Markets ETF (EEM), and PowerShares QQQ Trust, Series 1 ETF (QQQ), that market participants from institutional to retail and public investors have been using for trading, hedging, and investing purposes with varying timelines.<sup>18</sup> The ETF market is one of the most highly-developed, sophisticated markets that provide traders and investors the opportunity to access practically all industries and enterprises. In 2012 investor demand for ETFs in all asset classes increased substantially. And in 2011 the demand

for global and international equity ETFs, to which the requirement applies, more than doubled.<sup>19</sup> The Exchange believes that the surveillance agreement requirement no longer serves a necessary (or indispensable) function in today's highly developed ETF market,<sup>20</sup> and actually creates a dynamic that negatively impacts the number of markets that can competitively trade ETF option products, to the detriment of market participants.

The current surveillance requirement has, at times, resulted in the investing public having to forego the opportunity to hedge risk or engage in other listed options strategies in a competitive environment. ETFs may lack active options contracts that would be more likely to develop if multiple exchanges could compete to offer and promote them. For example, an investor in the iShares MSCI Indonesia ETF (EIDO) is not permitted to sell call options or purchase protective puts simply because the Exchange cannot obtain a surveillance agreement with Bursa Efek Indonesia. However, an investor in iShares MSCI Emerging Markets Fund (EEM) is afforded the right to engage in listed options trading to hedge risk or execute other beneficial options strategies. Both underlying exchange-traded funds, EIDO and EEM, are listed for trading in the U.S., subject to constant regulatory scrutiny, and permitted to be purchased and sold via registered broker/dealers, yet, options can now be offered only on EEM. The Exchange believes this disparate treatment between investors of foreign-based instruments, especially between those that buy and sell options contracts on ETFs, which currently require surveillance agreements, as opposed to those that buy and sell shares of the underlying ETFs, which currently do not have the same onerous surveillance agreement requirement that ETF options have,<sup>21</sup> is not in the best interest of

market participants. The Exchange therefore proposes to establish that options on generically-listed global or international ETFs would not require surveillance agreements for listing.

The current surveillance agreement requirements, as well as all other requirements to list options on ETFs,<sup>22</sup> are not affected by this proposal and will continue to remain in place for options on ETFs that do not meet generic listing standards on equities exchanges for ETFs based on international and global indexes.

#### Generic Listing Standards for Exchange-Traded Funds

The Exchange notes that the Commission has previously approved generic listing standards pursuant to Rule 19b-4(e) of the Exchange Act<sup>23</sup> for ETFs based on indexes that consist of stocks listed on U.S. exchanges including NASDAQ, the ETF listing exchange within the Group.<sup>24</sup> In general, the criteria for the underlying component securities in the international and global indexes are similar to those for the domestic indexes, but with modifications as appropriate for the issues and risks associated with non-U.S. securities.

In addition, the Commission has previously approved proposals for the listing and trading of options on ETFs based on international indexes as well as global indexes (e.g., based on non-U.S. and U.S. component stocks).<sup>25</sup> In

the primary ETF listing venue in the Group, NASDAQ Rules 5705 regarding ETFs and 5735 regarding Managed Fund Shares ("MFSs") have no explicit requirements concerning surveillance agreements for regularly listed (non-generic) ETFs and MFSs, and simply state that FINRA will implement written surveillance procedures. Section 19(b)(2) filings regarding ETFs and MFSs typically indicate that the Exchange may obtain information regarding trading in the shares from FINRA and markets and other entities that are members of the Intermarket Surveillance Group ("ISG"), which includes securities and futures exchanges, or with which the Exchange has in place a surveillance agreement (which is not required by rule). Regarding ETFs and MFSs listed pursuant to generic (19b-4(e)) standards and reviewed and approved for trading under Section 19(b)(2) of the Act, Rule 5705 simply notes that the Commission's approval order may reference surveillance sharing agreements with respect to non-U.S. component stocks.

<sup>22</sup> For purposes of brevity, these other requirements are not set forth, but can be found in NOM Chapter IV, Section 3(i).

<sup>23</sup> 17 CFR 240.19b-4(e).

<sup>24</sup> See Securities Exchange Act Release No. 54739 (November 9, 2006), 71 FR 66993 (November 17, 2006) (SR-Amex-2006-78) (initial order relating to generic listing standards for ETFs based on international or global indexes). See also NASDAQ Rule 5705(a) (3) (A) (ii) and (b) (3) (A) (ii).

<sup>25</sup> See, e.g., Securities Exchange Act Release Nos. 57013 (December 20, 2007), 72 FR 73923 (December 28, 2007) (SR-CBOE-2007-140) (approval order to list and trade options on iShares MSCI Mexico

<sup>15</sup> See NOM Chapter IV, Section 3(i)i.-iii., which is re-numbered as NOM Chapter IV, Section 3(i)i.(1)-(3). For consistency, NOM Chapter IV, Section 3(i)iv.-vi. is re-numbered NOM Chapter IV, Section 3(i)ii.-iv.

<sup>16</sup> See Securities Exchange Act Release No. 43921 (February 2, 2001), 66 FR 9739 (February 9, 2001) (SR-Phlx-2000-107) (ETF approval order).

<sup>17</sup> [http://www.icifactbook.org/fb\\_ch3.html](http://www.icifactbook.org/fb_ch3.html).

<sup>18</sup> These can be from intraday exposure (e.g., using Daily S&P 500 Bear 3x Shares (SPXS)) to long-term 401(k) or retirement fund exposure (e.g., using SPY).

<sup>19</sup> [http://www.icifactbook.org/fb\\_ch3.html](http://www.icifactbook.org/fb_ch3.html).

<sup>20</sup> ETFs and ETPs listed in the United States gathered \$24.6 billion USD in net new assets in June 2014 which, when combined with positive market performance, pushed the ETF/ETP industry in the United States to a new record high of \$1.86 trillion USD invested in 1,613 ETFs/ETPs, from 58 providers listed on 3 exchanges. And according to ETFGI, an independent ETF/ETP research and consultancy firm in the U.K., ETFs and ETPs listed globally reached \$2.64 trillion USD in assets, a new record high, at the end of Q2 2014. <http://www.mondovisione.com/media-and-resources/news/according-to-etfgi-etfs-and-etps-listed-globally-reached-us264-trillion-in-as/>.

<sup>21</sup> While the surveillance agreement requirement for options on ETFs found in NOM Chapter IV, Section 3(i) (see note 15 and related text) has resulted in significant negative implications for market participants, there is no such surveillance agreement requirement for the underlying ETFs. In particular, when looking to the rules of NASDAQ,

approving ETFs for equities exchange trading, the Commission thoroughly considered the structure of the ETFs, their usefulness to investors and to the markets, and SRO rules that govern their trading. The Exchange believes that allowing the listing of options overlying ETFs that are listed pursuant to the generic listing standards on equities exchanges for ETFs based on international and global indexes and applying Rule 19b-4(e)<sup>26</sup> should fulfill the intended objective of that rule by allowing options on those ETFs that have satisfied the generic listing standards to commence trading, without the need for the public comment period and Commission approval. The proposed rule has the potential to reduce the time frame for bringing options on ETFs to market, thereby reducing the burdens on issuers and other market participants. The failure of a particular ETF to comply with the generic listing standards under Rule 19b-4(e)<sup>27</sup> would not, however, preclude the Exchange from submitting a separate filing pursuant to Section 19(b)(2),<sup>28</sup> requesting Commission approval to list and trade options on a particular ETF. Moreover, the Exchange notes that the generic standards such as those in proposed NOM Chapter IV, Section 3(i) are not new in the options world, and have been used extensively for listing options on narrow-based and broad-based indexes.<sup>29</sup>

Index Fund, when CBOE did not have in place a surveillance agreement with the Bolsa Mexicana de Valores (the "Bolsa"); 57014 (December 20, 2007), 72 FR 73934 (December 28, 2007) (SR-ISE-2007-111) (approval order to list and trade options on iShares MSCI Mexico Index Fund, when ISE did not have in place a surveillance agreement with the Bolsa); 56778 (November 9, 2007), 72 FR 65113 (November 19, 2007) (SR-AMEX-2007-100) (approval order to list and trade options on iShares MSCI Mexico Index Fund, when AMEX did not have in place a surveillance agreement with the Bolsa); and 55648 (April 19, 2007), 72 FR 20902 (April 26, 2007) (SR-AMEX-2007-09) (approval order to list and trade options on Vanguard Emerging Markets ETF, when AMEX did not have in place a surveillance agreement with the Bolsa). See also Securities Exchange Act Release Nos. 50189 (August 12, 2004), 69 FR 51723 (August 20, 2004) (SR-AMEX-2004-05) (approving the listing and trading of certain Vanguard International Equity Index Funds); and 44700 (August 14, 2001), 66 FR 43927 (August 21, 2001) (SR-AMEX-2001-34) (approving the listing and trading of series of the iShares Trust based on foreign stock indexes).

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

<sup>27</sup> *Id.*

<sup>28</sup> 15 U.S.C. 78s(b)(2).

<sup>29</sup> NOM Chapter IV, Sections 3 and 6 have, for example, weighting, capitalization, trading volume, and minimum number of components standards for listing options on broad-based and narrow-based indexes. For a definition of broad-based index (market index) and narrow-based index (industry index), see NOM Chapter XIV, Sections 2(k) and (j), respectively.

#### Requirements for Listing and Trading Options Overlying ETFs Based on International and Global Indexes

Options on ETFs listed pursuant to these generic standards for international and global indexes would be traded, in all other respects, under the Exchange's existing trading rules and procedures that apply to options on ETFs and would be covered under the Exchange's surveillance program for options on ETFs.

Pursuant to proposed NOM Chapter IV, Section 3(i), the Exchange may list and trade options on an ETF without a CSSA provided that the ETF is listed pursuant to generic listing standards for ETFs based on international or global indexes, in which case a comprehensive surveillance agreement is not required. As noted, one such rule, which discusses things such as weighting, capitalization, trading volume, minimum number of components, and where components are listed, is NASDAQ Rule 5705(b)(3)(A)(ii) regarding ETFs (IFSs and PDRs).<sup>30</sup> The Exchange believes that these generic listing standards are intended to ensure that securities with substantial market capitalization and trading volume account for a substantial portion of the weight of an index or portfolio.

The Exchange believes that this proposed listing standard for options on ETFs is reasonable for international and

<sup>30</sup> NASDAQ Rule 5705(b)(3)(A)(ii) regarding IFSs, for example, has the following requirements (reproduced in relevant part): a. component stocks (excluding Derivative Securities Products) that in the aggregate account for at least 90% of the weight of the index or portfolio (excluding Derivative Securities Products) each shall have a minimum market value of at least \$100 million; b. component stocks (excluding Derivative Securities Products) that in the aggregate account for at least 70% of the weight of the index or portfolio (excluding Derivative Securities Products) each shall have a minimum worldwide monthly trading volume of at least 250,000 shares, or minimum global notional volume traded per month of \$25,000,000, averaged over the last six months; c. the most heavily weighted component stock (excluding Derivative Securities Products) shall not exceed 25% of the weight of the index or portfolio, and, to the extent applicable, the five most heavily weighted component stocks (excluding Derivative Securities Products) shall not exceed 60% of the weight of the index or portfolio; d. the index or portfolio shall include a minimum of 20 component stocks; provided, however, that there shall be no minimum number of component stocks if either one or more series of Index Fund Shares or Portfolio Depositary Receipts constitute, at least in part, components underlying a series of Index Fund Shares, or one or more series of Derivative Securities Products account for 100% of the weight of the index or portfolio; and e. each U.S. Component Stock shall be listed on a national securities exchange and shall be an NMS Stock as defined in Rule 600 of Regulation NMS under the Act, and each Non-U.S. Component Stock shall be listed and traded on an exchange that has last-sale reporting. NASDAQ Rule 5705(a)(3)(A)(ii) has similar standards, but tailored for PDRs.

global indexes, and, when applied in conjunction with the other listing requirements, will result in options overlying ETFs that are sufficiently broad in scope and not readily susceptible to manipulation. The Exchange also believes that allowing the Exchange to list options overlying ETFs that are listed on equities exchanges pursuant to generic standards for series of ETFs based on international or global indexes under which a CSSA is not required, will result in options overlying ETFs that are adequately diversified in weighting for any single security or small group of securities to significantly reduce concerns that trading in options overlying ETFs based on international or global indexes could become a surrogate for trading in unregistered securities.<sup>31</sup>

The Exchange believes that ETFs based on international and global indexes that have been listed pursuant to the generic standards are sufficiently defined so as to make options overlying such ETFs not susceptible instruments for manipulation. The Exchange believes that the threat of manipulation is, as discussed below, sufficiently mitigated for underlying ETFs that have been listed on equities exchanges pursuant to generic listing standards for series of ETFs based on international or global indexes under which a comprehensive surveillance agreement is not required and for the overlying options; the Exchange does not see the need for a CSSA to be in place before listing and trading options on such ETFs. The Exchange notes that its proposal does not replace the need for a CSSA as provided in current NOM Chapter IV, Section 3(i). The provisions of Section 3(i), including the need for a CSSA, remain materially unchanged and will continue to apply to options on ETFs that are not listed on an equities exchange pursuant to generic listing standards for series of ETFs based on international or global indexes pursuant to which a CSSA is not required. Instead, proposed NOM Chapter IV, Section 3(i) adds an additional listing mechanism for certain qualifying options on ETFs to be listed on the Exchange.

Finally, to account for proposed NOM Chapter IV, Section 3(i) and make Section 3 easier to follow, the Exchange proposes technical changes to the

<sup>31</sup> The Exchange also notes that not affording retail investors the ability to trade on a regulated exchange can be detrimental. While products can be traded off exchange in the over the counter ("OTC") market, which has increased settlement, clearing, and market risk as opposed to exchanges, the relatively unregulated OTC market is usually not a viable option for retail and public investors.

formatting of this section of the rule. Thus, the Exchange proposes re-numbering NOM Chapter IV, Section 3(i).i.–iii. to NOM Chapter IV, Section 3(i).i.(1)–(3), respectively. And, for consistency, the Exchange proposes re-numbering NOM Chapter IV, Section 3(i).iv.–vi. to NOM Chapter IV, Section 3(i).ii.–iv., respectively. This is merely re-numbering and there are no changes to the language of these parts of Section 3(i).

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>32</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>33</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. In particular, the proposed rule change has the potential to reduce the time frame for bringing options on ETFs to market, thereby reducing the burdens on issuers and other market participants. The Exchange also believes that enabling the listing and trading of options on ETFs pursuant to this proposed new listing standard will benefit investors by providing them with valuable risk management tools. The Exchange notes that its proposal does not replace the need for a CSSA as provided in NOM Chapter IV, Section 3(i). The provisions of current Section 3(i), including the need for a CSSA, remain materially unchanged and will continue to apply to options on ETFs that are not listed on an equities exchange pursuant to generic listing standards for series of ETFs based on international or global indexes under which a comprehensive surveillance agreement is not required. Instead, proposed NOM Chapter IV, Section 3(i) adds an additional listing mechanism for certain qualifying options on ETFs to be listed on the Exchange in a manner that is 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 facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The proposal would promote just and equitable principles of trade. When the

surveillance agreement requirement was instituted as discussed in 2001 on Phlx, the oldest options exchange in the Group, ETFs were, comparatively speaking, in a developmental state.<sup>34</sup> The first ETF introduced in 1993 was a broad-based domestic equity fund tracking the S&P 500 index. After the introduction of the first ETF in 1993, the development of ETF products was very limited during the first decade of their existence. Since the end of 2001, when there was a total of only 102 ETFs listed on U.S. markets, however, the ETF market has matured tremendously and grown exponentially. With a total of 1,194 listed ETFs at the end of 2012, the ETF market is now one of the most highly-developed, sophisticated markets with many very well known, highly traded and liquid products that provide traders and investors the opportunity to access practically all industries and enterprises. While investor demand for ETFs in all asset classes increased substantially, in 2011 the demand for global and international equity ETFs, to which the requirement applies, more than doubled.<sup>35</sup> The Exchange believes that the current surveillance requirement no longer serves a necessary function in today's highly developed market, and, as discussed, actually creates a dynamic that negatively impacts the number of markets that can competitively trade ETF option products. This hurts market participants. The Exchange therefore proposes to establish that pursuant to proposed NOM Chapter IV, Section 3(i) options may be listed on certain ETFs that are based on global and international funds and meet generic listing standards.

The proposal would in general protect investors and the public interest. The Exchange believes that modifying the surveillance agreement requirement for ETFs would not hinder the Exchange from performing surveillance duties designed to protect investors and the public interest. There are various data consolidators, vendors, and outlets that can be used to access data and information regarding ETFs and the underlying securities (e.g., Bloomberg, Dow Jones, FTEN). In addition, firms that list ETFs on an exchange receive vast amounts of data relevant to their products that could be made available to listing exchanges as needed. The Exchange has access to the activity of the direct underlying instrument and the ETF, and through the Intermarket

Surveillance Group ("ISG") the Exchange can obtain such information related to the underlying security as needed.<sup>36</sup> Moreover, other than the surveillance agreement requirement there are, as discussed, numerous requirements must be met to list options on ETFs on the Exchange.

The proposal would remove impediments to and perfect the mechanism of a free and open market and a national market system. Multiple listing of ETFs, options, and other securities and competition are some of the central features of the current national market system. The Exchange believes that the surveillance agreement requirement has led to clearly anti-competitive results in a market that is based on competition. As such, the Exchange believes that the surveillance agreement requirement for options on certain ETFs is no longer necessary and proposes new NOM Chapter IV, Section 3(i). The proposed rule change will significantly benefit market participants. As discussed at length, the proposed rule will negate the negative anti-competitive effect of the current surveillance agreement requirement that has resulted in de facto regulatory monopolies where only solitary exchanges, or only a few exchanges, are able to list certain ETF options products. The Exchange believes this is inconsistent with Commission policies and the developing national market system, as well as the competitive nature of the market, and therefore proposes amendment.<sup>37</sup> The Exchange believes that the proposal would encourage a more open market and national market system based on competition and multiple listing. The generic listing standards for ETFs based on global or international indexes have specific requirements regarding relative weighting, minimum capitalization, minimum trading volume, and minimum number of components that have been approved by the Commission years ago for foreign ETFs.<sup>38</sup> Moreover, such listing standards have been in continuous use for listing options on

<sup>36</sup> See <https://www.isgportal.org/home.html>. Another global organization similar to ISG is The International Organization of Securities Commissions ("IOSCO").

<sup>37</sup> As discussed, the Exchange is decidedly not proposing that the surveillance agreement requirement be deleted entirely, but rather that only those options on ETFs that do not meet very specific generic listing standards need to have surveillance agreements in order to list on the Exchange.

<sup>38</sup> See Securities Exchange Act Release No. 54739 (November 9, 2006), 71 FR 66993 (November 17, 2006)(SR-Amex-2006-78)(initial order relating to generic listing standards for ETFs based on international or global indexes). See also NASDAQ Rule 5705(a)(3)(A)(ii) and (b)(3)(A)(ii).

<sup>32</sup> 15 U.S.C. 78f(b).

<sup>33</sup> 15 U.S.C. 78f(b)(5).

<sup>34</sup> See Securities Exchange Act Release No. 43921 (February 2, 2001), 66 FR 9739 (February 9, 2001)(SR-Phlx 2000-107)(ETF approval order).

<sup>35</sup> [http://www.icifactbook.org/fb\\_ch3.html](http://www.icifactbook.org/fb_ch3.html).

narrow-based and broad-based indexes on the Exchange.<sup>39</sup> Allowing the listing of options on underlying ETFs based on global and international indexes that meet generic listing standards would encourage a free and open market and national market system to the benefit of market participants.

For the above reasons, the Exchange believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

#### *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 that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the Exchange believes that the proposal is, as discussed, decidedly pro-competitive and is a competitive response to the inability to list products because of the surveillance agreement requirement. The Exchange believes that the proposed rule change will result in additional investment options and opportunities to achieve the investment objectives of market participants seeking efficient trading and hedging vehicles, to the benefit of investors, market participants, and the marketplace in general. Competition is one of the principal features of the national market system. The Exchange believes that this proposal will expand competitive opportunities to list and trade products on the Exchange as noted.

#### *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 proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>40</sup> and Rule 19b-4(f)(6) thereunder.<sup>41</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>42</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>43</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that waiver of the operative delay will allow the Exchange to list and trade certain ETF options on the same basis as other options markets.<sup>44</sup> The Commission believes the waiver of the operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.<sup>45</sup>

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 change should be approved or disapproved.

### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2015-097 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F

Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2015-097. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet 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 Web site 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 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 available publicly. All submissions should refer to File Number SR-NASDAQ-2015-097, and should be submitted on or before September 15, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>46</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>39</sup> See Chapter XIV, Sections 6 and 3.

<sup>40</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>41</sup> 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change.

<sup>42</sup> 17 CFR 240.19b-4(f)(6).

<sup>43</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>44</sup> See *supra* note 7.

<sup>45</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>46</sup> 17 CFR 200.30-3(a)(12).