

propose to amend any of the other criteria in Commentary .01 to Phlx Rule 1009, including the requirements that: there must be a minimum of 7,000,000 shares of the underlying security owned by public investors; there must be a minimum of 2,000 holders of the underlying security; and that there must be a trading volume of at least 2,400,000 shares in the preceding twelve months.

Moreover, the Exchange believes that requiring in the proposal that the underlying security be listed on the New York Stock Exchange, Inc. ("NYSE"), the American Stock Exchange LLC ("Amex"), or the Nasdaq Stock Market, Inc. ("Nasdaq"), as provided for in the definition of "Covered Security" from Section 18(b)(1)(A) of the 1933 Act⁸ would ensure that the underlying security meets the highest listing standards in the securities industry. Should the underlying security not qualify as a Covered Security, the \$7.50 market price per share standard would still apply.

The Exchange believes that the proposed \$3.00 market price per share standard is also consistent with the Phlx maintenance and delisting criteria found in Phlx Rule 1010, which are used to determine whether an underlying security previously approved for Exchange options transactions no longer meets the requirements for listing. Commentary .02 to Phlx Rule 1010 sets a \$3.00 market price per share of the underlying security threshold for determining whether the Exchange may continue listing and trading options on an underlying security that has been previously approved for options trading under Phlx Rule 1009. As long as a \$3.00 standard is recognized as an acceptable pricing standard for options trading, albeit as a standard for continued listing, the Exchange believes that the proposed \$3.00 should be the threshold standard for initial listing as well.

Consistent with the listing standards proposed by other options exchanges,⁹ the Exchange has proposed, as a safeguard against price manipulation, that the underlying security has a closing market price of at least \$3.00 per share for the five consecutive business days preceding the date on which the Exchange submits a certificate to the OCC for listing and trading. The market price of such underlying security would be measured by the closing price reported in the primary market in which the underlying security is traded. The

Exchange believes that this "look back" period of five consecutive days would provide a sufficient measure of protection from any attempts to manipulate the market price of the underlying security.

The Exchange also believes that the proposed rule change, as amended, would encourage specialists to delist inactive option classes, particularly those classes in which the market price of the underlying security is below \$7.50. In particular, under Phlx Rule 1009 as it currently exists, a specialist on the Exchange to whom an option class has been allocated may be reluctant to delist an inactive option class if the market price of the underlying security is below \$7.50 because once delisted, the Exchange's current initial listing criteria must be met to re-list the option class, including the requirement that the market price per share of the underlying security be at least \$7.50 for the majority of business days during the preceding three months. The Phlx believes that the proposed \$3.00 price standard and the five-day look-back period would provide a reliable test for stability, would present a more reasonable time period for qualifying the price of an underlying security, and makes sense in today's economic conditions. The Exchange notes that the Commission recently granted Phlx and other options exchanges approval to list additional series on an option class when the market price of the underlying security is below \$3.00, provided that at least one other options exchange trades the series to be added, and at the time the other options exchange added that series, it met the requirements to add a new series, including the \$3.00 price requirement.¹⁰

Finally, for the purposes of consistency within the Phlx rules, the Exchange proposes to amend Commentary .05 to Phlx Rule 1009 which relates to Restructure Securities. Currently, Commentary .05 provides a method to certify that the market price of a Restructure Security satisfies the pricing requirement of Commentary .01 to Phlx Rule 1009, and specifically references the \$7.50 market price per share in Commentary .05(d). In order to

make all of Phlx Rule 1009 consistent with the pricing standard change of this proposal, the amended rule would reflect that the market price standard for Restructure Securities that are "covered securities" will also be reduced from \$7.50 to \$3.00.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹¹ in general, and furthers the objectives of Section 6(b)(5) of the Act¹² in particular, in that by changing listing standards for Covered Securities, the Exchange can provide investors with those options that are most useful and demanded by them without sacrificing investor protection.

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

The Exchange does not believe that the proposed rule change, as amended, 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 solicited or received with respect to the proposed rule change, as amended.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change, as amended, has been filed by the Exchange as a "non-controversial" rule pursuant to Section 19(b)(3)(A) of the Act¹³ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁴ Consequently, because the foregoing rule change, as amended: (1) Does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) does not become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4 thereunder.¹⁶

The Phlx has requested that the Commission waive the five-day pre-filing notice requirement and the thirty-day operative waiting period. The Commission is exercising its authority

¹⁰ See Securities Exchange Act Release No. 46789 (November 7, 2002), 67 FR 69284 (November 15, 2002) (SR-Phlx-2002-71). The Exchange represents that this rule (Commentary .02 to Phlx Rule 1010) is consistent with similar rules regarding listing and maintenance standards of the Amex, International Securities Exchange, Inc. ("ISE"), Chicago Board Options Exchange, Inc. ("CBOE") and the Pacific Exchange, Inc. ("PCX"). See Commentary .02 to Amex Rule 916; ISE Rule 503(c); Interpretation and Policy .02 to CBOE Rule 5.4; and Commentary .02 PCX Rule 3.7.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

¹³ 15 U.S.C. 78s(b)(3)(A).

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4.

⁸ See note 5 *supra*.

⁹ See note 6 *supra*.