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Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

**Re: Petition to Amend Rule 146(b) to Designate Securities Listed on the
Nasdaq Options Market as Covered Securities for the Purpose of
Section 18 of the Securities Act of 1933**

Dear Ms. Murphy:

By this Petition, The Nasdaq Stock Market LLC (“Nasdaq”) requests that the Securities and Exchange Commission (the “Commission”) institute a rulemaking proceeding¹ to amend Rule 146(b)² pursuant to the Securities Act of 1933³ (the “Securities Act”) to designate securities listed on the Nasdaq Options Market (“NOM” or “exchange”) as covered securities for the purpose of Section 18 of the Securities Act.⁴ Section 18 allows the Commission to designate as “covered securities,” the offering of which are exempt from state regulation, securities that are “listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities” listed on the New York Stock Exchange (“NYSE”), the American Stock Exchange⁵ (“Amex”), or the Nasdaq National Market System⁶ (“Nasdaq/NMS”) (or any successor to such entities) (collectively, the “named markets”).⁷ Nasdaq believes that the listing standards

¹ See Securities and Exchange Commission Rules of Practice, Rule 192, 17 CFR 201.192.

² 17 CFR 230.146(b).

³ 15 U.S.C. 77a *et seq.*

⁴ 15 U.S.C. 77r.

⁵ Now known as NYSE Amex.

⁶ Now known as NASDAQ Global Market.

⁷ In 1998, the Commission, on its own initiative, determined that it had the statutory authority to designate securities listed, or authorized for listing, on the named markets as “covered securities.” Securities Act Release No. 7494, 63 FR 3032 (January 21, 1998).

applicable to options listed on NOM are substantially similar to the options listing standards of Amex. Moreover, the failure to designate NOM issues as “covered securities” would be inconsistent with the Commission's mandate under Section 11A of the Securities and Exchange Act of 1934 (the “Exchange Act”) to “assure ... fair competition ... among exchange markets.”⁸

Background

In 1996, Congress adopted The National Securities Markets Improvement Act of 1996 (“NSMIA”)⁹ because “the system of dual Federal and state securities regulation [had] resulted in a degree of duplicative and unnecessary regulation”¹⁰ and “this duplicative regulation tends to raise the cost of capital to American issuers of securities without providing commensurate protection to investors or to our markets.”¹¹ On October 11, 1996, NSMIA was signed into law. NSMIA modified Section 18 of the Securities Act to provide exclusive federal regulation of securities listed on one of the named markets. Further, “in order to avoid competitive disparities, Congress provided the Commission with the discretionary authority to extend similar preemption treatment to” securities listed on another market that has listing standards that are substantially similar to the listing standards of one of the named markets.¹²

When NSMIA was adopted, Congress was well aware of how the states had adopted and enforced their “blue sky” laws. As noted in the Senate Report, “states have exempted from their ‘blue sky’ regulation securities traded on the New York Stock Exchange, the American Stock Exchange and the National Market System of Nasdaq. The bill codifies these exemptions...”¹³ In fact, while the historic exemptions for the NYSE and Amex were, for the most part, based upon statutes in the different states, the Nasdaq National Market exemption resulted from the execution of a Memorandum of Understanding (“MOU”), which followed lengthy negotiations between the North American Securities Administrators Association (“NASAA”) and the National Association of Securities Dealers (“NASD”). Thereafter, NASAA entered into similar MOU’s with respect to certain securities listed on various regional exchanges and the Commission, as noted below, later exercised its discretionary authority to designate these same securities as “covered securities.”

⁸ 15 U.S.C. 78k-1.

⁹ Pub. L. 104-290, 110 Stat. 3416 (1996).

¹⁰ H.R. Conf. Rep. No. 864, 104th Cong., 2d Sess. (1996).

¹¹ Id.

¹² Securities Act Release No. 7422, 62 FR 32705 at 32706 (June 17, 1997).

¹³ Senate Rep. No. 293, 104th Cong., 2d Sess. (1996) at 14.

Since 1998, the Commission has exercised its discretionary authority to designate in Rule 146(b) as covered securities, for the purposes of Section 18 of the Securities Act, the securities listed on: (i) Tier I of the Pacific Exchange (now NYSE Arca, Inc. or “NYSE Arca”); (ii) Tier I of the Philadelphia Stock Exchange (now NASDAQ OMX PHLX LLC or “Phlx”); (iii) Chicago Board Options Exchange (now Chicago Board Options Exchange, Incorporated or “CBOE”); (iv) options listed on the International Securities Exchange, LLC (“ISE”);¹⁴ and (v) the Nasdaq Capital Market¹⁵ (which, together with the named markets, are referred to herein as the “exempt markets”).¹⁶

The securities that are currently listed on NOM consist of standardized options issued and guaranteed by The Options Clearing Corporation (“OCC”) that are also listed on at least one of the other options exchanges that is either a named market or an exempt market.¹⁷ Therefore, the securities listed for trading on NOM are, by definition, “covered securities” for the purpose of Section 18 of the Securities Act. However, the Exchange may, in the future, list standardized options issued and guaranteed by OCC that may not be listed on a named market or an exempt market; and may desire to act as a back-up trading facility for Phlx in the event that Phlx cannot list and trade options on its proprietary indexes.¹⁸ NOM submits this Petition to the Commission to amend Rule 146(b) to designate all securities listed on NOM as “covered securities” for the purpose of Section 18 of the Securities Act.

Discussion

NOM has reviewed the options listing standards for classes of securities that NOM trades, specifically equity options and index options, and determined that they are

¹⁴ ISE was the last major option exchange for which the Commission designated an exchange’s securities to be covered securities under Rule 19(b)(1) of the Securities Act. See Securities Act Release No. 8442 (July 14, 2004), 69 FR 43295 (January 20, 2004)(order adopting Rule 146 amendment to designate options listed on ISE as covered securities). On or about January 27, 2010, BATS filed a Petition to Amend Rule 146(b) to designate BATS securities as covered securities; NOM believes that the BATS petition is pending before the Commission.

¹⁵ The Nasdaq Capital Market was previously named The Nasdaq Small Cap Market. For consistency, this Petition refers to the former Nasdaq Small Cap Market as The Nasdaq Capital Market regardless of the name at the time. See Securities Act Release No. 8791 (April 18, 2007), 72 FR 20410 (April 24, 2007)(order adopting Rule 146 amendment to designate securities listed on the Nasdaq Capital Market as covered securities).

¹⁶ Securities Act Release No. 7494, 63 FR 3032 (January 21, 1998).

¹⁷ All standardized options issued by OCC have the equal protection of OCC’s system of clearing members’ obligations, margin deposits, and clearing funds.

¹⁸ Phlx currently lists nine proprietary option indexes, also known as sector indexes, including the PHLX Gold and Silver Index, PHLX Oil Service Sector Index, and PHLX Semiconductor Sector Index.

substantially similar to corresponding Amex options listing standards.¹⁹ NOM lists only standardized options and its listing standards therefore pertain only to such options.²⁰

Listing Standards for Non-Index Options Overlying Securities

Equity Options

Amex and NOM require initially that an underlying security on which options can be listed and traded must be an "NMS stock" as defined in Rule 600 of Regulation NMS of the Exchange Act²¹ and must have a substantial number of outstanding shares that are widely held and actively traded.²²

Amex and NOM have virtually identical quantitative initial listing requirements pertaining to the public float, distribution of shares, and trading volume of the security underlying equity options. Both markets require at least 7 million shares to be publicly held and at least 2,000 public shareholders.²³ Both markets require the market price of the underlying security to be \$3.00 for the previous five consecutive business days before listing if the security is a "covered security," and at least \$7.50 for a majority of the three calendar months preceding selection of the security is not a "covered security."²⁴ Additionally, both markets require a trading volume of at least 2.4 million in the preceding 12 months (these criteria are known as "initial equity options listing criteria").²⁵

Both markets require that the issuer of an underlying security must be in compliance with the Exchange Act.²⁶ Both markets also indicate that notwithstanding the

¹⁹ The Commission has interpreted the "substantially similar" standard to require listing standards at least as comprehensive as those of the named markets, and has noted that differences in language or approach do not necessarily lead to a determination that the listing standards of the petitioner exchange are not substantially similar to those of a named market. See Securities Act Release No. 8442, 69 FR 43295 (January 20, 2004)(order adopting Rule 146 amendment to designate options listed on ISE as covered securities).

²⁰ Moreover, NOM does not list and trade certain options products that may be listed on Amex (for example, fixed return options and binary broad-based index options), and therefore does not have listing standards specific to such products. Amex does not have listing standards for certain options products (for example, micro narrow-based index options), that NOM has listing standards for. As demonstrated in this Petition, such inconsequential differences do not change the conclusion that NOM and Amex have substantially similar listing standards.

²¹ 17 CFR 242.600.

²² Compare Amex Rule 915(a) with NOM Chapter IV, Section 3(a).

²³ Compare Amex Rule 915 Commentary .01(1)-(2) with NOM Chapter IV, Section 3(b)(i)-(ii).

²⁴ Compare Amex Rule 915 Commentary .01(4) with NOM Chapter IV, Section 3(b)(v).

²⁵ Compare Amex Rule 915 Commentary .01(3) with NOM Chapter IV, Section 3(b)(iv).

²⁶ Compare Amex Rule 915 Commentary .01(5) with NOM Chapter IV, Section 3(b)(iii).

quantitative initial equity options listing criteria, an options contract may be listed and traded if the underlying security meets guidelines for continued listing and options on such underlying security are listed and traded on at least one other national securities exchange.²⁷

As is true for equity options, Amex and NOM have virtually identical quantitative initial listing requirements for options on restructured companies, American depository receipts (“ADRs”), international funds, exchange-traded fund shares (“ETFs,” or “fund shares”), trust issued receipts (“TIRs”), and index-linked securities or exchange traded notes (“ILS” or “ETN”).

Restructured Companies

Both markets require that at least 50 million shares of the restructure security must be issued and outstanding.²⁸ Both markets require that the aggregate market value represented by the restructure security is at least \$500 million;²⁹ or in the alternative the aggregate book value of the assets or revenues attributed to business represented by the restructure security are not less than \$50 million and the relevant percentage of the aggregate book value of the assets attributed to the business represented by the original security.³⁰ Both markets have a market price standard of the restructure security of at least \$7.50 prior to trading if the restructure security is not a “covered security, and of at least \$3.00 if the restructure security is a “covered security.”³¹ Both markets require consideration of the 2.4 million trading volume standard that is set forth in the respective initial listing standards of the markets.³² Additionally, both markets prohibit “when issued” trading.³³

²⁷ Compare Amex Rule 915 Commentary .01(6) with NOM Chapter IV, Section 3(k).

²⁸ Compare Amex Rule 915 Commentary .05(c) with NOM Chapter IV, Section 3(c)(ii).

²⁹ Compare Amex Rule 915 Commentary .05(a)(iii) with NOM Chapter IV, Section 3(c)(v)(1).

³⁰ Compare Amex Rule 915 Commentary .05(a)(iii) with NOM Chapter IV, Section 3(c)(v)(2). Relevant percentage refers to either 25% when the applicable measure determined with respect to the original security or the business it represents includes the business represented by the restructure security; or 33-1/3% when the applicable measure determined with respect to the original security or the business it represents excludes the business represented by the restructure security. Compare Amex Rule 915 Commentary .05(a) with NOM Chapter IV, Section 3(c)(i).

³¹ Compare Amex Rule 915 Commentary .05(d)(ii) with NOM Chapter IV, Section 3(c)(iv)(2).

³² Compare Amex Rule 915 Commentary .05(d)(iii) with NOM Chapter IV, Section 3(c)(iii).

³³ Compare Amex Rule 915 Commentary .05(b) with NOM Chapter IV, Section 3(c)(xi). Both markets indicate that “when issued” trading is trading of options contracts that overlie a restructure security that is not yet issued and outstanding.

American Depository Receipts

Both markets require that they have in place an effective surveillance sharing agreement (“SSA”) with the primary exchange in the home country where the security underlying the ADR is traded.³⁴ As an alternative to the SSA requirement, both markets require that for three months prior to selection of the ADR for options trading either the combined trading volume of the ADR and other related ADRs and securities occurring in the U.S. ADR market or in markets with which the exchange has in place an effective SSA represents at least 50% of the combined worldwide trading volume;³⁵ or represents at least 20% of the combined worldwide trading volume where prior to selection the average daily trading volume (“ADV”) for the security in the U.S. markets is 100,000 or more shares and the trading volume is at least 60,000 shares per day in U.S. markets on a majority of the trading days prior to selection.³⁶

International Funds

Both markets require that international funds meet the initial equity options listing criteria and that the markets either have a market information sharing agreement³⁷ or the international funds are diversified funds as classified in the Investment Company Act of 1940³⁸ and issuers of securities held by the fund are based in five of more countries.³⁹

Exchange Traded Funds

Both markets require that exchange-traded funds or fund shares⁴⁰ must be traded on a national securities exchange and be defined as “NMS stock” under Rule 600 of Regulation NMS pursuant to the Exchange Act.⁴¹ Both markets require that ETFs represent interests in open-end management investment companies that hold approved securities and/or financial instruments or money market instruments that represent investments in indexes or portfolios of investments, represent commodity pool ETFs,⁴² or

³⁴ Compare Amex Rule 915 Commentary .03(1) with NOM Chapter IV, Section 3(f)(i).

³⁵ Compare Amex Rule 915 Commentary .03(2) with NOM Chapter IV, Section 3(f)(ii).

³⁶ Compare Amex Rule 915 Commentary .03(3) with NOM Chapter IV, Section 3(f)(iii).

³⁷ Compare Amex Rule 915 Commentary .04 with NOM Chapter IV, Section 3(h). Both markets indicate that a "market information sharing agreement" would permit the relevant exchange to obtain trading information relating to the securities held by the fund including the identity of the participant of the foreign exchange executing a trade.

³⁸ 15 U.S.C. 80a et seq.

³⁹ Compare Amex Rule 915 Commentary .04 with NOM Chapter IV, Section 3(g).

⁴⁰ ETFs are known as fund shares on NOM.

⁴¹ 17 CFR 242.600.

⁴² Commodity pool ETFs are known as funds on Amex.

represent currency trust shares.⁴³ Each market requires that ETFs in addition either meet the initial equity options listing criteria⁴⁴ or the fund shares are available for creation or redemption each business day in cash or in kind from the investment company.⁴⁵ In addition, non-U.S. component stocks of the index or portfolio on which the fund shares are based that are not subject to comprehensive surveillance agreements (“CSA”) do not represent more than 50% of the weight of the index or portfolio; stocks for which the primary market is in any one country that is not subject to a CSAs do not represent 20% or more of the weight of the index; and stocks for which the primary market is in any two countries that are not subject to CSAs do not represent 33% or more of the weight of the index.⁴⁶ Both markets require that for commodity pool ETFs and currency trust shares, the markets enter into CSAs.⁴⁷ Both markets indicate that options may be listed on funds that represent certain enumerated commodity trusts (e.g. SPDR Gold Trust, iShares Silver Trust).⁴⁸

Trust Issue Receipts

Both markets require that TIRs must be principally traded on a national securities exchange or through a national securities association.⁴⁹ In addition, both markets require that TIRs must either meet initial equity options listing criteria or be available each business day for issuance or cancellation, and not more than 20% of the weight of the TIR is represented by ADRs on securities for which the primary market is not subject to a CSA.⁵⁰

Index-Linked Securities or Exchange Traded Notes

ILS (ETN)⁵¹ are debt obligations that are based on certain underlying securities.⁵² ILS are also known as exchange traded notes (“ETN”). Both markets require that ILS

⁴³ Compare Amex Rule 915 Commentary .06 with NOM Chapter IV, Section 3(i).

⁴⁴ Compare Amex Rule 915 Commentary .06(a) with NOM Chapter IV, Section 3(h)(iv). NOM requires 7 million shares to be publicly held and at least 2,000 public shareholders. The Exchange does not believe this to be a substantial difference, particularly when viewed in conjunction with all of the other listing requirements.

⁴⁵ Compare Amex Rule 915 Commentary .06(a) with NOM Chapter IV, Section 3(i)(iv).

⁴⁶ Compare Amex Rule 915 Commentary .06(b)(i)-(iii) with NOM Chapter IV, Section 3(i)(i)-(iii).

⁴⁷ Compare Amex Rule 915 Commentary .06(b)(iv)-(v) with NOM Chapter IV, Section 3(i)(v)-(vi).

⁴⁸ Compare Amex Rule 915 Commentary .10 with NOM Chapter IV, Section 3(i). NOM does not trade certain funds that are noted in the Amex listing standards (e.g. ETFS Palladium Trust, ETFS Platinum Trust), and as such NOM does not include these products in its listing standards.

⁴⁹ Compare Amex Rule 915 Commentary .07 with NOM Chapter IV, Section 3(j).

⁵⁰ Compare Amex Rule 915 Commentary .07(a)-(b) with NOM Chapter IV, Section 3(j)(i)-(ii).

⁵¹ AMEX refers to index-linked securities as Section 107 Securities.

(ETN) must either meet initial equity options listing criteria or be redeemable at the option of the holder at least on a weekly basis at a price related to the underlying Reference Asset where the issuing company is obligated to issue or repurchase the securities in aggregation units for cash or cash equivalents.⁵³ In addition, both markets must implement surveillance procedures for options on ILS (ETN), including CSAs with markets trading in non-U.S. components.⁵⁴

As with initial listing standards, NOM and AMEX have virtually identical quantitative maintenance requirements. Both exchanges require, for continued approval of an options listing, at least 6.3 million shares of the underlying security publicly held by persons other than those required to report their security holdings under Section 16(a) of the Exchange Act⁵⁵ and at least 1,600 public shareholders for continued listing of that security's options contracts.⁵⁶ Both exchanges require a trading volume of at least 1.8 million in the preceding 12 months.⁵⁷ Neither exchange has a market price per share requirement for continued listing. Both exchanges also require that the underlying security be an "NMS stock" as defined in Rule 600 of Regulation NMS under the Exchange Act.⁵⁸ Failure to meet any one of these criteria may result in delisting of an option or not opening for trading any additional series of options of the class covering that underlying security.⁵⁹ As is true for initial listing requirements, Amex and NOM have substantially similar maintenance requirements for continued listing of options on ADRs,⁶⁰ ETFs,⁶¹ TIRs,⁶² Holding Company Depository Receipts ("HOLDRS"),⁶³ and ILS (ETN).⁶⁴

⁵² Compare Amex Rule 915 Commentary .11(a)-(b) with NOM Chapter IV, Section 3(l)(i)-(ii). The securities that underlie ILS are known in the NOM and Amex rules as equity index-linked securities, commodity-linked securities, currency-linked securities, fixed income index-linked securities, futures-linked securities, and multifactor index-linked securities (together the "Reference Assets").

⁵³ Compare Amex Rule 915 Commentary .11(c) with NOM Chapter IV, Section 3(l)(iii).

⁵⁴ Compare Amex Rule 915 Commentary .11(d) with NOM Chapter IV, Section 3(l)(iv).

⁵⁵ 15 U.S.C. 78p(a).

⁵⁶ Compare Amex Rule 916 Commentary .01(1)-(2) with NOM Chapter IV, Section 4(b)(i)-(ii).

⁵⁷ Compare Amex Rule 916 Commentary.01(3) with NOM Chapter IV, Section 4(b)(iii).

⁵⁸ 17 CFR 242.600.

⁵⁹ Compare Amex Rule 916 with NOM Chapter IV, Section 4(a). These sections provide that where exceptional circumstances have caused an underlying security not to comply with current approval maintenance requirements, regarding number of publicly held shares of publicly held principal amount, number of shareholders, trading volume or market price an Exchange may, in the interest of maintaining a fair and orderly market or for the protection of investors, determine to continue to open additional series of option contracts of the class covering that underlying security.

⁶⁰ Compare Amex Rule 916 Commentary .06 with NOM Chapter IV, Section 4(g).

⁶¹ Compare Amex Rule 916 Commentary .07 with NOM Chapter IV, Section 4(h).

Amex rules include an express provision that Amex will monitor on a daily basis news sources for information of corporate actions, whereas NOM rules do not.⁶⁵ The Exchange notes that each registered exchange has an obligation under Sections 6 and 19(g) of the Exchange Act to comply with its own rules.⁶⁶ To comply with these statutory requirements, NOM must monitor corporate and other events, which may have a bearing on whether a security underlying an option continues to satisfy NOM maintenance listing standards. The Exchange believes that this does not represent a significant difference between NOM and AMEX maintenance requirements.⁶⁷

Listing Standards for Index Options Overlying Securities

Narrow-Based Indexes

NOM and Amex have substantially similar provisions for the designation of narrow-based indexes as eligible to underlie index options. Both markets indicate that index options on narrow-based indexes may be listed and traded either pursuant to a rule change proposal that is approved by the Commission under Section 19(b) of the Exchange Act,⁶⁸ or pursuant to an expedited procedure that involves submitting to the Commission a Form 19b-4(e) under Rule 19b-4(e) of the Exchange Act.⁶⁹

With respect to listing and trading narrow-based index options pursuant to Rule 19b-4(e), NOM and the Amex have virtually identical quantitative initial listing requirements pertaining to market value, trading volume, calculation of the index, inclusion of non-U.S. component securities or ADRs, index weighting, index components, rebalancing, information barriers maintained by broker-dealers, and the dissemination of index values.

⁶² Compare Amex Rule 916 Commentary .08 with NOM Chapter IV, Section 4(i).

⁶³ Both markets consider HOLDERS to be a type of TIR. Compare Amex Rule 916 Commentary .09 with NOM Chapter IV, Section 4(j).

⁶⁴ Compare Amex Rule 916 Commentary .12 with NOM Chapter IV, Section 4(k).

⁶⁵ Compare Amex Rule 916 Commentary .10 with NOM Chapter IV, Section 4.

⁶⁶ 15U.S.C. 78f(b), 78s(g).

⁶⁷ This is consistent with the findings of the Commission when reviewing ISE's Rule 146(b) Petition and an analogous rule situation (ISE did not have a news monitoring rule while Amex did). See Securities Act Release No. 8442 (July 14, 2004), 69 FR 43295 (January 20, 2004).

⁶⁸ 15 U.S.C. 78s(b).

⁶⁹ 17 CFR 240.19b-4(e). Compare Amex Rule 901C Commentary .03 with NOM Chapter XIV, Section 6. Narrow-based indexes are also known as stock index industry groups or industry indexes on Amex and NOM, respectively.

Both markets require narrow-based index options to be either capitalization-weighted, modified capitalization-weighted, price-weighted, or equal dollar weighted.⁷⁰ Indexes that are equal-dollar weighted must be rebalanced at least once every calendar quarter.⁷¹ If an index is maintained by broker-dealer, the index must be calculated by a third party who is not a broker-dealer, and the broker-dealer must erect an informational barrier around its personnel who have access to information concerning changes in the index.⁷² NOM has additional restrictive requirements that options must be designated as A.M.-settled and that the indexes consist of ten or more components, which Amex does not.⁷³

Both markets require that each component security has a market capitalization of at least \$75 million, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, the market capitalization must be at least \$50 million.⁷⁴ Trading volume of each component security must have been at least one million shares for each of the last six months, except that for each of the lowest weighted component securities in the index that in the aggregate account for no more than 10% of the weight of the index, trading volume must have been at least 500,000 shares for each of the last six months.⁷⁵ In a capitalization-weighted index or a modified capitalization-weighted index, the lesser of the five highest weighted component securities in the index or the highest weighted component securities in the index that in the aggregate represent at least 30% of the total number of component securities in the index each must have had an average monthly trading volume of at least 2,000,000 shares over the past six months.⁷⁶

Both markets require that no single component security represents more than 30% of the weight of the index, and the five highest weighted component securities in the index do not in the aggregate account for more than 50% (65% for an index consisting of fewer than 25 component securities) of the weight of the index.⁷⁷ Component securities that account for at least 90% of the weight of the index and at least 80% of the total number of component securities in the index must satisfy the listing requirements applicable to individual underlying securities.⁷⁸ Each component security must be an

⁷⁰ Compare Amex Rule 901C Commentary .03(b)(i) with NOM Chapter XIV, Section 6(b)(2), which does not include the modified equal-dollar weighting methodology.

⁷¹ Compare Amex Rule 901C Commentary .03(b)(ii) with NOM Chapter XIV, Section 6(b)(11).

⁷² Compare Amex Rule 901C Commentary .03(b)(iii) with NOM Chapter XIV, Section 6(b)(12).

⁷³ Compare Amex Rule 901C Commentary .03 with NOM Chapter XIV, Section 6(b)(1)-(2).

⁷⁴ Compare Amex Rule 901C Commentary .03(a)(1) with NOM Chapter XIV, Section 6(b)(3).

⁷⁵ Compare Amex Rule 901C Commentary .03(a)(2) with NOM Chapter XIV, Section 6(b)(4).

⁷⁶ Compare Amex Rule 901C Commentary .03(a)(3) with NOM Chapter XIV, Section 6(b)(5).

⁷⁷ Compare Amex Rule 901C Commentary .03(a)(7) with NOM Chapter XIV, Section 6(b)(6).

⁷⁸ Compare Amex Rule 901C Commentary .03(a)(4) with NOM Chapter XIV, Section 6(b)(7).

"NMS stock" as defined in Rule 600 of Regulation NMS of the Exchange Act.⁷⁹ Non-U.S. component securities (stocks or ADRs) that are not subject to CSAs must not in the aggregate represent more than 20% of the weight of the index.⁸⁰ Finally, both exchanges require that the underlying index value be reported at least once every fifteen seconds during the time the index options are traded on the exchange.⁸¹

As is true for initial listing requirements, Amex and NOM have substantially similar maintenance requirements for narrow-based index options.⁸²

Broad-Based Indexes

As with narrow-based index options, NOM and Amex indicate that index options on broad-based indexes may be listed and traded either pursuant to a rule change proposal that is approved by the Commission under Section 19(b) of the Exchange Act,⁸³ or pursuant to Rule 19b-4(e) of the Exchange Act.⁸⁴

With respect to listing and trading broad-based index options pursuant to Rule 19b-4(e), NOM and Amex have virtually identical quantitative initial listing requirements pertaining to market value, trading volume, calculation of the index, inclusion of non-U.S. component securities or ADRs, index weighting, index components, rebalancing, system capacity, information barriers maintained by broker-dealers, the dissemination of index values, and surveillance.

Both markets have identical calculation standards and require broad-based index options to be A.M.-settled and either capitalization-weighted, modified capitalization-weighted, price-weighted, or equal dollar weighted.⁸⁵ Indexes that are equal-dollar weighted must be rebalanced at least once every calendar quarter.⁸⁶ Indexes maintained by broker-dealers must be calculated by a third party who is not a broker-dealer, and the

⁷⁹ Compare Amex Rule 901C Commentary .03(a)(6) with NOM Chapter XIV, Section 6(b)(8). Amex uses pre-Rule 600 language in subsection (a)(6).

⁸⁰ Compare Amex Rule 901C Commentary .03(a)(5) with NOM Chapter XIV, Section 6(b)(9).

⁸¹ Compare Amex Rule 901C Commentary .03(b)(iv) with NOM Chapter XIV, Section 6(b)(10).

⁸² Compare Amex Rule 901C Commentary .03(d) with NOM Chapter XIV, Section 6(c).

⁸³ 15 U.S.C. 78s(b).

⁸⁴ 17 CFR 240.19b-4(e). Compare Amex Rule 901C Commentary .02 with NOM Chapter XIV, Section 3. Broad-based indexes are also known as broad stock index groups or market indexes on Amex and NOM, respectively.

⁸⁵ Compare Amex Rule 901C Commentary .02(a)(2)-(3) with NOM Chapter XIV, Section 3(b)(2)-(3).

⁸⁶ Compare Amex Rule 901C Commentary .02(a)(13) with NOM Chapter XIV, Section 3(b)(13).

broker-dealer must erect an informational barrier around its personnel who have access to information concerning changes in the index.⁸⁷

Both markets require that the index must consist of 50 or more component securities,⁸⁸ and component securities that account for at least 95% of the weight of the index must have a market capitalization of at least \$75 million, except that component securities that account for at least sixty-five percent of the weight of the index must have a market capitalization of at least \$100 million.⁸⁹ Amex and NOM both require that component securities that account for at least 80% of the weight of the index satisfy the listing criteria applicable to individual underlying securities.⁹⁰ Furthermore, each component security that accounts for at least 1% of the weight of the index must have an ADV of at least 90,000 shares during the last six month period.⁹¹ No single component security may account for more than 10% of the index's weight, and the five highest-weighted securities may not, in the aggregate, account for more than 33% of the index's weight.⁹² Each component security must be an NMS stock,⁹³ and non-U.S. component securities, in the aggregate, may not make up more than 20% of the index's weight.⁹⁴

Both exchanges also have the same distribution requirements for the value of the index, requiring that the index value be disseminated at least once every fifteen seconds by a major market data vendor.⁹⁵ Each exchange must believe it has adequate system capacity to support the trading of options on the index.⁹⁶ Finally, both NOM and Amex require that they have written surveillance procedures in place with respect to surveillance of trading of options on the index.⁹⁷

As is true for initial listing requirements, Amex and NOM have substantially similar maintenance requirements for broad-based index options.⁹⁸

⁸⁷ Compare Amex Rule 901C Commentary .02(a)(14) with NOM Chapter XIV, Section 3(b)(14).

⁸⁸ Compare Amex Rule 901C Commentary .02(a)(4) with NOM Chapter XIV, Section 3(b)(4).

⁸⁹ Compare Amex Rule 901C Commentary .02(a)(5) with NOM Chapter XIV, Section 3(b)(5).

⁹⁰ Compare Amex Rule 901C Commentary .02(a)(6) with NOM Chapter XIV, Section 3(b)(6).

⁹¹ Compare Amex Rule 901C Commentary .02(a)(7) with NOM Chapter XIV, Section 3(b)(7).

⁹² Compare Amex Rule 901C Commentary .02(a)(8) with NOM Chapter XIV, Section 3(b)(8).

⁹³ Compare Amex Rule 901C Commentary .02(a)(9) with NOM Chapter XIV, Section 3(b)(9).

⁹⁴ Compare Amex Rule 901C Commentary .02(a)(10) with NOM Chapter XIV, Section 3(b)(10).

⁹⁵ Compare Amex Rule 901C Commentary .02(a)(11) with NOM Chapter XIV, Section 3(b)(11).

⁹⁶ Compare Amex Rule 901C Commentary .02(a)(12) with NOM Chapter XIV, Section 3(b)(12).

⁹⁷ Compare Amex Rule 901C Commentary .02(a)(15) with NOM Chapter XIV, Section 3(b)(15).

⁹⁸ Compare Amex Rule 901C Commentary .02(b) with NOM Chapter XIV, Section 3(c).

NOM believes that there are no differences in the way options may be considered for and initially listed or maintained on NOM and AMEX that have any bearing on whether the listing standards of the two markets are substantially similar.

Position Limits, Exercise Limits and Margin Requirements for Options

Both markets have substantially similar position and exercise limits for options on non-index securities,⁹⁹ narrow-based index securities,¹⁰⁰ and broad-based index securities.¹⁰¹ NOM rules require that narrow-based index options and broad-based index options comply with position and exercise limits set by CBOE, and that in the case than an option is traded on NOM but not CBOE, options participants must comply with the applicable rules of NOM.¹⁰² Both markets also have substantially similar margin requirements for options.¹⁰³ NOM rules require that its participants or associated persons are bound by the margin requirements of either CBOE or NYSE.¹⁰⁴ CBOE, NYSE and Amex position and index limits and margin rules have already been determined to be substantially similar.¹⁰⁵

The Listings Program

It is important to note that Nasdaq's rules-based options listing program, which includes NOM listings, is robust and transparent. To the extent practicable, Nasdaq applies bright-line, objective listing criteria to initially make a determination whether to list an option product and thereafter to monitor the product to ensure that it meets all of the requirements for continued listing.

Nasdaq's listing enforcement program sits atop a sophisticated, web-based, proprietary system that is used to determine initial and continued listing compliance. This system receives nightly data feeds of reports filed with the Commission and others by entities that underlie options; and accesses proprietary, commercial, and public databases and market data to determine compliance with initial and continued listing standards. Alerts are generated to help the staff prioritize listing reviews, make listing determinations, and process compliance concerns in a timely manner. Consistent with the previously noted transparency of the listing process, Nasdaq staff has no discretion to waive the application of required initial or continued listing standards. Nasdaq maintains

⁹⁹ Compare Amex Rule 904 and Rule 905 with NOM Chapter III, Section 7 and Section 9.

¹⁰⁰ Compare Amex Rule 904C(c) and Rule 905C with NOM Chapter XIV, Section 7 and Section 9.

¹⁰¹ Compare Amex Rule 904C(b) and Rule 905C with NOM Chapter XIV, Section 5 and Section 9.

¹⁰² NOM Chapter XIV, Section 5 and Section 7.

¹⁰³ Compare Amex Rule 462 with NOM Chapter XIII, Section 3.

¹⁰⁴ NOM Chapter XIII, Section 3.

¹⁰⁵ Securities Act Release No. 7494, 63 FR 3032 (January 21, 1998).

a list, updated as needed and daily, of all NOM options that are listed and that fail to meet continued listing requirements.

Conclusion

Section 11A of the Exchange Act requires that there be fair competition among exchange markets and between exchange markets and markets other than exchange markets to further the public interest and protection of investors. The lack of a blue sky exemption for NOM may be an impediment to competition. The Exchange may, in the future, want to list standardized options that are not listed on a named market or an exempt market (e.g. NOM proprietary indexes). Equally as important is the future capability of the Exchange to act as a back-up trading facility for Phlx in the event that Phlx cannot list and trade options on its proprietary indexes. Clearly, designation of all securities listed on NOM as “covered securities” for the purpose of Section 18 of the Securities Act will be necessary to pursue such listings¹⁰⁶ and to act as a back-up facility for proprietary listings.

As demonstrated in this Petition, the listing standards of NOM are “substantially similar” to those of the named markets, particularly Amex, and are supported by an effective, rigorous regulatory program. Approving this Petition will serve to protect the interests of investors, since it would encourage market participants to list and trade options on a market that is characterized by high listing standards and superior regulation, and promote competition among markets.

Were the Commission on the other hand to reject this Petition, it could create a potential unfair competitive disparity among marketplaces that would not allow NOM to list proprietary option products (or act as a back-up for proprietary products), which would be contrary to the Exchange Act.

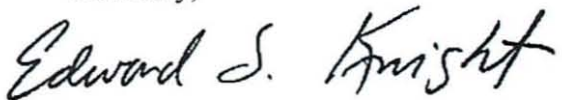
For the reasons set forth herein, we respectfully petition the Commission to amend Rule 146(b) to designate securities listed on NOM as covered securities under section 18(b)(1) of the Securities Act. Amending Rule 146(b) to include options listed on NOM as covered securities will exempt those securities from State registration (blue sky registration) requirements as set forth under Section 18(a) of the Securities Act. This action will establish parity between NOM and the other named and exempt options exchanges and will eliminate an unfair impediment to competition.

¹⁰⁶ The OCC has, through its Office of General Counsel, informed the Exchange that until NOM is a named (exempted) exchange for purposes of Rule 146, OCC will not clear singly listed or proprietary NOM products.

Ms. Elizabeth M. Murphy
Nasdaq Petition to Amend Rule 146(b)
October 8, 2010
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If you have any questions, or if we can provide any additional information that would be helpful to the Commission or its staff, please feel free to call me.

Sincerely,

Handwritten signature of Edward J. Knight in black ink.

cc: Chairman Mary L. Shapiro
Commissioner Kathleen L. Casey
Commissioner Elisse B. Walter
Commissioner Luis A. Aguilar
Commissioner Troy A. Paredes
Ms. Meredith Cross, Director, Division of Corporation Finance
Mr. Robert E. Cook, Director, Division of Trading and Markets