

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-78714; File No. SR-Phlx-2016-84]

### Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 1042A, Exercise of Options Contracts and Options Floor Procedure Advice G-1, Index Option Exercise Advice Forms

August 29, 2016.

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 August 22, 2016, NASDAQ PHLX LLC (“Phlx” or “Exchange”) 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 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 Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 1042A, Exercise of Options Contracts and Options Floor Procedure Advice G-1, Index Option Exercise Advice Forms

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaqphlx.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 is amending Rule 1042A to provide additional clarity to member organizations and add additional requirements regarding the procedures to be followed in order to exercise American style index option contracts. Currently, Rule 1042A states that “[a] memorandum to exercise any American style stock index option contract, issued or to be issued in a customer, market maker or firm account at the Options Clearing Corporation must be received or prepared by the member organization no later than five minutes after the close of trading on that day and must be time-stamped at the time it is received or prepared.”<sup>3</sup> Commentary .01 further states that “[a]ll memoranda of exercise instructions prepared pursuant to this Rule 1042A are subject to Securities and Exchange Commission rules 17a-3(a)(6) and 17a-4(b).” However, the rule does not state what a “memorandum of exercise” is. Nor does it state from whom the member organization may “receive” it.

Rule 1042A also requires a member or member organization to that intends to submit an “exercise notice” for any American style option contract(s) on behalf of a customer, specialist, Registered Options Trader, or firm account to deliver an “Exercise Advice” on a form prescribed by the Exchange, to a place designated by the Exchange, no later than five minutes after the close of trading.<sup>4</sup> However, the rule does not state what an “Exercise Advice” or an “exercise notice” is, or whether they may be the same thing or a different thing, or how they relate to the “memorandum to exercise” (though both the memorandum to exercise and the exercise advice are due no later than five minutes after the close of trading). The Exchange believes therefore that the current rule is susceptible to misinterpretation and confusion on the part of the reader.

The Exchange has consequently determined to provide additional clarity to member organizations regarding procedures to be followed in order to exercise an American-style index option contract. It proposes to delete all rule text currently found in section (a) of Rule 1042A with the exception of the first part of the first sentence, which reads simply and clearly that “[w]ith respect to index option contracts,

clearing members are required to follow the procedures of the Options Clearing Corporation for tendering exercise notices”. In place of the deleted text, the Exchange proposes to adopt several new provisions that clearly articulate the procedures to be followed.

The new language specifies that Clearing Members must follow the procedures of the Options Clearing Corporation (“OCC”) when exercising American-style cash-settled index options contracts issued or to be issued in any account at OCC. Member organizations must also observe certain procedures with respect to American-style cash-settled index options.

Specifically, for all contracts exercised by the member organization or by any customer of the member organization, an “exercise advice” must be delivered by the member organization in such form or manner prescribed by the Exchange no later than five (5) minutes after the close of trading on that day.<sup>5</sup> Subsequent to the delivery of an “exercise advice,” should the member organization or a customer of the member organization determine not to exercise all or part of the advised contracts, the member organization must also deliver an “advice cancel” in such form or manner prescribed by the Exchange no later than five (5) minutes after the close of trading on that day.<sup>6</sup> These procedures would not apply on the business day prior to expiration in a series expiring on a day other than a business day, or on the expiration day in series expiring on a business day.<sup>7</sup>

The new rule language also adds some new provisions not covered by the existing rule text. It provides that the Exchange may determine to extend the applicable deadline for the delivery of “exercise advice” and “advice cancel” notifications pursuant to this paragraph if unusual circumstances are present.<sup>8</sup> It prohibits member organizations from time stamping or submitting an “exercise advice” prior to the purchase of the contracts to be exercised if the member organization knew or had reason to know that the contracts had not yet been purchased.<sup>9</sup> The new language adds a provision specifying that the failure of any member organization to follow the procedures in the rule could result in the assessment of a fine, which may include but is not limited to disgorgement of potential

<sup>5</sup> See proposed Rule 1042A(i). An exercise advice is a notification to the Exchange of a member’s intention to exercise one or more options contracts.

<sup>6</sup> See proposed Rule 1042A(ii).

<sup>7</sup> See proposed Rule 1042A(vii). Existing Rule 1042A(b) is being deleted as redundant.

<sup>8</sup> See proposed Rule 1042A(iii).

<sup>9</sup> See proposed Rule 1042A(iv).

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

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

<sup>3</sup> See existing Rule 1042A(i).

<sup>4</sup> See existing Rule 1042A(ii).

economic gain obtained or loss avoided by the subject exercise, as determined by the Exchange.<sup>10</sup> The new language also states that preparing or submitting an “exercise advice” or “advice cancel” after the applicable deadline on the basis of material information released after such deadline, in addition to constituting a violation of the Rule, is activity inconsistent with just and equitable principles of trade.<sup>11</sup>

The new language requires each member organization to prepare a memorandum of every exercise instruction received showing by time stamp the time when such instruction was so received. It provides that such memoranda shall be subject to the requirements of Commission Rule 17a-4(b).<sup>12</sup> Finally, the new language requires each member organization to establish fixed procedures to ensure secure time stamps in connection with their electronic systems employed for the recording of submissions to exercise or not exercise expiring options.<sup>13</sup>

The Exchange also proposes to amend Options Floor Procedure Advice (“OFPA”) G-1 by conforming it to the requirements of updated Rule 1042A. References to a specific “Exercise Advice Form” are replaced with general references to exercise advices to eliminate any suggestion that a specified form must be used in order to comply with Rule 1042A. The Exchange intends that any written evidence reflecting that Rule 1042A’s requirements have been met will be sufficient to constitute an exercise advice.<sup>14</sup> The amendments also

eliminate an outdated reference to C/MACS, which is no longer in use at OCC,<sup>15</sup> and modify the OFPA to reflect that expiration now typically occurs on a business day rather than on a Saturday.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with section 6(b) of the Act<sup>16</sup> in general, and furthers the objectives of section 6(b)(5) of the Act<sup>17</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 adding rules providing clear procedures concerning exercise of American index options. Rule 1042A is intended to provide for the maintenance of a level playing field between holders of long and short positions in expiring index options. After trading has ended on the final trading day before expiration, persons who are short the option have no way to close out their short positions. To put option holders on equal footing, the rule minimizes the time period in which a holder can exercise an index option after the close of trading on the last business day prior to expiration in series expiring on a day other than a business day or on the expiration day in series expiring on a business day.

version of the form, updated to conform to this proposed rule change. These updates include (1) the addition of a statement that the rule does not apply in series expiring on a day other than a business day or on the expiration day in series expiring on a business day, (2) the deletion of capitalization of the terms memorandum of exercise and exercise advice, as these are not defined terms in the rule, (3) the addition of a reference to memorandum of exercise instructions, which is a term used in the rule, (4) the deletion of a statement that the form must be time stamped “contemporaneously with its submission” and addition of new language that conforms to the rule, (5) the adjustment of a cross reference to the rule, in order for the form to refer to the correct rule section required by the context, and (6) the updating of the name of the Exchange from Philadelphia Stock Exchange to NASDAQ OMX PHLX. Members may continue to use the form, updated as reflected in *Exhibit 3*, if they choose to do so. Members will also be able to continue to fill the Rule 1042A exercise advice requirements by sending an email to the Exchange, or by providing the required exercise advice notification in any other manner directed by the Exchange. The Exchange accepts the time indicated on an email as satisfaction of the time stamp requirement.

<sup>15</sup> According to OCC, C/MACS was an on-line, menu-driven system that allowed OCC member firms to access or input trade information directly from or to OCC’s clearing systems. See Securities Exchange Act Release No. 35982 (July 18, 1995), 60 FR 38072 (July 25, 1995), at footnote 6.

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

<sup>17</sup> 15 U.S.C. 78f(b)(5).

The Exchange believes that the introductory language of Rule 1042A as revised, as well as sections (i), (vii) and (viii) largely restate the existing rule, but in a much more clear and understandable way. New sections (ii) and (iii) provide, respectively, for the delivery of “advice cancels” if made on a timely basis and for the extension of applicable deadlines for delivery of exercise advices and advice cancel notifications in unusual circumstances. The advice cancel language codifies existing practice that is not spelled out in the current rule, and the rule providing for extension of deadlines provides the Exchange with flexibility to deal with unusual market circumstances in a way that is fair to market participants. New subsection (iv) clearly prohibits the preparation, time stamping or submitting an “exercise advice” prior to the purchase of the contracts to be exercised, if the member organization knew or had reason to know that the contracts had not yet been purchased. New sections (v) and (vi) articulate clearly that violation of Rule 1042A may result in consequences including disgorgement and that preparing or submitting an exercise advice or advice cancel after the applicable deadline on the basis of material information released after the deadline violates Rule 1042A and constitutes activity inconsistent with just and equitable principles of trade. These provisions should discourage lack of compliance with Rule 1042A. Finally, compliance should be enhanced by the adoption of section (ix), a new requirement to establish procedures to ensure secure time stamps for the recording of submissions to exercise or not exercise expiring options. The proposed amendments to OFPA G-1 are designed to promote just and equitable principles of trade and to protect investors and the public interest by conforming it to the requirements of updated Rule 1042A, eliminating potential confusion concerning a requirement that a specified form must be used in order to comply with Rule 1042A, eliminating an outdated reference to C/MACS, reflecting current practice that exercise advices may be delivered to Exchange staff in the trading crowd as well as at the Surveillance Post on the Exchange floor, and acknowledging that expiration now typically occurs on a business day rather than on a Saturday.

## 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

<sup>10</sup> See proposed Rule 1042A(v). Exchange Rule 960.1 provides that any member alleged to have violated rules of the Exchange shall be subject to the disciplinary jurisdiction of the Exchange, and after notice and opportunity for a hearing may be appropriately disciplined by expulsion, suspension, fine, censure, limitation or termination as to activities, functions, operations, or association with a member or member organization, or any other fitting sanction in accordance with the provisions of the Exchange’s disciplinary rules.

<sup>11</sup> See proposed Rule 1042A(vi).

<sup>12</sup> See proposed Rule 1042A(viii). The Exchange is deleting existing Commentary .01 of Rule 1042A as redundant. The Exchange believes that including the requirement in the text of the rule rather than as a “Commentary” is a preferable approach in terms of organization and presentation of the rule. Although the proposed language does not contain the requirement that memoranda of exercise instructions are subject to Commission Rule 17a-3(a)(6), the Exchange notes that the rule upon which its proposal is based, NOM Rulebook chapter VIII, Exercises and Deliveries, section 1, Exercise of Options Contracts, Supplementary Material .02, does not contain this requirement. The Exchange seeks to conform its Rule 1042A to the counterpart NOM rule in this respect.

<sup>13</sup> See proposed Rule 1042A(ix).

<sup>14</sup> The Exchange currently does not require the use of a specific form of exercise advice. Nonetheless, certain floor-based members currently use a “Phlx Index Option Exercise Advice Form.” The Exchange has attached as *Exhibit 3* a revised

necessary or appropriate in furtherance of the purposes of the Act because the rule provides additional detail and requirements relating to procedures for exercise of American index options that apply to all members equally.

*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 foregoing 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)(iii) of the Act<sup>18</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>19</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: (i) Necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) 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 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-Phlx-2016-84 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-Phlx-2016-84. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-Phlx-2016-84 and should be submitted on or before September 23, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Robert W. Errett,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

**[Investment Company Act Release No. 32241; 812-14630]**

**Starboard Investment Trust and Cavalier Investments, Inc.; Notice of Application**

August 29, 2016.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice of an application under section 6(c) of the Investment Company Act of 1940 ("Act") for an exemption from section 15(a) of the Act and rule 18f-2 under the Act, as well as from certain disclosure requirements in rule 20a-1 under the Act, Item 19(a)(3) of Form N-1A, Items 22(c)(1)(ii), 22(c)(1)(iii), 22(c)(8) and 22(c)(9) of Schedule 14A under the Securities Exchange Act of 1934, and Sections 6-07(2)(a), (b), and (c) of Regulation S-X ("Disclosure Requirements"). The requested exemption would permit an investment adviser to hire and replace certain sub-advisers without shareholder approval and grant relief from the Disclosure Requirements as they relate to fees paid to the sub-advisers.

**APPLICANTS:** Starboard Investment Trust (the "Trust"), a Delaware statutory trust registered under the Act as an open-end management investment company with multiple series, and Cavalier Investments, Inc., a Massachusetts corporation registered as an investment adviser under the Investment Advisers Act of 1940 (the "Adviser," and, collectively with the Trust, the "Applicants").

**DATES Filing Dates:** The application was filed March 18, 2016, and amended on June 20, 2016.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on September 23, 2016, and should be accompanied by proof of service on the applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested.

Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090. Applicants: The Trust, 116 South Franklin Street, Rocky Mount, NC 27804; the Adviser, 50 Braintree Hill Park #105, Braintree, MA 02184.

**FOR FURTHER INFORMATION CONTACT:** Hae-Sung Lee, Attorney-Adviser, at (202) 551-7345, or Mary Kay Frech, Branch Chief, at (202) 551-6821 (Division of

<sup>18</sup> 15 U.S.C. 78s(b)(3)(a)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>20</sup> 17 CFR 200.30-3(a)(12).