

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-63647; File No. SR-Phlx-2010-148)

January 5, 2011

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Granting Approval of a Proposed Rule Change Relating to Certain Membership Rules Including Affiliations and Lapse of Membership Applications

I. Introduction

On November 5, 2010, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change relating to certain membership rules. The proposed rule change was published for comment in the Federal Register on November 22, 2010.<sup>3</sup> The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

A. Affiliations

Currently, Phlx Rule 793 (“Affiliations- Dual or Multiple”) allows a person that holds a Phlx trading permit to associate or affiliate with one or more Phlx members or a non-member that is engaged in the securities business if such affiliation is approved in writing by the member and disclosed to the Exchange.<sup>4</sup> However, no member may use his or her trading permit to

---

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

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

<sup>3</sup> Securities Exchange Act Release No. 63318 (November 16, 2010), 75 FR 71155 (“Notice”).

<sup>4</sup> Specifically, the rule provides that “[n]o person shall at the same time be a partner, ... officer, director, stockholder, or associated person of more than one member or participant organization, nor shall he be affiliated in any manner with a non-member or non-participant organization which is engaged in the securities business, unless such affiliation has been disclosed to and approved in writing by the member and/or

qualify more than one member organization. Further, the rule provides that the Exchange could disapprove multiple affiliations that the Exchange believed were “inconsistent with Exchange standards of financial responsibility, operational capability, or compliance responsibility.”

Among other things, Rule 793 allows a broker-dealer to seek an affiliation in order to obtain membership status without the need to secure a membership seat (or, subsequent to the Exchange’s demutualization, a trading permit). Such an arrangement would have been appropriate, for example, where a broker-dealer sought only electronic access to the Exchange, since the Exchange only requires one permit to qualify a member organization. Another example would be applicable in the case of access to the Phlx trading floor. Because Phlx requires each person associated with a member organization on the trading floor who functions in a trading capacity to have a permit, and every trader on the floor must possess a Series A-1 permit,<sup>5</sup> affiliation could allow floor traders to affiliate with another member organization to satisfy certain trading or staffing requirements.

The Exchange now proposes to eliminate Rule 793. In its place, the Exchange proposes to amend existing Rule 908 (“Rights and Privileges of A-1 Permits”) to add a new paragraph (b)(i) to allow a trading permit holder on the Exchange’s floor to affiliate with up to two member organizations that are under common ownership. Specifically, the proposed rule provides that: “[n]otwithstanding applicable By-Laws and Rules conditioning membership, a Series A-1 permit holder on the Exchange’s trading floor may be affiliated with up to two (2) member

---

participant organizations and such approval has been filed with the Office of the Secretary.”

<sup>5</sup> For example, a Series A-1 permit holder is required to display a badge when on the trading floor that identifies the member organization on whose behalf the trader is trading that day. A Series A-1 permit holder may not trade for more than one member organization on the same day.

organizations (a primary and a secondary member organization) that are under common ownership....” The proposed rule would define “common ownership” to be at least 75% common ownership between the member organizations. Further, both the primary and secondary member organizations would need to notify the Phlx Membership Department of the affiliation, and such notification must include an attestation of common ownership, the names of the individuals responsible for supervision of the permit holder, and the Exchange account numbers for billing purposes. Under the proposed rule, a Series A-1 permit holder would have the ability to engage in trading activity on the Exchange’s floor on behalf of either the primary or secondary member organization that the permit is affiliated with per Rule 908(b)(i).<sup>6</sup>

Despite the ability to affiliate with up to two member organizations, the proposal provides that a Series A-1 permit holder would be required to comply with all current membership By-Laws and Rules. Further, both the permit holder and the affiliated member organizations also must comply with all applicable trading, registration, qualification, examination, and other membership requirements. In particular, the Series A-1 permit holder is required to obtain and maintain all necessary qualifications (including examinations) and registrations. In addition, the Series A-1 permit holder would be required to disclose to the Exchange the individuals at each member organization (both the primary and secondary member organization) that are responsible for supervising the Series A-1 permit holder.

As a consequence of the proposal, any Series A-1 permit holder that currently affiliates with an unrelated party would not be permitted to continue to qualify that member organization. In addition, a permit holder would not be permitted to maintain an affiliation

---

<sup>6</sup> A Series A-1 permit holder may not trade for more than one member organization on the same day.

with more than two member organizations, and both organizations must be under common ownership.

In recognition of the proposed deletion of Rule 793 and new Rule 908(b)(i), the Exchange also proposed to make conforming changes to other rules that reference affiliation. In particular, the Exchange proposed to amend Option Floor Procedure Advice (“OFPA”) F-9 to conform to new Rule 908(b)(i).<sup>7</sup> In addition, the Exchange would remove references to “dual affiliation” in OFPA F-11 and Regulation 3 in favor of a reference simply to “affiliation,” and would replace a reference to Rule 793 with Rule 908 in OFPA F-11. The Exchange further would amend Rule 908(h) to add an “or” to the text of the rule to make clear that a permit may be transferred either intra-firm or to an inactive nominee registered with the Exchange.

#### B. Lapsed Applications

In addition, the Exchange proposes to amend Rule 900.2 to address lapsed membership applications. Pursuant to Exchange Rule 900.2, applicants desiring membership in the Exchange are required to submit information in a form prescribed by the Membership Department.<sup>8</sup> According to the Exchange, after a 90 calendar day period has elapsed, the information provided by the applicant is stale and no longer provides a reliable or reasonable basis for the Exchange to

---

<sup>7</sup> In particular, the Exchange proposed in F-9 to remove references to “dual” so that the rule simply refers to affiliations; to require reports of affiliations to be sent to the Membership Department instead of the Exchange’s Office of the Secretary to conform with the text of amended Rule 908; replace the reference to Rule 793, which is being deleted, with a reference to Rule 908; amend the language in OFPA F-9 to remove the requirements to explain compensation since affiliations would only be permitted for organizations that are under common ownership; and add a sentence indicating that floor members must adhere to the requirements in renamed (a) and (b), and to reference Exchange Rule 1020 for the newly named F-9(ii)(a).

<sup>8</sup> The Membership Department posts the requisite forms on the Exchange’s website at [http://www.nasdaqomxtrader.com/Trader.aspx?id=membership\\_phlx](http://www.nasdaqomxtrader.com/Trader.aspx?id=membership_phlx). The Membership Department updates the forms from time to time and makes them available on this website.

make a determination on admitting a person for membership.<sup>9</sup> The Exchange represented that the Membership Department expends a considerable amount of resources requesting updates from members and researching information to make a reasonable determination when an application is outdated.<sup>10</sup>

To address this situation, the Exchange proposed to amend Exchange Rule 900.2<sup>11</sup> to require persons seeking membership to the Exchange to provide all information and respond to subsequent requests from the Membership Department for information within a 90 calendar day period. Any failure to respond in the prescribed period would result in the application lapsing. If an application lapses, the person would be required to submit a new application if it wants to continue with its application.<sup>12</sup> Upon a showing of good cause, the Exchange may extend the timeframe.<sup>13</sup> The Exchange would not refund the fee associated with submitting an application and the applicant would be required to pay a new fee to resubmit the application if it chooses to proceed with its application for membership.<sup>14</sup>

---

<sup>9</sup> See Notice, supra note 3, at 71157.

<sup>10</sup> See id.

<sup>11</sup> The Commission notes that the Exchange proposed to renumber Rule 900.2(e) as 900.2(f) due to the new proposed Rule 900.2(e).

<sup>12</sup> The purpose of the new application would be to update all information to provide the Membership Department with current information on which to base a decision to accept the applicant for membership. The Exchange expressed its intent to file a proposal with the Commission to amend its Fee Schedule to reflect the lapsed application fee.

<sup>13</sup> See Notice, supra note 3, at 71157. The Exchange also may extend the time period when it makes a request for additional information relatively close to the 90-day deadline. See id.

<sup>14</sup> The Exchange's Application Fee can be found on the Fee Schedule located on the Exchange's website at <http://www.nasdaqomxtrader.com/content/marketregulation/membership/phlx/feesched.pdf>.

### III. Discussion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange,<sup>15</sup> and, in particular, the requirements of Section 6(b) of the Act<sup>16</sup> and the rules and regulations thereunder. Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>17</sup> in that the proposal promotes just and equitable principles of trade, prevents fraudulent and manipulative acts, removes impediments to and perfects the mechanism of a free and open market and a national market system, and, in general, protects investors and the public interest.

The Commission believes the proposal, which limits the ability of a Series A-1 permit holder to qualify other organizations for Exchange membership is reasonable, as it will continue to allow flexibility in permitting a permit holder to qualify up to one other member organization (the “secondary member organization”) for Exchange membership that is under common ownership with the primary member organization with which the permit holder is associated. While the Commission notes that based on the proposal, a Series A-1 permit holder who currently affiliates with an unrelated member organization (not under common ownership) to qualify the member organization for electronic access or access to the trading floor would not be permitted to continue to qualify that member organization, the Commission believes that the proposal is a reasonable alternative that may assist firms in addressing staffing issues for entities under a common ownership that conduct a floor-based trading business.

---

<sup>15</sup> In approving this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

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

The Exchange's proposal recognizes the changed environment in terms of the means by which persons obtain access to the Exchange. Current Rule 793 was adopted when the Exchange was a membership organization and access was obtained through ownership of a limited number of seats on the Exchange. Rule 793 allows persons to access and trade on the Exchange that might not have otherwise been able to purchase or obtain a membership seat. However, since it demutualized, the Exchange now offers access via an unlimited number of trading permits, which can be more readily obtained by qualified individuals compared to former membership seats. In this respect, the Exchange's proposal modernizes the affiliation provision in recognition of the transition of the Exchange from a mutual to a demutualized organization.

Furthermore, the Commission notes that the Exchange represented in its proposal, as described above, that the Exchange would continue to have access to information on an affiliation necessary to carry out its regulatory responsibility with respect to the member organizations and their affiliated persons. Further, an affiliation would not excuse a person from any of the Exchange's By-Laws and rules governing membership. Notably, both the permit holder and the affiliated member organizations must comply with all applicable registration, qualification, examination, and other membership requirements, and the permit holder must continue to obtain and maintain all necessary qualifications (including examinations) and registrations. Further, the Series A-1 permit holder must disclose to the Exchange the individuals at each member organization (both the primary and secondary member organization) that are responsible for supervising the Series A-1 permit holder. The Commission believes that these provisions are designed to ensure compliance with applicable membership rules and should assure the Exchange's oversight of any affiliation.

In addition, the Commission believes that the Exchange's proposed conforming changes to OFPA F-9, F-11, and Regulation 3 appropriately reflect the proposed deletion of Rule 793 and

the new provision in Rule 908(b)(i). Separately, the Commission believes that the proposal to amend the language in Rule 908(h) should provide Exchange members with clarity as to the transfer of permits.

Finally, the Commission believes that requiring applicants for Phlx membership to respond to requests for documentation or additional information within a 90 calendar day period, absent a showing of good cause, is reasonable and should provide the Exchange's Membership Department up-to-date information that it can utilize to make decisions concerning membership applications. The 90-day response period and subsequent lapse of an application for non-response should encourage prompt replies by applicants to Exchange requests for information and documentation and should assure that the Exchange has reliable and current information on which to base membership decisions.



IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-Phlx-2010-148) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

Elizabeth M. Murphy  
Secretary

---

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).