

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64338; File No. SR-Phlx-2011-13)

April 25, 2011

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to Amendments to NASDAQ OMX PHLX LLC's Limited Liability Company Agreement, By-Laws, Rules, Advices and Regulations

I. Introduction

On February 16, 2011, 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"),¹ and Rule 19b-4 thereunder,² a proposed rule change to alter its governance structure and to make other non-substantive conforming changes. The proposed rule change was published for comment in the Federal Register on March 4, 2011.³ On April 15, 2011, the Exchange filed Amendment No. 1 to the proposed rule change.⁴ The Commission received no comment letters regarding the proposal. This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange proposes to amend its Limited Liability Company Agreement ("LLC Agreement") and By-Laws to substantially conform them to The NASDAQ Stock Market LLC's ("NASDAQ") Second Amended Limited Liability Company Agreement ("NASDAQ LLC

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 63981 (February 25, 2011), 76 FR 12180 (March 4, 2011) ("Notice").

⁴ In Amendment No. 1, the Exchange amended the text of Rules 607, 862, 1012, 1017, 1058, 1079, 1080, 1082, and 3202 to reflect separate and unrelated intervening proposed rule changes that became effective after this proposal was published for comment. Because Amendment No. 1 is technical in nature, the Commission is not required to publish it for comment.

Agreement”) and By-Laws, respectively. These conforming changes include, among other things: (1) the elimination of the Exchange’s Series A Preferred Stock and dissolution of the Member Voting Trust; (2) modifications to the Exchange’s board and committee structure to harmonize it with NASDAQ’s board and committee structure;⁵ (3) the elimination of foreign currency option (“FCO”) participations, of which there are none outstanding; (4) the elimination of definitions, rules, and references to XLE (the Exchange’s former equities trading platform); and (5) changes to other terms, names, and cross-references contained in the Exchange’s LLC Agreement and By-Laws, including technical and grammatical changes to reflect the Exchange’s recent conversion from a Delaware corporation to a Delaware limited liability company (“LLC”),⁶ and changes to clarify and simplify the By-Laws, Rules, Option Floor Procedure Advices and Equity Floor Procedure Advices (the latter two are collectively referred to herein as “Advices”), and Regulations of the Exchange.

A. Elimination of the Series A Preferred Stock and Dissolution of the Member Voting Trust

The Exchange proposes to amend the Exchange’s formation documents to eliminate the Series A Preferred Stock. In 2003, Phlx, formerly the Philadelphia Stock Exchange, Inc., filed with the Commission to amend its formation documents to form a demutualized Delaware stock

⁵ To align itself with the terminology used by NASDAQ, the Exchange proposes to rename the Board of Governors to now be the Board of Directors (“Board”). As a result, all references to “Governors” would be changed to “Directors” in the By-Laws, Rules, Advices, and Regulations of the Exchange. See Notice, supra note 3, 76 FR at 12181, 12185, 12189.

⁶ See Securities Exchange Act Release No. 62783 (August 27, 2010), 75 FR 54204 (September 3, 2010) (SR-Phlx-2010-104). As a result of the conversion, all references to Incorporation would be changed to LLC in the By-Laws, Rules, Advices, and Regulations of the Exchange. The specific proposed rule changes relating to this amendment are discussed in detail in the Notice. See Notice, supra note 3, 76 FR at 12181, 12189.

corporation.⁷ At the time of demutualization, the Exchange amended its Certificate of Incorporation to designate one share of preferred stock as the “Series A Preferred Stock,” the holder of which had the sole power to select and remove the On-Floor Governors,⁸ in accordance with specified procedures.⁹ A trust agreement was created and the one and only outstanding share of Series A Preferred Stock was then held by the Phlx Member Voting Trust (“Trust”). The Exchange believes that these arrangements were necessary at the time of demutualization to preserve the ability of members to vote for and affirmatively elect certain board Governors because: (i) under Delaware law, only stockholders can elect the directors of a Delaware corporation; and (ii) after the demutualization, Members and Member Organizations that were not owners at the time of the demutualization were not stockholders of the Exchange.¹⁰

After the Exchange’s demutualization, the trustee of the Trust, pursuant to the Amended Trust Agreement, had the power to vote the share of Series A Preferred Stock to elect the Member Governor and the Designated Independent Governors,¹¹ as directed by the vote of the

⁷ See Securities Exchange Act Release No. 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73).

⁸ “On-Floor Governors” were the Governors elected by the Exchange’s Members and Member Organizations. See Securities Exchange Act Release No. 53734 (April 27, 2006), 71 FR 26589 (May 5, 2006) (SR-Phlx-2005-93); email from Angela S. Dunn, Assistant General Counsel, Office of the General Counsel, NASDAQ OMX (“Dunn”), to Ronesha A. Butler, Special Counsel, Division of Trading and Markets, Commission (“Butler”), dated April 20, 2011 (“Dunn Email”). See also supra note 7 (discussing On-Floor Governors).

⁹ See supra note 7.

¹⁰ See Notice, supra note 3, 76 FR at 12181.

¹¹ After the Exchange’s demutualization, the term “On-Floor Governors” was eliminated and replaced by the Member Governor and the Designated Independent Governors. See Dunn Email, supra note 8. “Member Governor” means a Governor who is a Member or a general partner or an executive officer (vice-president and above) of a Member Organization and is duly elected to fill the one vacancy on the Board of Governors allocated to the Member Governor. See By-Laws Article I. “Designated Independent

Member Organization Representatives of Member Organizations entitled to vote pursuant to Article III of the By-Laws. According to the Exchange, this process was designed to facilitate the exercise by Members and Member Organizations of their rights to fair representation in the selection and removal of certain Governors of the Exchange and to facilitate the administration of the affairs of the Exchange in accordance with the Act.¹² In particular, the Trust ensured that the candidates for Governor elected by vote of the Members were, in turn, validly elected to the Board of Governors pursuant to Delaware law and that the Members' vote could not be overridden.

In 2008, the Exchange was acquired by and became a wholly-owned subsidiary of The NASDAQ OMX Group, Inc. ("NASDAQ OMX"). The Exchange represents that, since the acquisition by NASDAQ OMX, there are no longer any other common shareholders of Phlx.¹³ As a result, the Exchange's formation documents were amended so that the Series A Preferred Stockholder is the sole preferred shareholder of the Exchange and elects the Member Governor and the Designated Independent Governors pursuant to Section 16 of the LLC Agreement and Article IV of the By-Laws.¹⁴ Currently, the number of Designated Independent Governors, together with the Member Governor, equals at least 20% of the total number of Governors who are elected by the Series A Preferred Stockholder. Further, Phlx recently restructured to a limited liability company and thus is no longer a corporation subject to Delaware corporate

Governors" means those Independent Governors who are elected by the holder of the Series A Preferred Stock. See id.

¹² See Notice, supra note 3, 76 FR at 12181.

¹³ See id.

¹⁴ The Exchange represents that the Series A Preferred Stock is still held by the Trust pursuant to the Third Amended and Restated Trust Agreement dated February 22, 2007 ("Amended Trust Agreement"). See Notice, supra note 3, 76 FR at 12181.

law.¹⁵ Accordingly, the Exchange proposes to amend the LLC Agreement to refer to the fact that it has a single stockholder – NASDAQ OMX (“Stockholder”).

Because the Exchange believes the Series A Preferred Stock mechanism is no longer necessary to facilitate the exercise by Members and Member Organizations of their rights to fair representation, Phlx proposes to eliminate the Trust in favor of a nomination process for Member Representative Directors that is identical to the process currently utilized by NASDAQ.¹⁶ The Exchange believes that its proposed board structure and election process, identical to that of NASDAQ, would provide Members and Member Organizations fair representation in the selection and removal of certain directors of the Exchange (“Directors”) in accordance with the Act.¹⁷ The Exchange would maintain the requirement that at least 20% of the Directors would be Member Representative Directors, and all Directors other than the Member Representative Directors would be elected by the Stockholder as described in the By-Laws.¹⁸

The Exchange represents that it would continue to accept nominations from Members and Member Organizations for certain designated Board positions.¹⁹ With respect to the election of the Member Representative Directors, the Exchange represents the process would remain

¹⁵ See supra note 6.

¹⁶ The term “Member Representative Director” would mean a Director who has been elected or appointed after having been nominated by the Member Nominating Committee or by a Member pursuant to the By-Laws. A Member Representative Director may be, but is not required to be, an officer, director, employee, or agent of a Member. See Notice, supra note 3, 76 FR at 12185.

¹⁷ See id. at 12181. The Exchange is not proposing to amend its By-Laws with respect to the nomination of Directors, which process is currently the same as that of NASDAQ. Rather, the Exchange is proposing to eliminate the prior mechanism concerning the actual election of designated directors that the Series A Preferred Stock and accompanying Trust were designed to facilitate.

¹⁸ See LLC Agreement, Section 8.

¹⁹ See Notice, supra note 3, 76 FR at 12181.

substantially unchanged.²⁰ In an uncontested election (i.e., when there is only one candidate nominated for each open Member Representative Director position), the Stockholder would be obligated to elect the Member Representative Directors from the list of candidates provided by the Member Nominating Committee.²¹ In a contested election, the Stockholder would be obligated to elect the persons on the list of candidates who received the most Member votes, where the Members have the right to cast one vote for each Member Representative Director position to be filled.²² The Stockholder would not have discretion to do anything other than vote for the Member Representative Director candidates nominated as described above.

B. Composition of the Board

The Exchange proposes to conform its Board structure to mirror that of NASDAQ's, including provisions related to composition and powers, standing committees, meetings, and quorum. Among other provisions, the Exchange proposes to amend its LLC Agreement to indicate that the Stockholder would have discretion to determine the size of the Board, subject to compositional and term requirements. The authorized number of Directors could be increased or decreased by the Stockholder at any time, upon notice to all Directors, but no decrease in the number of Directors could shorten the term of any incumbent Member Representative Director.²³ Currently, the By-Laws give the Board of Governors the exact same discretion.²⁴

²⁰ See id. at 12184.

²¹ See id.

²² See id. Pursuant to proposed By-Laws Article II, Section 2-1, a candidate would be added to the list of candidates by a Member that submits a timely and duly executed written nomination to the Secretary of the Exchange. The Exchange represents that it provides Members procedures to nominate candidates at each annual meeting. See Notice, supra note 3, 76 FR at 12182.

²³ See NASDAQ LLC Agreement, Section 9.

²⁴ See By-Laws Article IV, Section 4-1.

Phlx would retain one-year terms for Directors and would allow for removal of a Director for cause (e.g., the Director no longer satisfies the classification for which the Director was elected or the Director's continued service as such would violate the compositional requirements of the Board).²⁵ Additionally, the Exchange would retain the discretion to hold Member meetings.²⁶

The Exchange proposes to amend its By-Laws regarding the annual election of Member Representative Directors to mirror the provisions of the NASDAQ By-Laws. Specifically, the Stockholder would be able to fill a vacancy in a Member Representative Director position on the Board with a person from a list of candidates prepared by the Member Nominating Committee. Filling such vacancies currently requires a majority vote by the Board of Governors.²⁷ However, as proposed, the vacancy could remain unfilled if the remaining term of the vacant Director position is less than six months.²⁸

The Exchange also proposes to amend the composition qualifications for its Board. Currently, the Board of Governors includes: one Governor who is the Chief Executive Officer; one Governor who is a Member Governor; one Governor who is a Stockholder Governor; and such additional Governors, who are Independent Governors, to fill the remaining seats, including

²⁵ See NASDAQ By-Laws Article II, Section 2; Notice, supra note 3, 76 at 12184-85. Currently, Governors are elected for one year. See By-Laws Article IV, Section 4-3. Similar to NASDAQ provisions, each Director elected, designated, or appointed by the Stockholder would hold office until a successor is elected and qualified or until the earlier of such Director's death, resignation, expulsion, or removal.

²⁶ See By-Laws Article IV, Section 4-11; Dunn Email, supra note 8.

²⁷ See email from Dunn to Butler, dated April 21, 2011. The Exchange also proposes to rename Article II "Annual Election of Member Representative Directors and Other Actions By Members." The specific NASDAQ By-Laws and the relevant, current By-Laws are identified in the Notice. See Notice, supra note 3, 76 FR at 12184.

²⁸ See proposed By-Laws Article II, Section 2-3; NASDAQ By-Laws Article II, Section 3.

a number of Designated Independent Governors, who, together with the Member Governor, equal at least 20% of the total number of Governors.²⁹

As proposed, the new Board would consist of: a number of Non-Industry Directors, including at least one Public Director and at least one Stockholder Director (or if the Board consists of ten or more Directors, at least two Stockholder Directors), which would equal or exceed the sum of the number of Industry Directors and Member Representative Directors to be elected under the terms of the LLC Agreement. The Exchange would retain the same 20% requirement with respect to directors elected by Members, and the composition of the new Board would be identical to that of NASDAQ.

The Exchange proposes to amend Article I of the By-Laws to incorporate changes to defined terms that concern its revised Board structure.³⁰ The Exchange is proposing to replace the Independent Governor designation with “Public Director,” the Designated Industry Governor/Member Governor designation with “Member Representative Director,” and the Stockholder Governor designation with “Stockholder Director.”

The Exchange proposes to adopt the following definitions for the various Director positions. The term “Industry Director” would mean a Director who has demonstrated industry experience by satisfying one of several criteria.³¹ The term “Non-Industry Director” would

²⁹ All of the Governors are required to meet the respective qualifications set forth in Article I of the By-Laws. See Notice, supra note 3, 76 FR at 12185. The number of Governors is set by the Board of Governors. See By-Laws, Section 4-1.

³⁰ The specific additions and deletions are listed in the Notice. See Notice, supra, note 3, 76 FR at 12183.

³¹ The Director either: (i) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than 10% of the equity of a broker or dealer, and the broker or dealer accounts for more than 5% of the gross revenues received by the consolidated entity; (iii) owns more than 5% of the equity

mean a Director who is (i) a Public Director; (ii) an officer, director, or employee of an issuer of securities listed on the national securities exchange operated by the Exchange; or (iii) any other individual who would not be an Industry Director.³² The term “Public Director” would mean a Director who has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA.³³ The term “Stockholder Director” would mean a Director who is an officer, director (or a person in a similar position in business entities that are not corporations), designee, or employee of a holder of common stock or any affiliate or subsidiary of such holder of common stock and is duly elected to fill the one vacancy on the Board allocated to the Stockholder Director.³⁴

C. Committees of the Board

Currently, the Exchange’s enumerated standing committees are: an Executive Committee, a Regulatory Oversight Committee, a Business Conduct Committee, a Nominating Committee, a Member Nominating Committee, a Quality of Markets Committee, and an Options

securities of any broker or dealer, whose investments in brokers or dealers exceed 10% of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20% or more of the professional revenues received by the Director or 20% or more of the gross revenues received by the Director's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50% or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20% or more of the professional revenues received by the Director or member, or 20% or more of the gross revenues received by the Director's or member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Exchange (or any affiliate thereof) or the Financial Industry Regulatory Authority (“FINRA”) (or any predecessor) or has had any such relationship or provided any such services at any time within the prior three years. See id. at 12185.

³² See id.

³³ See id.

³⁴ See id.

Trade Review Committee. Additional committees may be established by resolution of the Board of Governors.³⁵ Each standing committee is currently composed of not more than nine members, including ex-officio members, except for the Options Trade Review Committee which may be composed of twenty members.³⁶ Currently, the chair of each standing committee must be a member of the Board of Governors and at least one other person on each committee must be a Governor, except for the Options Trade Review Committee.³⁷ All committee members are appointed by the Board of Governors, and each appointee serves for one year, except for the members of the Options Trade Review Committee who are appointed for terms of no more than three years, subject to reappointment by the Board of Governors.³⁸

The Exchange proposes to revise its current standing committees to more closely align them with the standing committees of NASDAQ. Committees would fall into two categories: “Committees Composed Solely of Directors” or “Committees Not Composed Solely of Directors.” This categorization of committees would not affect any committee’s compositional requirements. The Executive Committee, a Finance Committee,³⁹ and the Regulatory Oversight Committee, all of which the Exchange currently has, would be Committees Composed Solely of Directors. The Nominating Committee, the Member Nominating Committee, and the Business

³⁵ See By-Laws Article X; Notice, supra note 3, 76 FR at 12182.

³⁶ See Notice, supra note 3, 76 FR at 12182.

³⁷ See id.

³⁸ See id.

³⁹ The current By-Laws permit, but do not require, a Finance Committee. See By-Laws Article X, Section 10-1.

Conduct Committee, all of which also currently exist, would be Committees Not Composed Solely of Directors.⁴⁰

The Exchange proposes to amend the composition of the Business Conduct Committee by increasing its size from between five and nine to between eight and twelve, as determined by the Board.⁴¹ Further, while the composition of the Business Conduct Committee would remain majority “Non-Industry,”⁴² the compositional requirements would change slightly to require that the number of Non-Industry Directors, including at least three Public Directors, equal or exceed the sum of the number of Industry Directors and Member Representative Directors. This new composition would result in Phlx’s Business Conduct Committee mirroring the composition of the NASDAQ Review Council, which performs similar functions.⁴³ The Business Conduct Committee would continue to include a number of Member Representative Directors equal to at least 20% of the total number of members.⁴⁴

In addition, the language describing the responsibilities of the Quality of Markets Committee would be revised to conform to the language used to describe the responsibilities of the NASDAQ Quality of Markets Committee, though the Quality of Markets Committee would continue to perform the same functions that it performs today.⁴⁵ The Quality of Markets

⁴⁰ Proposed By-Laws Section 5-1, titled “Committees,” would require committee members, who are not Directors, to provide the Secretary of the Exchange certain information to classify as a committee member. See Notice, supra note 3, 76 FR at 12186.

⁴¹ See id.

⁴² See id.

⁴³ See NASDAQ By-Laws Article VI, Section 2.

⁴⁴ Currently, at least one Member who conducts options business at the Exchange is required to be on the Business Conduct Committee. See By-Laws Article 10, Section 10-11.

⁴⁵ See By-Laws Article 10, Section 10-21; NASDAQ By-Laws Article III, Section 6. The Quality of Markets Committee would continue to: (1) provide advice and guidance to the

Committee would continue to include broad representation of market participants, including investors, market makers, integrated retail firms, and order entry firms. Further, it would continue to be comprised of a number of Member Representative Directors that is equal to at least 20% of the total number of members. The number of Non-Industry Directors would continue to equal or exceed the sum of the number of Industry Directors and Member Representative Directors.

Finally, the Exchange proposes to rename its Options Trade Review Committee as the Market Operations Review Committee and expand its scope to include both equities and options matters.⁴⁶ This committee would continue to include a number of Member Representative Directors equal to at least 20% of the total number of members. Further, the By-Laws would continue to require that no more than 50% of the members of the Market Operations Review Committee would be engaged in market making activity or employed by a Member firm whose revenues from market making activity exceed 10% of its total revenues.⁴⁷

D. Meetings of the Board and Committees

Board on issues relating to the fairness, integrity, efficiency, and competitiveness of the information, order handling, and execution mechanisms of the national securities exchange operated by the Exchange from the perspective of investors, both individual and institutional, retail firms, market making firms, NASDAQ-listed companies, and other market participants; and (2) advise the Board with respect to national market system plans and linkages between the facilities of the Exchange and other markets.

⁴⁶ Accordingly, all references to “Options Trade Review Committee” would be changed to “Market Operations Review Committee” in the By-Laws, Rules, Advices, and Regulations of the Exchange as discussed in the Notice. See supra note 3, 76 FR at 12189. The functions of this committee are specified in Rules 124, 1092, 3312, and Option Floor Procedure Advice F-27. See id. at 12187.

⁴⁷ See By-Laws Article X, Section 10-10; Notice, supra note 3, 76 FR at 12187.

The Exchange proposes to amend its LLC Agreement to modify the provisions regarding meetings of the Board to mirror provisions in NASDAQ's LLC Agreement which are similar to current Phlx By-Laws.⁴⁸ In the absence or disqualification of a member of a committee composed solely of Directors, the member or members thereof present at any meeting and not disqualified from voting, whether or not such members constitute a quorum, could unanimously appoint another member of the Board to act at the meeting in the place of any such absent or disqualified member.⁴⁹ Members of each committee would hold office for such period as may be fixed by a resolution adopted by the Board. Any member of a committee could be removed from such committee only by the Board, and vacancies could be filled by the Board.

The quorum requirements for the Board and the committees are not substantively changing. Thus, as proposed, a majority of a committee would continue to constitute a quorum and the vote of a majority present would continue to be an act of the committee.⁵⁰ Further, any committee that consists solely of one or more Directors would continue to have and could exercise all the powers and authority of the Board in the management of the business and affairs of the Exchange, to the extent provided in a resolution of the Board.⁵¹

E. Elimination of Foreign Currency Options Participations

⁴⁸ See NASDAQ LLC Agreement, Section 9; By-Laws Article IV, Sections 4-10, 4-11, and 4-14.

⁴⁹ See proposed LLC Agreement, Section 8; NASDAQ LLC Agreement, Section 9.

⁵⁰ See By-Laws Article IV, Section 4-9, and Article X, Section 10-3.

⁵¹ See By-Laws Article X, Section 10-3.

The initial offering period for FCOs on Phlx began on January 25, 1982 and extended through the last business day preceding the first day of FCO trading on the Exchange.⁵² Access to the Exchange’s FCO market was available only to those who purchased a FCO participation (“FCO Participation”). Non-members were admitted to the Exchange as FCO participants (“FCO Participants”) by the Exchange’s Admission Committee upon completing an application process similar to that utilized when Exchange membership was sought.⁵³

In 2003, when the Exchange demutualized, the Exchange proposed that access to the Exchange’s facilities and the right to trade would be conferred by newly-issued permits rather than by ownership or leasing of seats of the Exchange.⁵⁴ However, the Exchange preserved the concept of FCO Participations after its demutualization. Trading of FCOs continued to be allowed through the FCO Participations, but, since demutualization, trading of any product other than FCOs requires permits.⁵⁵

The Exchange represents that it currently does not have any persons who are FCO Participants because such participations are no longer necessary in light of the fact that a trading permit holder has the ability, by virtue of the trading permit, to trade all of the products traded on the Exchange, including FCOs.⁵⁶ The Exchange is proposing to eliminate FCO Participations and to delete all related references and provisions that are only applicable to FCO Participations,

⁵² See Securities Exchange Act Release No. 19134 (October 14, 1982), 47 FR 46949 (October 21, 1982) (SR-Phlx-82-5).

⁵³ See id.

⁵⁴ See Securities Exchange Act Release No. 48847 (November 26, 2003), 68 FR 67720 (December 3, 2003) (SR-Phlx-2003-73).

⁵⁵ See Rule 908. FCO Participants and the organizations upon which the Exchange confers FCO trading privileges are subject to all the provisions of the Rules that are applicable to Members and Member Organizations, and to many provisions of the By-Laws. See Notice, supra note 3, 76 FR at 12184.

⁵⁶ See Notice, supra note 3, 76 FR at 12184.

including remaining provisions concerning seat leases, owners, and lessors in the By-Laws and the Rules.

F. Technical Changes

The Exchange proposes to delete definitions and Equity Floor Procedure Advices that related solely to the Exchange's former equity trading system, XLE, which ceased operations in October 2008.⁵⁷ In addition, the Exchange is proposing to change references from "XLE" to "PSX," the Exchange's recently-launched new cash equities trading platform,⁵⁸ where applicable. Rule 3202 notes existing rules which are applicable to PSX, and the Exchange proposes to amend it to enumerate former By-Laws applicable to PSX participants, which would be relocated to sections of the Rules, and to include another rule pertaining to listing criteria on PSX.⁵⁹

The Exchange is also proposing to remove outdated references to AUTO-X and AUTOM, which references no longer apply to the current equity options trading platform, Phlx XL.⁶⁰ Additionally, the Exchange proposes to update certain references to AUTOM and AUTO-X with references to Phlx XL, where applicable.⁶¹

⁵⁷ See Securities Exchange Act Release No. 58613 (September 22, 2008), 73 FR 57181 (October 1, 2008) (SR-Phlx-2008-65). The definitions are listed in the Notice. See supra note 3, 76 FR at 12189.

⁵⁸ See Securities Exchange Act Release No. 62877 (September 9, 2010), 75 FR 56633 (September 16, 2010) (SR-Phlx-2010-79).

⁵⁹ The specific rules are identified in the Notice. See supra note 3, 76 FR at 12190.

⁶⁰ The Exchange removed such verbiage from Rule 1014. See Securities Exchange Act Release No. 63036 (October 4, 2010), 75 FR 62621 (October 12, 2010) (SR-Phlx-2010-131); Dunn Email, supra note 8.

⁶¹ See Rule 1080(a).

Lastly, the Exchange proposes to amend other references in the Rules to correct and update cross-references to sections that were impacted by previous rule changes;⁶² to make technical amendments to certain rules which are reserved or would benefit from the addition of a heading for ease of reference; and to make other non-substantive changes. In particular, the Exchange proposes to:

- amend the LLC Agreement to require explicitly that the Board keep books and records within the United States;
- permit a transfer or assignment to an affiliate of the Stockholder;⁶³
- add a new Schedule A to the LLC Agreement to define certain new terms for ease of reference;⁶⁴
- replace “Member Organization Representative” with “Executive Representative;”
- replace certain references to “Phlx” with references to the “Exchange;”
- update names of other self-regulatory organizations references in the Rules; and
- change references to reflect the restructuring of certain departments of the Exchange, including name changes;⁶⁵

⁶² See Securities Exchange Act Release Nos. 42889 (June 2, 2000), 65 FR 36878 (June 12, 2000) (SR-Phlx-00-12) (a proposal to rescind Rule 132); 60169 (June 24, 2009), 74 FR 31782 (July 2, 2009) (SR-Phlx-2009-40) (a proposal to amend text in Rule 1043); and 63036, supra note 60.

⁶³ The Exchange represents that this change would give the Stockholder the ability to transfer or assign the common stock of Phlx to an affiliate within the NASDAQ OMX organizational chart. See Dunn Email, supra note 8.

⁶⁴ The specific definitions are listed in the Notice. See supra note 3, 76 FR at 12183. Additionally, the Exchange proposes to adopt new rules of construction to further explain the definitions as used in the LLC Agreement, and the current Schedule A, amended to eliminate the reference to the Trust, would become Schedule B. See id.

⁶⁵ The specific references are described in detail in the Notice. See id. at 12189.

The Exchange has represented that these proposed changes are all technical in nature and do not constitute substantive or material changes.⁶⁶

III. Discussion

After careful review of the proposal, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁶⁷ In particular, the Commission finds that the proposal is consistent with Section 6(b)(1) of the Act,⁶⁸ which requires a national securities exchange to be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act. The Commission further finds that the proposal is consistent with Section 6(b)(3) of the Act,⁶⁹ which requires that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission also finds that the proposal is consistent with Section 6(b)(5) of the Act,⁷⁰ which requires, among other things, that the rules of an exchange be 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.

The Commission finds that the proposed elimination of Phlx's Series A Preferred Stock and dissolution of the Trust is consistent with the Act. Though it is dismantling the current

⁶⁶ See id. at 12190.

⁶⁷ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁶⁸ 15 U.S.C. 78f(b)(1).

⁶⁹ 15 U.S.C. 78f(b)(3)

⁷⁰ 15 U.S.C. 78f(b)(5).

mechanism through which it assures that members have the power to nominate, vote for, and elect certain representative governors to its Board of Governors, the Exchange is preserving the fair representation of members in the selection of governors/directors by adopting provisions that are substantially similar to those currently utilized by NASDAQ, which were previously approved by the Commission.⁷¹ In particular, under the new process, the Exchange will continue to accept nominations from Members and Member Organizations for specifically designated Member Representative Director positions, and the Stockholder will be obligated to elect persons on the list of candidates provided by the Member Nominating Committee (which list, in the case of a contested election, would be those directors that received the most Member votes). The Commission notes that the dissolution of the Trust will not eliminate or affect the ability of members to nominate and vote for Member Representative Directors, nor will it affect the assurance that Members' chosen director candidates will be elected to the Board by the Stockholder. The Commission believes that the proposed nomination process for Member Representative Directors, similar to that of NASDAQ, would provide Members and Member Organizations with fair representation in the selection of certain Directors of the Exchange in accordance with the Act.

⁷¹ See Securities Exchange Act Release No. 53128 (January 13, 2006), 71 FR 3550, 3553 (January 23, 2006) (File No. 181) (approving NASDAQ as a national securities exchange) ("NASDAQ Approval Order").

The Commission notes that the revised LLC Agreement and By-Laws will require the Board to include Public,⁷² Non-Industry,⁷³ and Member Representative Directors,⁷⁴ the latter of which will continue to comprise at least 20% of the Board. The Commission has previously noted that, consistent with Section 6(b)(3) of the Act,⁷⁵ the selection of Member Representative Directors helps to ensure that an exchange's members have a voice in the governing body of the exchange and the corresponding exercise by the exchange of its self-regulatory authority, and that the exchange is administered in a way that is equitable to all who trade on its market or through its facilities.⁷⁶ Further, the composition of the Board will continue to satisfy the requirements of Section 6(b)(3) of the Act by requiring that one or more directors be representative of issuers and investors and not be associated with a member of the Exchange, broker, or dealer.

The Exchange also proposes to adopt a provision that allows for the removal of a Director with cause (e.g., where the Director no longer satisfies the classification for which the Director was elected or the Director's continued service as such would violate the compositional requirements of the Board). The Commission finds that such removal for cause is consistent with the Act in that it is identical to a NASDAQ provision previously approved by the

⁷² A Public Director has no material business relationship with a broker or dealer, the Exchange or its affiliates, or FINRA.

⁷³ A Non-Industry Director is a Public Director; an officer, director, or employee of an issuer of securities listed on the national securities exchange operated by the Exchange; or any other individual who would not be an Industry Director.

⁷⁴ A Member Representative Director is elected or appointed after having been nominated by the Member Nominating Committee or by a Member pursuant to the By-Laws, and he or she may, but is not required to be, an officer, director, employee, or agent of a Member.

⁷⁵ 15 U.S.C. 78f(b)(3).

⁷⁶ See NASDAQ Approval Order, supra note 71, 71 FR at 3553.

Commission, and is designed to ensure that the Board continues to satisfy compositional requirements consistent with Section 6(b)(3) of the Act.⁷⁷ In addition, the Exchange proposes to amend its By-Laws so that the Stockholder would fill a vacancy of a Member Representative Director on the Board with a person from a list of candidates prepared by the Member Nominating Committee. Currently, such vacancies may be filled only upon a majority vote by the Board of Governors.⁷⁸ This change is intended to replicate a NASDAQ provision previously approved by the Commission, and is consistent with the Act in that it is designed to ensure that the Board continues to satisfy compositional requirements, particularly those concerning fair representation.⁷⁹ The Commission believes that Phlx's revised governing documents, as proposed, will continue to provide for the fair representation of Phlx Members and Member Organizations and also will provide board qualification requirements that are consistent with the Act and consistent with those that have been approved previously by the Commission for NASDAQ.

The Commission finds that the Exchange's proposal to modify the composition of Business Conduct Committee is consistent with the Act. The proposed revisions to the composition of the Business Conduct Committee will make it identical to the composition of the equivalent NASDAQ committee (the NASDAQ Review Council).⁸⁰ In particular, the Exchange proposes to increase the number of Non-Industry and Member Representative Directors on the committee as well as require the Business Conduct Committee to be comprised of a number of

⁷⁷

Id.

⁷⁸

The vacancy could remain unfilled if the term of the vacant Director position is less than six months.

⁷⁹

See NASDAQ Approval Order, supra note 71, 71 FR at 3553.

⁸⁰

See id. at 3554 (“The Commission believes that [NASDAQ’s] proposed committees should enable it to carry out its responsibilities under the Exchange Act.”). See also Notice, supra note 3, 76 FR at 12187.

Member Representative Directors that equals at least 20% of the total number of members of the committee.⁸¹

In addition, other proposed changes to the Exchange's committees will not materially affect the compositional requirements that are currently in place. For example, the Quality of Markets and Market Operations Review Committees are currently, and will remain, subject to the same compositional requirement for Member Representative Directors, and the Regulatory Oversight Committee will continue to be comprised of Public Directors. According to the Exchange, these compositional requirements are designed to foster the Exchange's ability to protect the public interest and foster the integrity of the Exchange by bringing a unique, unbiased perspective to these committees and the work that they perform. Among other things, the Exchange intends for these changes to increase representation of Non-Industry Directors on the committees. The Commission notes these proposed changes are designed to align Phlx's compositional requirements with those of its affiliated exchange, NASDAQ, which were previously approved by the Commission.⁸²

The Commission finds that the Exchange's proposal to eliminate FCO Participations is also consistent with the Act. Importantly, the Exchange represents that it currently does not have any persons who access the Exchange's FCO market exclusively through an FCO Participation, as such participations are no longer utilized on the Exchange in light of the ability, since the Exchange demutualized, of any permit holder to trade FCO Participations by means of a general all-purpose trading permit. As a result, the Commission believes that the elimination of FCO

⁸¹ Currently, the Business Conduct Committee is required to have not less than one Member who conducts options business at the Exchange, which would provide less than 20% member representation if the committee had more than five members.

⁸² See NASDAQ Approval Order, supra note 71, 71 FR at 3554.

Participations will not adversely impact the ability of market participants to continue to access and trade on the Exchange FCO market.

The Commission believes that the remaining revisions to the LLC Agreement, By-Laws, Rules, Advices, and Regulations, including those related to the Exchange's organizational structure, renaming the Board of Governors the Board of Directors, and identifying NASDAQ OMX as the single Stockholder, are consistent with the Act and are designed to update the Exchange's governance process and create equivalent governing standards between Phlx and NASDAQ, which are both controlled by NASDAQ OMX. The proposed changes are designed to conform certain Phlx provisions to more closely parallel provisions maintained by NASDAQ that were previously approved by the Commission.

Finally, the Exchange's proposed conforming changes to various provisions of the LLC Agreement, By-Laws, Rules, Advices, and Regulations to amend cross references, update terminology, and rename and renumber sections are consistent with the Act and are intended to make non-material revisions to update and correct various outdated references. For example, the revisions to eliminate references to FCO Participations and to XLE, as well as other now-obsolete terms are reasonable and are not intended to constitute a material or substantive change to any provision. The Commission finds that these changes are technical in nature and will provide clarity to the Exchange's LLC Agreement, By-Laws, Rules, Advices, and Regulations.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁸³ that the proposed rule change (SR-Phlx-2011-13), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸⁴

Cathy H. Ahn
Deputy Secretary

⁸³ 15 U.S.C. 78s(b)(2).

⁸⁴ 17 CFR 200.30-3(a)(12).