

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62775; File No. SR-PHLX-2010-115)

August 26, 2010

Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Amendment to Rule 862 Relating to, Among Other Things, Eliminate Broker Discretionary Voting for All Elections of Directors, Except for Companies Registered under the Investment Company Act of 1940

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4² thereunder, notice is hereby given that on August 18, 2010, NASDAQ OMX PHLX, Inc. (“PHLX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ 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, pursuant to Section 19(b)(1) of the Act⁵ and Rule 19b-4 thereunder,⁶ proposes to amend PHLX Rule 862 (Proxies at Direction of Owner) to comport with the Chicago Board Options Exchange (“CBOE”) Rule 31.85(b) and the New York Stock Exchange (“NYSE”) Rule 452 to eliminate broker discretionary voting for all elections of directors at

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

⁵ 15 U.S.C. 78s(b)(1).

⁶ 17 CFR 240.19b-4.

shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the “1940 Act”),⁷ to amend PHLX Rule 862 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company, and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company’s investment advisory contract with a new investment advisor. In addition, including the changes noted above, this proposal reorganizes the broker voting rules to specifically include 20 instances where member organizations may not vote without customer instructions, while retaining the prohibition that the member organization may not vote without instructions from the customer on matters that may substantially affect the rights and privileges of the stockholders. This proposal also clarifies proxy procedures and proxy record retention.

The text of the proposed rule change is available on the Exchange’s Website at <http://www.nasdaqtrader.com/micro.aspx?id=PHLXRulefilings>, 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.

⁷ The Commission notes that the exception for companies registered under the 1940 Act only apply to uncontested director elections, i.e., when there is no counter solicitation. See proposed Phlx Rule 862(b)(2).

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

PHLX Rule 862 provides instructions on how the proxies are voted. The purpose of the proposed rule change is to amend PHLX Rule 862(2) to comport with CBOE Rule 31.85(b) and NYSE Rule 452 to eliminate broker discretionary voting for all elections of directors at shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the “1940 Act”), to amend PHLX Rule 862 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company, and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company’s investment advisory contract with a new investment advisor. In addition, including the changes noted above, this proposal reorganizes the broker voting rules to specifically include 20 instances where member organizations may not vote without customer instructions, while retaining the prohibition that the member organization may not vote without instructions from the customer on matters that may substantially affect the rights and privileges of the stockholders. This proposal also clarifies proxy procedures and proxy record retention.

The proposed amendment does not materially change the proxy rules with the exception of the changes made in this filing. Amending PHLX Rule 862 to comport with CBOE Rule 31.85 (b) and NYSE Rule 452 provides consistency among the exchanges to eliminate disparities regarding proxy voting. The Exchange proposes this amendment in response to a request by the Securities and Exchange Commission (the “Commission”) that self-regulatory organizations

have uniform proxy rules regarding broker discretionary voting.⁸ As a result, PHLX believes the broker discretionary voting amendments will have little impact on the market participants since the changes are in line with the rules of the other self-regulatory organizations as defined within the meaning of Section 3(a)(26) of the Act⁹ (otherwise known as “SROs”). PHLX members with customers are also members of one of the other SROs.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act¹⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act¹¹ 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. Specifically, the Exchange believes that the proposed rule change will protect investors and the public interest by ensuring better corporate governance and transparency of the election process for directors and by promoting greater uniformity with the proxy rules of other SROs. In particular, for Exchange member organizations that are also member firms of other SROs, confusion might arise as to which SROs’ proxy voting rules are applicable to a company listed on the Exchange if there are disparities between the rules of the Exchange and the other SROs.

The proposal should further the protection of investors and the public interest by assuring that voting on matters as critical as the election of directors can no longer be determined by member organizations without specific instructions from the beneficial owner, and thus should

⁸ See NYSE Approval Order, 74 FR at 33298, Commission Release No. 34-60215 (July 1, 2009), note 69.

⁹ 15 U.S.C. 78c(a)(26).

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

enhance corporate governance and accountability to shareholders. Additionally, other changes enhance the proxy rules by providing clarity to proxy handling and record retention matters which also improves the protection to the investors.

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 necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹² and Rule 19b-4(f)(6)¹³ thereunder because the proposal does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) by its terms, become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, provided that the Exchange has given the Commission notice of its intent to file the proposed rule change, along with a brief description and text of 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.¹⁴

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ The Exchange has satisfied the five business day pre-filing requirement.

A proposed rule change filed under Rule 19b-4(f)(6) normally may not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)¹⁵ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay period. In making this request, the Exchange noted that waiver of the 30-day operative delay will conform to the Commission's desire to eliminate any disparities with proxy voting.

The Commission believes that the waiver of the 30-day operative delay period is consistent with the protection of investors and the public interest.¹⁶ The proposal would permit the Exchange to comply with the Commission's stated goal that self-regulatory organizations who currently allow members to use discretionary voting for director elections conform their rules to the NYSE's rules to eliminate any voting disparities depending on where the shares are held.¹⁷ In this regard, Phlx's proposed changes to Rule 862 are substantively similar to NYSE Rule 452 and CBOE Rule 31.85. Further, the proposal would conform the Exchange's rule to the NYSE's rule with respect to voting on investment advisory contracts. Moreover, the Commission notes that the NYSE's adopted rule changes were subject to full notice and comment, and considered and approved by the Commission.¹⁸ Finally, the Commission notes that the clarification of proxy procedures, record retention, and other changes to Phlx Rule 862 are based substantially on CBOE's rules. Based on the above, the Commission finds that

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

¹⁶ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁷ See supra note 8.

¹⁸ See id.

waiving the 30-day operative delay period is consistent with the protection of investors and the public interest, and the proposal is therefore deemed operative upon filing.

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 necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.¹⁹

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 e-mail to rule-comments@sec.gov. Please include File Number SR-PHLX-2010-115 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-PHLX-2010-115. This file number should be included on the subject line if e-mail 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 website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the

¹⁹ 15 U.S.C. 78s(b)(3)(C).

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 website 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 such 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-2010-115 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Florence E. Harmon
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).